

(2008) 01 P&H CK 0271

High Court Of Punjab And Haryana At Chandigarh

Case No: Criminal Appeal No. 820-SB of 1997, Criminal Appeal No. 1171 -SB of 1999 and Criminal Appeal No. 792-SB of 1999

Dalbir Singh alias Beera

APPELLANT

Vs

The State of Punjab

RESPONDENT

Date of Decision: Jan. 24, 2008

Acts Referred:

- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 15

Citation: (2008) 24 CriminalCC 86

Hon'ble Judges: R.S. Madan, J

Bench: Single Bench

Advocate: Baljit K. Mann and Mr. K.S. Dhaliwal, for the Appellant; D.K. Mittal, D.A.G., for the Respondent

Final Decision: Allowed

Judgement

R.S. Madan, J.

By this order, I will dispose of the three criminal appeals captioned above, which have arisen out of the common judgment dated July 24, 1999, rendered by the learned Additional Sessions Judge, Patiala in Sessions Case No. 239-T of 12.01.1998, whereby he has convicted all the three accused u/s 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter for brevity to be referred to as the "Act"), and sentenced them to undergo rigorous imprisonment for 10 years each and to pay an amount of Rs. one lac each. In default of payment of fine, they were further sentenced to undergo rigorous imprisonment for two years each.

2. In brief, the facts of the case are that on October 17, 1997 Inspector Rajbir Singh along with ASI Gurcharan Singh, HC Mehtab Singh and other police officials, held naka on the bridge of Bhakra Canal on the road towards Village Paharpur where Resh-winder Singh, resident of Village Kheri came present and he was joined with the police party. In the meantime, truck bearing No. HR-07-6254 came from the side

of bridge of Bhakra Canal towards village Paharpur. The truck was stopped by Inspector Rajbir Singh, It was being driven by Gurbachan Singh accused while Dalbir Singh was sitting in the centre and Baljinder Singh was sitting next to him. As Inspector Rajbir Singh had suspicion, he called Halqa DSP Pritpal Singh Thind, who immediately on receipt of message arrived at the spot. The identity of the accused was asked for and an option was given to them as to whether they wanted to be searched before a Magistrate but all the accused reposed confidence in him. Then their consent statement Ex.PC was recorded, which was signed by Gurbachan Singh accused and thumb marked by the other accused and attested by Rashwinder Singh PW, ASI Gurcharan Singh and DSP Pritpal Singh. Then on the directions of the DSP, Inspector Rajbir Singh conducted the search of the truck and found 40 bags of gram husk lying on the back side of the truck and 55 bags of poppy husk concealed ahead of those bags. The bags of poppy husk were numbered as Sr.No. 1 to 55.250 grams of poppy husk was separated as sample from each bag and the samples were also numbered, as per the number of the bags. On weighment each bag was found to have 30 kg. of poppy husk. The samples were made into parcels. The sample parcels and the bags were then sealed with the seal bearing impression "PPS" of the DSP. Sample seal impression Ex.PE was also prepared. The seal after use was retained by the Deputy Superintendent of Police Pritpal Singh. The case property and the truck were taken into possession vide memo Ex.PD attested by the aforesaid witnesses. 40 bags of gram husk were also taken into possession vide memo Ex.PF. Ruqa Ex.PG was sent to the police station for the registration of the case by Inspector Rajbir Singh, on the basis of which formal FIR Ex.PG/1 was recorded by SI Gajjan Singh. Inspector Rajbir Singh prepared the rough site plan Ex.PH of the place of recovery with correct marginal notes and recorded the statements of the witnesses. After disclosing the grounds of arrest vide memo Ex.PJ, all the accused were arrested as they failed to produce any permit or licence for the possession of contraband bags of poppy husk. From the personal search of the accused Rs.50/- were recovered from Baljinder Singh, Rs. 105/- from Dalbir Singh and Rs.86/-, driving licence and one challan chit from Gurbachan Singh accused, which were taken into possession vide memo Ex.PK/1 to Ex.PK/3. On return to the police station, Inspector Rajbir Singh deposited the case property with seals intact with the MHC Gurdev Singh and put the accused in the police lockup. On the next day, he produced the accused and the case property before the Illaqa Magistrate. On receipt of report of the Chemical Examiner Ex.PM/1 and completion of necessary investigation and other formalities, challan against the accused was presented in the Court.

3. The learned trial court after going through the report u/s 173 of the Code of Criminal Procedure, found a prima facie case against the accused u/s 15 of the Act and they were accordingly charged thereunder. The charge-sheet was read over and explained to the accused in vernacular, to which they pleaded not guilty and claimed trial.

4. In order to bring home the guilt of the accused, the prosecution relied upon the testimony of Inspector Devinder Yadav PW1, Constable Raghbir Singh PW2, HC Gurdev Singh PW3, Pritpal Singh PW4, ASI Gurbachan Singh PW5 and Inspector Rajbir Singh PW6 and the evidence of the prosecution was closed.

