

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

308

**CRA-S-29-SB-2000
Reserved on 16.11.2022
Date of Decision: 22.11.2022**

Surinder Kumar

...Appellant

Versus

State of Punjab

... Respondent

CORAM : HON'BLE MR. JUSTICE N.S.SHEKHAWAT

Present : Mr. Vishal Garg Narwana, Advocate with
Mr. Kinshuk Nanda, Mr. Mukul Ahuja, Mr. Rajat
Sheokand and Mr. Sourabh Sheroan, Advocate
for the appellant.

Mr. M.S. Bajwa, DAG, Punjab.

N.S.SHEKHAWAT, J. (Oral)

The present appeal has been directed against the impugned judgment of conviction and order of sentence dated 18.12.1999 passed by the Court of learned Additional Sessions Judge, Gurdaspur, whereby, the present appellant had been convicted under Section 5 of the Explosive Substances Act (hereinafter referred to as '**the Act**') and sentenced to undergo rigorous imprisonment for a period of three years and to pay a fine of Rs. 1,000/- and in default of payment of fine, he was further sentenced undergo simple imprisonment for one month.

The brief facts of the case are that on 29.10.1995, SHO Gurdial Singh alongwith ASI Jaswinder Singh, Constable Gurdip Singh and other police officials held a *Naka* at Simble Chock, Pathankot on the directions of the Deputy Superintendent of Police. A

jeep bearing registration No. HP-02-3098, being driven by the accused was seen coming from the opposite side, which was stopped by the police party. It was checked by the police party and on the search two gunny bags were recovered from the spot from the seat of the jeep. The two gunny bags were opened and it was found that there was explosive substance in the same. Two samples of 500 grams each were separated in plastic bags and two separate parcels were prepared. The remaining substance in the two bags, on weighing, was found to be 42 kilograms and 500 grams and 7 kilograms and 800 grams, respectively, which were put back in the same of gunny bags and all the parcels were sealed with the seal 'GS' and was handed over to ASI Jaswinder Singh. The case property was taken into possession vide a recovery memo, which was attested by ASI Jaswinder Singh and Constable Balbir Singh. On the personal search of the accused, a sum of Rs. 1400/- was recovered from the hand bag, which was held by the accused in his hand. Certain other recoveries were also made vide separate recovery memos. Even the jeep was also taken into possession vide a separate recovery memo, which was attested by the witnesses.

To prove the charge against the accused, the prosecution examined 7 witnesses in all.

The prosecution examined PW1 ASI Jaswinder Singh, who was part of the team, which apprehended the accused alongwith

about 51 kilograms of explosive of explosive substance. He is the witness to the recovery memo Ex.PA, vide which the case property was taken into possession. He also signed the recovery memo Ex.PB, whereby, currency notes, permit of jeep, one wrist watch, RC of the jeep and driving licence were taken into possession by the police. The prosecution examined Constable PW2 Wassan Singh, who had delivered the special report in the case. The prosecution examined PW3 Tarlok Singh, Reader to the District Magistrate, Gurdaspur, who proved sanction for prosecution Ex.PE, which was bearing the signatures of the then District Magistrate, Gurdaspur. The prosecution examined PW4 Muni Lal, ASI Police Lines Gurdaspur, who registered the formal FIR Ex.PF/1. PW5 MHC Kuldip Kumar was posted as MHC in the Police Station and tendered his affidavit Ex.PG. PW6 Balbir Singh, Senior Assistant, Office of Secretary, State Transport Authority brought the record relating to the registration of the jeep in question, which stood in the name of Surinder Kumar appellant. The prosecution further examined PW7 (wrongly mentioned as PW8) SI Gurdial Singh, who was posted as SHO on the Police Station on 29.10.1995 and had conducted the initial investigation in the matter.

After conclusion of the evidence by the prosecution, the statement of the accused under Section 313 Cr.P.C. was recorded and he stated that his taxi was attached with the taxi stand near Pushap

Cinema. The local police took away his taxi and kept with them for a number of days without paying him the charges. When he demanded the fare, he was detained and falsely implicated in the instant case. No explosive was recovered from his vehicle and these bags could not be placed under the seats of his vehicle. The accused also examined DW1 Puran Chand, LFC, from the office of Deputy Commissioner, Gurdaspur, who stated that the appellant had a fire works licence from 16.03.1980 to 31.03.1990 and has not been renewed thereafter as per the record.

After the conclusion of the trial, vide the impugned judgment and order, the learned trial Court convicted and sentenced the appellant as stated above.

Assailing the impugned judgment and order, the appellant has preferred the instant appeal before this Court.

I have heard learned counsel for the parties and with their able assistance, I have gone through the record.

