Before Rameshwar Singh Malik, J.

H.C. SUKHWINDER SINGH—*Petitioner*

versus

UNION OF INDIA AND OTHERS—*Respondents*

CRWP No.322 of 2009

September 02, 2015

Constitution of India, 1950 — Art. 226 — Indian Penal Code, 1860 — S. 212 — Petitioner recruited as Head Constable in BSF in 1984 on the basis of his sports credentials — Charge-sheeted in 1988 on the ground that he harboured terrorists — General Security Force Court sentenced him to three years imprisonment and ordered dismissal from service — Inspector General, BSF dismissed mercy petition — Thereafter, Director General, BSF dismissed petition against conviction and sentence — It was argued before High Court that the alleged confessional statement of the petitioner was illegally recorded and infact was denied — Further argued that the persons allegedly harboured were not declared terrorists by any Court — High Court agreed with the above contention and further found that petitioner had no knowledge that the persons allegedly harboured were terrorists and nor was there such an allegation in the chargesheet — Court held that no offence u/s 212 IPC made out, and moreover, orders of authorities cryptic and non-speaking — Conviction of the petitioner and his dismissal from service set-aside — writ petition allowed.

Held that a bare reading of the provisions of law contained in Section 212 IPC would show that the accused must have the knowledge or has reason to believe that the person who was being harboured by him, has committed an offence. Thus, it is not only the *mens rea* but knowledge of the accused, is also equally important. It was not even the charge against the petitioner that he had the knowledge or had reason to believe that above said Malkiat Singh @ Bapu, Gurjant Singh and Kala, as a matter of fact, had committed an offence. Further, petitioner has clarified each and every thing in this regard in his statement (Annexure P-9), that he had no connection with the above said persons namely Malkiat Singh etc.

(Para 11)

Further held that petitioner completely denied his alleged confessional statement (Annexure P-8). In such a situation, could the alleged confessional statement been made the basis of conviction of the petitioner, particularly when petitioner was not having any knowledge whether above said Malkiat Singh etc. were the offenders. The answer is and has to be an emphatic 'No'. It is so said because no Court of law has ever held abovesaid Malkiat Singh etc. as terrorists. Having said that, this Court feels no hesitation to conclude that impugned orders have resulted in serious miscarriage of justice and the same cannot be sustained.

(Para 12)

P.S. Hundal, Senior Advocate with
Jashandeep Singh, Advocate *for the petitioner.*

Rajiv Sharma, Advocate for the respondent-UOI.

RAMESHWAR SINGH MALIK, J.

(1) Feeling aggrieved against the impugned order of sentence dated 23.01.1989 (Annexure P-5), order dated 06.02.1989 passed by respondent No.3 (Annexure P-6) and order dated 18.05.1989 (Annexure P-7) passed by respondent No.2, whereby petitioner was sentenced to undergo rigorous imprisonment for three years and was dismissed from service, he has approached this Court by way of instant writ petition, for setting aside the impugned orders.

(2) Initially, petitioner filed Civil Writ Petition No.11790 of 1989 which was admitted for regular hearing vide order dated 15.09.1989 passed by a Division Bench of this Court. Reply dated 18.12.1989 was filed on behalf of the respondents. Later on, vide order dated 05.03.2009, the above said Civil Writ Petition filed by the petitioner was ordered to be treated as Criminal Writ Petition No.322 of 2009.

(3) Learned Senior Counsel for the petitioner, while referring to Annexures P-1, P-2 and P-3, submits that petitioner was an athlete of national level. However, the charge was levelled against the petitioner vide charge-sheet dated 18.12.1988 (Annexure P-4), that he harboured terrorists Malkiat Singh @ Bapu, Gurjant Singh and Kala at his residence. Petitioner joined BSF in the rank of Head Constable as a sportsman w.e.f. 01.01.1984 and he was attached with the Headquarter, Jalandhar. At the relevant time, he was attached with 87 Bn. B.S.F., Jalandhar. He further submits that petitioner was tried by General Security Force Court and was sentenced to three years R.I., besides he

was dismissed from service vide impugned order dated 23.01.1989 (Annexure P-5). Petitioner filed his mercy petition which was rejected vide order dated 06.02.1989 (Annexure P-6) passed by Inspector General of Border Security Force, Punjab, Jalandhar-respondent No.3.

