
(2008) 03 SHI CK 0030
In the High Court Of Himachal Pradesh

Mahant Bal Giri and Another and Mangat Ram APPELLANT
Vs
State of H.P. RESPONDENT

Date of Decision : 07-03-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20

Citation : (2008) CriLJ 2648 : (2008) 1 ShimLC 455

Hon'ble Judges : V.K. Ahuja, J; Surinder Singh, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Surinder Singh, J.—This judgment will dispose of both the appeals titled above, as these have arisen from the same judgment passed by the learned trial court in case No. 2-S/7 of 2004 decided on 12.5.2004.

2. The challenge has been made by the appellants against their conviction and sentence u/s 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short the Act), for allegedly possessing 1 Kg. 400 grams of Charas.

3. Precisely, the facts of the case are that on 8.12.2003, Gurdoyal Singh Inspector/SHO, Police Station, Solan was on routine traffic checking along with other police officials near Oachghat. He put a Nakka at Sultanpur road. At about 1.30 p.m. when he was checking the documents of a scooter of one Narinder Sharma (PW1), a white coloured Ambassador Car bearing registration No. HR-20-E-5373, which was being driven by Mangat Ram came from Oachghat side, it was stopped by the police. Mahant Balgiri appellant was found sitting in the front seat beside the driver and Chander Phul on the rear seat. The documents of the said vehicle were checked. Said Shri Gurdoyal Singh asked Mangat Ram, appellant to open the bonnet of the car to match the engine and chassis number with registration certificate in the presence of Narinder Sharma (PW1) and one Pyare Lal, Postman who also happened to be present there. On opening the bonnet Gurdoyal Singh, Inspector noticed a poly-pack kept concealed near the

battery of the car. On checking it, he came to know that it was Charas. On weighing it was found to be 1 Kg. 400 grams. Said Inspector separated two samples of 25 grams each from the recovered quantity and sealed it separately with impression "H". The remaining quantity was sealed with the same seal. The seal was allegedly handed over to Narinder Sharma (PW1). The case property was taken into possession vide memo Ex.PB. He also filled in NCB Forms on the spot.

4. A Ruqqa was sent for registration of the case. The Special Report was also sent to the Superintendent of Police Solan. Thereafter, the appellants were arrested. They were informed about the grounds of the arrest.

5. The case property was deposited with MHC of the police station. One sample was sent for chemical examination through Constable Rita Kumari (PW 6). Chemical Analyst report shows that the sample contained the Charas. On completing the challan, it was presented before the trial court, against the appellants.

6. Having found a prima-facie case against each of the appellants u/s 20 of the Act, they were charge-sheeted, they pleaded not guilty and claimed trial. To prove its case, the prosecution examined PW-1 Narinder Sharma, PW-2 Mohan Lal Constable, PW-3 Madan Lal, Constable, PW-4 Ms. Phulla Devi Lady Constable, PW-5 Yoginder Singh, Head Constable (MHC), PW-6 Reeta Kumari Lady Constable and PW-7 Gurdayal Singh Inspector.

7. The appellants were also examined u/s 313 of the Code of Criminal Procedure. It is admitted by the appellants that Mangat Ram was the driver of the aforesaid car and the other appellants were its occupants, but the recovery of Charas is denied by them. According to them, their signatures were obtained on certain papers in the police station itself. They also denied the presence of any scooter of Narinder Sharma on the spot as alleged.

8. The appellants were called upon to enter into the defence, but no defence evidence was led by them. At the end of the trial, on going through the evidence on record and on appreciating the rival contentions of the learned Counsel for the parties, the learned trial court, putting the reliance on the judgment of the apex Court in *Madan Lal and Another Vs. State of Himachal Pradesh*, convicted the appellants and sentenced them to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs. 1,00,000/- each.

