

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-M-22675-2020 (O&M)
Date of Decision: 02.11.2020

Kuldeep @ Bablu

...Petitioner

vs.

State of Haryana

...Respondent

Coram : Hon'ble Mr. Justice B.S. Walia.

Present: Mr. Amit Choudhary, Advocate for the petitioner.

Mr. Surender Singh Asstt. AG, Haryana.

B.S. Walia, J. (VC)

1. Case is being taken up for hearing through Video Conferencing due to the outbreak of pandemic Covid-19.
2. Prayer in the second petition under Section 439 of Cr.P.C. is for grant of regular bail to the petitioner during pendency of trial in case FIR No.58 dated 13.03.2020, registered under Section 20/61 of the NDPS Act, 1985, at Police Station Uklana, District Hisar.
3. It needs noticing here that vide order dated 23.06.2020, first petition U/s 439 of Cr.P.C., was dismissed as withdrawn, with liberty to take out appropriate proceedings, in view of challan having been filed on 16.06.2020, after dismissal of the bail petition by the learned trial Court on 15.05.2020.
4. Learned counsel contends that as per the FIR, information was received that one Vishnu son of Ram Bhagat, was doing business of selling intoxicating substance in a car bearing HR20T-2914, Alto, LXI make and that he had come to Budha Khera with a large quantity of narcotics in the car which was standing in his house and in case a raid was conducted, he could be

arrested along with the narcotics. Thereupon raid was conducted and after associating the Tehsildar, videography of the house of Vishnu was conducted and a car under cover was found standing in Vishnus house and on seeing the police, two ladies came out, one of whom, disclosed her name as Sharda Devi wife of Ram Bhagat, mother of Vishnu, and second lady disclosed her name as Parmeshwari Devi wife of Jeet Ram Bishnoi, grandmother of Vishnu, residents of Budha Khera, who stated that they were not aware as to what was in the car nor they had the keys of the car, whereupon the cover was removed from the car in front of the Tehsildar and a number of respectable persons of the village whereupon the car was found to be an Alto LXI bearing No.HR-20-T-2914. Then Mahavir Singh, Pardhan son of Sujan Chand, caste Bishnoi, resident of Budha Khera, agreed to take part in the investigation and search was conducted in his presence and in the presence of the Tehsildar whereupon the car was found to be unlocked with its keys inside the same. On checking the car, three plastic bags were found, from which, 82 kg and 100 grams of ganja was recovered. However, no document was found in the car. Necessary formalities were completed and total of 82 kg 100 grams of ganja along with plastic bag as also the car was taken into police possession, whereupon, ruqa was sent to the police station for registration of an FIR against Vishnu.

5. On investigation, the car was found to be registered in the name of Krishan Kumar son of Narsi, caste Bishnoi, resident of Budha Khera, who made a statement Annexure P/2 dated 13.03.2020, U/s 161 of Cr.P.C. that although he was the owner of the car, the petitioner, his son i.e. Kuldeep alias Bablu, used to drive the same and was also maintaining it and that the petitioners marriage was fixed for 18.03.2020, for which he had taken the car

on 13.03.2020, for distribution of marriage cards, but after some time he came back and disclosed that Sanjay son of Dharampal, caste Bishnoi, resident of Budha Khera, had taken his car to visit Barwala and in the evening, he came to know that the police had recovered ganja from his car, which was standing in the house of Vishnu. Thereafter the petitioner was arrested on 08.04.2020.

6. Learned counsel contends that the car from which ganja was recovered no doubt belonged to the petitioner's father and was being used and maintained by the petitioner but on the date in question i.e. 13.03.2020, the petitioner's friend Sanjay had borrowed it from the petitioner while petitioner had gone out for distributing invitation cards for his marriage scheduled for 18.03.2020. Learned counsel contends that the car along with its keys was recovered from the premises of the house of Vishnu and no recovery had been made from the petitioner nor he was involved in any other case and he had been falsely implicated in the instant case. Learned counsel refers to the decision of Hon'ble the Supreme Court in **Bhola Singh vs. State of Punjab 2011 (2) RCR (Criminal) 337**, to contend that there was no evidence whatsoever to prove that the petitioner was aware that the vehicle which belonged to his father and which was being used and maintained by him, had been used by Sanjay and Vishnu for ferrying narcotics and it was only if there was evidence to prove beyond reasonable doubt that the petitioner had knowledge of said aspect that a presumption under Section 35 of the NDPS Act, 1985 could be drawn against him. Learned counsel contends that in the absence of there being any material whatsoever to prove the involvement of the petitioner, the petitioner was liable to be released on bail especially in view of

the fact that challan had been filed, but charges had not been framed, therefore conclusion of the trial would take considerable period of time to conclude. Relevant extract of the decision in Bhola Singh's case (supra) is reproduced as under:-

“6. Mr. Kuldip Singh, the learned counsel for the State of Punjab, has however supported the judgment of the Trial Court. We however repeatedly asked the learned counsel as to whether there was any evidence as to the involvement of the appellant, other than that he was the co-owner of the truck and that he had given a wrong address. The learned counsel fairly stated that there was no other evidence against the appellant.