The learned counsel for the appellant submits that the ingredients of Section 5 of the Act are not fulfilled and there is no evidence to prove the charge under Section 5 of the Act against him. Still further, as per Section 7 of the Act, the sanction from the Central Government had not been taken and consequently the present appellant had been wrongly prosecuted for the offences punishable under Section 5 of the Act. Still further, he contended that the

investigation was tainted and had been carried out with an ulterior motive. There is no evidence to show that any Naka was laid by the police and no DDR entry was proved on record. No independent witness was joined during the process of search, recovery and investigation. There was cutting on the memos Ex.PA and Ex.PC and the recovery of the explosive substance from the present appellant was doubtful. Thus, it is prayed that the impugned judgment and order may be set aside and the appellant may kindly be ordered to be acquitted.

The arguments raised by the learned counsel for the appellant have been vehemently opposed by the learned counsel appearing for the State of Punjab who submits that the ingredients of Section 5 of the Act were complete in the instant case and non-examination of independent witness can be no ground to set aside the impugned judgment of conviction. Still further, the evidence by the accused clearly suggested that he was having a licence for keeping the explosives in the past, consequently, the accused was aware of the provisions of the Act and had committed illegality by keeping the explosive substance in his jeep and the learned State counsel prays for upholding the impugned judgment and order passed by the learned trial Court.

Section 2(a) of the Explosive Act, 1884 defines “**Explosive Substance**” and same has been reproduced below:-

*(a) the expression “**explosive substance**” shall be deemed to include any materials for making any explosive substance; also any apparatus, machine, implement or material used, or intended to be used, or adapted for causing, or aiding in causing, any explosion in or with any explosive substance; also any part of any such apparatus, machine or implement;*

(b) XXX XXX XXX

Section 5 of the Act has been reproduced as under:-

Punishment for making or possessing explosives under suspicious circumstances.—Any person who makes or knowingly has in his possession or under his control any explosive substance or special category explosive substance, under such circumstances as to give rise to a reasonable suspicion that he is not making it or does not have it in his possession or under his control for a lawful object, shall, unless he can show that he made it or had it in his possession or under his control for a lawful object, be punished,—

(a) in the case of any explosive substance, with imprisonment for a term which may extend to ten years, and shall also be liable to fine;

(b) in the case of any special category explosive substance, with rigorous imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.]

Section 7 of the Explosive Substances Act, (as it stood prior to 01.02.2002) has been reproduced below:-

7.Restriction on trial of offences.- *No Court shall proceed to the trial of any person for an offence against this Act except with the consent of 3* the Central government.*

Learned counsel for the appellant vehemently argues that the ingredients of Section 5 the Act are not fulfilled in the instant case and he is liable to be acquitted on this ground alone. I find force in the arguments raised by the learned counsel for the appellant. In order to bring home the offence under Section 5 of the Act, the prosecution has to prove that the substance in question is an explosive substance; that the accused person has made or knowingly has in his possession or under his control any explosive substance; that he does so under such circumstances as to give rise to a reasonable suspicion and that he is not making it or does not have it in his possession or under his control for a lawful object.

In the instant case, the prosecution could not lead any evidence to show that the accused was having in his possession the

explosive substance for any unlawful purpose. A reference can also be made to the law laid down by this Court in the matter of **Bharat Singh Vs. State of Haryana** 1980(2) ILR (Punjab) 179 in which this Court has held as follows:-

*“From the plain reading of this section, it is clear that to substantiate the charge under this Section two things must be proved. Firstly that the explosive substance was in conscious possession and secondly that the possession or control was as to give rise to a reasonable suspicion that he is not making it or does not have it for a lawful object. In the present case, the prosecution has only proved that he was keeping grenades in his possession, but the second ingredient has not been proved that he was keeping it for using the same for an unlawful purpose. Even A.S.I. Raghbir Singh, P.W.5 has not stated that the appellant was keeping it for an unlawful purpose. In similar circumstances **Patna High Court in Rajani Kanta Mandal v. The State of Bihar, AIR 1959 Patna 314,** relying on a judgment of House of Lords in **R. v. Hallam, (1957) 1 All ELR 665,** observed as under :-*

"To substantiate a charge under Section 5, Explosive Substances Act, it is not sufficient to prove merely that the accused was in conscious possession of an explosive substance. The prosecution has further to prove that the incriminating objects were recovered from the possession of the accused in circumstances giving rise to a reasonable suspicion that he had them in his possession not for a lawful object. If there is no

evidence to prove this the charge under Section 5 is not sustainable against him."

The provision of Section 4(1) of the Explosive Substances Act, 1883, of England is in the following terms:-

"Any person who..... knowingly has in his possession or under his control any explosive substance, under such circumstances as to give rise to a reasonable suspicion that he does not have it in this possession or under his control for a lawful object shall, unless he can show that he.... does not have it in his possession or under for a lawful object, be guilty of felony....."

