Dehal Singh vs State Of H.P on 31 August, 2010

Equivalent citations: AIR 2010 SUPREME COURT 3594, 2010 AIR SCW 5533, AIR 2011 SC (CRIMINAL) 958, (2011) 1 BOMCR(CRI) 288, (2011) 2 MAD LJ(CRI) 381, (2011) 99 ALLINDCAS 161 (SC), (2010) 4 RECCRIR 369, (2010) 47 OCR 476, 2010 ALLMR(CRI) 4014, 2010 (9) SCC 85, (2010) 4 MH LJ (CRI) 353, (2011) 72 ALLCRIC 661, (2011) 1 ALLCRIR 595, (2011) 1 EFR 267, 2010 (3) SCC (CRI) 1139, (2010) 4 KCCR 188, (2010) 4 RAJ LW 3406, (2010) 3 SIM LC 317, (2010) 4 CURCRIR 1, (2010) 1 ALD(CRL) 983

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Bench: Chandramauli Kr. Prasad, Harjit Singh Bedi

Reportable

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1215 OF 2005

DEHAL SINGH .... APPELLANT

Versus

STATE OF HIMACHAL PRADESH .... RESPONDENT

WITH

CRIMINAL APPEAL NO. 1216 OF 2005

DINESH KUMAR .... APPELLANT

Versus

STATE OF HIMACHAL PRADESH .... RESPONDENT

JUDGMENT

Chandramauli Kr. Prasad, J.

1. Both the appeals arise out of the same judgment and as such they were heard together and are being disposed of by this common judgment.

2. The case unfolded by the prosecution and accepted by both the Courts i.e. trial and appellate Court is that on 18th October, 2002 at 9.20 A.M. PW.16, Brijesh Sood, Station House Officer, Police Station Sundernagar along with PW.8, Madan Lal, Assistant Sub-Inspector of Police and other Police personnel were present for a routine-check at Lalit Chowk at Sundernagar in the District of Mandi. Brijesh Sood received a secret information that a car bearing Registration No.HP-34- 7700 is coming from Mandi side in which two persons are carrying huge quantity of `Charas'. The aforesaid information was reduced into writing and intimation to the said effect was sent to the Additional Superintendent of Police, Mandi. At about 10 A.M., one Maruti Esteem car bearing Registration No.HP-34-7700 came from Mandi side which was stopped by PW.16, Brijesh Sood and he found two persons sitting in the car, including the driver. Brijesh Sood made enquiry from the person who was driving the car and he disclosed his name as Dehal Singh (appellant in Criminal Appeal No.1215 of 2005) and the other person sitting on the front seat by the side of the driver-seat, disclosed his name as Dinesh Kumar, resident of Goa (appellant in Criminal Appeal No.1216 of 2005). Brijesh Sood gave option in writing to the accused persons, whether they want to give personal search or search of the vehicle before a Magistrate or a Gazetted Officer. Both the appellants gave their consent for being searched by him. Accordingly PW.16, Brijesh Sood searched the car and luggage lying inside the car but nothing incriminating was found either in the car or the luggage. A mechanic was called by PW.3, Churamani, who opened the shields of the windows/doors when packets of brown colour were found concealed between the shields and doors wrapped with black and red adhesive tape. On opening the packets, `Charas' in the shape of stick and chappatis was detected. Churamani was asked by PW.16, Brijesh Sood to bring weighing scale and weight. He brought the weighing scale from the grocery shop of PW.5, Ram Lal and on weightment 27 Kg. 800 gms. of Charas was found. Two samples of 50 grams each were taken out after mixing the entire charas. It was duly sealed.

3. Appellant, Dehal Singh produced the registration certificate along with driving licence and other papers concerning the vehicle. The appellants and seized Charas along with samples were taken to the Police Station where the personal search of the appellants was conducted. The samples of the Charas and other articles recovered from the personal search of the appellants were deposited with PW.8, Additional Malkhana Head Constable, Rajinder Kumar for safe custody. First Information Report was thereafter drawn and a special report sent to the Superintendent of Police. PW.8, Rajinder Kumar sent one parcel of the sample to the Chemical Examiner, who in his report opined that it contained Charas. After usual investigation charge-sheet was submitted against the two appellants and ultimately they were put on trial. They pleaded not guilty and claimed to be tried.

4. The prosecution in support of its case has all together examined 16 witnesses besides various other documentary evidence were also brought on record. In their statements, under Section 313 of the Code of Criminal Procedure appellants pleaded false implication and both of them have stated that the appellant, Dinesh Kumar had taken lift in the car from Kullu to Delhi.