(4) Thereafter, impugned order dated 18.05.1989 (Annexure P-7) was passed by the Director General, Border Security Force, dismissing his petition against conviction and sentence. Learned Senior Counsel for the petitioner would next contend that the alleged confessional statement (Annexure P-8) of the petitioner was illegally recorded which was clarified by him in his statement (Annexure P-9). While referring to Section 212 of the Indian Penal Code ('IPC' for short), learned Senior Counsel for the petitioner contended that petitioner never intended or, as a matter of fact, committed any such offence. No offence under Section 212 IPC was made out against the petitioner. In support of his contentions, learned Senior Counsel for the petitioner places reliance on the following judgments: -

1. ***Ram Raj Chaudhury and another*** *versus* ***Emperor***[1]

2. ***Kuriakose Chacko*** *versus* ***State***[2] ***(Travancore-Cochin High Court)***

(5) He concluded by submitting that since no Court of law ever held that Gurjant Singh etc. were terrorists, as a matter of fact, it could not have been presumed by the respondents against the petitioner, while passing the impugned orders. He prays for setting aside the impugned orders (Annexure P-5, P-6 and P-7), by allowing the present petition.

(6) On the other hand, learned counsel for the respondent-UOI submits that proceedings were taken against the petitioner, strictly in accordance with law. Procedure was rightly followed. Petitioner was granted an opportunity to defend himself and nothing more was required, before passing the impugned orders. He prays for dismissal of the present petition.

(7) Having heard the learned counsel for the parties, after careful perusal of the record of the case and giving thoughtful consideration to the contentions raised, this Court is of the considered opinion that present one has been found to be a fit case warranting interference at the hands of this Court, while exercising its inherent

[1] AIR 1946 Patna 74
[2] 52 Cr. L.J. 1951 470

jurisdiction under Section 482 Cr.P.C., for the following more than one reasons.

(8) The impugned order dated 23.01.1989 (Annexure P-5), which is a short one, reads as under: -

"The Court is closed for the consideration of the sentence.

Sentence

The Court sentence the accused No.84555004 Head Constable Sukhwinder Singh of 40 Bn BSF attached with 87 Bn BSF to suffer three (3) years Rigorous Imprisonment and dismissal from service.

Announcement of sentence

The Court being reopened, the accused is brought before it. Sentence is announced in open Court as being subject to confirmation.

Signed at HQ 87 Bn BSF Fazilka this 23rd day of January, 1989.

Law Officer	Presiding Officer
Sd/-	Sd/-
(D.S. Ahluwalia)`	(V.K. Tagalay)
JAD (Law)	Commandant
HQ DG BSF	90 Bn BSF

I confirm the finding and sentence of the Court. I direct that the sentence of RI for 3 years shall be carried out by confinement in civil prison.

Sd/-
Inspector General
BSF Punjab
Confirming Authority."

Place: Jalandhar Cantt
Dated: 03, Feb., 1989

(9) Petitioner filed his appropriate petition against the abovesaid impugned order, in view of the relevant provisions of law but the same was also rejected by respondent No.2, by passing the following order dated 18.05.1989 (Annexure P-7): -

"No.6/37/89-Pet/BSF/CLO (D&L)/1674-80
Government of India
Ministry of Home Affairs
Directorate General Border Security Force
(Disc & Litigation Branch)

DGO Complex Block No.10
Lodhi Road, New Delhi-3
Dated the 18th May 1989

To

Ex. HC Sukhwinder Singh (Convict)
No.84555004 of 40 Bn BSF
Attached with 87 Bn BSF
(Through Supdt. Central Jail Ferozepur)

Sub: Petition

It is to inform you that your petition dated Nil against conviction and sentence awarded by the General Security Force Court, was duly considered by the Director General, Border Security Force and rejected being devoid of merit.