5. After the evidence of the prosecution was closed, the entire incriminating evidence appearing against the accused was put to them in their statements recorded u/s 313 of the Code of Criminal procedure, to which they pleaded innocence and stated that nothing incriminating was recovered from their possession. Accused Dalbir Singh further stated that firstly the police involved him in a case u/s 302 of the Indian Penal Code falsely and after he was acquitted in that case, he was falsely implicated in the instant case, due to party faction. Accused Baljiner Singh has specifically stated that he was working as a cleaner/conductor on the said truck and the police took him to the police station along with Gurbachan Singh, owner of the truck, and involved him in this case. Accused Gurbachan Singh stated that the police demanded his vehicle for taking the people to the rally to be addressed by the Prime Minister of India, without paying any charges. When he refused to accede to their request, the police took him and the truck to the police station and falsely implicated in the present case.

In defence, the accused examined Rajbir Singh DW1.

6. After going through the evidence brought on the record, the learned Additional Sessions Judge, Patiala drew the conclusion that the prosecution has proved its case beyond any shadow of doubt and thus convicted and sentenced the accused, fully described in the opening part of the judgment. I have heard the learned counsel for the parties and have minutely scanned the evidence brought on the record.

7. The learned counsel for the appellants have challenged the case of the prosecution on the ground that the prosecution has miserably failed to prove that the accused were in conscious possession of the contraband, allegedly recovered from them. Once the conscious possession of the contraband stuff is not proved, it cannot be easily said that the recovery of the poppy husk in the present case relates to the accused. In support of their contention reference was made to a Full Bench Decision of this Court in case *Kashmir Singh v. State of Punjab and Karam Singh v. State of Punjab*, 2006(3) CCC 08 (P&H) (FB): Criminal Appeals No.407 and 408-DB of 1999, the Full Bench has dealt in detail with Sections 35 and 54 of the NDPS Act and observed that unless the accused is put in the statement u/s 313 Cr.P.C. that they were in conscious possession of the contraband, the order of conviction and sentence can not be recorded against the accused. It is the fundamental right of the accused to know the case of the prosecution to enable him develop his defence.

8. It has been further observed that 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 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, as provided in Section 35 of the Act. 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 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 substance;
- (b) any opium poppy, cannabis plant or coca plant growing on any land which he cultivated;
- (c) any apparatus specially designed or any group of utensils specially adopted for the manufacture of any narcotic drug or psychotropic substance 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".

9. The learned counsel for the appellant referred to the judgment of the Supreme Court in *Madan Lal and another v. State of H.P.*, 2004(1) ACJ 260 (S.C.): 2004(2) CCC 361 (S.C.): 2003 SCC (Cri) 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 back grounds. 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 kind 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". (See Cr.CCp.365,366)

At the end of this judgment, the Full Bench further observed that the accused is to be given an opportunity to rebut the presumption as envisaged in Section 313 of the

Code of Criminal Procedure.

10. Admittedly, in the instant case, the accused have not been asked any question with respect to the presumption of conscious possession as envisaged u/s 313 Cr.P.C. Therefore, they have not been afforded any opportunity to enable them to develop their defence. In this view I am further fortified from the judgment, of Division Bench of this Court reported as *Raj Kumar v. State of Punjab*, 2005(1) CCC 368 (P&H) : 2005(1) RCR(Cri) 70 (DB), wherein it was observed that in the statement of accused recorded u/s 313 Cr.P.C. no question was asked that they were in conscious possession, the order of conviction is liable to be set aside.

11. To strengthen his arguments, the learned counsel contended that in fact the accused were not the owners of the contraband stuff as from their personal search they were found to be in possession of currency notes, which were taken into possession by various recovery memos. Had the contraband poppy husk been in possession of the accused persons, they would have some money with them to meet the exigencies they may come across while carrying the offensive goods or importing the offensive goods from one place to other.

12. According to the learned counsel even if the accused have been found carrying the aforesaid offensive contraband stuff in the truck on the date, they cannot be held guilty for the commission of the crime because no alternative charge u/s 8 of the Act for transporting the offensive goods was framed against the accused.

13. Learned counsel for the appellants next contended that Section 8 of the NDPS Act deals with the prohibition of certain operations, which reads as under :-

(a) cultivate any coca plant or gather any portion of coca plant; or

(b) cultivate the opium poppy or any cannabis plant; or

(c) Produce, manufacture, possess, sell, purchase, transport, warehouse, use, consume, import inter-State, export inter-State, import into India, export from India or transship any Narcotic drug or psychotropic substance, except for medical or scientific purposes and in the manner and to the extent provided by the provisions of this Act or the rules or orders made thereunder and in case where any such provision, imposes any requirement by way of licence, permit or authorization also in accordance with the terms and conditions of such licence, permit or authorization:

Provided that, and subject to the other provisions of this Act and the rules made thereunder, the prohibition against the cultivation of the cannabis plant for the production of ganja or the production, possession, use, consumption, purchase, sale, transport, warehousing, import inter-State and export inter- State of ganja for any purpose other than medical and scientific purpose shall take effect only from the date which the Central Government may, by notification in the Official Gazette, specify in this behalf;

(Provided further that nothing in this Section shall apply to the export of poppy straw for decorative purposes).