5. On appreciation of the evidence the trial court held both the appellants guilty under Section 20 of Narcotic Drugs and Psychotropic Substances Act, 1985 and sentenced them to undergo rigorous imprisonment for a period of 10 years each and to pay a fine of Rs.1,00,000/- each and in default of payment of fine to suffer rigorous imprisonment for a further period of four years.

6. Appellants preferred separate appeals against the judgment and order of conviction and sentence and the High Court of Himachal Pradesh by its common judgment dated 18th October, 2004 passed in Criminal Appeal Nos. 600 and 603 of 2003 dismissed both the appeals.

7. Both the appellants assail the aforesaid order by grant of special leave to appeal.

8. Mr. Nagendra Rai, learned Senior Counsel appears on behalf of the appellant in Criminal Appeal No.1215 of 2005, whereas appellant in Criminal Appeal No.1216 of 2005 is represented by Mr. P.S. Mishra, learned Senior Counsel.

9. Mr. Rai submits that according to the prosecution two samples of 50 gms. each were taken and sent to the Forensic Science Laboratory for examination, but net weight of the sample received in the laboratory was 65.5606 gms. This discrepancy in weight of sample, in the submission of Mr. Rai, casts serious doubt to the credibility of the prosecution case and this is enough to reject the case of the prosecution. Credibility of the recovery proceedings, in his submission is eroded if the quantity found by the analyst is more than the quantity sealed and sent to him. He points out that taking into consideration the discrepancy in the weight of the samples at the time when it was taken and in the laboratory, this Court in the case of Noor Aga vs. State of Punjab and another, 2008(16) SCC 417, held the case of the prosecution to be not trustworthy. Our attention has been drawn to paragraph 97 of the judgment which reads as follows:

> "97. The fate of these samples is not disputed. Although two of them were kept in the malkhana along with the bulk, but were not produced. No explanation has been offered in this regard. So far as the third sample, which allegedly was sent to the Central Forensic Science Laboratory, New Delhi is concerned, it stands admitted that the discrepancies in the documentary evidence available have appeared before the court, namely:
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> (i) While original weight of the sample was 5 gm, as evidenced by Exts. PB, PC and the letter accompanying Ext. PH, the weight of the sample in the laboratory was recorded as 8.7 gm.
>
> (ii) Initially, the colour of the sample as recorded was brown, but as per the chemical-examination report, the colour of powder was recorded as white."

(underlining ours)

10. Reliance has also been placed on a decision of this Court in the case of Rajesh Jagdamba Avasthi vs. State of Goa, 2005(9) SCC 773, and our attention has been drawn to paragraph 14 of the judgment which reads as follows:

> "14. We do not find it possible to uphold this finding of the High Court. The appellant was charged of having been found in possession of charas weighing 180.70 gm. The charas recovered from him was packed and sealed in two envelopes. When the said

> envelopes were opened in the laboratory by the Junior Scientific Officer, PW 1, he found the quantity to be different. While in one envelope the difference was only minimal, in the other the difference in weight was significant. The High Court itself found that it could not be described as a mere minor discrepancy. Learned counsel rightly submitted before us that the High Court was not justified in upholding the conviction of the appellant on the basis of what was recovered only from envelope A ignoring the quantity of charas found in envelope B. This is because there was only one search and seizure, and whatever was recovered from the appellant was packed in two envelopes. The credibility of the recovery proceeding is considerably eroded if it is found that the quantity actually found by PW 1 was less than the quantity sealed and sent to him. As he rightly emphasised, the question was not how much was seized, but whether there was an actual seizure, and whether what was seized was really sent for chemical analysis to PW 1. The prosecution has not been able to explain this discrepancy and, therefore, it renders the case of the prosecution doubtful."

11. We do not find any substance in the submission of Mr. Rai and the decisions relied on are clearly distinguishable. The vehicle was intercepted and searched on a highway and it has come in the evidence of PW.16, Brijesh Sood that he had sent PW.3, Churamani to bring weighing scale and weight from the grocery shop of PW.5, Ram Lal. From the evidence of PW.3, Churamani and PW.5, Ram Lal, the grocery shop owner it is evident that the weighing scale and the weight came from the grocery shop. It is common knowledge that weighing scale and weight kept in the grocery-shop are not of such standard which can weigh articles with great accuracy and therefore difference of 15 gms. in weight, in the facts and circumstances of this case, is not of much significance. Sample was taken by a common weighing scale and weight found in a grocery shop, whereas the weight in the laboratory recorded with precision scale. This would be evident from the fact that the weight of the sample recorded in the laboratory was 65.5606 gms. In this background, small difference in weight loses its significance, when one finds no infirmity in other part of the prosecution story.

