

IN THE HIGH COURT OF CHHATTISGARH AT BILASPUR

CRIMINAL APPEAL NO. 245 / 2004

Appellant
(in Custody)

: Hirma Markami S/o Dama Markami
Aged about 30 Years,
R/o Village Jute Palli,
Gram Panchayat Tumsa Palli,
P.S. & Dist : Malkhangiri (Orissa)

Versus

Respondent

: State of Chhattisgarh
Through the District Magistrate Jagdalpur
Dist : Jagdalpur -(C.G.)

CRIMINAL APPEAL U/S 374 (2) OF THE CRIMINAL PROCEDURE CODE.

A.F.R.
31-3-06
(47)
(31)

HIGH COURT OF CHHATTISGARH AT BILASPUR

Cr. Appeal No.245/2004

Single Bench: Hon'ble Shri. Dilip Raosaheb Deshmukh, J.

Hirma Markami

Vs.

State of Chhattisgarh

PRESENT: -

**Shri Prafull N. Bharat, learned counsel for the accused-appellant.
Shri U.K.S.Chandel, Panel Lawyer for the State.**

ORAL JUDGMENT

(Delivered on 31-03-2006)

This appeal is directed against the judgment dated 12-01-2004 delivered by Shri R.S. Sharma, Special Judge (N.D.P.S. Act.), Bastar at Jagdalpur in Sessions Case No.47/2003 whereby the appellant was convicted under Section-20(b)(ii)(B) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the "Act") and was sentenced to R.I. for 5 years and a fine of Rs.25,000/- and in default of payment of fine to undergo additional R.I. for 1 year.

2. Briefly stated the prosecution story is that on 29-09-2003 upon receiving secret information that a person was transporting ganja in Payal Bus coming from Konta to Durg and was seated at Seat No.23, Assistant Sub Inspector Diwakar Uppadhyay PW-1 of Police Station-Bodhghat after recording the said information vide Ex.P-1 proceeded to the spot. At the bus stand, Jagdalpur the appellant was seated inside the bus and a reddish green air bag was kept below his seat. After observing necessary legal

formalities, the air bag was searched and it was found to contain 4 packets in which ganja like substance was kept. Upon being weighed the 4 packets, weighed 4.500 Kilogram, 2.500 kilogram, 1.500 Kilogram and 650 Grams respectively thus weighing in all 9.150 Kilogram of ganja. From each packet, two samples of 25 grams each were taken and sealed and remaining ganja was also sealed. The 8 sample packets of 25 grams each and the remaining ganja kept in a sealed condition in the aforesaid air bag, was entrusted to B.P.Joshi, Malkahana Moharrir, PW-2 P.S.-Bodhghat on 30-09-2003 and on the same day entry was made in the Malkhana Register Vide Ex.P-23(C). On 02-10-2003 four packets along with the specimen impression of seal were sent through constable Rajesh Singh to Forensic Science Laboratory and entry to that effect was made in the Malkhana Register on 05-10-2003 vide Rojnamchasana No. 269. Four sample packets along with a memo Ex.P-19 of Superintendent of Police, Bastar at Jagdalpur were delivered, not by Constable Rajesh Singh but by another Constable Jeetu Ram No.90 of P.S.-Bodhghat to the Forensic Science Laboratory after considerable delay on 10-10-2003. Vide report dated 05-01-2004 Ex.P-25 it was opined that all the four packets contained ganja. After completion of investigation, the appellant was prosecuted under Section-20(b)(ii)(B) of the Act. The appellant abjured the guilt and pleaded innocence and led no evidence. The prosecution examined 4 witnesses. Relying upon the evidence led by the prosecution, the learned trial Judge convicted and sentenced the appellant as aforesaid in para-1. (Supra)

3. Shri Prafull N. Bharat, learned counsel for the appellant has assailed the conviction and sentence awarded by the learned trial Judge on the following grounds :-

- (A) That the prosecution has failed to establish that the air bag containing ganja like substance was in the conscious possession of the appellant at the time of seizure.
- (B) Total non-compliance of Section-52(3) and Section-55 of the Act vitiates the prosecution.
- (C) In view of the fact that the four sample packets changed hands after being entrusted to Constable Rajesh Singh on 02-10-2003 and were ultimately delivered on 10-10-2003 by Constable Jeetu Ram did not rule out the possibility that the seals were tampered with and the substance examined by the Forensic Science Laboratory was not the same which was alleged to have been seized from the appellant.