9. The appellants have assailed their conviction and sentence passed by the learned trial court, on the ground that PW-1 Narinder Sharma did not support the case of the prosecution and another independent witness Pyare Lal, a Postman was not examined. There was no entry of the case property made in the Malkhana-Register and the prosecution could not prove the actual and conscious possession of the alleged contraband. The link evidence was not complete. In nutshell, it is contended that the learned trial court did not appreciate the evidence on record in the right perspective.

10. Shri Anup Chitkara, learned Counsel representing the appellants in Criminal Appeal No. 318 of 2004 has vehemently argued that the actual and conscious possession of the appellants in the facts and circumstances can not be attributed to the appellants and the learned trial court had misapplied the judgment of Madan Lal's case supra, which has caused miscarriage of justice. It is also canvassed that if the evidence is properly scanned, a substantial doubt is created from the prosecution evidence itself regarding the complicity of the appellants with the alleged crime. Further that the prosecution could not establish that the recovered stuff was a contraband. Shri Virender Thakur, learned Counsel for the appellant Mangat Ram in Criminal Appeal No. 345 of 2004 has adopted the arguments of Mr. Anup Chitkara, and urged that the evidence on record is insufficient to sustain the conviction of the appellants.

11. Contra, Mr. RK. Sharma, learned Additional Advocate General has supported the impugned judgment passed by the learned trial court and submitted that there is no error therein.

12. To appreciate the rival contentions, we carefully reappraised the evidence on record.

13. It is an admitted fact that the car in question was being driven by Mangat Ram and the appellants were its occupants and PW7 Gurdayal Singh Inspector had laid a Nakka on Sultanpur near Oachghat and this car was stopped. He was accompanied by the police officials Mohan Lal, Devender Kumar, Purshottam Kumar, HHG Suresh Kumar. He has further stated that he asked Mangat Ram, driver, to raise the bonnet in order to verify the engine and Chassis numbers with those mentioned in the registration certificate. On lifting the bonnet, said Inspector noticed a plastic bag containing 1 Kg. 400 grams. Charas kept concealed near the battery. He took samples as aforesaid. PW2 Mohan Lal Constable, who was accompanying Gurdayal Singh (PW7) has corroborated his version regarding the recovery whereas, Narinder Sharma did not support the prosecution. Though he had resiled from his earlier version recorded u/s 161 of the Code of Criminal Procedure yet regarding recovery he affords corroboration, the presence of the appellants and their car on the spot in the presence of police is not denied. He has also stated that the police had informed him of the recovery of Charas from the appellants and police obtained his signatures on each of the parcels.

14. Thus there is no ground to dispute the above statements of the witnesses to the extent of recovery from the engine portion of the car.

15. Now the question is whether the appellants Mahant Balgiri and Chander Phool can be attributed its actual and conscious possession. Our answer is "No" because Mangat Ram appellant was the driver. He was having the keys of the car and was in actual control of the vehicle. The car was not owned by any of the above occupants. None of the articles, of the said appellants, were found in the poly bag recovered from the engine portion of the car to connect them with the

recovered stuff. They had no domain over the site from where the recovery was made. Therefore, no knowledge can be attributed to any of them. Even there is no allegation or evidence of conspiracy against them. Since they were traveling with the appellant Mangat Ram, in the car will not make them liable, in the aforesaid facts and circumstances of the case.

16. The reliance put by the learned trial court on Madan Lal and Another Vs. State of Himachal Pradesh, is absolutely misplaced. The facts of the case in hand were juxtaposed to that of Madan Lal's case supra. In that case the Charas was recovered from a steel doloo kept in a plastic bag kept on the seat of the cabin in the car in which all the five accused were traveling. It was against this factual backdrop, the apex Court held that the accused were aware of it and it constituted conscious possession. But in the instant case, the facts do not spell out that the aforesaid appellants were aware of the said article kept in the engine portion of the car, in which they were traveling.

