

HARBHAJAN SINGH

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v.

STATE OF HARYANA

(Criminal Appeal No. 1480 of 2011)

APRIL 25, 2023

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[ABHAY S. OKA AND RAJESH BINDAL, JJ.]

Narcotic Drugs and Psychotropic Substances Act, 1985: ss. 25, 35 – Applicability of s. 25 – When – Presumption of culpable mental state u/s. 35 – When, available –On facts, truck found lying turtle and bags of powder scattered which on investigation found to be narcotic substance – Two witnesses saw the driver and the cleaner coming out of the truck and disclosed the name of the owner-appellant, and fled away – Conviction of the appellant u/s. 25 and imposition of imprisonment for 10 years by the courts below – On appeal, held: s. 25 provides that if an owner of a vehicle knowingly permits it to be used for commission of any offence punishable under the NDPS Act, he shall be punished accordingly – On facts, the witnesses turned hostile – They did not even identify the driver and the cleaner of the truck – Appellant was not with the vehicle nor he was arrested from the spot when the accident occurred or when the truck and contraband were taken into custody – His conviction was merely being the registered owner of the truck – Prosecution failed to produce any material on record to show that the vehicle, if was used for any illegal activity, was used with the knowledge and consent of the appellant – Even presumption as provided for u/s. 35 would not be available since the prosecution failed to discharge initial burden on it to prove the foundational facts – In the absence thereof, the onus would not shift on the accused– Courts below erred in shifting the onus on the appellant to prove his innocence without the foundational facts having been proved by the prosecution – Thus, the conviction of the appellant cannot be legally sustained – Judgments passed by the courts below set aside.

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*Bhola Singh v. State of Punjab (2011) 11 SCC 653 :
[2011] 2 SCR 642 – relied on.*

Balwinder Singh v. Asstt. Commr., Customs and Central Excise (2005) 4 SCC 146; State by Inspector of Police,

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- A *Narcotic Intelligence Bureau, Madurai, Tamil Nadu v. Rajangam (2010) 15 SCC 369; Gangadhar alias Gangaram v. State of Madhya Pradesh (2020) 9 SCC 202 – referred to.*

Case Law Reference

B	(2005) 4 SCC 146 (2010) 15 SCC 369 (2020) 9 SCC 202 [2011] 2 SCR 642	referred to referred to referred to relied on	Para 3 Para 3 Para 3 Para 8
C	CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 1480 of 2011.		
	From the Judgment and Order dated 14.05.2010 of the High Court of Punjab & Haryana at Chandigarh in CRLA No. 1091 of 2005.		
D	D. N. Goburdhun, Sr. Adv., Brij Bhushan, Ms. Priyanka Tyagi, Advs. for the Appellant. Dinesh Chandra Yadav, AAG, Samar Vijay Singh, Ishwar Chand, A. S. Rishi, Manoj Gautam, Keshav Mittal, Ms. Amrita Verma, Ms. Sabarni Som, Nikhil Kumar, Rajat Mishra, Advs. for the Respondent.		
E	The Judgment of the Court was delivered by RAJESH BINDAL, J.		
F	1. The Appellant-Harbajan Singh was convicted vide judgment dated 18.05.2005 passed by the Trial Court under Section 25 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as “the NDPS Act”) and sentenced to undergo imprisonment for a period of 10 years. In appeal, the conviction and sentence of the Appellant was upheld by the High Court vide order dated 14.05.2010. The orders are under challenge before this Court.		
G	2. Briefly, the facts of the case are that the Appellant was owner of the truck bearing registration no. PAT/2029. It turned turtle near Hanuman Mandir, Hisar Road, Village Agroha on 15.05.2000 at 9.00 P.M. First Information Report (FIR) No.68 was registered at 4.25 P.M. on 16.05.2000 on the information furnished by the police party on patrol duty. As per the information furnished to the police party by two witnesses		
H	H Ram Sarup (PW-6) and Naresh Kumar (PW-10) the accident occurred		

on 15.05.2000 at about 9.00 P.M. after the truck hit the divider. The driver and cleaner came out of the truck and on enquiry by the said witnesses, they informed their names as Joginder Singh s/o Jang Singh and Gurmail Singh s/o Nachhattar Singh. They also disclosed the name of the owner of the truck as Harbhajan Singh. The driver and the cleaner then went away on the pretext of calling the owner but never returned. Police, on suspicion that the bags loaded in the truck were containing some contraband substance, unloaded them and took them into custody. Samples were drawn and sent for testing. After investigation, chargesheet was filed against Joginder Singh, Gurmail Singh and the Appellant. The Trial Court acquitted Joginder Singh and Gurmail Singh as two of the witnesses who according to prosecution had informed the police party about the names of the driver and cleaner of the truck were declared hostile. However, the Appellant who was the registered owner of the truck was convicted under Section 25 of the NDPS and the conviction was upheld by the High Court.

