

(2006) 2 RCR(Criminal) 477

High Court Of Punjab And Haryana At Chandigarh

Case No: Criminal Appeal No. 407-DB of 1999

Kashmir Singh

APPELLANT

Vs

State of Punjab

RESPONDENT

Date of Decision: Feb. 22, 2006

Acts Referred:

- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 35

Citation: (2006) 2 RCR(Criminal) 477

Hon'ble Judges: Kiran Anand Lall, J; K.S. Garewal, J; Amar Dutt, J

Bench: Full Bench

Advocate: A.S. Kalra, Mr. S.S. Joshi, for the Appellant; S.S. Randhawa, D.A.G. Punjab, Mr. B.S. Rana, D.A.G. Haryana, Mr. Ajai Lamba for U.T., for the Respondent

Final Decision: Allowed

Judgement

K.S. Garewal, J.

The question that has been referred to the Full Bench for decision is regarding the correct meaning of "possession" in the context of the Narcotics Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the Act). Under what circumstances and in what manner is the presumption of "culpable mental state" to be raised u/s 35 of the Act. Furthermore, under what circumstances and in what manner is the court to presume that the accused committed an offence, in respect of possession of any drug, the possession of which he fails to account satisfactorily. This presumption being raised u/s 54 of the Act.

Section 35 reads as under :-

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.

Section 54 reads as under :-

Presumption from possession of illicit articles - In trials under the Act, it may be presumed, until (unless ?) and until the contrary is proved, that the accused has committed an offence under this Act in respect of -

- (a) any narcotic drug or psychotropic substances or controlled substances;
- (b) any opium poppy, cannabis plant or coca plant growing on any land which he has cultivated;
- (c) any apparatus specially designed or any group of utensils specially adopted for the manufacture of any narcotic drug or psychotropic substances or controlled substance; or
- (d) any material which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance or controlled substance; or any residue left of the materials from which any narcotic drug or psychotropic substance or controlled substance has been manufactured,

for the possession of which he fails to account satisfactorily.

2. In the present case Kashmir Singh and Karam Singh were travelling in truck PJC 1494. The truck was intercepted at 5.00 A.M. on September 1, 1991 by S.I. Rachhpal Singh of Police Station Samana. At that time Kashmir Singh was driving the truck while his companion Karam Singh was sitting by his side. The truck was carrying 110 bags of poppy husk.

3. Learned Additional Sessions Judge, Patiala vide his judgment dated July 13, 1999 found both the accused guilty u/s 15 of the Act and sentenced them to undergo rigorous imprisonment for 12 years and to pay a fine of Rs. 1.00 lac and in default of payment of fine to further undergo rigorous imprisonment for one year.

4. Criminal Appeal No. 407-DB of 1999 has been filed by Kashmir Singh while Criminal Appeal No. 408-DB of 1999 has been filed by Karam Singh.

5. The question of law which we have been called upon to decide can be best understood by using illustrative examples and what better example can there be than the present case in which two men travelling in a truck were stopped by the police and on search it was found that they were using the truck to transport a huge quantity of poppy husk. According to Section 54, in trials under the Act, it may be presumed unless and until the contrary is proved that the accused has committed an offence under the Act for the

possession of which he fails to account satisfactorily.

5. In addition to the above in any prosecution for an offence under the Act which requires a culpable mental state of the accused, the Court shall presume the existence of such mental state. In defence the accused shall have to prove that he had no such mental state with respect to the act charged as an offence. Culpable mental state includes intention, motive, knowledge of a fact and belief in, or reason to believe a fact. 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.

6. Assistance of judicial precedent in deciding this reference can be had from the judgment of the Supreme Court in *Madan Lal and another v. State of H.P.*, 2003 (4) RCR 100 (SC) : 2003 SCC (Cr.) 1664 wherein it was held as under :-

The word "possession" means the legal right to possession. The expression "possession" is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different backgrounds. Possession in a given case need not be physical possession but can be constructive, having power and control over the article in the case in question, while the person to whom physical possession is given holds it subject to that power or control.

