SUPREME COURT OF INDIA

State of Punjab

Vs.

Hari Singh

Crl.A.No. of 2009

(Dr. Arijit Pasayat and Dr.M.K.Sharma JJ)

16.02.2009

JUDGEMENT

Dr. ARIJIT PASAYAT, J.

1. Leave granted.

2. The State of Punjab is in appeal against the judgment of a learned Single Judge of the High Court of Punjab and Haryana, allowing the appeal filed by the present respondents, who were accused nos.1 to 4. They faced trial for offence punishable under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short the `Act'). Each was sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs.1,00,000/- each with default stipulations. They were convicted by the learned Special Judge, Patiala, for having been found to be in possession of 16 bags of poppy husk, each containing 30 kgs.

3. According to the prosecution case, on 9.7.1999, SI Krishan Kumar along with other police officials and one PW Gurjail Singh was going from village Kadrabad to Gajewas and when they were three kilometers away from the village, they noticed three men and two women sitting on the bags lying between the surgarcane fields and a heap of earth. On seeing the police party, these persons tried to slip away. Sub Inspector Krishan Kumar stopped the vehicle and apprehended accused Puran Singh, Hari Singh, Jaswinder Kaur and Charanjit Kaur while 5th accused (who was identified as Amrik Singh by Gurjail Singh) slipped away. The Sub-Inspector sent a wireless message to the police station and called S.P.Os Rajwinder Kaur and Surinder Kaur to the spot and in their presence apprised the apprehended persons that the police want to search the bags on which they had been sitting and they could ask for search being conducted in the presence of a Gazetted Officer or Magistrate. In response to this, the persons opted for being searched by a Gazetted Officer. Their statements were recorded and through wireless, S.I. Krishan Kumar requested DSP, Samana Shri Paramvir Gill to reach at the spot and in his presence the bags were taken and grounds

of arrest served upon the appellants and eventually after receipt of adverse report from the Chemical Examiner a challan was presented against them.

4. After considering the materials and evidence on record, the trial Court came to the conclusion that prima facie a case under Section 15 of the Act was made out against the accused and as they pleaded not guilty, the prosecution was called upon to lead its evidence. It examined SI Manjit Singh (PW-1), HC Rakesh Kumar (PW-2), DSP P.S. Gill (PW-3), Inspector Krishan Kumar (PW-4), Gurtej Singh (PW-5) and SI Gurcharan Singh (PW6).

5. After conclusion of the evidence, the incriminating circumstances appearing in the prosecution case were put to the accused, who denied the allegations and asserted that they were innocent and have been falsely implicated in the case by the police due to enmity. Puran Singh asserted that Inspector Paramjit Singh who was posted as SHO, Police Station, Dirba, District Sangrur and ASI Jarnail Singh are inimical towards him.

The police officials had picked up his sons Amrik Singh, Baghel Singh and his nephew Paramjit Singh on 16.4.1987. Aggrieved by this, Puran Singh had filed a writ petition of habeas corpus and when this petition came up for hearing. Mr. M.L. Bharara, Superintendent of High Court, who was appointed as Warrant Officer had also been brought into Police Station by ASI Jarnail Singh and when the Warrant Officer inquired about him, the Police Officials replied that he had given him a thousand rupee as bribe for making a false report. Action under the Contempt of Courts Act had been initiated against two officials and Inspector Paramjit Singh had been fined with Rs.1000/- and in default of payment of fine he was sentenced to undergo SI for a period of two months. Again, Gurusewak Singh, who was DSP Railways had picked up his son and brother-in-law. His brother-in-law was killed and in that case his son had appeared as a witness against the police officials and writ petition had also been filed against them in the Punjab and Haryana High Court. Due to this, Police Department is inimical towards him and his family and had falsely implicated them in the case. The accused had brought on record certified copy of the judgment passed by Shri G.S. Dhiman, Additional Sessions Judge, Sangrur on 24.5.2003 and photocopy of the Criminal Contempt Petition No.13 of 1987 marked D2 and closed the evidence.

