

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 2108 OF 2008

Balbir Kaur

.... Appellant

Versus

State of Punjab

..... Respondent



JUDGMENT

Dr. Mukundakam Sharma, J.

1. This appeal is directed against the judgment and order passed by the High Court of Punjab and Haryana at Chandigarh on 15.05.2008 whereby and whereunder the High Court upheld the order of conviction passed against the appellant herein for the offence punishable under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the NDPS Act') and sentenced her to undergo rigorous

imprisonment for a period of ten years, and to pay a fine of Rs. 1 lac, and in default of payment of the same to undergo rigorous imprisonment for another period of two years, for having found in possession of 2 bags containing 61 Kgs. of poppy husk, without any permit or licence.

2. The facts stated in brief are that on 19.12.1988, Sub Inspector Uttam Singh along with ASI Kasturi Lal and other police officials, was going from village Shambu to Village Tepla, Rajgarh and Ram Nagar Sainia, for patrol duty and when the police party reached near the turning of Village Darian, the appellant was found sitting on two bags. It is alleged that on seeing the police party, the appellant turned her face towards her village. Due to the conduct and behaviour of the appellant and on suspicion, Sub Inspector Uttam Singh asked her about the contents of the bags. She replied by stating that the bags contained poppy husk. It was also alleged that in the meanwhile, Rajwant Pal Singh, an independent witness came there and he also joined the police party. It is alleged that then Sub Inspector Uttam Singh gave option to the accused whether she wanted to be searched before the Gazetted Officer or Magistrate to which she replied that she wanted to be searched before a Gazetted Officer and by a lady. Upon this Sub Inspector Uttam Singh sent wireless message to D.S.P. Harcharan Singh Bhullar and also requested for presence of a lady

constable. In the meanwhile, D.P.S. Harcharan Singh Bhullar alongwith Charanjit Kaur, a lady SPO came to the aforesaid place. D.P.S. Harcharan Singh Bhullar thereafter disclosed his identity and that of lady SPO to the appellant. Then SI Uttam Singh conducted the search and both the bags were found to contain poppy husk, and therefore, two samples of 250 gms each from both the bags were taken out as samples. The first bag contained 30 kg 500 gms whereas the second bag contained 29 kgs. 500 gms of poppy husk. Sample parcels and the bags were sealed and then after completing the necessary formalities the SI Uttam Singh arrested the accused and recorded the statement of the witnesses. SI Uttam Singh thereafter deposited the case property with the MHC Gurmail Singh and on receipt of the report of the Chemical Examiner and on completion of other necessary investigation formalities, charge sheet against the appellant was presented. The court framed charges against the appellant and the case was put down for trial of accused.

3. During trial, the prosecution examined a number of witnesses. The statement of the appellant was also recorded under Section 313 of the Criminal Procedure Code, 1973 (in short "the CrPC") wherein she denied the charges and stated that she was innocent. In her defence, Rajwant Pal Singh (DW-1) and Budh Kaur (DW-2) were examined. The trial court

thereafter examined the records including the depositions of all the witnesses and after examination of the records passed its Judgment and Order dated 20.02.1999 holding that the prosecution has been able to prove its case beyond reasonable doubt. The court held that on 19.02.1998 the appellant was found in possession of two bags containing 61 Kgs of poppy husk without any permit or licence. Consequently, the trial court held the appellant guilty under Section 15 of the NDPS Act and passed an order of conviction. Thereafter, the trial court heard the appellant on the question of sentence. After hearing the parties, the trial court sentenced the appellant to undergo minimum sentence of rigorous imprisonment for a period of ten years and to pay a fine of Rs. 1 lac under section 15 of the NDPS Act and in default thereof to undergo rigorous imprisonment for another period of two years.

4. Being aggrieved by the aforesaid order, the appellant filed an appeal before the High Court of Punjab and Haryana challenging the aforesaid order of conviction and sentence. The High Court after hearing the parties passed the Judgment and Order on 15.05.2008 whereby the High Court upheld the Judgment and Order passed by the trial court after dismissing the appeal filed by the appellant herein.