Sd/-
(K.K. Sharma)
Law Officer Grade-I
For and on behalf of
Director General
Border Security Force

Copy forwarded to: -

1) HQ Punjab Frontier, BSF

2) Sector HQ Abohar

3) Comdt 40 Bn BSF

4) Comdt 87 Bn BSF

5) Sudpt. Central Jail Ferozepur- w.r.t. to his letter No.1526 dated 1.3.1989. It is requested the letter mean for Ex.HC Sukhwinder Singh (Convict) may please be handed over to him under proper receipt and the same forwarded to this office for record."

(10) A bare combined reading of the abovesaid impugned orders would show that nothing much was discussed, so as to indicate even remotely as to how the guilt was established against the petitioner, for the offence of harbouring the alleged terrorists. The only charge against the petitioner was that of harbouring the alleged terrorists namely Malkiat Singh @ Bapu, Gurjant Singh and Kala. Offence of harbouring an offender is punishable under Section 212 IPC and the same reads as under: -

"**Section 212. Harbouring offender**.—Whenever an offence has been committed, whoever harbours or conceals a person whom he knows or has reason to believe to be the offender, with the intention of screening him from legal punishment;

if a capital offence.—shall, if the offence is punishable with death, be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine;

if punishable with imprisonment for life, or with imprisonment.—and if the offence is punishable with 1[imprisonment for life], or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;

and if the offence is punishable with imprisonment which may extend to one year, and not to ten years, shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of imprisonment provided for the offence, or with fine, or with both.

2["Offence" in this section includes any act committed at any place out of 3[India], which, if committed in 3[India], would be punishable under any of the following sections, namely, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459 and 460; and every such act shall, for the purposes of this section, be deemed to be punishable as if the accused person had been guilty of it in 3[India].]

Exception.- This provision shall not extend to any case in which the harbour or concealment is by the husband or wife of the offender."

The illustration to Section 212 IPC which is also relevant here, reads as under: -

A, knowing that B has committed dacoity, knowingly conceals B in order to screen him from legal punishment. Here, as B is liable to 1[imprisonment for life], A is liable to

> imprisonment of either description for a term not exceeding three years, and is also liable to fine."

(11) A bare reading of the provisions of law contained in Section 212 IPC would show that the accused must have the knowledge or has reason to believe that the person who was being harboured by him, has committed an offence. Thus, it is not only the *mens rea* but knowledge of the accused, is also equally important. It was not even the charge against the petitioner that he had the knowledge or had reason to believe that abovesaid Malkiat Singh @ Bapu, Gurjant Singh and Kala, as a matter of fact, had committed an offence. Further, petitioner has clarified each and every thing in this regard in his statement (Annexure P-9), that he had no connection with the abovesaid persons namely Malkiat Singh etc.

(12) Petitioner completely denied his alleged confessional statement (Annexure P-8). In such a situation, could the alleged confessional statement been made the basis of conviction of the petitioner, particularly when petitioner was not having any knowledge whether abovesaid Malkiat Singh etc. were the offenders. The answer is and has to be an emphatic 'No'. It is so said because no Court of law has ever held abovesaid Malkiat Singh etc. as terrorists. Having said that, this Court feels no hesitation to conclude that impugned orders have resulted in serious miscarriage of justice and the same cannot be sustained.