6. The Trial Court came to hold that the accusations were established beyond reasonable doubt and, accordingly, convicted and sentenced the accused.

7. Stand of the accused persons before the High Court was that there was no evidence to show any conscious possession, which is a sine-qua-non for recording conviction under Section 15 of the Act. Additionally, it was submitted that no question regarding possession was put to any of them in their examination under Section 313 of the Code of Criminal Procedure, 1973 (in short, `the Code'). It was also urged that the prosecution was the outcome of personal vandata by some officials. The High Court accepted the stand of the appellants and directed acquittal holding that there was no evidence of conscious possession and in any event, the requisite questions under Section 313 Cr.P.C. were not put.

8. In support of the appeal, learned counsel for the appellant submitted that the High Court was wrong in its view both with regard to the conscious possession aspect as well as the questioning under Section 313 Cr.P.C.

9. Learned counsel for the respondents, on the other hand, submitted that whether there was conscious possession is a question of fact and the High Court's judgment does not call for any

interference.

10. Whether there was conscious possession had to be determined with reference to the factual backdrop in each case. The fact which can be culled out from the evidence on record is that the accused persons were sitting atop gunny bags containing the contraband articles.

11. Section 15 makes possession of contraband articles an offence.

Section 15 appears in chapter IV of the Act which relates to offence for possession of such articles. It is submitted that in order to make the possession illicit, there must be a conscious possession. Section 15 deals with punishment for contravention in relation to poppy straw.

12. It is highlighted that unless the possession was coupled with requisite mental element, i.e. conscious possession and not mere custody without awareness of the nature of such possession, Section 15 is not attracted.

13. The expression `possession' is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different backgrounds. It is impossible, as was observed in Superintendent & Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunja and Ors. (AIR 1980 SC 52), to work out a completely logical and precise definition of "possession" uniformally applicable to all situations in the context of all statutes.

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

15. As noted in Gunwantlal v. The State of M.P. (AIR 1972 SC 1756) possession in a given case need not be physical possession but can be constructive, having power and control over the article in case in question, while the persons whom physical possession is given holds it subject to that power or control.

16. The word `possession' means the legal right to possession (See Health v. Drown (1972) (2) All ER 561 (HL). In an interesting case it was observed that where a person keeps his fire arm in his mother's flat which is safer than his own home, he must be considered to be in possession of the same. (See Sullivan v. Earl of Caithness (1976 (1) All ER 844 (QBD).

17. 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 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 Anr. v. State of Himachal Pradesh (2003 (6) SCALE 483).

18. In the present case, though, there was evidence regarding conscious possession, but, unfortunately, no question relating to possession, much less conscious possession was put to the accused under Section 313 Cr.P.C. The questioning under Section 313 Cr.P.C. is not an empty formality.

19. A few decisions of this Court need to be noticed in this context.

20. In Bibhuti Bhusan Das Gupta & Anr. v. State of West Bengal (AIR 1969 SC 381), this Court

held that the pleader cannot represent the accused for the purpose of Section 342 of the Code of Criminal Procedure, 1898 (hereinafter referred to as `Old Code') which is presently Section 313 Cr.P.C.

21. Section 313 Cr.P.C. reads as follows:

"313. Power to examine the accused.--(1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the court--
(a) may at any stage, without previously warning the accused, put such questions to him as the court considers necessary;

(b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case:

Provided that in a summons case, where the court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).

(2) No oath shall be administered to the accused when he is examined under sub-section (1).

(3) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.

(4) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed."

22. The forerunner of the said provision in the Old Code was Section 342 therein. It was worded thus:

"342. (1) For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the court may, at any stage of any inquiry or trial, without previously warning the accused, put such questions to him as the court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence.

(2) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them;

but the court and the jury (if any) may draw such inference from such refusal or answers as it thinks just.

(3) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

(4) No oath shall be administered to the accused when he is examined under sub-section (1)."