The word "conscious" means awareness about a particular fact. It is a state of mind which is deliberate or intended.

Once possession is established, the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of the presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles.

Whether there was conscious possession has to be determined with reference to the factual backdrop. The facts which can be culled out from the evidence on record are that all the accused persons were travelling in a vehicle and were known to each other and it has not been explained or shown as to how they travelled together from the same destination in a vehicle which was not a public vehicle.

In the factual scenario of the present case, not only possession but conscious possession has been established. It has not been shown by the accused- appellant that the possession was not conscious in the logical background of Sections 35 and 54 of the Act. The evidence clearly establishes that they knew about the transportation of charas, and each had a role in the transportation and possession with conscious knowledge of what they were doing. The accused- appellant does not stand on a different footing merely because he was the driver of the vehicle.

7. In Madan Lal's case a car was stopped and it was found to be carrying five persons. The car's driver was Manjit Singh and the other four persons were sitting with him. On personal search of the accused nothing incriminating was found on their respective persons. On search of the car a black bag was found. It contained a steel can in a plastic bag. Charas weighing 820 gms was recovered from the can. All the accused, including the driver, were found guilty u/s (sic) of the Act.

8. However, the Supreme Court India in Avtar Singh v. State of Punjab, 2002 (4) RCR (Cri.) 180 had dealt with the matter in a somewhat different way. A truck was intercepted carrying 16 bags of poppy husk, driven by Balbir Chand and 4 other men were travelling in it. Two of passengers escaped while the other two Swarna Ram and Swatantera Kumar were found sitting on the bags in the truck and accused were arrested. Swarna Ram was acquitted because his identity had not been established. The truck's owner Amrik Singh was also acquitted because there was no proof that he knowingly allowed the vehicle to carry poppy husk. The remaining accused were convicted. In appeal the Hon'ble Supreme Court held as follows :-

The word "possession" no doubt has different shades of meaning and it is quite elastic in its connotation. Possession and ownership need not always go together by the minimum requisite element which has to be satisfied in custody or control over the goods. Can it be said, on the basis of the evidence available on record, that the three appellants - one of whom was driving the vehicle and other two sitting on the bags, were having such custody or control ? It is difficult to reach such conclusion beyond reasonable doubt. It transpires from evidence that the appellants were not the only occupants of the vehicle. One of the persons who was sitting in the cabin and another person sitting at the back of the truck made themselves (scarce ?) after seeing the police and the prosecution could not establish their identity. It is quite probable that one of them could be custodian of goods whether or not he was the proprietor. The persons who were merely sitting on the bags, in the absence of proof of anything more, cannot be presumed to be in possession of the goods. For instance, if they are labourers engaged merely for loading and unloading purposes and there is nothing to show that the goods were at least in their temporary custody, conviction u/s 15 may not be warranted. At best, they may be abettors, but there is no such charge here. True, their silence and failure to explain circumstances in which they were travelling in the vehicle at the odd hours, is one strong circumstance that can be put against them.

It was also held that :

A case of drawing presumption u/s 114 of the Evidence Act could perhaps be made out then to prove the possession of the accused, but the fact remains that in the course of examination u/s 313 Cr.P.C. not even a question was asked that they were the persons in possession of poppy husk, placed in the vehicle. The only question put to them was that as per the prosecution evidence, they were sitting on the bags of poppy husk. Strangely enough, even the driver was questioned on the same lines. The object of examination u/s

313, it is well known, is to afford an opportunity to the accused to explain the circumstances appearing in the evidence against him. It is unfortunate that no question was asked about the possession of goods. Having regard to the charge of which appellants were accused, the failure to elicit their answer on such a crucial aspect as possession, is quite significant. In this state of things, it is not proper to raise a presumption u/s 114 of the Evidence Act nor is it after to conclude that the prosecution established beyond doubt that the appellants were in possession of poppy husk which was being carried by the vehicle. The High Court resorted to the presumption u/s 35 which relates to culpable state of mind, without considering the aspect of possession. The trial Court invoked the presumption u/s 54 of the Act without addressing itself to the question of possession. The approach of both the courts is erroneous in law. Both the courts rested their conclusion on the fact that the accused failed to give satisfactory explanation for travelling in the vehicle containing poppy husk at an odd hour. But, the other relevant aspects pointed out above were neither adverted nor taken into account by the trial court and the High Court. Non-application of mind to the material factors has thus vitiated the judgment under appeal.

