

(2011) 09 GAU CK 0043
In the Gauhati High Court
Case No : Criminal Appeal No. 11 (SH) of 2009

Union of India (UOI)

APPELLANT

Vs

Shri Shankar Debnath

RESPONDENT

Date of Decision : 06-09-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 313

Evidence Act, 1872 — Section 24, 25, 27

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 29, 35, 53, 54

Citation : (2011) 4 GLT 628

Hon'ble Judges : Madan B. Lokurthe, C.J; T. Vaiphei, J

Bench : Division Bench

Advocate : R. Deb Nath, CGC, for the Appellant; K.C. Gautam, for the Respondent

Final Decision : Dismissed

Judgement

T. Vaiphei, J.—This criminal appeal is directed against the judgment and order dated 3-9-2009 passed by the learned Special Judge, Narcotic Drugs and Psychotropic Substances Act, Shillong in CrI. NDPS Case No. 2/2008 acquitting the Respondent from the charge of Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substance Act, 1985 ("the Act" for short) for unauthorised transportation of 495 kilograms (a commercial quantity) of ganja in a truck.

2. The facts giving rise to this appeal may be noted straightaway. According to the prosecution, on 22-3-2008, a specific information received to the effect that one Tata truck LP (1612) bearing registration number WB-03-9587 ("the truck") loaded with consignment of ganja concealed under trade goods was on its way to Kolkata via Shillong. This prompted the officials of the Custom Department to keep constant surveillance of the truck on 23-3-2008 along NH-44 and at about 16:30 hours, they intercepted the truck near Mawryngkneng, East Khasi Hills District, Meghalaya. There were three persons on board in the truck. On query, they came to learn from the driver that other persons who were on

board were the owner of the truck and the helper of the truck respectively. While scrutinising the document as produced by the driver, the helper of the truck managed to escape from the site in the forested area near the highway under cover of darkness. A massive manhunt was accordingly launched in that forested area, but the helper could not be traced out. Both the truck owner along with the driver were then brought to the Customs Headquarters at Shillong under escort together with the truck and the loaded goods for detailed search, examination and for completing other formalities. On reaching the Customs Headquarters at Shillong at around 8.30 P.M., two independent witnesses were called to witness the search of the truck. The driver of the truck then, in the presence of the truck owner and the independent witnesses, identified and pointed out the exact place where the contraband packages of ganja were concealed beneath the miscellaneous trade goods (scraps). Subsequently, in the presence of the driver, owner of the vehicle and independent witnesses, the goods were unloaded from the truck wherein 13 packages of compressed ganja packed in newspapers and over wrapped by transparent polythene sheets and tied with plastic ropes and repacked in HDPE bags/gunny bags were found concealed beneath the miscellaneous goods (scraps).

3. The prosecution case further stated that on 24-3-2008, the officials of the Customs Department further checked the truck in the presence of the driver, owner of the truck and the two independent witnesses to ascertain whether any secret cavity or any false bottom concealment existed inside the truck, but there was none. However, some non-contraband goods were also found inside the truck. Thereafter, the Customs Officers conducted formal process of seizure and other formalities, and weighment of the recovered ganja was done by preparing a weighment sheet wherein the gross and net weight of the ganja of the bags, etc. were detailed. The seized ganja was found to weigh a total of 495 kilograms. Representative samples of the ganja were taken out from the seized 13 packages of ganja, mixed into homogeneous mixture and 4 samples packets of about 24 grams each were made from this mixture and were subsequently put in 4 different polythene pouches and heat seal. The envelopes were then pasted closed and wax-sealed with departmental seal No. "7 CCP NER Shillong" and the four sealed envelopes containing drawn samples were then marked as S-1 (Original), S-1 (Duplicate), S-2(Original) and S-2 (Duplicate), which were signed by Shri Dhruba Kapali, Shri Shankar Debnath, the Seizing Officers and two independent witnesses. The contraband items were then seized from the possession of these two officials. The statement of the Respondent and co-accused were recorded u/s 67 of the Act whereafter they were arrested on 24-3-2008 for commission of the offence punishable u/s 20(b) and/or 29(1) of the Act. The sealed envelopes containing ganja samples were sent to the Director, Forensic Science Laboratory, Kahilipara, Government of Assam for testing where it was found to be positive. Ultimately, the case was forwarded to the learned Special Judge, Narcotic Drugs and Psychotropic Substances Act, Shillong for trial. The learned Special Judge thereafter framed the charge against