23. Dealing with the position as the section remained in the original form under the Old Code, a three-Judge Bench of this Court in Hate Singh Bhagat Singh v. State of Madhya Bharat (AIR 1953 SC 468) that:

"The statements of the accused recorded by the Committing Magistrate and the Sessions Judge are intended in India to take the place of what in England and in America he would be free to state in his own way in the witness-box. They have to be 10 received in evidence and treated as evidence and be duly considered at the trial."

24. Parliament, thereafter, introduced Section 342-A in the Old Code (which corresponds to Section 315 of the present Code) by which permission is given to an accused to offer himself to be examined as a witness if he so chose.

25. In Bibhuti Bhusan Das Gupta's case (supra) another three-Judge Bench dealing with the combined operation of Sections 342 and 342-A of the Old Code made the following observations:

"Under Section 342-A only the accused can give evidence in person and his pleader's evidence cannot be treated as his. The answers of the accused under Section 342 is intended to be a substitute for the evidence which he can give as a witness under Section 342-A. The privilege and the duty of answering questions under Section 342 cannot be delegated to a pleader.

No doubt the form of the summons show that the pleader may answer the charges against the accused, but in so answering the charges, he cannot do what only the accused can do personally.

The pleader may be permitted to represent the accused while the prosecution evidence is being taken. But at the close of the prosecution evidence the accused must be questioned and his pleader cannot be examined in his place."

26. The Law Commission in its 41st Report considered the aforesaid decisions and also various other points of view highlighted by legal men and then made the report after reaching the conclusion that:

(i) in summons cases where the personal attendance of the accused has been dispensed with, either under Section 205 or under Section 540-A, the court should have a power to dispense with his examination; and (ii) in other cases, even where his personal attendance has been dispensed with, the accused should be examined personally.

27. The said recommendation has been followed up by Parliament and Section 313 of the Code, as is presently worded, is the result of it. It would appear prima facie that the court has discretion to dispense with the physical presence of an accused during such questioning only in summons cases and in all other cases it is incumbent on the court to question the accused personally after closing prosecution evidence. Nonetheless, the Law Commission was conscious that the rule may have to be relaxed eventually, particularly when there is improvement in literacy and legal-aid facilities in the country. This thinking can be discerned from the following suggestion made by the Law Commission in the same report:

"We have, after considering the various aspects of the matter as summarised above, come to the conclusion that Section 342 should not be deleted. In our opinion, the stage has not yet come for it being removed from the statute-book. With further increase in literacy and with better facilities for legal aid, it may be possible to take that step in the future."

28. The position has to be considered in the present set-up, particularly after the lapse of more than a quarter of a century through which period revolutionary changes in the technology of communication and transmission have taken place, thanks to the advent of computerisation. There is

marked improvement in the facilities for legal aid in the country during the preceding twenty-five years. Hence a fresh look can be made now. We are mindful of the fact that a two-Judge Bench in Usha K. Pillai (1993 (3) SCC 208) has found that the examination of an accused personally can be dispensed with only in summons case. Their Lordships were considering a case where the offence involved was Section 363 IPC. The two-Judge Bench held thus: (SCC pp. 212-13, para 4) "A warrant case is defined as one relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding two years. Since an offence under Section 363 IPC is punishable with imprisonment for a term exceeding two years it is a warrant case and not a summons case.

Therefore, even in cases where the court has dispensed with the personal attendance of the accused under Section 205(1) or Section 317 of the Code, the court cannot dispense with the examination of the accused under clause (b) of Section 313 of the Code because such examination is mandatory."

