

IN THE PUNJAB AND HARYANA HIGH COURT AT
CHANDIGARH.

CRM-M-3780-2021

Date of Decision: 22.03.2021

Tarsem Kumar

...Petitioner

V/S

State of Punjab

...Respondents

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

Present: Mr. Aditya Sanghi, Advocate for the petitioner.
Mr. Sarbjit Singh Cheema, AAG, Punjab.

B.S. WALIA, J (VC)

1. Case is being taken up for hearing through Video Conferencing due to Covid-19 pandemic.
2. Prayer in the petition under Section 439 Cr.P.C. is for grant of regular bail to the petitioner during the pendency of trial in case FIR No.231 dated 15.11.2020 registered under Sections 15(c)/18(b), Narcotic Drugs and Psychotropic Substances Act, 1985 at Police Station Sangat, District Bathinda.
3. Learned counsel contends that the petitioner has been involved in the instant case on account of his being owner of the truck on the basis of disclosure statement of co accused from whom 300 kg of poppy husk and 1.5 Kg opium was recovered and who implicated the petitioner by stating that he had gone to Rajasthan on the asking of the petitioner on 14.11.2020 at the address as given by the petitioner and that poppy husk was partially stacked at the house of the petitioner. Learned Counsel contends that implication on the basis of disclosure statement alone is legally

the commission of the offence. Moreover, no recovery was made from the petitioner nor was the petitioner involved in any other case.

Learned counsel has referred to the decision of Hon'ble the Supreme Court in **Bhola Singh Versus State of Punjab 2011(11) SCC 653** to contend that mere ownership of truck by the accused without there being any other evidence to connect the accused with the commission of the offence, nor there being any evidence to indicate that the accused had knowingly permitted the use of his vehicle for any improper purpose, a *sine qua non* for the applicability of Section 25 of the Act, Section 35 of the Act could also not be attracted in the absence of initial burden being discharged that the accused had knowledge that his vehicle was being used for transporting narcotic drugs. Learned Counsel contends that it is only if the initial burden is discharged that the accused had knowledge that his vehicle was being used for transporting narcotics that the presumption under Section 35 of the Act would arise.

4. Learned counsel contends that it could not be presumed that the petitioner had knowledge that his vehicle was being used for transporting the narcotic substances merely on the basis of disclosure statement of co-accused Sahib Singh, that the perusal of the FIR revealed that the trolly bearing No.PB03AP-5750 while being driven by co accused Sahib Singh on being stopped on 12.20 PM on 15.11.2020 on Bathinda-Dabwali Road was found loaded with 680 yellow coloured plastic bags of super fertilizers out of which 20 bags were of black colour and which were opened, checked and from which 15 kg poppy husk was recovered from each sack while from one of said sacks, apart from poppy husk, 1.5 kg opium contained in a plastic

carry bag, whose mouth was tied with a thread was also recovered, that from the photocopy of RC taken into possession by the police, the petitioner was learnt to be owner of the trolla while as per the Builty, bags of Single Super Phosphate Roh were learnt to have been loaded from Sadhanba Phosphate and Chemicals Limited, Debari Railway Station Road Gudli Debari, Udaipur (Rajasthan) for delivery to M/s Indian Potash Limited C/o Gagan Krishi Farm Mansa.

5. Learned AAG has on query clarified that “Horse Trolla” is a powered vehicle and does not refer to a horse driven carriage.

6. Learned counsel by relying on the decision in **Bhola Singh’s case (supra)** contends that since the vehicle was being driven by driver Sahib Singh, the onus that the petitioner had not permitted the use of his vehicle for transporting narcotic substances had been discharged, therefore, neither the provisions of Section 25 nor presumption under Section 35 of the Act was attracted. Relevant extract of the decision of **Bhola Singh’s case (supra)** is reproduced as under:

“5. We have gone through the judgment of the Trial Court and High Court insofar as Bhola Singh is concerned. We see that he was not present at the spot and the allegation against him is that he was the co-owner of the truck and that while purchasing the truck he had given his residential address in Rajasthan whereas he was a resident of Haryana. The High Court has accordingly drawn a presumption under Section 35 of the Act against him to hold that by giving a fake address his culpability was writ large on the facts of the case.

5A. Mr. T.N. Razdan, the learned counsel for the appellant has raised only one argument before us during the course of the hearing. He has pointed out that there was no evidence that the appellant had been involved in the smuggling of contraband and even if the prosecution story that he was the co-owner of the truck and had given a wrong address while purchasing the truck was correct, these factors could not fasten him with any liability under Sections 15 and 25 of the Act. He has also submitted that the "culpable mental state" and the conditions for the applicability of Section 35 of the Act were not made out.

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) RCR (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. Reference is also made by learned counsel for the petitioner to the decision of Hon'ble the Supreme Court in ***Haricharan Kurmi Vs. State of Bihar*** in **Criminal Appeals No.208 and 209 of 1963** to contend that mere implication on the basis of disclosure statement is legally unsustainable. Relevant extract of the decision of **Haricharan Kurmi's case** (**supra**) is reproduced as under :

“As we have already indicated, this question has been considered on several occasions by judicial decisions and it has been consistently held that a confession cannot be treated as evidence which is substantive evidence against a co-accused person. In dealing with a criminal case where the prosecution relies upon the confession of one accused person against another accused person, the proper approach to adopt is to consider the other evidence against such an accused person, and if the said evidence appears to be satisfactory and the court is inclined to hold that the said evidence may sustain the charge framed against the said accused person, the court turns to the confession with a view to assure itself that the conclusion which it is inclined to draw from the other evidence is right.

8. Learned AAG, Punjab, on the other hand, has fairly conceded that apart from the disclosure statement, there is no other material to connect the petitioner with the commission of the offence. Learned AAG has not been able to point out any other material to connect the petitioner with the commission of the offence nor has learned AAG been able to show that the petitioner was aware that his vehicle was being used for improper purpose of transporting narcotics except on the basis of his being owner of the truck. I have considered the submissions of learned counsel and in view of the decision of Hon’ble the Supreme Court in **Haricharan Kurmi’s case**

case on the basis of disclosure statement alone without there being any recovery from the petitioner and without there being any other material to connect the petitioner with the commission of the offence, is debatable especially in the absence of material to show that the petitioner was aware that his vehicle was being used for improper purpose of transporting narcotics and this supposition could not be drawn merely on the basis of his being owner of the truck. Accordingly, neither Section 25 nor the presumption under Section 35 of the Act would be attracted.

9. In the light of position noted above, the instant petition is allowed. Petitioner- Tarsem Kumar is ordered to be released on regular bail during the pendency of the trial on his furnishing bail bond and surety bond to the satisfaction of the learned trial Court/Chief Judicial Magistrate/Duty Magistrate concerned, provided he is not required in any other case. The petitioner shall also comply with the conditions contained in Section 437(3) Cr.P.C. However, nothing stated hereinabove would be construed as an expression of opinion on the merits of the case.

(B.S. Walia)
Judge

22.03.2021.

'Rajender'

Whether speaking/reasoned : Yes/No.

Whether reportable : Yes/No.