the co-accused u/s 20(b)(ii)(B) of the Act, to which they both pleaded not guilty and claimed to be tried. In the course of trial, as many as fourteen witnesses were examined on behalf of the prosecution while sixty-four numbers of documents, five paper marks and eighteen material exhibits were exhibited to substantiate the charges against the Respondent and the co-accused. On completion of the prosecution evidence, they were examined u/s 313 Code of Criminal Procedure. At the conclusion of the trial, the trial passed the impugned judgment acquitting the Respondent and convicting the co-accused u/s 20(b) of the Act and sentencing him to undergo the imprisonment indicated earlier.

4. We have heard Mr. R. Debnath, the learned CGC, appearing for the Appellant and Mr. K.C. Gautam, the learned Counsel for the Respondent. We have also carefully perused the impugned judgment and other materials on record. The sole question which falls for consideration in this appeal is, whether the Respondent was in conscious possession of the contraband ganja when the same were seized by the Customs officials on 23-3-2008? According to learned CGC, possession in a given case need not be physical possession but having power and control over the article in question, while the person to whom physical possession is given holds it subject to that power or control and so construed, the Respondent had a vital role in the transportation of, and was, therefore, in conscious possession of, the contraband ganja. It is submitted by the learned CGC that the Respondent in the accused examination categorically admitted vide Question No. 12, 13 and 14 that he purchased HSD for the truck from M/s SC & SR Paul Filling Station, Katigorh on 20-3-2008, which was corroborated by the evidence of PW 10 and such admission has demonstrated that, as the owner of the truck, he was in conscious possession of the contraband ganja loaded in the truck which admittedly belonged to him, thereby making him liable to be convicted u/s 20(b)(ii)(B) of the Act. On the other hand, Mr. K.C. Gautam, the learned Counsel for the Respondent, while defending the impugned judgment, contends that when the driver of the truck, namely, Dhruba Kapali (the non-appellant/co-accused) had already admitted in his evidence vide Ext.6 and Ext. 8 and in his examination u/s 313 Code of Criminal Procedure that he with full knowledge loaded the ganja with the helper, who had absconded, in the truck for a consideration of Rs. 200/-per packet and that the Respondent was not present when the ganja was loaded in the truck and had no knowledge about this, the trial court rightly held that the Respondent could not be said to be in conscious possession of the contraband ganja. He heavily relies on the decision of the Apex Court in Dharampal Singh Vs. State of Punjab, to fortify his submissions. Contending that the impugned judgment does not suffer from any infirmity, he urges this Court to dismiss the appeal.

5. There is no dispute at the bar that the quantity of ganja seized from the truck i.e. 495 kilograms is a commercial quantity. The co-accused/non-appellant was proved to have been in conscious possession of the seized contraband ganja and was accordingly held guilty to the offence u/s 20(b)(ii)(B) of the Act charged against him and was sentenced to undergo imprisonment as noted earlier. It is a

settled proposition of law that to bring the offence within the mischief of Section 20(b) of the Act, possession has to be a conscious possession. The initial burden of proof of possession lies on the prosecution and once it is discharged, the legal burden would shift on the accused. Standard of proof expected from the prosecution is to prove possession beyond all reasonable doubt but what is required to be proved by the accused to establish his innocence would be by preponderance of probability. Once the plea of accused is found probable, discharge of initial burden by the prosecution will not nail him with offence. Since the offences under the Act are more serious in nature, a higher degree of proof is required to convict an accused. Section 54 deals with presumption from possession of illicit articles, which reads thus:

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.

In *Dharampal Singh Vs. State of Punjab*, , this provision has been explained by the Apex Court in the following manner:

15. From a plain reading of the aforesaid it is evident that it creates a legal fiction and presume 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 satisfactorily account for possession of opium.

16. 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 *State of Punjab Vs. Hari Singh and Others*, , 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 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.

