SUPREME COURT OF INDIA

Dharampal Singh

Vs.

State of Punjab

Crl.A.No.1479 of 2008

(Harjit Singh Bedi and Chandramauli Kr. Prasad JJ.)

09.09.2010

JUDGEMENT

Chandramauli Kr.Prasad, J.

1. Appellants have preferred these appeals separately, aggrieved by the judgment and order dated 22nd January, 2008 passed by the Punjab and Haryana High Court in Criminal Appeal No.686-DBA of 1997, whereby while reversing the judgment of acquittal dated 7th May, 1997 passed by the Sessions Judge, Faridkot in Sessions Case No.73 of 1994 (Sessions Trial No.71 of 1994) convicted the appellants for the offence under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the `Act') and sentenced them to undergo rigorous imprisonment for a period of 10 years each and to pay a fine of Rs.1 lac each and in default to undergo further rigorous imprisonment for a period of one year each.

2. According to the prosecution, on 4th June,1994 PW.3, Jagmohan Singh, Station House Officer of Police Station, Mehna along with Assistant Sub-Inspector of Police, Ranjit Singh and other police personnel were on a routine picket duty near the passage leading to the various colonies from Ajitwal.

> "While they were on duty a white Maruti Car, bearing No.PID 6096 was seen coming from the side of village Kokri Kalan through an unmetalled road and when signalled by Jagmohan Singh, it stopped. On enquiry the person driving the car disclosed his name as appellant Dharampal Singh whereas the other person sitting by his side on the front seat disclosed his name as appellant Major Singh. According to the prosecution, the Station House Officer apprised them that they intend to search their car and whether they wish to be searched in the presence of a Magistrate or a Gazetted Officer. Both of them expressed their desire to be searched by a Gazetted Police Officer and accordingly on his wireless message Narinderpal Singh, Superintendent of Police, Moga along with security personnel reached there. According to the prosecution an attempt was made to join independent persons to

witness to the search but none were available. Hence, the car was searched by Jagmohan Singh in the presence of the Superintendent of Police and in the dicky of the car a gunny bag containing opium, wrapped in a glazed paper was found.

Total weight of the opium found was 65 kilograms and from that sample of 100 grams was taken and kept in a sealed cover. The sample so taken was sent to the Chemical Examiner, who found the same to be opium. After completion of the investigation charge-sheet was submitted under Section 18 of the Act and ultimately the appellants were put on trial for commission of the offence punishable under the aforesaid Section."

3. The prosecution in support of its case altogether examined seven witnesses and the report of the Chemical Examiner was tendered as evidence. In the statement under Section 313 of the Code of Criminal Procedure they pleaded false implication and examined six defence witnesses. The trial court on appreciation of evidence came to the conclusion that the prosecution had failed to prove, the compliance of Section 50 of the Act and accordingly acquitted both the appellants of the charge levelled against them. In this connection the trial court had observed as follows:

"In this case, there is non compliance of the provisions of Section 50 of the Narcotic Drugs and Psychotropic Substances Act, which has been held to be a mandatory. In this case, admittedly no consent memo was prepared. In case *State of Punjab vs. Labh Singh*[1] where there was no evidence that the accused was informed in writing of his right to be searched before a Gazetted Officer or a Magistrate, and the accused had been acquitted by the Court, the Hon'ble Supreme Court refused to interfere in the order of acquittal. In case State of Punjab-appellant Criminal Report 303 in para No.57 at page 320, it was held by our own Hon'ble High Court that the non compliance of the provisions of Section 50 of the Act would per se result in vitiating the trial and conviction and it would amount to taking away the most valuable and substantive right of the suspected person in establishing his innocence and rendering the recovery of the Narcotic Drugs and Psychotropic Substances is illegal qua the possession of the accused. This shows that the non compliance of the provisions of Section 50 is fatal to the case of the prosecution."

4. Aggrieved by the order of acquittal, State preferred appeal and the High Court by the impugned judgment has set aside the order of acquittal and convicted the appellants as above.

