

CASE NO.:
Appeal (crl.) 786 of 2002

PETITIONER:
Madan Lal and Anr.

RESPONDENT:
Vs.
State of Himachal Pradesh

DATE OF JUDGMENT: 19/08/2003

BENCH:
DORAISWAMY RAJU & ARIJIT PASAYAT.

JUDGMENT:
J U D G M E N T

WITH

CRIMINAL APPEAL NOS. 788/2002 AND 905/2003

ARIJIT PASAYAT, J

Since these three appeals involve identical issues they are disposed of by this common judgment.

The appellants and one other person faced trial for alleged commission of offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short 'the Act').

All the five accused were found guilty of the alleged offence and all of them were sentenced to undergo rigorous imprisonment for a term of 10 years and to pay a fine of Rs.1 lakh with a default stipulation of a further rigorous imprisonment of 3 months in case of default to pay the fine.

By the impugned judgment the High Court of Himachal Pradesh at Shimla dismissed the appeals filed by the accused appellants.

In appeal Nos. 786/2002 and 788/2002 at the Special Leave Petition stage, there were four petitioners. The special leave petition so far as petitioner Goyal Nath is concerned was dismissed by an order dated 5.8.2002.

Accusations which led to the trial of the accused appellants in a nutshell is as follows:

On 5.10.1999, a secret telephonic message was recorded by Sunder Lal, A.S.P. (PW-11) that charas was being transported in a Maruti Esteem blue car bearing No.CH0-IE-2764 which was coming towards Oachghat. The information was reduced by him into writing. He gave directions to the SHO, Police Station, Solan to send the information to the Superintendent of Police and thereafter proceeded towards the spot where the car was expected to come. On reaching the spot, he formed a raiding party consisting of Jainarain (PW-1) and Ashwani Kumar Gupta (PW-2) and the car was stopped by the raiding party. Accused, Manjit Singh was driving the car and the remaining accused persons were sitting therein. In the presence of witnesses, Jainarain (PW-1) gave an option to the accused persons as to whether they wanted to be searched by a Magistrate or by him. Accused appellants consented for the search by Jainarain (PW-1). On personal search of the accused persons nothing

incriminating was found on their person. When the car was searched, a black coloured bag was found which contained a steel doloo kept in a plastic bag. The said doloo contained 820 grams of charas. After separating two samples of 25 grams each the remaining charas were separately sealed and samples were sent to the Officer Incharge, Police Station, Solan for registration of a case. On the basis of the information FIR was recorded at the Police Station. The car along with the documents and the key were also seized. The sealed parcels of the case property were handed over to the SHO (PW-9) who re-sealed them. The samples were analysed by the Chemical Examiner who filed a report vide Ext.PW-10/A with the finding that the samples were that of charas. On being satisfied about commission of offence under Section 20 of the Act, a charge sheet was submitted. After framing of charge, the accused persons faced trial.

To substantiate its accusation, prosecution examined 11 witnesses. The accused appellants pleaded innocence. On consideration of the evidence on record, the accused persons were convicted and sentenced as aforesaid. The appeals preferred by the accused appellants were dismissed by the impugned judgment.

Mrs. Subhadra Chaturvedi, learned amicus curiae appearing for the accused appellants submitted that the prosecution was totally without basis and there were several irretrievable infractions of statutory provisions which render the trial vitiated and consequently the judgments are unsustainable.

Firstly, it was submitted that the mandatory requirements of Sections 42 and 50 were not complied with. Further, the officials had tampered with the samples as the weight of the sample was less than what was indicated.

Elaborating the different pleas, it was submitted that there was no material to show that the information which was required to be transmitted to the superior authority was so done. Further, the finding that there was no requirement to comply with the requirement of Section 50 when a vehicle has been searched is not correct. When accused Goyal Nath whose SLP has been dismissed, admitted that the seized charas belonged to him, other accused appellants should not have been convicted. There was no material to prove that there was any conscious possession of the contraband articles.

In case of accused-appellant Manjit Singh it was additionally submitted that he was only the driver of the vehicle and was not supposed to know what the other occupants were bringing.

In response, it was submitted by learned Additional Advocate General appearing for the State of Himachal Pradesh that all the points presently urged were considered by the Trial Court and the High Court, and after detailed analysis of the legal and factual position have been rightly rejected.

The first aspect which needs to be considered is whether there was any non-compliance of Sections 42 and 50 of the Act as pleaded. So far as these two provisions are concerned, they read as follows:

"Section 42: Power of entry, search, seizure and arrest without warrant or authorization:

(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by

general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from persons knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset, -

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act.

Provided that if such officer has reason to believe that a search warrant or authorization cannot be obtained without affording opportunity for the concealment or evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.