3. Brief argument raised by the learned counsel for the appellant is that Section 25 of the NDPS Act provides that an owner of the vehicle could be convicted only if he knowingly permits use of his vehicle for commission of any offence. No such case was made out by the prosecution. Even the presumption as provided for in Section 35 of the NDPS Act cannot be raised as the prosecution had failed to discharge its initial burden of proving the foundational facts. In the statement of the Appellant as recorded under Section 313 of the Criminal Procedure Code, 1973, it was submitted that he had given the truck on hire to one Kashmir Singh s/o Hoshiyar Singh resident of Dalel Singhwala for carrying sand. The Appellant was not arrested from the spot. The driver and cleaner of the truck have already been acquitted and the State has not filed any appeal challenging their acquittal. In support of his arguments, learned counsel for the Appellant has relied upon the judgments of this Court in *Balwinder Singh v. Asstt. Commr., Customs and Central Excise¹*, *State by Inspector of Police, Narcotic Intelligence Bureau, Madurai, Tamil Nadu v. Rajangam²*, *Bhola Singh v. State of Punjab³* and *Gangadhar alias Gangaram v. State of Madhya Pradesh⁴*.

¹(2005) 4 SCC 146

²(2010) 15 SCC 369

³(2011) 11 SCC 653

⁴(2020) 9 SCC 202

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- A 4. On the other hand, learned counsel for the State submitted that the Appellant has failed to prove its case that the truck was not being used for any illegal activities. The owner of the truck is vicariously liable. Though stand was taken by him that the truck was given for carrying sand however no such evidence was led by him to prove his plea. Presumption goes against him.
- B 5. Heard learned counsel for the parties and perused the relevant referred record.
- C 6. The basic facts of the case as have been noticed above are not in dispute. The Appellant who is the registered owner of the truck was not arrested from the spot. A case was set up by the prosecution that Joginder Singh and Gurmail Singh were driver and cleaner of the truck. Even they were not arrested from the spot. Their identity was established on the basis of the information furnished to the police party by Ram Sarup (PW-6) and Naresh Kumar (PW-10). However, when appeared in Court, they were declared hostile. Joginder Singh and Gurmail Singh were acquitted. The Appellant is owner of the truck. He was not arrested from the spot. Section 25 of the NDPS Act provides that if an owner of a vehicle knowingly permits it to be used for commission of any offence punishable under the NDPS Act, he shall be punished accordingly.
- E 7. In the case in hand, the prosecution has failed to produce any material on record to show that the vehicle in question, if was used for any illegal activity, was used with the knowledge and consent of the Appellant. Even presumption as provided for under Section 35 of the NDPS Act will not be available for the reason that the prosecution had failed to discharge initial burden on it to prove the foundational facts. In the absence thereof, the onus will not shift on the accused.
- G 8. The issue was considered by this Court in ***Bhola Singh's*** case (*supra*). It was opined that unless the vehicle is used with the knowledge and consent of the owner thereof, which is *sine qua non* for applicability of Section 25 of the NDPS Act, conviction thereunder cannot be legally sustained. Relevant paragraphs thereof are extracted below:
- H *"8. We have considered the arguments advanced by the learned counsel. We see that Section 25 of the Act would not be applicable in the present case as there is no evidence to indicate that Bhola Singh, the appellant had either knowingly permitted the use of the vehicle for any improper purpose.*

The sine qua non for the applicability of Section 25 of the A Act is thus not made out.

9. The High Court has however drawn a presumption against the appellant under Section 35 of the Act. This provision is reproduced below:

"35. Presumption of culpable mental state.—(1) In any prosecution 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.”

10. While dealing with the question of possession in terms of Section 54 of the Act and the presumption raised under Section 35, this Court in Noor Aga v. State of Punjab (2008) 16 SCC 417 while upholding the constitutional validity of Section 35 observed that as this section imposed a heavy reverse burden on an accused, the condition for the applicability of this and other related sections would have to be spelt out on facts and it was only after the prosecution had discharged the initial burden to prove the foundational facts that Section 35 would come into play.

