

(2009) 02 RAJ CK 0085
In the Rajasthan High Court

Ganga Singh, Babu Lal and Banshi Lal	APPELLANT
Vs	
Central Narcotic Bureau	RESPONDENT

Date of Decision : 26-02-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 24, 25, 26, 27, 35
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21, 29, 35, 50, 54

Citation : (2009) 02 RAJ CK 0085

Hon'ble Judges : Bhanwaroo Khan, J

Bench : Single Bench

Judgement

Bhanwaroo Khan, J.—Since all the three criminal appeal filed individually by appellant Babu Lal, Ganga Singh and Banshi Lal arise out of the common judgment dated 26.9.2002 passed by the Special Judge, NDPS Act Cases, Jaipur, the same are being disposed of by this common judgment. Briefly narrated the facts of the case are that on being received a secrete information by the Inspector, Narcotic Bureau, who informed about the same to Superintendent Vijay Singh and after writing down the said information and transmitting the same to the higher authorities, he proceeded to lay a raid on 11.3.2001 and as per the information the bus bearing No. RJ-13-P- 2114 which was coming from Jaipur and was going to Ganganagar was got stopped by the Inspector. The conductor and the driver of the bus were informed about the information and search was given by the Inspector to them. In the bus the three accused appellants were found in suspicious circumstances. Hence they were deboarded and were inquired into. They disclosed their names as Ganga Singh, Banshi Lal and Babu Lal. An information u/s 50 of the Narcotic Drugs and Psychotropic Substances Act (for short `the Act") was given to each of them and they agreed for their search. On search from the possession of appellant Babu Lal tickets of all the three persons were recovered, from the possession of appellant Banshi Lal a bag containing clothes of all the three persons was recovered and from the bottom of the shoes of Ganga Singh a plastic bag having 270 grams of heroin

was recovered. Two samples of 5 grams each were taken which were sealed at the spot and the rest of the heroin was also sealed separately. Marks A, A1 and A2 were put on the packets. Statement of appellant Ganga Singh, Banshi Lal and Babu Lal u/s 67 of the Act were recorded and thereafter all the three accused appellants were arrested. A case under the provisions of the NDPS Act was registered against the three appellants. The samples of the heroin were sent for the chemical examination to the FSL and as per the chemical examination report the heroin recovered from the appellant Ganga Singh found to contain 9.54% morphine. After investigation complainant Shri Rakesh Bhargava, Inspector, Central Narcotic Bureau, Jaipur filed a complaint for the offence u/s 8/21 of the Act before the trial court.

2. On the basis of the material and evidence collected by the prosecution during investigation of the case, the learned trial court framed charge against the appellant Ganga Singh under Sections 8/21 and 8/29 and against the appellants Babu Lal and Banshi Lal u/s 8/29 of the Act to which they denied, pleaded not guilty and claimed trial.

3. To prove its case, the prosecution examined seven witnesses and also exhibited 32 documents. In their statements u/s 313 Cr.P.C. the appellants stated that the evidence of the prosecution is false. However, no witness was examined in their defence.

4. After recording evidence of the prosecution and hearing both the sides the learned trial court has come to the conclusion that from the possession of accused appellant Ganga Singh 270 grams of heroin was recovered and on the basis of the statements recorded u/s 67 of the Act of the appellants, involvement of appellant Babu Lal and Banshi Lal was also found.

5. Therefore, the learned trial court by the impugned judgment dated 26.9.2002 convicted and sentenced the appellants in the following manner:

Ganga Singh:

Under Section 8/21 of the Act:

to undergo rigorous imprisonment for ten years and to pay a fine of Rs. 1,00,000/-. In default of payment of fine to undergo rigorous imprisonment for two years.

Under Section 8/29 of the Act: to undergo rigorous imprisonment for ten years and to pay a fine of Rs. 1,00,000/-. In default of payment of fine to undergo rigorous imprisonment for two years.

Babu Lal & Banshi Lal:

Under Section 8/29 of the Act:

to undergo rigorous imprisonment for ten years and to pay a fine of Rs. 1,00,000/-. In default of payment of fine to undergo rigorous imprisonment for

two years.

Feeling aggrieved of the judgment of conviction and order of sentence passed by the learned trial court appellants Ganga Singh and Babu Lal filed their appeals but appellant Banshi Lal did not file appeal. A co-ordinate Bench of this Court vide order dated 27.11.2008 directed the appellant Banshi Lal to file appeal and Amicus Curiae was also appointed and as per the directions of the Co-ordinate Bench, appellant Banshi Lal has also filed his appeal.