6. In *Sorabkhan Gandkhan Pathan v. State of Gujarat* (2004) 13 SCC 608, on an information received by Police Inspector V.K. Amaliyar on 12-10-1992 at 12.15 AM that certain persons were carrying illicit liquor in an auto rickshaw, the said Police Inspector organised a raiding party and on intercepting the auto rickshaw he found A-1 carrying a hand bag which when searched was found to contain 1960 grams of charas valued at Rs. 30,000/-. It is based on such recovery the Appellant and two other accused persons were charge-sheeted. The Apex Court held that as the contraband was seized from the possession of the A-1, he was rightly convicted.

However, in overturning the conviction of A-2, the Apex court observed thus:

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 auto rickshaw, along with three other person. 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 auto rickshaw, in our opinion, is not justified. As a matter of fact, the courts below have rightly acquitted the other 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.

7. In the instant case, trial court recorded its finding on the question as to whether the Respondent was in possession or in conscious possession of the contraband ganja in the following manner:

47. On evaluation of the evidence as discussed above it is clearly understood, the instant case was initiated on the basis of source information, and finally the truck

bearing registration No. WB-03/9587 was intercepted by custom official at Mawryngkneng East Khasi Hills on 23-3-2008, and during search thirteen bags containing ganja was recovered in presence of independent witnesses and on weight found to be 495 Kgs, and samples gave positive test for cannabis (ganja). It is also a fact that the driver accused Shri Dhruba Kapali himself (the convicted non-appellant) himself in his statement that is exhibit-5 free translation copy exhibit-6, exhibit-8 and 9 (free translation copy) clearly admitted that he with full knowledge loaded the ganja in the truck in lieu of Rs. 200/-(Rupees two hundred) only per packet at the place near Baba Hotel, and in his statement also he and helper Rahul who were present during loading of the ganja in the truck and made specifically clear that the accused Shri Sankar Debnath was not present when the ganja was loaded in the truck, and this was not within the knowledge of the accused Shri Sankar Debnath (the Respondent herein), who is the owner of the truck. and the same fact he also admitted in his statement u/s 313 Code of Criminal Procedure.

48. On the other hand, on examination of the prosecution evidence as discussed above there is no specific evidence came before the Court to say confidently or to presume without any hesitation that the accused Shri Sankar Debnath was all along in the truck from his departure from Agartala till interception of the truck at Mawryngkneng East Khasi Hills.

49. Court cannot presume until and unless possession has been established. In this instant case the driver when he himself is admitting that he had loaded the ganja without the knowledge of owner accused of the truck and owner accused had no knowledge about presence of ganja in the truck, Court cannot presumed that the accused that the accused Shri Sankar Debnath was in conscious possession of ganja when the evidence is said otherwise.

8. We have carefully gone through the confession of the convicted non-appellant (who is none other than the driver of the truck) made in the inquiry u/s 67(c) of the Act, which was exhibited as Exhibit-6 and which was never retracted by him. In this statement, he had admitted that the Respondent was not aware of the loading of the contraband ganja in the truck. In his examination u/s 313 Code of Criminal Procedure also, he reiterated this admission. Under the law, the confession of a co-accused cannot be relied on for convicting the co-accused. In *Kanhaiyalal Vs. Union of India (UOI)*, , it is held by the Apex Court that a statement u/s 67 of the Act by a person directed to appear before the officer concerned may be relied upon as a confessional statement against such person. A conviction can be maintained solely on the basis of such confession. It was further held therein that since officer vested with "powers of an officer in charge of a police station" u/s 53 of the Act is not a "police officer" within the meaning of Section 25 of the Evidence Act, a statement u/s 67 of the Narcotic Drugs and Psychotropic Substances Act is not the same as a statement made u/s 161 Code of Criminal Procedure unless made under threat or coercion. It is this vital difference, which allows a statement made u/s 67 of the Narcotic Drugs and

Psychotropic Substances Act to be used as a confession against the person making it and excludes it from the operation of Section 24 to 27 of the Evidence Act. Now, if a confessional statement u/s 67 of the Act can be used against the maker of the confession for conviction, a fortiori, there is no reason why such a statement u/s 67 giving a clean chit to the co-accused cannot be used to exonerate the latter. As the Respondent has been given a clean chit by the co-accused, we have no reason to disagree with the trial court in holding that the Respondent was not in conscious possession of the contraband ganja as charged by the prosecution. He is, therefore, entitled to the benefit of doubt.

9. Resultantly, this appeal has no merit and is hereby dismissed. The Respondent need not surrendered to his bail bonds. Transmit the L.C. Record forthwith.