11. Applying the facts of the present case to the case cited above, it is apparent that the initial burden to prove that the appellant had the knowledge that the vehicle he owned was being used for transporting narcotics still lays on the prosecution, as would be clear from the word “knowingly”, and it was only after the evidence proved beyond reasonable doubt that he had the knowledge would the presumption under Section 35 arise. Section 35 also presupposes that the culpable mental state of an accused has to be proved as a

- A *fact beyond reasonable doubt and not merely when its existence is established by a preponderance of probabilities. We are of the opinion that in the absence of any evidence with regard to the mental state of the appellant no presumption under Section 35 can be drawn. The only evidences which the prosecution seeks to rely on is the Appellant's conduct in giving his residential address in Rajasthan although he was a resident of Fatehabad in Haryana and that the Appellant had taken the truck on superdari. Registration of the offending truck cannot by any stretch of imagination fasten him with the knowledge of its misuse by the driver and others. "*
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- C **(emphasis supplied)**
9. On the facts of the case in hand, it is evident that FIR No.68 dated 16.05.2000 was registered on a complaint by Sub-Inspector Ram Mehar (PW-8) who was on a petrol duty when it was found the truck no. PAT/2029 was lying turtle and bags of powder scattered. He was informed by two shopkeepers at the nearby place, namely, Ram Sarup (PW-6) and Naresh Kumar (PW-10) that the accident occurred at 9 P.M. on 15.05.2000. After the accident, the driver and the cleaner came out of the truck cabin and on enquiry by the said witnesses they informed their names as Joginder Singh s/o Jang Singh and Gurmail Singh s/o Nachhattar Singh. They claimed themselves to be the driver and cleaner of the truck. They had gone to inform the owner of the truck of the said accident but did not return. Having suspicion that the truck was carrying contraband substances, both the truck and the contraband items were taken into possession.
- F 10. Eleven prosecution witnesses were produced. Two prosecution witnesses namely Ram Sarup (PW-6) and Naresh Kumar (PW-10) could be said to be relevant for the reason that in the FIR their names were mentioned as the witnesses who had informed the police party about the names of the driver and cleaner of the truck. They denied that any incident had happened in their presence or they informed anything to the police party. Both were declared hostile. They did not even identify the driver and cleaner of the truck. PW-7 ASI Ram Sarup was posted at Police Station Agroha along with Sub-Inspector Ram Mehar (PW-8), who was the author of the FIR. Besides reiterating what is stated in the FIR in his evidence, he added that on 19.05.2000 Balwan Singh s/o Chatar Singh, resident of New Grain Mandi, Barwala stated that Joginder
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Singh s/o Jang Singh and Gurmail Singh s/o Nachhattar Singh, the driver and cleaner of the truck in question stated before him that they have brought 21 bags of Choorapost along with powder from Rajasthan on instructions of Harbhajan Singh and that their truck turned turtle at Agroha. As the police party was in search of them, they asked that they be produced before the police. The fact remains that Balwan Singh s/o Chatar Singh was not produced in evidence. The case sought to be set up by the prosecution was that the driver and the cleaner of the truck made extra judicial confession before Balwan Singh s/o Chatar Singh. Ram Mehar who is the author of the FIR appeared as PW-8. In his statement also, nothing was stated against the Appellant. He also referred to the statement of Balwan Singh s/o Chatar Singh recorded during investigation, who was not produced in evidence.

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11. The appellant in his statement recorded under Section 313 CrPC denied all the suggestions. In the entire evidence led by the prosecution, no material was produced against the Appellant to discharge initial burden to prove the foundational facts that the offence was committed with the knowledge and consent of the Appellant. It is a case in which he was not with the vehicle nor was he arrested from the spot when the accident occurred or when truck and contraband were taken into custody. He has been convicted merely on the ground that he was the registered owner of the truck. The Trial Court had put entire burden of defence on the Appellant being the registered owner of the vehicle. The Court held that the driver and cleaner of the vehicle being poor will not take risk of smuggling such huge quantity of contraband without the connivance of the owner and it was for the appellant to clear his stand. The judgment of the Trial Court was upheld by the High Court.

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12. In the case in hand, the primary error committed by the Courts below while convicting the Appellant is that the onus is sought to be shifted on him to prove his innocence without the foundational facts having been proved by the prosecution. Hence, the conviction of the Appellant cannot be legally sustained.

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13. For the aforementioned reasons, the appeal is allowed. The judgments passed by the Courts below are set aside. The bail bonds of the Appellant stand discharge.

Appeal allowed.

Nidhi Jain
(Assisted by : Mayank Batra and Rakhi, LCRAs)

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