(13) The above said view taken by this Court also finds support from the Division Bench judgment in **Ram Raj Chaudhury**'s case (supra) and the same reads as under: -

> "Fazl Ali C.J.- The petitioners have been convicted under Section 212 Penal Code, and sentenced to one year's rigorous imprisonment on a charge of harbouring one Prithvi Ahir, who is said to have been concerned in a serious dacoity committed in July 1942, with the intention of screening him from legal punishment. From the judgments of the Courts below, it appears that the Sub-Inspector in charge of Nawanagar police-station, having received confidential information that Prithvi Ahir was concealing himself in village Barasar, proceeded to that village, and at about 2 A.M. he found Prithvi Ahir and three others including the two petitioners sleeping in a marai in front of the house of the accused. According to the prosecution, the marai belonged to the petitioners, and,

though the evidence on the point is not conclusive, it may for the purpose of deciding this application be assumed that the petitioners were its owners. The crucial question in this case is whether the petitioners knew or had reason to believe that Prithvi had committed an offence of dacoity. Neither of the Courts below has referred to any direct evidence on this point, but they have merely inferred from certain circumstances that the petitioners must have known that Prithvi was concerned in the alleged dacoity. The learned Sessions Judge in dealing with this matter observes:

> "This man Prithvi, it appears, belongs to Shahpur jurisdiction, but it can hardly be supposed from the place and circumstances in which he was arrested that the accused were unaware of his identity or antecedents. The evidence is that both the appellants were found sleeping along with Prithvi and Joga Kandu in the same marai. It is inconceivable that Prithvi would thus have been sheltered by the accused in their marai if he was merely a stranger to them; and there can be no doubt, in my opinion, in all these circumstances that the appellants knew that he was a proclaimed absconder and had knowingly harboured him in their marai."

The learned Sessions Judge had put the prosecution case at its highest but, in my opinion, the circumstances referred to by him do not conclusively show that the petitioners knew, or had reason to believe that Prithvi had committed a dacoity. It has been pointed out in a number of cases that Section 212 applies to the harbouring of persons who have actually committed an offence, and it does not apply to the harbouring of persons not being criminals, who merely abscond to avoid or delay a judicial investigation. There is really no clear evidence to show that the petitioners knew that Prithvi was a proclaimed offender. But even if they did, it does not follow that they knew that he had in fact committed an offence of dacoity. The point which arises in this case arose in another case in this Court, which related to the conviction of one Jang Bahadur; and Meredith J. dealt with it in this way:

> "There is another aspect of the case which has been lost sight of by the Courts below. The prosecution was premature. Section 212 says nothing about the harbouring of an absconder or an accused person. It renders punishable only the harbouring of a person when it is known or there is reason to believe that he is the offender. The first thing to be proved in a case under this Section is that an offence has been committed by the person harboured. Jang Bahadur's trial, however, has not yet been concluded. Until actually convicted, he is, like every one else, entitled to the presumption that he is innocent. Only the Court can say in due course whether he is actually an offender or not. The Court has not yet said that; and until the Court has pronounced upon the fact, a prosecution for harbouring him is clearly premature. The proper course would have been to hold up this case under Section 212 until the conclusion of Jang Bahadur's trial, when it might have proceeded in the event of his conviction, but obviously not otherwise."
>
> I am clearly of the opinion that this conviction cannot be supported, and I would, therefore, allow this application and set aside the conviction and sentence of the petitioners."

(14) No contrary judgment was cited by learned counsel for the respondents. Further, during the course of hearing, when a pointed question was put to learned counsel for the respondents that whether any Court of law has ever held abovesaid Malkiat Singh etc. as terrorists, he had no answer and rightly so, it being a matter of record. In fact, in this regard there is not even a passing reference in the reply filed on behalf of the respondents. Further, there is nothing on record to show that petitioner, as a matter of fact, was having any knowledge that Malkiat Singh etc. were offenders, which was the pre-requisite for making out a case against the petitioner under Section 212 IPC. It was not even part of the charge-sheet (Annexure P-4) against the petitioner. In this view of the matter, it can be safely concluded that the prosecution has miserably failed to make out any case against the petitioner for the offence under Section 212 IPC. Thus, the conviction and sentence of the petitioner, by way of impugned orders cannot be sustained.