7. Section 5 of the Explosive Substances Act, is pari materia in the same words.

It has also been held by the High Court of Bombay in the matter of **Sikandar Axamani Vs. State of Goa, as represented by Officer-in-Charge, Ponda Police Station, Ponda, Goa 2014 SCC Online Bombay 298** as under:-

"From the above provision of Section 5 of the Act, it can be understood that mere possession or control of any explosive substance does not make out an offence punishable under the said Section. Coupled with such possession or control, there have to be circumstances to give rise to a reasonable suspicion that the accused who possessed the same or had the same under his control was not making it or did not have it in his possession or under his control for a lawful object. It is well settled that "possession" or Control" for the purpose of Section 5 of

the Act, as rightly contended by the learned Counsel appearing on behalf of the accused, means something more than mere constructive or legal possession or control. The prosecution must prove conscious possession or actual control of the incriminating articles or objects and must also prove mens rea or guilty knowledge”.

Still further, to uphold the conviction under Section 5 of the Act, the sanction of the Central Government was mandatory. In the instant case, the prosecution had examined PW3 Tarlok Singh, Reader to the District Magistrate Gurdaspur. PW3 Tarlok Singh placed on record the sanction for prosecution as Ex.PA, which was bearing the signatures of Shri A.S. Chhatwal, the then District Magistrate Gurdaspur. Apart from that, there was no other sanction on record. In fact, in the cases of explosive substance, the sanction of the Central Government was required for the trial of the offences under the Act prior to 01.02.2002. The same view was held by this Court in the matter of Charanjit Singh @ Sukha @ Veeru @ Bhatt Vs State of Punjab 2002(2) R.C.R. (Criminal) 96 and it was held as follows:-

8. *In support of this submission, he draw my attention to Shingara Singh v. State of Punjab, AIR 1971 Punjab and Haryana 246 it was held that according of sanction for prosecution under Section 5 of the Explosive Substances Act is the function of the Central Government but this function of the Central Government can be delegated to the State Government*

and if this function is delegated by the Central Government to the State Government, that function becomes the function of the Central Government. It was held that a statutory function of the State Government, becomes the function of the Governor and the business of the State Government under Article 166(3) of the Constitution such statutory business. It is, therefore, competent for the Governor to allocate such statutory function to the Ministers by making rules under Article 166(3). The State Government while according sanction under Section 7 of the Explosive Substances Act would no doubt be discharging the function of the Central Government and not of the State Government, but the performance of this function would be the business of the State Government, for the convenient transaction of which the Governor can make rules of business under Article 166(3). While making rules under Article 166(3) the Governor is not legislating in respect of the matters included in list-I of the Seventh Schedule of the Constitution and is only regulating the manner in which the business of the State Government is to be performed.

9. It was submitted that on the sanction accorded by the District Magistrate, Ferozepur, accused could not be prosecuted for offences punishable under the Explosive Substances Act, 1908. District Magistrate could accord sanction only for prosecuting the accused under Section 25 of the Arms Act.

Still further, the learned counsel for the appellant has

drawn the attention of this Court towards the testimony of PW8 SI

Gurdial Singh, who was posted as Station House Officer, Police Station Division No. 1, Pathankot. On 29.10.95, he alongwith other police officials had conducted the search and the recovery memos were prepared in his presence. He was the main investigating officer in the instant case. However, the said witness admitted in his cross-examination that the recovery memos Ex.PA and Ex.PC were also got written from a constable at his dictation. Carbon copies were also prepared of the said memos. Firstly, Ex.PA was got prepared and got signed from the witnesses and then other memo Ex.PB was got prepared and after that memo Ex.PC was got prepared and was got signed. Ex.DA to Ex.DC were the carbon copies of Ex.PA to Ex.PC. He admitted that the signatures of the witnesses on the carbon copies were different from the signatures on the above memos. He further admitted that the corrections on the carbon copies of Ex. PA to Ex.PC are with the pen, whereas, his signatures on these memos are on the carbon. In fact, the above testimony raises a question mark on the entire process of recovery of the explosive substance, vehicle in question and other recoveries from the appellant. Apart from that, the prosecution did not examine any independent witness, even though, the police had sufficient opportunity to join such witnesses at the time of recovery. Consequently, even the recovery of the explosive substance from the present appellant was doubtful.

Resultantly, the appeal succeeds and is hereby allowed.
The impugned judgment and order dated 18.12.1999 passed by the Court of learned Additional Sessions Judge, Gurdaspur, are set aside and the accused is acquitted of the charges.

All the pending miscellaneous applications, if any, are disposed off, accordingly.

The case property, if any, may be dealt with in accordance with law after the expiry of the period of limitation.

The trial Court record be transmitted back.

22.11, 2022
amit rana

(N.S.SHEKHAWAT)
JUDGE

Whether reasoned/speaking : Yes/No
Whether reportable : Yes/No