12. Now referring to the decision of this Court in the case of Noor Aga (supra) the difference in the weight at the time of taking samples and at the laboratory was considered material as in the said case the sample was taken by the Custom Officials at the Airport and the Court came to the conclusion that weight was taken from a precision scale. Further it is not only the discrepancy in the weight which led this Court to reject the case of the prosecution but had taken into consideration several other discrepancies to come to the said conclusion. This shall be evident from paragraph 98 of the judgment, which reads as follows:

> "98. We are not oblivious of the fact that a slight difference in the weight of the sample may not be held to be so crucial as to disregard the entire prosecution case as ordinarily an officer in a public place would not be carrying a good scale with him. Here, however, the scenario is different. The place of seizure was an airport. The officers carrying out the search and seizure were from the Customs Department. They must be having good scales with them as a marginal increase or decrease of quantity of imported articles whether contraband or otherwise may make a huge difference

under the Customs Act."

13. Further in the said case it has been observed that discrepancy in weight individually may not be fatal. It is apt to reproduce paragraph 119 (3) and (4) of the said judgment in this regard:

119. Our aforementioned findings may be summarised as follows:

1. xxx xxx xxx xxx

2. xxx xxx xxx xxx

3. There are a large number of discrepancies in the treatment and disposal of the physical evidence.

There are contradictions in the statements of official witnesses. Non-examination of independent witnesses and the nature of confession and the circumstances of the recording of such confession do not lead to the conclusion of the appellant's guilt.

4. Finding on the discrepancies, although if individually examined, may not be fatal to the case of the prosecution but if cumulative view of the scenario is taken, the prosecution's case must be held to be lacking in credibility.

5. xxx xxx xxx xxx

6. xxx xxx xxx xxx"

14. Now, we proceed to consider the decision of this Court in the case of Rajesh Jagdamba Awasthi (supra) relied on by the appellants and find the same clearly distinguishable. In the said case on fact the Court found the recovery proceeding to be suspicious and further there was every possibility of the seized substance tampered. Those infirmities led this Court to doubt the truthfulness of the prosecution case. This is evident from paragraph 15 of the judgment which reads as follows:

"15. This is not all. We find from the evidence of PW 4 that he had taken the seal from PSI Thorat and after preparing the seizure report, panchnama, etc. he carried both the packets to the police station and handed over the packets as well as the seal to Inspector Yadav. According to him on the next day, he took back the packets from the police station and sent them to PW 3 Manohar Joshi, Scientific Assistant in the Crime Branch, who forwarded the same to PW 1 for chemical analysis. In these circumstances, there is justification for the argument that since the seal as well as the packets were in the custody of the same person, there was every possibility of the seized substance being tampered with, and that is the only hypothesis on which the discrepancy in weight can be explained. The least that can be said in the facts of the

case is that there is serious doubt about the truthfulness of the prosecution case."

15. Mr. Rai, then submits that though option was given to the appellant to be searched before a Gazetted Officer or nearest Magistrate but they were not apprised of their right to be searched in their presence and hence the procedure followed does not fulfill the requirement of Section 50 of Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the "Act'"). He emphasized that accused is not to be given an option to be searched in the presence of the Gazetted Officer or Magistrate but to be apprised of his right to be searched in their presence. According to him conveying option and apprising the right are distinct. According to him, this does not satisfy the mandate of Section 50 of the Act and once its violation is established the search and seizure is rendered illegal and on this ground alone appellants' conviction is vitiated. He points out that the Charas was not recovered from the possession of the appellants but from the vehicle, but nonetheless appellants were also searched and thus it was obligatory to follow the provisions of Section 50 of the Act. He finds support to the aforesaid submission from the decision of this Court in the case of Dilip and another vs. State of M.P., 2007 (1) SCC 450, and our attention has been drawn to paragraph 16 of the judgment which reads as follows:

"16.In this case, the provisions of Section 50 might not have been required to be complied with so far as the search of scooter is concerned, but keeping in view the fact that the person of the appellants was also searched, it was obligatory on the part of PW 10 to comply with the said provisions. It was not done."