29. Contextually we cannot bypass the decision of a three-Judge Bench of this Court in Shivaji Sahabrao Bobade v. State of Maharashtra (1973 (2) SCC 793) as the Bench has widened the sweep of the provision concerning examination of the accused after closing prosecution evidence. Learned Judges in that case were considering the fallout of omission to put to the accused a question on a vital circumstance appearing against him in the prosecution evidence. The three-Judge Bench made the following observations therein: (SCC p. 806, para 16) "It is trite law, nevertheless fundamental, that the prisoner's attention should be drawn to every inculpatory material so as to enable him to explain it. This is the basic fairness of a criminal trial and failures in this area may gravely imperil the validity of the trial itself, if consequential miscarriage of justice has flowed. However, where such an omission has occurred it does not ipso facto vitiate the proceedings and prejudice occasioned by such defect must be established by the accused. In the event of evidentiary material not being put to the accused, the court must ordinarily eschew such material from consideration. It is also open to the appellate court to call upon the counsel for the accused to show what explanation the accused has as regards the circumstances established against him but not put to him and if the accused is unable to offer the appellate court any plausible or reasonable explanation of such circumstances, the court may assume that no acceptable answer exists and that even if the accused had been questioned at the proper time in the trial court he would not have been able to furnish any good ground to get out of the circumstances on which the trial court had relied for its conviction."

30. The above approach shows that some dilution of the rigour of the provision can be made even in the light of a contention raised by the accused that non-questioning him on a vital circumstance by the trial court has caused prejudice to him. The explanation offered by the counsel of the accused at the appellate stage was held to be a sufficient substitute for the answers given by the accused himself.

31. What is the object of examination of an accused under Section 313 of the Code? The section itself declares the object in explicit language that it is "for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him". In Jai Dev v. State of Punjab (AIR1963 SC 612) Gajendragadkar, J. (as he then was) speaking for a three-Judge Bench has focussed on the ultimate test in determining whether the provision has been fairly complied with. He observed thus:

"The ultimate test in determining whether or not the accused has been fairly examined under Section 342 would be to inquire whether, having regard to all the questions put to him, he did get an opportunity to say what he wanted to say in respect of prosecution case against him. If it appears that the examination of the accused person was defective and thereby a prejudice has been caused to

him, that would no doubt be a serious infirmity."

32. Thus it is well settled that the provision is mainly intended to benefit the accused and as its corollary to benefit the court in reaching the final conclusion.

33. At the same time it should be borne in mind that the provision is not intended to nail him to any position, but to comply with the most salutary principle of natural justice enshrined in the maxim audi alteram partem.

The word "may" in clause (a) of sub-section (1) in Section 313 of the Code indicates, without any doubt, that even if the court does not put any question under that clause the accused cannot raise any grievance for it. But if the court fails to put the needed question under clause (b) of the sub-section it would result in a handicap to the accused and he can legitimately claim that no evidence, without affording him the opportunity to explain, can be used against him. It is now well settled that a circumstance about which the accused was not asked to explain cannot be used against him.

34. But the situation to be considered now is whether, with the revolutionary change in technology of communication and transmission and the marked improvement in facilities for legal aid in the country, is it necessary that in all cases the accused must answer by personally remaining present in court. We clarify that this is the requirement and would be the general rule. However, if remaining present involves undue hardship and large expense, could the court not alleviate the difficulties. If the court holds the view that the situation in which he made such a plea is genuine, should the court say that he has no escape but he must undergo all the tribulations and hardships and answer such questions personally presenting himself in court. If there are other accused in the same case, and the court has already completed their questioning, should they too wait for long without their case reaching finality, or without registering further progress of their trial until their co-accused is able to attend the court personally and answer the court questions? Why should a criminal court be rendered helpless in such a situation?

35. The one category of offences which is specifically exempted from the rigour of Section 313(1)(b) of the Code is "summons cases". It must be remembered that every case in which the offence triable is punishable with imprisonment for a term not exceeding two years is a "summons case".

Thus, all other offences generally belong to a different category altogether among which are included offences punishable with varying sentences from imprisonment for three years up to imprisonment for life and even right up to death penalty. Hence there are several offences in that category which are far less serious in gravity compared with grave and very grave offences.

Even in cases involving less serious offences, can not the court extend a helping hand to an accused who is placed in a predicament deserving such a help?