6. Heard learned Counsel for the appellants and the learned Special Public Prosecutor and perused the material and evidence available on record. So far as recovery of 270 grams of heroin through Fard Recovery (Ex.P.2) is concerned, to prove this fact the prosecution has examined PW.2 Prahlad Swami and PW.3 Indra Singh, Conductor and Driver of the bus respectively who are independent witnesses and have admitted their signatures on the Fard Recovery (Ex.P.2) from 'C' to 'D' and 'E' to 'F'. Fard Recovery also contains signatures of PW.1 Vijay Singh Meena and PW.5 Sanjay Paliwal and it has also been signed by the appellants. Therefore, there can be no doubt that 270 grams of heroin was recovered from the possession of appellant Ganga Singh. Facing with this situation, learned Counsel appearing for the appellant Ganga Singh without assailing the judgment of the trial court on the point of conviction of the appellant Ganga Singh, on the basis of the decision of the Apex Court in the matter of E. Micheal Raj Vs. Intelligence Officer, Narcotic Control Bureau, has only argued that as per the recovery memo only 270 grams of heroin has been recovered from the possession of the appellant Ganga Singh and as per the report of the FSL it contains 9.54% morphine and thus, the total quantity of morphine comes to 25 grams and as per the notification having entry-56 has been specifying 'small quantity' and 'commercial quantity', the recovered heroin comes out to more than small but less than commercial quantity and, therefore, punishment could have been imposed u/s 21(b) of the Act which may extend up to ten years. Learned Counsel for the appellants further submits that all the three appellants are in judicial custody from about 8 years and have already undergone the major part of the sentence imposed upon them and as such, as per the provisions of Section 21(b) of the Act the appellants can be released on the period of sentence already undergone by them. In the case of E.Micheal Raj (supra) the sentence of the accused was reduced to six years with a fine of Rs. 20,000/-. It has been specifically held by their Lordships of the Supreme Court that:

The intention of the legislature is to levy punishment based on the content of the offending drug in the mixture and not on the weight of the mixture as such. In the mixture of a narcotic drug or a psychotropic substance with one or more neutral substance(s), the quantity of the neutral substance(s) is not to be taken into consideration while determining the small quantity or commercial quantity of a narcotic drug or psychotropic substance. It is only the actual content by weight of the narcotic drug which is relevant for the purposes of determining whether it

would constitute small quantity or commercial quantity.

7. In the present case the narcotic drug with mixture which was found in possession of the appellant Ganga Singh is 270 grams of heroin and as per the report of the Chemical Examiner, Govt. Opium Factory Lab, Neemuch (Ex.P.33) the percentage of morphine is 9.54 which comes out only 25 grams of morphine which is less than the commercial quantity but higher than the small quantity and thus, the offence committed by the appellant Ganga Singh would be punishable u/s 21(b) of the Act.

8. For appellants Babu Lal and Banshi Lal, counsel appearing on their behalf have submitted that there is no direct recovery of contraband from these two appellants but after considering them as co-passengers with appellant Ganga Singh and on the basis of joint and conscious possession of the heroin recovered from appellant Ganga Singh they have wrongly been convicted u/s 8/29 of the Act. Learned Counsel for the appellants placing reliance on the judgments of the co-ordinate Benches of this Court in the matters of Mohd.Ameer v. State of Rajasthan 2007 (2) WLC 102 and Ashok Kumar and Anr. v. Union of India 2002(2) RCC 1085 have contended that if any contraband is recovered from a co-traveller merely because tickets of all the three persons were found from the possession of appellant Babu Lal, the appellants Babu Lal and Banshi Lal cannot be held guilty of the conscious possession of the contraband which was recovered from the possession of appellant Ganga Singh and they cannot be held guilty either of conspiracy or of abetment and in these circumstances both the appellants cannot be held guilty for the charges. Counsel further contended that there is no evidence to show that the appellants Babu Lal and Banshi Lal were in conspiracy or in abetment for commission of the offence under the Act and presumption against the evidence available on record cannot be drawn against them. There is no evidence also to this effect that these appellants were dealing with narcotic drugs and have any incriminating role for drug trafficking. Therefore, presumption for actual or conscious possession cannot be drawn against these two appellants and as such, their conviction u/s 8/29 of the Act cannot be sustained. Per contra, learned Special P.P. has contended that statements of all the three accused persons u/s 67 of the Act were recorded and the statement recorded u/s 67 of the Act is admissible against the person who gave such statement and on the basis of the sole testimony of statement u/s 67 of the Act, if it is voluntary and without applying any coercive method if given then a presumption can be raised that the accused was having knowledge of the heroin with Gang Singh and by travelling with him they assisted him in commission of crime. Learned Special P.P. placing reliance on the judgment of the Apex Court in the matter of Kanhaiyalal v. Union of India 2008 Cr.L.R.(SC) 312 has contended that the statement made u/s 67 of the Act, unless made under threat or coercion, can be used as a confession against the person making it and excludes it from the operation of Sections 24 - 27 of the Evidence Act. Learned Special P.P. further contended that presumption of conscious possession laid under Sections 35 read with 54 can be drawn against a person on the basis of

the statement recorded u/s 67 of the Act. In support of his contention, learned P.P. placed reliance on the judgment of the Apex Court in the matter of Megh Singh v. State of Punjab 2003 Cr.L.R.(SC)900.