6A. We have considered the arguments advanced by the learned counsel. We see that Section 25 of the Act would not be applicable in the present case as there is no evidence to indicate that Bhola Singh the appellant had either knowingly permitted the use of the vehicle for any improper purpose. The sine qua non for the applicability of Section 25 of the Act is thus not made out. The High Court has however drawn a presumption against the appellant under Section 35 of the Act. This provision is reproduced below :

"35. Presumption of culpable mental state :-

(1) In any prosecution for an offence under this Act which requires a culpable mental state of the accused, the Court shall presume the existence of such mental state but it shall be a defence for the

accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation :- In this section "culpable mental state" includes intention, motive knowledge of a fact and belief in, or reason to believe, a fact.

(2) For the purpose of this section, a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability.:

7. While dealing with the question of possession in terms of Section 54 of the Act and the presumption raised under Section 35, this Court in Noor Aga v. State of Punjab and Anr., 2008(3) R.C.R.(Criminal) 633 : 2008(4) R.A.J. 381 : (2008)16 SCC 417 while upholding the constitutional validity of Section 35 observed that as this Section imposed a heavy reverse burden on an accused, the condition for the applicability of this and other related sections would have to be spelt out on facts and it was only after the prosecution had discharged the initial burden to prove the foundational facts that Section 35 would come in to play. Applying the facts of the present case to the cited one, it is apparent that the initial burden to prove that the appellant had the knowledge that the vehicle he owned was being used for

transporting Narcotics still lay on the prosecution, as would be clear from the word "knowingly", and it was only after the evidence proved beyond reasonable doubt that he had the knowledge would the presumption under Section 35 arise. Section 35 also presupposes that the culpable mental state of an accused has to be proved as a fact beyond reasonable doubt and not merely when its existence is established by a preponderance of probabilities. We are of the opinion that in the absence of any evidence with regard to the mental state of the appellant no presumption under Section 35 can be drawn. The only evidence which the prosecution seeks to rely on is the appellant's conduct in giving his residential address in Rajasthan although he was a resident of Fatehabad in Haryana while registering the offending truck cannot by any stretch of imagination fasten him, with the knowledge of its misuse by the driver and others. We accordingly allow the appeal, set aside the judgments of the Courts below and order the appellant's acquittal. His bail bonds shall stand discharged."

7. Learned AAG, Haryana, on instructions from SI Bhoop Singh, contended that investigation revealed that accused-Sanjay had called the petitioner thrice at 09:16, 9:17 and 9:19 AM, but he fairly conceded that apart from the aforementioned aspect of the matter as also the fact that the car belongs to the petitioner's father and was being maintained and used by the petitioner, there was no material against the petitioner, besides, co-accused Sanjay, by whom, the car was borrowed from the petitioner, as well as Vishnu

from whose house the car was recovered were to be arrested.

8. I have considered the submissions of learned counsel for the parties.

9. The car is stated to have been handed over by the petitioner on 13.03.2020 to his friend Sanjay for going to Barwala in connection with some urgent work, while the petitioner was distributing cards for his marriage scheduled for 18.03.2020. However, on the same day, the car was recovered from the premises of Vishnu while under cover which was removed and the car was found to contain not only the keys of the car but also 82 kg 100 grams of ganja, which was taken into police possession in the presence of the mother and grandmother of Vishnu as well as Tehsildar and other respectable persons of the village. There is no other material other than the fact that the car is owned by the petitioner's father and was being maintained and used by the petitioner and of accused-Sanjay having made three calls to the petitioner as referred to above. However, learned Counsel for the petitioner contended that the calls were apparently made for getting the car from the petitioner.

10. Accordingly, after taking into account all aspects of the matter, but without expressing any opinion on the merits of the case, the petition for regular bail is **allowed** and petitioner-Kuldeep alias Bablu, is ordered to be released on bail, subject to his furnishing bail / surety bonds to the satisfaction of the learned trial Court / CJM / Duty Magistrate, concerned, provided he is not required in any other case. The petitioner shall also abide by the conditions contained in Section 437(3) Cr.P.C. However, it is made clear that in case the petitioner is found involved in any other similar offence during the period he is on bail in the instant case, the bail granted to

him in the instant case, shall be liable to be cancelled on an application to the above effect being moved by the prosecution. However, nothing stated hereinabove would be construed as an expression of opinion on the merits of the case.

02.11.2020
'PS-Rajesh'

(B.S. Walia)
Judge

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No