4. Reliance was placed on Gopal Vs. State of Madhya Pradesh reported in 2002 (Volume-9) Supreme Court Cases-595, Avtar Singh & Others Vs. State of Punjab reported in 2002 (Volume-7) Supreme Court Cases-419, Bhola Ram Kushwaha Vs. State of Madhya Pradesh reported in A.I.R.-2001-Supreme Court-229, State of Rajasthan Vs. Daulat Ram reported in A.I.R.-1980-Supreme Court-1314 and also the decision rendered by this Court in case of Sukhchand @ Sudru das Vs. State of Chhattisgarh in Criminal Appeal No.925/2002 decided on 30-01-2006 in support of the above contention. On the other hand, Shri U.K.S.Chandel, learned Panel lawyer argued in support of the impugned judgment.

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5. Having heard rival contentions, I have perused the record. It is now well settled by a catena of decisions, that in a prosecution under Section-20(b)(ii)(B) of the Act, the prosecution has to establish beyond doubt that the substance examined by the Forensic Science Laboratory, was the same which was alleged to have been seized from the possession of the appellant and that there was no possibility of tampering with the seals. To ensure this, the prosecution has to establish two things. Firstly that at the time when the ganja is alleged to have been seized the Officer effecting the seizure also prepared the specimen impression of the seal used by him to seal the substances and the samples taken therefrom. Such specimen impression of seal should also be sent to the Forensic Science Laboratory for comparison. Secondly, compliance of Section-52(3) & Section-55 of the Act has also to be ensured and before entrusting the sample packets for safe custody at the Malkhana, the Station House Officer of the concerned Police Station should affix his seal on the sample packets as also the remaining substance which were delivered for safe custody at Malkhana in a sealed condition. The provision contained in Section-52(3) & Section-55 of the Act enure to the benefit of the accused-appellant in order to establish his innocence.

6. In the present case, seizure memo Ex.p-12 does not show that specimen impression of seal used to seal sample packets or the remaining substances was prepared and sent to F.S.L. alongwith the 4 sample packets ~~thereon~~ or a separate specimen of the seal was prepared. The ganja is alleged to have been seized on 30-09-2003 and was entrusted for safe custody on the same day

to Malkhana Moherir B.P.Joshi PW-2. However, there is absolutely no evidence to show that at the time of entrustment of the sample packets as also the remaining substance, the Station House Officer of P.S. Bodhghat had also affixed his seal thereon as required under Section-55 of the Act. Thus, there is total non-compliance of Section 55 of the Act. The entry in the Malkhana Register Ex.P-23(C) also does not show that the specimen impression of the seal used to seal the aforesaid articles, was also entrusted along with the aforesaid articles. Ex.P-24 is the duty certificate given to Constable Rajesh Singh No. 243 of P.S. Bodhghat for taking the four sample packets to the Forensic Science Laboratory for examination on 02-10-2003. However, there is no explanation as to why an entry to that effect was not made in the Rojnamchasana or at least in the Malkhana Register Ex.p-23(C) on the same day. The entry in the Malkhana Register Ex.P-23 (C) in column No.8 shows that the four sample packets were sent through another Constable No.192. The name of this Constable has also not been mentioned. A perusal of the report of the Forensic Science Laboratory shows that the four sample packets were received for chemical analysis through one Constable Jeetu Ram No.90 of P.S.-Bodhghat on 10-10-2003. It is thus clear that four sample packets sent for analysis to the Forensic Science Laboratory, changed hands from Constable Rajesh Singh No.243 on 02-10-2003 to Constable No.192 and finally on 10-10-2003 ~~with~~ to Constable Jeetu Ram No.90 who ultimately delivered the packets at the Forensic Science Laboratory. There is absolutely nothing to show as in whose custody the four sample packets were kept after being taken out from the Malkhana on 02-10-2003 and before delivery ^{at the F.S.L.} on 10-10-2003. In view of the fact that at the time of