5. Being aggrieved by the Judgment and Order passed by the High Court, the present appeal was filed by way of special leave.

6. Ms. Kamini Jaiswal, learned counsel appearing for the appellant submitted that no case of conviction and sentence was made out on the basis of evidence on record. It was also submitted by her that the appellant was a lady of about 70 years and that there was some bias of the police officers against her as she had initiated certain proceedings against them in the past. It was further submitted that there was no independent witness examined by the prosecution and it had examined only official witnesses although independent witnesses were present at the time of occurrence, who, however, deposed against the prosecution and in favour of the appellant. She also submitted that at the time of search of the appellant – accused, there was total non-compliance of Sections 52 and 57 of the NDPS Act inasmuch as the police officers did not inform her that she had a right to be searched in the presence of a Gazetted Officer and such a Gazetted Officer was made available only when the appellant herself asked for the presence of such an officer. It was also submitted by her that there are material discrepancies in the statement of witnesses. There was also delay in sending samples as alleged recovery of poppy husk was made on 19.02.1988 whereas the sample was deposited in the office of the

Chemical Examiner on 23.02.1988 and the said delay have not been explained by the prosecution, and therefore, the order of conviction and sentence is required to be set aside. It was also submitted that the prosecution has failed to prove and establish its case beyond reasonable doubt on the basis of the evidence on record that the appellant was in conscious possession of the contraband goods. It was submitted that the appellant was found sitting on two bags containing poppy husk and when she was asked as to what was contained therein she told that the same contained poppy husk and therefore the only allegation against her is that she was sitting on two bags on an open road, from which it cannot be presumed that she was in conscious possession of the contraband goods.

7. With the able help and assistance of the counsel appearing for the parties, we have examined the entire evidence on record as also the relevant provisions of the Act. The evidence, which has come on record, indicates that just before her search, the appellant was found sitting on two bags and that on seeing the police party the appellant turned her face towards her village. When Sub Inspector – Uttam Singh asked the appellant about the contents of the bags, she replied by stating that the bags contained poppy husk. The said Sub Inspector – Uttam Singh (PW-6) has categorically stated this in his evidence. Not even a suggestion was put to him in the

cross examination in that regard. What actually was done was that when the said statement came on evidence the same appears to have been objected to but there was no suggestion given in the cross examination on the behalf of the appellant at the time of examination of the said witness. In any case the said two bags were carried by the appellant as stated by the said witness, and upon search the same were found to contain poppy husk.

8. Since recovery of poppy husk was made from the bags carried by the appellant, therefore, the submission that there was violation of the provisions of Sections 52 - 57 of the NDPS Act is baseless and devoid of any merit. Reference in this regard may be made to the decision of this Court in **State of Punjab v. Baldev Singh**, (1999) 6 SCC 172; **Avtar Singh v. State of Punjab**, (2002) 2 SCC 419; **State of Punjab v. Balkar Singh**, (2004) 3 SCC 582; **Dilip v. State of M. P.**; **State of Haryana v. Mai Ram**, (2008) 8 SCC 292; and **Hardip Singh v. State of Punjab**, (2008) 8 SCC 557.
9. In **Madan Lal v. State of H. P.**, (2003) 7 SCC 465, it was held by this Court that the issue with regard to conscious possession is to be determined on the fact situation of each case. The Court observed as follows in relevant paras::

“19. 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 are that all the accused persons were travelling 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.

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

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

22. 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 *Supdt. & Remembrancer of Legal Affairs, W.B. v. Anil Kumar Bhunja*⁴ to work out a completely logical and precise definition of “possession” uniformly applicable to all situations in the context of all statutes.

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

24. As noted in *Gunwantlal v. State of M.P.*⁵ possession in a given case need not be physical possession but can be constructive, having power and control over the article in the case in question, while the person to whom physical possession is given holds it subject to that power or control.

25. The word “possession” means the legal right to possession (see *Heath v. Drown*⁶). In an interesting case it was observed that where a person keeps his firearm 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*⁷.)

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.

