
(2001) 02 P&H CK 0108

In the Punjab And Haryana At Chandigarh

Case No : Criminal Appeals No"s. 217-DB, 230-DB and 256-DB of 2000

Sarabjit Singh

APPELLANT

Vs

State of Punjab
 Karam Singh Vs State of Punjab

 Kashmir Singh Vs State of Punjab

RESPONDENT

Date of Decision : 01-02-2001

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 15, 25, 35, 42(1), 50

Citation : (2001) 2 RCR(Criminal) 775

Hon'ble Judges : H.S. Bedi, J;A.S. Garg, J

Bench : Division Bench

Advocate : Mr. Jasbir Singh, for the Appellant; Mr. S.S. Randhawa, Dy. A.G., Punjab, for the Respondent

Judgement

Harjit Singh Bedi, J.—The prosecution story is as under :-

2. On the intervening night of 11th and 12th December, 1992, Sub Inspector Gurbax Singh (PW-2) Station House Officer of Police Station, Amargarh had laid a Nakabandi at the bridge of the canal minor in the area of village Dialpur Chhanna. Att about 2-00 A.M. they spotted atruckbearingNo. PJC-3513 approaching the Naka party. When the truck reached near the police party, Sub Inspector Gurbax Singh stopped the truck which was also encircled and four persons, namely, Kashmir Singh, the driver of the truck, Karam Singh sitting beside him and Dhanna Singh and Darshan Singh alias Kala sitting in the rear of the truck, were apprehended. These four persons when questioned told Sub Inspector Gurbax Singh that they were carrying 100 bags of poppy-husk in the truck. On this Sub Inspector Gurbax Singh sent a wireless message to the Deputy Superintendent of Police, Malerkotla, Sukhdev Singh Brar (PW-5), who too reached the spot. A search of the truck was thereafter made and 100 bags of poppy-husk were recovered each containing 40 Kgs. of poppy-husk Two samples of 250 grams each were taken from all the bags and remaining poppy husk was duly sealed. The registration certificate of the truck further revealed that it was

owned by accused Sarabjit Singh son of Gurdev Singh. No attempt was apparently made to arrest Sarabjit Singh but he appeared in the police Station voluntarily on December 18, 1992 and was taken into custody. The Chemical Examiner in his report opined that the contents of the samples were in fact poppy-husk. On the completion of the investigation all the accused other than Sarabjit Singh were charged u/s 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the Act), whereas Sarabjit Singh accused was charged for the offence punishable u/s 25 of the Act and as they pleaded not guilty, were brought to trial.

3. The prosecution, in support of its case, examined Sub Inspector Gurmukh Singh (PW-1), who had also been a member of the Naka party and had witnessed the search and seizure; Sub Inspector Gurbax Singh (PW-2), who had recorded the FIR; Constable Ram Singh (PW-3) and Head Constable Tarlochan Singh (PW-4), who were tendered for cross-examination; and Deputy Superintendent of Police Sukhdev Singh Brar(PW-5), the officer who had been summoned to the place of recovery by a wireless message and had also witnessed the recovery.

4. The prosecution case was then put to the accused and they denied the allegations levelled against them. Kashmir Singh and Karam Singh accused pleaded that they had been arrested from Malekotla after an altercation between them and Sub Inspector Gurbax Singh and a false case has been planted on them. Accused Dhanna Singh and Dar-shan Singh pleaded that they had been arrested from their respective homes. Accused Dhanna Singh further pleaded that as the he had personal enmity with Sarwan Singh, Inspector, who had earlier been posted as Station house Officer, Police Station, Sadar Pa-tialaand as Sub Inspector Gurbax Singh was a friend of Inspector Sarwan Singh, he had involved him on that account. They also examined Constable Raghwinder Pal Singh as DW-I and Home Guard volunteer Bant Singh from Police Station, Amargarh as DW-2.

5. The trial Court noted that the provisions of Section 50 of the Act were not attracted to the facts of the case as the seizure had been made from a truck and not from the person of the accused. It was also observed that the provisions of Section 42 of the Act were also not applicable as the recovery had been effected in the course of a Nakabandi and not on the receipt of any prior information. The Court also held that the factum of recovery had been proved by the evidence of Sub Inspector Gurmukh Singh and Sub Inspector Gurbax Singh, the Investigating Officers and Sukhdev Singh Brar, D.S.P. (PW-5), who had also reached the place soon after the seizure. The trial Court further observed that Head Constable Gurdarshan Singh, who had been sent to arrange for some independent witness and had also brought the scale for weighing the samples had not been examined was of no significance. The Court also found that the prosecution story that the seized property had been deposited in the Malkhana without loss of time stood proved from the affidavit (Ex.PK) of PW-4 Tarlochan

Singh Head Constable. The Court finally observed that though Sarabjit Singh accused had not been arrested from the spot but as he was admittedly the owner of the truck in question, a presumption had to be raised against him by virtue of the provisions of Section 35(1) of the Act and that the presumption had not been rebutted by him as all that had been said in defence was that he did not have the knowledge of the contents of the truck. The defence story was also rejected as lacking credibility. The trial Court accordingly convicted accused Kashmir Singh, Karam Singh, Dhanna Singh and Darshan Singh u/s 15 of the Act and Sarabjit Singh u/s 25 thereof and sentenced them to undergo rigorous imprisonment for twelve years and to pay a fine of Rs. 1,50,000/- and in default of payment of fine of four-ther undergo rigorous imprisonment for one and a half years.