14. Learned counsel for the appellant stated that the accused should have been alternatively charged for transportation of the offensive goods without permit or authorization, as required by law but no such alternative charge was framed in the instant case. Therefore, this infirmity in the prosecution case continues to exist. The contents of the charge framed against the accused, reads as under :-

"That you all on 17.10.1997 in the area of Village Chohant were found in possession of 55 bags of poppy husk, each containing 30/1-4 Kgs. Carrying in truck No.HR-07-6254, without any permit or licence and that you all thereby committed an offence punishable u/s 15 of the Narcotic Drugs & Psychotropic Substances Act and within the cognizance of this Court".

15. The accused have also not been put any question in this regard in their statements u/s 313 of the Code of Criminal Procedure. Therefore, the order of conviction recorded by the learned Special Judge, is not sustainable. Reference was made to Avtar Singh v. State of Punjab, 2002(2) ACJ 402 (S. C.) : 2002(4) RCR(Cri) 180 (SC) wherein in paragraph 7 of the judgment, their lordship of the Supreme Court observed as under :-

"Coming to the case of the third appellant who was driving the vehicle, there is one more infirmity in the prosecution case. He would have charged alternatively for transporting the offensive goods without permit or authorization as required by law; but such a charge was not laid. There was not even reference to Section 8 of the Act. The result is, he too goes scot free". (See ACJ p.405)

16. So far as the accused-appellants are concerned, they have not been charged u/s 8 of the Act, in the alternative. Therefore, in the absence of any charge u/s 8 of the Act and the statement of the accused u/s 313 Cr.P.C. they cannot be held guilty for any offence as they have not been afforded any opportunity to defend themselves.

17. Another limb of arguments of the learned counsel for the appellants is that form No.29 which was to be prepared at the spot and sent to the FSL does not bear the seal impression of the DSP. Form No.29 bears the date 20.10.1997 whereas the recovery was effected on 17.10.1997. On account of not preparing the form at the time of recovery, prejudice was caused to the accused. In support of this submission, learned counsel for the appellants placed reliance on Gian Singh v. State of Punjab, 2006(3) CCC 480 (P&H): 2006(2) RCR (Criminal) 611 (P&H), wherein this Court while placing reliance on the judgment of the Apex Court in Rajesh Jagdamba Avasthi v. State of Goa, 2005(1) CCC 305 (S.C.) : 2005(1) RCR(Crl.) 406 : 2005 ACJ 240 (SC) observed that the possibility of seal being tampered with, substance being changed and the container/packet being re-sealed cannot be ruled out.

18. The learned counsel for the appellants further contended that the Deputy Superintendent of Police after affixing his seal on the samples and the residue, instead of entrusting the seal to the independent witness, retained the same with him. Thus the non-entrustment of the seal to an independent witness by the Deputy Superintendent of Police further creates dent in the prosecution version.

19. Therefore, the finding of the learned trial Court that no prejudice is caused and being the huge recovery, cannot be termed to be a case of plantation, is not sustainable.

20. On the other hand the learned Senior Deputy Advocate General, Punjab contended that it is a case where the accused have been actually found to be in possession of the goods and they could not account for the possession of the offensive goods. They were caught red handed by the police party at 7.30 A.M. Therefore, it is not a case of plantation and the accused were in conscious possession of the contraband which they were having loaded in the truck. Hence, it is only the accused who can be treated to be in actual possession of the offensive goods.

21. After carefully considering the submissions of the learned counsel for the parties, it is not disputed that no alternative charge has been framed against the accused as envisaged u/s 8 of the Act for transporting the offensive goods. It is also not disputed that no question was put by the prosecution to the accused, with respect to conscious possession of the contraband, when they were examined u/s 313 Cr.P.C. that they were transporting the offensive goods in the vehicle at the relevant time. Thus in the absence thereof, the accused cannot be held guilty for the commission of any crime.

22. In the light of the foregoing discussion and keeping in view the facts and circumstances appearing in this case, it is held that the prosecution has miserably failed to bring home the guilt of the accused, beyond any shadow of doubt.

23. In the net result, these appeal are accepted. The order of conviction and sentenced passed against the accused-appellants by the learned Additional Sessions Judge, Patiala is set aside. The accused are acquitted of the charges framed against them. They are also discharged from their bail bonds already furnished by them.

24. The case property is confiscated to the State and be destroyed as per rules on the subject.