(15) Under somewhat similar circumstances, the Hon'ble Supreme Court in para 18 of its judgment in the case of ***Sanjiv Kumar*** *versus* ***State of Himachal Pradesh***[3] made the following observations which aptly apply to the present case and the same read as under: -

> "So far as accused Lekh Raj is concerned, we do not find an iota of material to indicate that he knew about the commission of offence by accused Sanjiv Kumar when he took him on his scooter and, therefore, the conviction of accused Lekh Raj of the offence under Section 212 IPC is wholly unsustainable in law. It may be stated that to attract the provisions of Section 212 IPC it is necessary to establish commission of an offence, harbouring or concealing the person known or believed to be the offender, and such concealment must be with the intention of screening him from legal punishment. The evidence adduced by the prosecution in this regard is wholly insufficient to establish either of the aforesaid ingredients, though all the ingredients are necessary to be proved. In this view of the matter the conviction of accused Lekh Raj for the offence under Section 212 is unsustainable and, we accordingly set aside the conviction and sentence and acquit him of the charge."

(16) Further, impugned order Annexure P-5 is the order of sentence. There is not even a passing reference as to how the petitioner was earlier found guilty and accordingly he was convicted. Nobody can be treated to be a convict until and unless the prosecution follows the procedure known to law, because it is the question of liberty of the accused. It is the philosophy of our criminal jurisprudence that hundreds of guilty may be acquitted but not even one innocent person should be convicted. However, in the present case it seems that respondent authorities have completely failed to follow this golden rule of law, while awarding sentence to the petitioner to undergo three years R.I. and also dismissal from service, therefore, the impugned orders passed against the petitioner, have resulted in serious miscarriage of justice and the same cannot be sustained.

(17) No other argument was raised.

(18) Considering the peculiar facts and circumstances of the case noted above, coupled with the reasons aforementioned, this Court is of the considered view that present petition deserves to be accepted.

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[3] 1999 (2) SCC 288

Consequently, the impugned order of sentence dated 23.01.1989 (Annexure P-5), order dated 06.02.1989 passed by respondent No.3 (Annexure P-6) and order dated 18.05.1989 (Annexure P-7) passed by respondent No.2, are hereby set aside. Consequences would follow and law will take its own course.

(19) Resultantly, with the abovesaid observations made, present criminal writ petition stands allowed, however, with no order as to costs.

P.S. Bajwa

Before Gurmit Ram, J.

AVTAR SINGH ALIAS TARI — *Petitioner*

versus

STATE OF PUNJAB — *Respondent*

CRA-S No.1473-SB-2005

September 02, 2015

Narcotic Drugs and Psychotropic Substances Act, 1985 — S.15 (c) — High Court acquitted the accused against conviction order passed by Special Court, Patiala on the ground that accused was not apprehended at the spot — Accused had no connection with car from which recovery of poppy husk was made during naka — Owner of car not part of investigation — Independent witness — Member Panchayat at time of naka not examined during trial — Appeal allowed by giving the benefit of doubt and acquitted of charge under Section 15 (c) of NDPS Act.

Held that in this case, it was an admitted fact that appellant was not apprehended at the spot. He slipped away from the spot after stopping his vehicle at some distance from the *naka* place by telling HC Amrik Singh that his vehicle had gone out of order. Then it was also case of prosecution that appellant was identified by HC Amrik Singh only. This HC Amrik Singh (PW3) in his cross-examination stated that he himself never arrested appellant Avtar Singh in any case. He did not know how many brothers the appellant has. He had no dealing with the appellant. The lights of the car in question were on when it was at the distance of 20 paces from the place of *naka*. So, in the light of this cross-examination of PW3, it is difficult to say that this witness had been in a position to identify the appellant at the relevant time since he