9. Presumption of culpable mental state is something that a Court shall presume. This necessarily means that the court shall presume it as a fact that the accused had the culpable mental state and it shall be recorded that such culpable mental state has been proved. Needless to say the accused can plead in defence that he had no such mental state but after the presumption has been raised he shall have to prove his defence that as a fact he had no mental state. He cannot rely merely on preponderance of probability.

Under Section 54 the words used are "it may be presumed" and not "it shall be presumed". This necessarily means that the accused can prove to the contrary but unless he is able to do so it would be presumed that he has committed an offence under the Act. The onus on the accused is not as strong as the one in Section 35.

10. These presumptions are questions of fact depending upon the case and it appears to be very difficult to lay down any specific mode and method in which the presumption can be raised. Facts in each case are different. Witnesses testify differently. They are subjected to different lines of cross-examination and what finally emerges from the evidence at the trial may be quite different from case to case. Since facts are different, presumptions of facts can also be different in different cases. Therefore, precedents only provide guidelines and are not binding on individual cases. A judgment may be applicable in one case while it may not be applicable and clearly distinguishable in another.

11. However, the other question as regards the manner in which these presumptions are to be used in criminal trials can be seen from the judgment of the Supreme Court in Avtar Singh's case (supra). The Court observed that the object of examination u/s 313 was to afford an opportunity to the accused to explain circumstances appearing in evidence against him. Therefore, it would not be proper to raise a presumption that the prosecution had established beyond reasonable doubt that the appellants were in possession of

poppy husk which was being carried in their vehicle.

12. When the Trial Judge records the statement of an accused person u/s 313 Cr.P.C. with regard to the circumstances which have appeared in evidence against him, the learned Judge gives the accused an opportunity to explain those circumstances. The accused generally denies the prosecution case against him but it is an opportune moment for him to plead any type of defence that he may like to take. Therefore, by extending the provisions of Section 313 Cr.P.C. and on first principles of fair trials as well, there is need to give every accused person an opportunity to explain the case against him.

Wheresoever the presumption under Ss. 35 & 54 is to be raised, it would be advisable for the Trial Court to frame a question under S. 313 Cr.P.C. in order to give the accused a fair opportunity to rebut the presumption. Indeed Ss. 35 and 54 do entitle the accused to rebut the presumptions but it is strange that Trial Courts do not give the accused this opportunity. Unless the accused have been given the opportunity to prove that he had no such mental state as presumed under S. 35 or that he had satisfactorily accounted for the possession which was being presumed against him u/s 54, the respective presumptions cannot be raised against the accused.

13. It may be useful to refer to some of the leading judgments of the Supreme Court to see how the question of presumption of culpable mental state and possession have been dealt with. In [Seshamni and Another Vs. The Deputy Director of Consolidation, District Basti U.P. and Others](#), the police on secret information had intercepted auto rickshaw which on checking was found to be carrying gunny bags. When the gunny bags were opened police found 10 parcels of charas but was unable to arrest the two persons who had loaded the consignment. Therefore, the driver of the auto rickshaw was tried. The driver in his statement u/s 313 Cr.P.C. admitted the recovery but pleaded that he was unaware of the contents of the gunny bags which had been loaded by the two missing persons who had directed him to transport the bags to a specific destination. Driver was acquitted by the Trial Court but convicted by the High Court on the ground that he had failed to rebut the presumption u/s 35 of the Act. Supreme Court of India allowed the appeal. It was held as under :-

The burden of proof cast on the accused u/s 35 can be discharged through different modes. One is that he can rely on the material available in the prosecution evidence. Next is, in addition to that, he can elicit answers from prosecution witnesses through cross-examination to dispel any such doubt. He may also adduce other evidence when he is called upon to enter on his defence. In other words, if circumstances appearing in the prosecution case or in the prosecution evidence are such as to give reasonable assurance to the court that the appellant could not have had the knowledge or the required intention, the burden cast on him u/s 35 of the Act would stand discharged even if he had not adduced any other evidence of his own when he is called upon to enter on his defence.