"The High Court has found that since the recovery was effected from the dicky of the car and not from the person of the appellants the provisions of Section 50 of the Act were not applicable and as such the question of violation thereof did not arise at all. The High Court further held that they were in possession of 65 Kilograms of opium. The finding of the High Court in this regard reads as follows:

"It is proved from the cogent, convincing, reliable and unimpeachable evidence of Jagmohan Singh, Inspector, Station House Officer, P.S. Mehna, PW-3, the Investigating Officer of this case, and Narinder Pal Singh, Superintendent of Police, PW-2, that Dharampal Singh, accused, was driving Car No.PID 6096 and Major Singh, accused, was sitting by his side, on the front seat, at the relevant time, when the recovery of 65 K.gms of opium, wrapped in a glazed paper, from a gunny bag, lying in the dicky of the same, was effected. The Car, in question, belonged to the brother of Dharampal Singh, accused, as per the registration certificate, referred to above. Since no enmity against the prosecution witnesses, was either alleged or proved, it could not be imagined that such a big haul of opium, could be planted, against the accused, by them. Since, the recovery of opium, was effected from the dicky of the Car, aforesaid, being driven by Dharampal Singh, accused, by the side of whom, on the front seat, Major Singh, accused was sitting, it can be safely held that both of them were found in possession of the same (opium)."

5. The High Court further taking into account the provisions of Sections 35 and 54 of the Act came to the conclusion that they were in conscious possession of opium and accordingly convicted and sentenced the appellants as above.

6. Mr. Nagendra Rai, learned Senior Counsel appears on behalf of the appellant in Criminal Appeal No.1479 of 2008 whereas the appellant in Criminal Appeal No.1470 of 2008 is represented by Pandit Parmanand Katara, learned Senior Counsel. They concede that in facts of the present case, Section 50 of the Act is not attracted, the ground on which the trial court had acquitted the appellants but they assail the conviction of the appellants on the ground mentioned hereinafter.

7. Mr. Rai, submits that for the conviction under Section 18 of the Act the possession has to be a conscious possession and merely the fact that the opium was found in the dicky of the car, which the appellant was driving itself, shall not establish conscious possession. In support of his submission he has placed reliance on a judgment of this Court in the case of *Avtar Singh and others vs. State of Punjab*[2], and our attention has been drawn to the following passage from paragraph 6 of the judgment which reads as follows:

"Possession is the core ingredient to be established before the accused in the instant case are subjected to the punishment under Section 15. If the accused are found to be in possession of poppy straw which is a narcotic drug within the meaning of clause (xiv) of Section 2, it is for them to account for such possession satisfactorily; if not, the presumption under Section 54 comes into play. We need not go into the aspect whether the possession must be conscious possession. Perhaps taking a cue from the decision of this Court in Inder Sain v. State of Punjab arising under the Opium Act, the learned trial Judge charged the accused of having conscious possession of poppy husk. Assuming that poppy husk comes within the expression poppy straw, the question, however, remains whether the prosecution satisfactorily proved the fact that the accused were in possession of poppy husk. Accepting the evidence of PW 4, the

Head Constable, it is seen that Appellant 3 (Accused 4) was driving the vehicle loaded with bags of poppy husk. Appellants 1 and 2 (Accused 1 and 2) were sitting on the bags placed in the truck. As soon as the vehicle was stopped by ASI (PW 2), one person sitting in the cabin by the side of the driver and another person sitting in the back of the truck fled. No investigation has been directed to ascertain the role played by each of the accused and the nexus between the accused and the offending goods. 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 but the minimum requisite element which has to be satisfied is 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 the 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 the 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 the custodian of the 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."

8. Another decision on which reliance is placed is the decision of this Court in the case of *Sorabkhan Gandhkhan Pathan and another vs. State of Gujara*[3], wherein it has been held as follows:

"7. However, we notice that so far as Accused 1, Appellant 1 herein is concerned, the contraband in question has been seized from his possession and, in our opinion, the prosecution has established the case against the said accused and the courts below have rightly convicted the said appellant. Whereas in regard to Appellant 2, it is the prosecution case itself that he was travelling in the autorickshaw, along with three other persons. The prosecution has not produced any material whatsoever to establish that either this appellant had the knowledge that Appellant 1 was carrying the contraband or was, in any manner, conniving with the said accused in carrying the contraband. In the absence of any such material, to convict the second appellant only on the ground that he was found in the autorickshaw, in our opinion, is not justified. As a matter of fact, the courts below have rightly acquitted the other two accused on similar ground and, in our opinion, the said benefit ought to have gone to Accused 2 also.

For the reasons stated, we find the prosecution has failed to establish its case against Appellant 2.