17. Unless the possession is coupled with the requisite mental element i.e. conscious possession and not mere the custody without awareness of the nature of such possession, Section 20 of the Act is not all attracted.

18. As already stated above, in the instant case, the said appellants had no power and control over "the article in question, therefore, we can also not press into service either Section 35 or 54 of the Act to draw the statutory presumption even. The findings of the learned trial court holding the appellants, who were passengers in the car, guilty are wrong, therefore, it deserves to be set aside as they are entitled to the benefit of a reasonable doubt on the strength of the above evidence.

19. Now we take up the case of appellant Mangat Ram driver of the Ambassador car which is quite different from the other appellants, their logic does not apply to him. We have held that the recovery of the poly-bag stands proved from the engine portion of the said car. He was in actual control of the said vehicle. The place, where poly bag was kept, can be said to be in his "special knowledge". He had the power and control over the said vehicle. He can be said to be in actual and conscious possession thereof. But even this finding is not sufficient to sustain his conviction unless it is proved that article recovered was a "contraband" within the meaning of the Act, so as to attract Section 20 of the Act. To answer this query relevant evidence in this behalf is required to be legally scanned.

20. PW-7 Inspector Gudayal Singh has no where stated that after the recovery the case property alongwith NCB forms and the sample of seal was deposited in the Malkhana with MHC Madan Lal (PW3). Though he (PW3) has stated in his affidavit that the case property was deposited with him by Inspector Gurdal Singh but he did not depose about the deposit of sample of seal(s) and the NCB forms. Further in this behalf, the statement of Constable Reeta Kumari (PW-6) is also relevant. She has placed on record her affidavit Ex.PK. She had taken the sample for the analysis on 9.12.2003 which was handed over to her by MHC

Madan Lal, it was bearing seal impression "H". She had deposited the same in C.T.L. Kandaghat, but she has nowhere stated that she had also taken the sample of seal for its comparison by the Chemical Laboratory. Even a perusal of the column No. 6 of the NCB form Ex.PN does not show the facsimile of the seal, used on the sample sent for analysis, which could be compared by the Examiner with the seal on the sample. Though the Chemical Examiner has put a lithographic stamp showing that the seals on the sample tallied with the impression of the seal, is not correct as the sample of the seal was never shown to have been separately sent as discussed. In view of this the contradictions that sample was affixed with three seals of "H" impression whereas it was found to have five seals as described on the NCB form assume importance. The inference of its tempering can be drawn. On the top of it, the Investigating Officer Gurdayal Singh has stated that he had taken the sample of seal only on a piece of cloth Ex.PL, but it is nowhere stated that this sample of seal was sent alongwith the sample for comparison by the Analyst. It is not understood as to how the witnesses have stated that the sample was not tampered with when the seal "H" which was used for sealing the case property was not produced before the Court and Narinder Sharma (PW 1) has stated that it was not handed to him nor there is any document to this effect. Thus, the evidence put-forth by the prosecution is far from satisfactory and makes the prosecution case highly doubtful.

21. Before the appellants can be convicted for possessing the contraband, it is incumbent upon the prosecution to prove that the alleged recovered article from the accused was a contraband, by leading cogent and reliable evidence. The prosecution has miserably failed to prove this fact, in this case. On culling the evidence of the prosecution, we are of the view that the actual and conscious possession of the appellants Mahant Balgiri and Chander Phool, the occupants of the said vehicle could not be proved in accordance with law. Madan Lal's case supra is not applicable in the facts and circumstances of this case. Further the prosecution has failed to prove that the alleged recovered substance was a contraband so as to attract Section 20 of the Act for the reasons stated above.

22. Therefore, the impugned judgment of conviction and sentence, passed by the learned trial court is unsustainable, hence it is set-aside. Accordingly, both the appeals are allowed. Consequently, the appellants are acquitted of the charges framed against them. They be set at liberty forthwith, if not required in any other case. Fine if deposited be refunded to them. Registry to comply with orders.