10. She was found sitting on the bags in the road and seeing the police party she behaved in a suspicious manner. Nothing has come on evidence to show that at that time any other person was present at the scene of occurrence. When she was asked about the contents in the bag she herself admitted that it contained poppy husk. Therefore, her possession of the contraband goods was conscious possession. So far as the submission with regard to alleged bias of the prosecution is concerned, we are of the view that no case of bias has been made out for the earlier proceedings which were initiated by the appellant herself by filing an application under section 438 CrPC for anticipatory bail. Another incident which is referred to and relied upon by the defence to show bias is that Sub Inspector Uttam Singh (PW-6) along with other police officials raided the appellant's residence but nothing incriminating was recovered from there. That itself does not make out a case of bias when she was found in broad light having in possession two bags of poppy husk.

11. In view of the concurrent findings of the trial court and as also the High Court holding that the appellant was in conscious possession of the said contraband goods, the allegation of non-disclosure of the purpose of search and the grounds of arrest to her are all of technical nature and without being any material force in them. The appellant herself knew that she was being searched for possession of contraband goods, and therefore, she had also sought for protection as provided under Section 52 and 57 of the NDPS Act. She was being searched and arrested on account of possession of contraband goods. The violation of the provisions of the NDPS Act was clearly known to her. The allegation that she herself asked for such protection instead of prosecution giving her the option to be searched before a Gazetted Officer, as required under the law, would not in any manner adversely affect her conviction and order of sentence passed by both the courts below. No prejudice could be shown by the appellant against the DSP, who was a Gazetted Officer and the lady officer present at the time of search.

12. It is also to be noted at this stage that the recovery of poppy husk was made from the bags carried by the appellant, so the submission that there was violation of the provisions of Section 50 is legally untenable. This Court has recently in **State of Haryana v. Maniram**, (2008) 8 SCC 292

@ p. 295 reiterating the well-settled legal position in this regard as follows:

“14. So far as the applicability of Section 50 is concerned, the High Court’s view is clearly indefensible. Section 50 reads as follows:

“50. *Conditions under which search of persons shall be conducted.*—(1) When any officer duly authorised 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.”

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*¹, *State of Punjab v. Baldev Singh*² and *Gurbax Singh v. State of Haryana*³.)

15. The language of Section 50 is implicitly (*sic* explicitly) 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 case*². A similar question was examined in *Madan Lal v. State of H.P.*⁴

16. Above being the position, the finding regarding non-compliance with Section 50 of the Act is also without any substance.”

13. As far as delay in sending the samples are concerned, we find the said contention untenable in law. Reference in this regard may be made to the decision of this Court in **Hardip Singh** case (*supra*), wherein there was a

gap of 40 days between seizure and sending the sample to chemical examiner. Despite the said fact the Court held that in view of cogent evidence that opium was seized from the appellant and the seals put on the sample were intact till it was handed over to the chemical examiner, delay itself is not fatal to prosecution case. In the present appeal, the contraband goods were recovered from the possession of the appellant on 19.02.1998 and the same were sent to the chemical examiner for chemical examination on 23.02.1998, the aforesaid delay has no consequence for the fact that the recovery of the said sample from the possession of the appellant stands proved and established by cogent and reliable evidence led in the trial. Therefore, it cannot be said that there was any delay in sending the said sample for examination. Since the appellant was sitting on the two bags and her conduct on turning her face towards the village on seeing the police party and thereafter telling the police party on asking by the police that the said bags contained poppy husk clearly establishes that she was in conscious possession of the contraband goods. So far as examination of no independent witness is concerned, we find that there was only one independent witness at the time of recovery of the contraband goods, who was won over by the defence. It is established from the facts that the said independent witness was examined by the defence as her witness in the

trial. It is not disclosed that any other independent person was present at the time of search and at the time of recovery of the contraband goods, and therefore, it cannot be said that the search and recovery are in any manner vitiated.

14. In this view of the matter, we find no merit in this appeal. Accordingly, the appeal is dismissed.

.....J.
(Dr. Mukundakam Sharma)

.....J.
(Dr. B.S. Chauhan)

New Delhi,
July 7, 2009