Therefore, this appeal, so far as he is concerned, succeeds and the same is allowed. The said Appellant 2, if in custody, shall be released forthwith, if not wanted in any other case. However, the appeal of the first appellant is dismissed."

9. We do not find any substance in this submission of the learned counsel. Appellant, Dharmpal Singh was found driving the car whereas appellant, Major Singh was travelling with him and from the dicky of the car 65 Kilograms of opium was recovered. The vehicle driven by the appellant, Dharampal Singh and occupied by the appellant, Major Singh is not a public transport vehicle. It is trite that to bring the offence within the mischief of Section 18 of the Act possession has to be conscious possession. The initial burden of proof of possession lies on prosecution and once it is discharged legal burden would shift on accused. Standard of proof expected from the prosecution is to prove possession beyond all reasonable doubt but what is required to prove innocence by the accused would be preponderance of probability. Once the accused plea is found probable, discharge of initial burden by the prosecution will not nail him with offence. Offences under the Act being more serious in nature higher degree of proof is required to convict an accused. It needs no emphasis that the expression possession is not capable of precise and completely logical definition of universal application in context of all the statutes. Possession is a polymorphous word and cannot be uniformly applied, it assumes different colour in different context. In the context of Section 18 of the Act once possession is established the accused, who claims that it was not a conscious possession has to establish it because it is within his special knowledge. Section 54 of the Act raises presumption from possession of illicit articles. It reads as follows:

> "54. Presumption from possession of illicit articles. - In trials under this Act, it may be presumed, 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 substance or controlled substance;
>
> (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 substance or controlled substance; or (d) any materials 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."
>
> From a plain reading of the aforesaid it is evident that it creates a legal fiction and presumes the person in possession of illicit articles to have committed the offence in case he fails to account for the possession satisfactorily. Possession is a mental state and Section 35 of the Act gives statutory recognition to culpable mental state. It includes knowledge of fact. The possession, therefore, has to be understood in the context thereof and when tested on this anvil, we find that the appellants have not been able to account for satisfactorily the possession of opium. Once possession is established the Court can presume that the accused had culpable mental state and

have committed the offence. In somewhat similar facts this Court had the occasion to consider this question in the case of *Madan Lal and another vs. State of H.P.*[4], wherein it has been held as follows:

"26. 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.

27. 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- appellants that the possession was not conscious in the logical background of Sections 35 and 54 of the Act."

10. Now, referring to the decision of this Court in the case of Avtar Singh (supra), the same is clearly distinguishable. In the said case, according to the prosecution itself, the vehicle loaded with bags of poppy husk was a truck and when it was stopped one person sitting in the cabin and another person sitting in the back of the truck fled away. The accused in the said case were not the only occupants and in the said background this Court held that they cannot be presumed to be in the possession of the goods and it is quite probable that one of those who fled away could have been the custodian thereof. However, in the present case the vehicle in question is not a transport vehicle and, therefore, the test applied in the case of public transport vehicles in which several persons travel cannot be applied in the facts of the present case.

"Similarly, in the case of Sorabkhan Gandhkhan Pathan(supra) the contraband was recovered from an autorickshaw and in the absence of specific case that the accused had knowledge of carrying the contraband, only on the ground that he was travelling in an autorickshaw, possession cannot be inferred. For the reasons aforesaid this case is of no assistance to the appellants."

11. Mr. Rai, then submits that circumstance that the appellants were in conscious possession of the opium was not put to them while being examined under *Section 313 of the Code of Criminal Procedure* and hence the conviction of the appellants is vitiated on this ground alone. He points out that this is very valuable right and its breach is sufficient to hold appellants' conviction to be bad in law. In support of the contention reference has been made to paragraph 9 and 18 of the judgment of this Court in the case of *State of Punjab vs. Hari Singh*[5] same reads as follows:

> "9. 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").
>
> 18. When the accused was examined under *Section 313 CrPC*, the essence of accusation was not brought to his notice, more particularly, that possession aspect, as was observed by this Court in Avtar Singh v. State of Punjab. The effect of such omission vitally affects the prosecution case."