6. Criminal appeal No. 217-DB of 200 has been filed by Sarabjit Singh, Criminal appeal No. 230-DB of 2000 by Karam Singh and criminal appeal No. 256-DB of 2000 by Kashmir Singh, whereas the remaining two accused have not filed any appeal. All three appeals are being disposed of by this common judgment.

7. We have heard Mr. Jasbir Singh, Advocate on behalf of accused Sarabjit Singh and Ms. Lisa Gill as Amicus Curiae on behalf of other two appellants.

8. It is conceded by the learned counsel for the appellants that the provisions of Section 50 of the Act were not applicable to the facts of the case, but it has been argued vehemently that the provisions of Section 42 were attracted and as they had been violated, the accused had suffered serious prejudice which should go to their benefit. It has also been urged that as no independent witness had been associated with the search and Head Constable Gurdarshan Singh who had been sent to procure an independent witness had not even been examined again cast a serious doubt on the prosecutability story.

9. Mr. Jasbir Singh advocate has further argued that his client, Sarabjit Singh, had been roped in by virtue of the presumptions raised u/s 35(1) of the Act and as this onus had been discharged by the accused he was entitled to acquittal on that basis. In this connection the learned counsel has placed reliance on Abdul Rashid Ibrahim Mansuri v. State of Gujarat 2000(1) RCR 611.

10. Mr. S.S. Randhawa, the learned counsel State has, however, pointed out that the provisions of Section 42 of the Act would not be applicable to a seizure which was made by chance and that the onus to rebut the presumption of guilt had not been discharged by Sarabjit Singh accused in the given facts as held by the Hon"ble Supreme Court in Kar-nail Singh v. State of Rajasthan 2000(4) RCR 171.

11. We have considered the arguments advanced by the learned counsel. A perusal of provisions of Section 42 of the Act would reveal that the procedure envisaged under subsection (2) thereof could be made applicable only to a case where there was prior information with the police. Admittedly, this is not the position in the present case as the seizure had been made in the course of a general nakabandi. The Hon"ble Supreme Court in Karnail Singh's case (supra) observed as under :-

"For attracting the applicability of Section 42, it is necessary that the officer empowered thereunder, before exercise of his right, has reason to believe from personal knowledge or information regarding the movement of narcotic drug or psychotropic substance. However, if the action is taken not upon his personal knowledge or information, the requirements of Section 42 would not be applicable."

12. The first argument raised by the learned counsel for the appellants is thus rejected.

13. It is true that no independent witness had been joined at the time of the search and seizure, but we find absolutely no reason to doubt the recovery made at the instance of Sub Inspectors Gurmukh Singh and Gurbax Singh and duly supported by PW-5 Sukhdev Singh Brar. A very large quantity of poppy husk been recovered. We find it difficult to believe that this quantity could have been planted on the accused.

14. We have also considered Mr. Jasbir Singh's argument with regard to Section 35 of the Act. Section 35 reads as under;-

"Presumption of culpable mental state - (1) In any-persecution for an offence under this 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.

Explanation - In this section "culpable mental state" includes intention, motive, knowledge of a fact and belief in, or reason to believe, a fact.

(2) 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."

15. While dealing with this provision, the Hon'ble Supreme Court observed in Abdul Rashid's case (supra) that the burden of proof cast on the accused u/s 35 could be discharged through various modes including the material available in the prosecution evidence as also the production of defence evidence. In this case, the Hon'ble Supreme Court found on facts that the onus cast on the appellant had been discharged as there had been non-compliance with the provisions of Section 42 of the Act and that the accused was an Auto Rickshaw driver and he had clearly stated that he had been carrying the contraband alongwith two passengers in the Auto Rickshaw without knowing either of the two persons. In the case before us we find the situation entirely different. The only evidence that has been read by Mr. Jasbir Singh in support of his argument is that accused Sarabjit Singh had presented himself to the police station voluntarily, which led to the presumption that he was innocent. We find that no other evidence had been produced by him in his defence despite an opportunity to do so. On the other hand, the contraband was being carried in the truck

admittedly owned by Sarabjit Singh accused. We are, therefore, of the opinion that merely because Sarabjit Singh had chosen to appear before the police voluntarily would not mean that he had discharged the strict onus laid upon him by the presumptions raised u/s 35 of the Act. We, therefore, reject this plea as well.

16. We, however, find that some reduction in the sentence imposed is called for. We, therefore, while dismissing the appeals, reduce the sentence imposed on the three appellants as also on the two others, who have not chosen to file the appeal, from twelve to ten years and to pay a fine of Rs. 1,00,000/- each. The default clause is maintained as it is.

17. Appeals dismissed.