14. In *Narcotics Control Bureau Jodhpur v. Murlidhar Soni and others*, 2004 (2) RCR 900 : 2004 (3) Ape Cri 124 (SC) the accused and his father were searched by the police. It was not the accused but his father Murlidhar who was found to be carrying a bundle containing the contraband. Both father and son were convicted but acquitted in appeal. Supreme Court in the appeal against the acquittal came to the conclusion that the prosecution had failed to show the conscious possession of the contraband by the respondent (son) and since Murlidhar Soni (father) has died, the arguments advanced on behalf of the respondent that he had only taken his father on a scooter to the place where they were arrested and had no knowledge about what was contained in the bundle were accepted and the respondent's acquittal was upheld.

15. In [State of Punjab Vs. Balkar Singh and Another](#), the police had searched a spot near a river where they found bags lying in a field and the accused-respondent sitting on them. The accused were convicted for the possession of 100 bags of poppy husk but on appeal they were acquitted. Acquittal was upheld by the Supreme Court because there was not enough proof of conscious possession. The police had not conducted further investigation to prove that the accused were really in possession of the bags.

16. In [Megh Singh Vs. State of Punjab](#), the decision of the Supreme Court in *Avtar Singh v. State of Punjab* (supra) was discussed in the following terms but the Court relying upon the principle of circumstantial flexibility, came to the conclusion that in the factual scenario of Megh Singh's case, the accused had failed to show that his possession was not conscious. It was held as under :-

Once possession is established, the person who claims that it was not a conscious possession has to establish, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles. This position was highlighted in [Madan Lal and Another Vs. State of Himachal Pradesh](#), .

Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases or between two accused in the same case. Each case depends on its own facts and a close similarity between one case and another is not enough because a single significant detail may alter the entire aspect. It is more pronounced in criminal cases where the backbone of adjudication is fact-based.

17. The Division Bench of this Court in *Raj Kumar v. State of Punjab*, 2005 (1) RCR CrL 70 recorded the following reasons for acquitting the accused :-

It would, therefore, be apparent that presumption of culpable mental state and presumption of possession can be raised against accused persons but where these presumptions are raised the accused has a right to rebut the presumptions by pleading in his defence that he has no such mental state with respect to the act charged as an

offence or that he has been able to satisfactorily account for the possession. Accused can give his counter explanation. It is necessary for the trial Court to frame a specific question regarding the presumption which is sought to be raised either u/s 35 or Section 54 when examining the accused u/s 313 Cr.P.C. and seeking his explanation. Unless this is done the presumption under Sections 35 and 54 cannot be used against the accused.

Consequently, in the present case, the presumptions were not available to the prosecution. Furthermore, the prosecution had failed to prove that either Raj Kumar (driver) or Hawa Singh (passenger) were in possession of the opium recovered from the bag which was lying in between them on the seat of the jeep.

18. In Raj Kumar's case the accused had been intercepted in a jeep from which 8.250 kgs of opium was recovered from a bag lying between the two accused.

19. For the above reasons we would answer the question raised by stating that no presumption under Sections 35 and 54 should be used against the accused unless he has been given an opportunity to rebut the presumptions in his statement u/s 313 Cr.P.C. by being called upon to explain the circumstances which give rise to the presumptions. Thereafter the accused should be given an opportunity to lead evidence in defence in support of his stand. However, there is no real or apparent conflict regarding the correct meaning of "possession" which needs to be resolved.

20. In the ultimate analysis each case under the Act would depend up on its own facts. Therefore, no hard and fast rule can be laid down to define what is or what is not "possession" of a drug or a narcotic substance.

21. Criminal Appeals 407-DB and 408-DB of 1999 shall now go back to the Division Bench.