Section 50: Conditions under which search of persons shall be conducted-

(1) When any officer duly authorized under Section 42 is about to search any person under the provisions of Section 41, section 42 or section 43,

he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorized under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973(2 of 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior."

The evidence of the witnesses i.e. PWs. 5, 8 and 11 throw considerable light on this controversy. In fact the original register which recorded the transmission of the information to the Superintendent of Police was perused by the High Court. On 27.12.2000 after perusing the register, the High Court noted that there was no over-writing or cutting in respect of the relevant entries. Constable (PW-8) has stated that he had taken a copy of the daily diary regarding receipt of information about transportation of charas (Ext.PW-5/A) and handed over to the reader of the Superintendent of Police at 10.40 a.m. the relevant document. PW-5 has corroborated this statement of PW-8 about delivery of the copy of information and he has stated that the same was placed before the concerned Superintendent of Police. In other words, the materials clearly establish that the information was sent without delay to the immediate superior officer of PW-11 i.e. Superintendent of Police. That being the position, contention regarding non-compliance of provisions of Section 42 is clearly without substance.

Now comes the question whether there was non-compliance of Section 50 of the Act.

A bare reading of Section 50 shows that it only applies in case of personal search of a person. It does not extend to search of a vehicle or a container or a bag, or premises. (See *Kalema Tumba v. State of Maharashtra and Anr.* (JT 1999 (8) SC 293), *The State of Punjab v. Baldev Singh* (JT 1999 (4) SC 595), *Gurbax Singh v. State of Haryana* (2001(3) SCC 28). The language of Section 50 is implicitly clear that the search has to be in relation to a person as contrasted to search of premises, vehicles or articles. This position was settled beyond doubt

by the Constitution Bench in Baldev Singh's case (supra). Above being the position, the contention regarding non-compliance of Section 50 of the Act is also without any substance.

Coming to the plea that there was reduction in weight of the samples sent for analysis and there was tampering, it has to be noted that this aspect has also been considered by the Trial Court which has recorded the reasons for rejecting the same. It has been noted that the seals were intact and there was no tampering. The view has been endorsed by the High Court. On considering the reasoning indicated that there was very minimal and almost ignorable variation in weight, we find no reason to interfere with the findings.

The other plea which was emphasized was the alleged statement of accused Goyal Nath that he alone was in possession of the contraband bags. The plea centers round a statement of search witness PW-1, who stated that Goyal Nath told him that contraband articles belonged to him. The statement was made totally out of context and no credence can at all be attached to the statement. The accused Goyal Nath in his examination under Section 313 of the Code of Criminal Procedure, 1973 (in short the 'Code') did not state that he was alone in possession of the contraband articles. On the contrary, he stated that he did not know anything about the alleged seizure.

Whether there was conscious possession has to be determined with reference to the factual backdrop. The facts which can be culled out from the evidence on record is that all the accused persons were traveling in a vehicle and as noted by the Trial Court they were known to each other and it has not been explained or shown as to how they travelled together from the same destination in a vehicle which was not a public vehicle.

Section 20(b) makes possession of contraband articles an offence. Section 20 appears in chapter IV of the Act which relates to offence for possession of such articles. It is submitted that in order to make the possession illicit, there must be a conscious possession.

It is highlighted that unless the possession was coupled with requisite mental element, i.e. conscious possession and not mere custody without awareness of the nature of such possession, Section 20 is not attracted.

The expression 'possession' is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different backgrounds. It is impossible, as was observed in Superintendent & Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunja and Ors. (AIR 1980 SC 52), to work out a completely logical and precise definition of "possession" uniformly applicable to all situations in the context of all statutes.

The word 'conscious' means awareness about a particular fact. It is a state of mind which is deliberate or intended.

As noted in Gunwantlal v. The State of M.P. (AIR 1972 SC 1756) possession in a given case need not be physical possession but can be constructive, having power and control over the article in case in question, while the person whom physical possession is given holds it subject to that power or control.

The word 'possession' means the legal right to possession (See Health v. Drown (1972) (2) All ER 561 (HL)). In an interesting case it was observed that where a person keeps his fire arm in his mother's flat which is safer than his own home, he must be considered to be in possession of the same. (See Sullivan v. Earl of Caithness (1976) (1) All ER 844 (QBD)).

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 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.

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.

In fact the evidence clearly establishes that they knew about transportation of charas, and each had a role in the transportation and possession with conscious knowledge of what they are doing. The accused-appellant Manjit Singh does not stand on a different footing merely because he was a driver of the vehicle. The logic applicable to other accused-appellants also applies to Manjit Singh.

Therefore, the presumption available by application of logic flowing from Sections 35 and 54 of the Act clearly applies to the facts of the present case. The judgments of the Trial Court and the High Court suffer from no infirmity to warrant interference. The appeals deserve dismissal, which we direct.