effecting the seizure, a specimen impression of the seal was not prepared, the total non-compliance of Section 55 of the Act and also the circumstance in which the sample packets changed hands after being taken out from the Malkhana for eight days leads to an irresistible inference that the possibility of tampering with the seal on the sample packets cannot be ruled out. Placing reliance upon State of Rajasthan Vs. Daulat Ram reported in A.I.R.-1980-Supreme Court-1314, I am of the considered opinion that on this count alone, the conviction and sentence awarded by the learned trial Judge deserves to be set aside.

7. It is also well settled that where the ganja is not alleged to have been seized during search of the person of the accused, the prosecution is also required to establish that the container in which the ganja was alleged to have been found was in the conscious possession of the appellant. A perusal of the seizure memo Ex.P-12 does not show any description of the place where the air bag was kept inside the bus. Assistant Sub Inspector Diwakar Uppadhyay stated in para-13 that the air bag was kept below the seat on which the appellant was seated. Chhabilal Negi PW-3 stated that the appellant was in possession of one bag but did not state the place where the bag was kept inside the bus. Manoj Jain PW-4 has stated in cross-examination para-2 that the air bag was kept near the feet of the appellant. He further stated that after entering the bus, the police lifted the bag and took the accused-appellant with them. It is also pertinent to note that in the examination under Section-313 of Cr.P.C., no question was asked to the appellant in this regard. In Avtar Singh & Others Vs. State of Punjab reported in 2002 (Volume-7) Supreme

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Court Cases-419- it was held that possession is the core ingredient to be established before the appellant can be convicted under Section-15 of the Act. In that case, the appellants were seated on the bags of poppy husk loaded on the truck. Another appellant was driving the vehicle. The question was whether on the basis of the evidence available on record, it could be said that the three appellants out of which one was driving the vehicle and the other two were seated on the bags were having such custody or control of the poppy husk so as to constitute conscious possession. In the facts and circumstance of the case, the Apex Court held that it was difficult to reach such a conclusion beyond reasonable doubt since the appellants were not the only persons in the vehicle. Persons, who were merely sitting on the bag in the absence of proof or anything more, could not be presumed to have any conscious possession of the goods. In the aforesaid circumstances, the Apex Court set aside the conviction and sentence of the appellants under Section-15 of the N.D.P.S. Act.

8. In the present case, the appellant was seated inside the bus and there were other passengers also traveling in the bus. Merely because the air bag was kept below the seat on which the appellant was seated cannot ^{be} said to constitute conscious possession of the appellant over the said air bag and its contents. In the absence of any positive evidence to constitute conscious possession of the appellant and also in the absence of any details having been given in the seizure memo Ex.p-23 (C) regarding the place where the air bag was actually kept, I am of the considered opinion that in the facts and circumstances of the case the

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prosecution has failed to prove beyond doubt that the appellant was in conscious possession of air bag and its contents.

9. Having thus considered the evidence led by the prosecution in its entirety, I am of the considered opinion that the conviction and sentence awarded by the learned trial judge deserves to be set aside.

10. In the result, the appeal is allowed. Conviction of the appellant under Section-20(b)(ii)(B) of the Act and the sentences awarded thereunder are set aside. The appellant is acquitted and shall be set at liberty forthwith, if not required in any other case. Fine if paid, shall be refunded to the appellant.

Sd-/
Dilip Raosaheb Deshmukh
Judge