16. This submission of Mr. Rai does not commend us at all. In the present case the vehicle was searched and the Charas was recovered from the vehicle and persons of the appellants were not searched. As the recovery has been from the vehicle the provision of Section 50 of the Act, in our opinion, was not required to be complied with. It is relevant here to mention that appellants were not searched at the place where the vehicle was intercepted and searched but after they were arrested, and brought to the Police Station, their search was made to find out the articles possessed by them before lodging them in lock-up.

17. Not only this, the prosecution has also claimed compliance of Section 50 of the Act. Section 50(1) of the Act, which is relevant for the purpose, 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 42 or Section 43, he shall, if such person as 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.
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> xxx xxx xxx xxx
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> 18. From a plain reading of the aforesaid provision it is evident that it comes into play only when search of a person other than vehicle etc. is taken. Further the authorized officer is to apprise person about to be searched to be taken to the nearest Gazetted

> Officer or to the Magistrate, if the person about to be searched so requires. Such an option was given to the appellants and, in our opinion, it is nothing but apprising them of their right. Option to choose is given to an accused when he has right to choose. It is communication of right either to accept or reject. Therefore, in our opinion giving the appellants option to be searched satisfied the requirement of Section 50 of the Act. In the case of Dilip (supra) relied on by the appellants the question which fell for consideration was as to whether Section 50 of the Act if at all required to be complied with and in the background of the fact that before search and seizure of the contraband from the scooter, personal search of the accused was carried out, this Court held that it was so required. This would be evident from paragraph 12 of the judgment which reads as follows:
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> "12.Before seizure of the contraband from the scooter, personal search of the appellants had been carried out and, admittedly, even at that time the provisions of Section 50 of the Act, although required in law, had not been complied with."

19. In the present case, as observed earlier, the vehicle was searched at the first instance and therefore there was no requirement at all to inform the appellants their right to be searched in the presence of the Gazetted Officer or Magistrate. Not only this, we have found that by giving option the appellants were apprised of their right and therefore the provision of Section 50 of the Act was fully complied with.

20. Mr. P.S. Mishra while adopting the submission advanced by Mr. Rai, has made an additional submission. He contends that appellant Dinesh Kumar cannot be held to be in conscious possession of the Charas as he had taken lift in the vehicle and he was not aware of the fact that Charas was being transported in the vehicle. In this connection he had referred to the statements of the appellants recorded under Section 313 of the Code of Criminal Procedure. Both of them had specifically pleaded that this appellant had taken lift in the car. According to Mr. Mishra if this explanation is accepted, this appellant deserves to be acquitted.

21. We do not find any substance in this submission of Mr. Mishra. Statement under Section 313 of the Code of Criminal Procedure is taken into consideration to appreciate the truthfullness or otherwise of the case of prosecution and it is not an evidence. Statement of an accused under Section 313 of the Code of Criminal Procedure is recorded without administering oath and, therefore, said statement cannot be treated as evidence within the meaning of Section 3 of the Evidence Act. Appellants have not chosen to examine any other witness to support this plea and in case none was available they were free to examine themselves in terms of Section 315 of the Code of Criminal Procedure which, inter alia, provides that a person accused of an offence is a competent witness of the defence and may give evidence on oath in disproof of the charges. There is reason not to treat the statement under Section 313 of the Code of Criminal Procedure as evidence as the accused cannot be cross-examined, with reference to those statements. However, when an accused appears as witness in defence to disproof the charge, his version can be tested by his cross-examination. Therefore, in our opinion the plea of the appellant Dinesh Kumar that he had taken lift in the car is not fit to be accepted only on the basis of the statements of the appellants under Section 313 of the Code of

Criminal Procedure.

22. Both the appellants have been found travelling in the car from which Charas was recovered and, therefore, they were in possession thereof. They were knowing each other. They were not travelling in a public transport vehicle. Distinction has to be made between accused travelling by public transport vehicle and private vehicle. It needs no emphasis that to bring the offence within the mischief of Section 20 of the Act possession has to be conscious possession. Section 35 of the Act recognizes that once possession is established the Court can presume that the accused had a culpable mental state, meaning thereby conscious possession. Further the person who claims that he was not in conscious possession has to establish it. Presumption of conscious possession is further available under Section 54 of the Act, which provides that accused may be presumed to have committed the offence unless he accounts for satisfactorily the possession of contraband. The view which we have taken finds support from a judgment of this Court in the case of Madan Lal and another vs. State of H.P., 2003 (7) SCC 465, 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.
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> 27. 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."

23. Thus we do not find any merit in these appeals and they are dismissed accordingly.

.....J. (HARJIT SINGH BEDI) .....J. (CHANDRAMAULI KR. PRASAD) New Delhi, August 31, 2010.