9. Lastly, referring to the statements of the three appellants recorded u/s 67 of the Act learned Spl. P.P. has contended that all the three appellants in their statements recorded u/s 67 of the Act have admitted of their involvement in the commission of the offence and in absence of any special reason to take a different view, arguments questioning voluntary nature of the statement recorded u/s 67 of the Act cannot be accepted. In support of his argument, learned Spl. P.P. has placed reliance on the judgment of the Apex Court in the matter of T. Thomson Vs. State of Kerala and Another,

10. Having heard learned Counsel for the parties I, have scanned the material and evidence available on the record of the case and also gone through the relevant provisions of the Act as well as the law cited at the Bar. In the matter of A.K. Mehaboob and P.K. Naushad Vs. Intelligence Officer, Narcotics Control Bureau, it has been decided that if there is statement u/s 67 of the Act then it is sufficient indicative that the accused were involved in the commission of offence. If the statement given is not under threat or obtained by coercive method. In the instant case the appellants have never retracted the confessionary statements given by them u/s 67 of the Act. The statements, admittedly, are recorded by the Narcotics Bureau and if it is so then as per the cited judgment of Kanhaiya Lal (supra) such statements can be used as evidence against the person making it and the operation of Sections 24 - 27 of the Indian Evidence Act is excluded. Learned Special Judge after relying upon the statements of the appellants if has convicted them, there is no illegality in the said judgment.

11. A perusal of the material and evidence available on record go to show that there are statements of the three appellants recorded u/s 67 of the Act which are Ex.P.24 (Ganga Singh), Ex.P.25 (Banshi Lal) and Ex.P.26 (Babu Lal). A perusal of the statements clearly show that it was well within the knowledge of appellants Banshi Lal and Babu Lal that appellant Ganga Singh was having heroin in his possession and from the very inception they were with him. The heroin which was found in possession of appellant Ganga Singh was put in the shoes in the presence of both the appellants which is clear from their statements recorded u/s 67 of the Act and they have categorically admitted about this factum of heroin which was in possession of appellant Ganga Singh. In view of the provisions of Section 35 of the Act which requires a culpable mental state of the accused, the court can presume the existence of such mental state but it is a defence for the accused to prove the fact that he had no such mental state with respect to the act charged for an offence. In the instant case the appellant Babu Lal and Banshi Lal have not rebutted about this culpable mental state and more so they have not led any evidence in this respect. They have also not cross-examined the witnesses for the prosecution regarding their culpable mental state and that the statements given by them were not given voluntarily. Therefore, for all the three

appellants a presumption can be drawn u/s 54 of the Act for the commission of the offence under the Act as none of the three appellants has submitted any explanation about the heroin which was found in possession of appellant Ganga Singh and both the appellants namely, Babu Lal and Banshi Lal were travelling jointly in the same bus. The tickets of all the three persons were found in the possession of Babu Lal and clothes of all the three appellants were recovered from the possession of Banshi Lal. The judgments in the cases of Mohd. Ameer (supra) and Ashok Kumar (supra) cited by the learned Counsel for the appellants in the light of the decision of the Apex Court in the matter of Kanhaiya Lal (supra) are of no avail to them as in both the judgments there was no statement of the accused u/s 67 of the Act. In the light of the above discussions and the oral evidence produced by the prosecution it is well proved that offence charged against both the appellants stood proved.

12. It is also pertinent to mention here that though the trial court at the time punishing appellant Banshi Lal has specifically mentioned that he is a previously convict under the provisions of the Act but no enhanced punishment was given to him. The State has also not preferred any appeal for enhancement.

13. Since as per the decision of the Apex Court in the matter of E.Micheal Raj (supra) the contraband found in the possession of appellant Ganga Singh as per report of the Chemical Examiner (Ex.P.33) having 9.5% morphine which comes to only 25 grams which is more than the small quantity but less than the commercial quantity, all the three appellants are liable to be punished u/s 8/21(b) of the Act and are entitled for reduction of the sentence imposed upon them by the trial court. So in the facts and circumstances of the case the ends of justice would be subserved if the sentence of all the three appellants is reduced to the period already undergone by them which comes out about 8 years as they were arrested on 11.3.2001 and since then they are in judicial custody. However, the fine imposed by the trial court and the sentence in default thereof are mentioned. To this extent these appeals are allowed. For the discussions hereinabove, all the three appeals are allowed in part. While maintaining conviction of the appellant Ganga Singh u/s 8/21(b) of the NDPS Act and that of the appellants Banshi Lal and Babu Lal u/s 8/29 of the NDPS Act, the sentence of imprisonment (ten years" rigorous imprisonment) imposed by the trial court is reduced to the period already undergone by them. However, the amount of fine so imposed by the trial court is maintained. If the appellants have deposited the amount of fine and are not required in any other case, they shall be released forthwith. In case the fine amount is not deposited by them, each of the appellants shall undergo sentence of two years rigorous imprisonment so imposed by the trial court in default of payment of fine.