36. Section 243(1) of the Code enables the accused, who is involved in the trial of warrant case instituted on police report, to put in any written statement. When any such statement is filed the court is obliged to make it part of the record of the case. Even if such case is not instituted on police report the accused has the same right (vide Section 247). Even the accused involved in offences exclusively triable by the Court of Session can also exercise such a right to put in written statements (Section 233(2) of the Code). It is common knowledge that most of such written statements, if not all, are prepared by the counsel of the accused. If such written statements can be treated as

statements directly emanating from the accused, hook, line and sinker, why not the answers given by him in the manner set out hereinafter, in special contingencies, be afforded the same worth.

37. We think that a pragmatic and humanistic approach is warranted in regard to such special exigencies. The word "shall" in clause (b) to Section 313(1) of the Code is to be interpreted as obligatory on the court and it should be complied with when it is for the benefit of the accused. But if it works to his great prejudice and disadvantage the court should, in appropriate cases, e.g., if the accused satisfies the court that he is unable to reach the venue of the court, except by bearing huge expenditure or that he is unable to travel the long journey due to physical incapacity or some such other hardship, relieve him of such hardship and at the same time adopt a measure to comply with the requirements in Section 313 of the Code in a substantial manner. How could this be achieved?

38. If the accused (who is already exempted from personally appearing in the court) makes an application to the court praying that he may be allowed to answer the questions without making his physical presence in court on account of justifying exigency the court can pass appropriate orders thereon, provided such application is accompanied by an affidavit sworn to by the accused himself containing the following matters:

(a) A narration of facts to satisfy the court of his real difficulties to be physically present in court for giving such answers.

(b) An assurance that no prejudice would be caused to him, in any manner, by dispensing with his personal presence during such questioning.

(c) An undertaking that he would not raise any grievance on that score at any stage of the case.

39. If the court is satisfied of the genuineness of the statements made by the accused in the said application and affidavit it is open to the court to supply the questionnaire to his advocate (containing the questions which the court might put to him under Section 313 of the Code) and fix the time within which the same has to be returned duly answered by the accused together with a properly authenticated affidavit that those answers were given by the accused himself. He should affix his signature on all the sheets of the answered questionnaire. However, if he does not wish to give any answer to any of the questions he is free to indicate that fact at the appropriate place in the questionnaire (as a matter of precaution the court may keep photocopy or carbon copy of the questionnaire before it is supplied to the accused for an answer). If the accused fails to return the questionnaire duly answered as aforesaid within the time or extended time granted by the court, he shall forfeit his right to seek personal exemption from court during such questioning. The Court has also to ensure that the imaginative response of the counsel is intended to be availed to be a substitute for taking statement of accused.

40. In our opinion, if the above course is adopted in exceptional exigency it would not violate the legislative intent envisaged in Section 313 of the Code.

41. The above position was indicated in Basav Raj R Patil v. State of Karnataka (2000 (8) SCC 740).

42. It is true that in Chandu Lal Chandraker's case (supra) two Hon'ble Judges have taken a view supporting that of the appellant. It appears that in said case no reference was made to Bibhuti Bhusan Das Gupta's case (supra).

43. Judged in the background of principles set out in Basav Raj R. Patil's case (supra) the inevitable conclusion is that the High Court's impugned order does not suffer from any infirmity to warrant interference.

44. When the accused was examined under Section 313 Cr.P.C., the essence of accusation was not brought to his notice, more particularly, that possession aspect, as was observed by this Court in Avtar Singha and Ors. v. State of Punjab (2002 (7) SCC 419). The effect of such omission vitally affects the prosecution case.

45. Above being the position, we find no merit in this appeal which is, accordingly, dismissed. However, certain directions given by the High Court for initiation of action against some officials could not have been given while dealing with an appeal and, therefore, stand expunged. The appeal is dismissed except for a direction for expulsion of the direction for initiation of departmental action.