12. We are not at all impressed by this submission of Mr. Rai. One of the circumstances appearing in the evidence put to the appellants while being examined under *Section 313 of the Code of Criminal Procedure*, and its answer read as follows:

> "Q. It is in evidence against you that in the presence of S.P. Narinderpal Singh, Jagmohan Singh Inspector searched the dicky of the car and recovered gunny bag containing opium from the dicky. On weighing the opium came to be 65 Kilograms 100 grams of opium was taken out as sample and the remaining opium was put in five tin boxes which were sealed with the seal of NPS of S.P. Narinderpal Singh and JS of Inspector Jagmohan singh. Box boxes containing opium Ex.P2 to Ex.P6 along its sample parcel were taken into possession vide memo Ex.PB impression of the seal was also prepared which are Ex.P7 and Ex.P8 and both the seals after use were handed over to ASI Ranjit Singh. What have you got to say about it? A. It is incorrect."
>
> As part of fair trial, Section 313 of the Code of Criminal Procedure requires giving opportunity to the accused to give his explanation regarding the circumstance appearing against him in the evidence adduced by the prosecution. The purpose behind it is to enable the accused to explain those circumstances. It is not necessary to put entire prosecution evidence and elicit answer but only those circumstances which are adverse to the accused and his explanation would help the court in evaluating the evidence properly. The circumstances are to be put and not the conclusion. It is not an idle formality and questioning must be fair and couched in a form intelligible to the accused. But it does not follow that omission will necessarily vitiate the trial. The trial would be vitiated on this score only when on fact it is found that it had occasioned a failure of justice."

13. Bearing in mind the aforesaid principle when we consider the facts of the present case we find that the prosecution intends to prove that the appellants were in possession of the opium by disclosing that illicit article was recovered from the dicky of the vehicle driven and occupied by them. Possession is a mental state and what has been unfolded by the

prosecution is that on search of dicky of the car opium was recovered. Circumstances aforesaid lead to the conclusion that the appellants were in conscious possession. Therefore, it cannot be said that appellants were not told to explain the circumstances appearing against them in the evidence.

14. Now, referring to the decision of this Court in Hari Singh (supra) relied on by the appellants, the same is clearly distinguishable. In the said case no question regarding possession was put to the accused in the examination under *Section 313 of the Code of Criminal Procedure*, which would be evident from paragraph 9 of the judgment quoted above and in the background thereof the Court held such omission to be vital affecting the case of the prosecution. In the case in hand we have in extenso reproduced the circumstances appearing against the appellants in the evidence and on fact found that the circumstances appearing against them were put to them in their statement under Section 313 of the Code of Criminal Procedure. In any of the view it has not occasioned failure of justice.

15. Pandit Katara while adopting the submission of Mr. Rai submits that the article recovered from the appellants is not opium and, therefore, their conviction is illegal. Aforesaid submission is founded in the light of evidence of DW.6, Swaran Kumar, Malkhana Clerk of the Court of Chief Judicial Magistrate, who in his evidence has stated that as per record 111 Kilograms of opium was sent to Ghazipur and from the report received it has been observed that the said consignment did not contain any alkaloid. No such plea was raised either before the Trial Court or the High Court and though this plea surprised us, we have examined the same. We have no doubt in mind that in case report pertains to the case in hand, the appellants cannot be held guilty of possessing the opium and have to be acquitted. But, it is not so. Pandit Katara has conveniently left the evidence of this witness in the cross-examination, wherein he has clearly deposed that he cannot tell as to which case the opium related. Otherwise also in the present case 100 grams opium was sent to the Chemical Examiner who found that to be opium. This witness had in mind a case in which 111 Kilograms of opium was sent.

> Therefore, the report referred to by DW.6 Sarwan Kumar is not remotely connected with the present case.

16. Pandit Katara had further submitted that no independent witness of search and seizure had been examined and on this ground alone the search and seizure is rendered illegal. He submits that rigours of Section 100 of the Code of Criminal Procedure are applicable and there being no independent witness, the case of the prosecution deserves to be rejected.

> "We do not find any substance in the submission of Mr. Katara.
>
> The case of the prosecution cannot be rejected only on the ground that independent witnesses have not been examined, in case on appraisal of the evidence on record the court finds the case of prosecution to be trustworthy. It has come in the evidence of the prosecution witnesses that an attempt was made to join person from public at the

time of search but none was available. In the face of it mere absence of independent witness at the time of search and seizure will not render the case of the prosecution unreliable."

17. We do not find any merit in these appeals and they are dismissed accordingly.

[1]*1997(1) Recent Criminal Reports 565*
[2]*2002 (7) SCC 419*
[3]*2004 (13) SCC 608*
[4]*2003 (7) SCC 465*
[5]*2009(4) SCC 200*