
(2008) 08 P&H CK 0015

High Court Of Punjab And Haryana At Chandigarh

Case No: Criminal Appeal No. 940-SB of 2001

Joga Singh and another

APPELLANT

Vs

State of Punjab

RESPONDENT

Date of Decision: Aug. 20, 2008

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 15, 35, 42, 54

Citation: (2010) 1 RCR(Criminal) 467

Hon'ble Judges: Harbans Lal, J

Bench: Single Bench

Advocate: K.S. Kahlon, for the Appellant; C.S. Brar, D.A.G., Punjab, for the Respondent

Final Decision: Dismissed

Judgement

Harbans Lal, J.

This appeal is directed against the judgment dated 26.7.2001/order of sentence dated 27.7.2001 passed by the Court of

learned Special Judge, Ferozepur, whereby he convicted and sentenced Joga Singh as well as Swaran Singh alias Tota Singh, both accused to

undergo rigorous imprisonment for 10 years and to pay a fine of Rs. 1,00,000/- each and in default of payment of the same, the defaulter to further

undergo rigorous imprisonment for one year u/s 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for brevity, `the Act").

As set up by the prosecution, on 18.4.1993 at about 10.30 P.M., Inspector Balkar Singh SHO of Police Station Dharamkot, accompanied by

other police officials set up Naka (picket) on the bank of Sutlej river in the area of village Chaktarewala. On 19.4.1993 around 4.00 A.M. a

tractor trolley came from eastern side which was signalled to stop with the help of torch-light. The same was being driven by accused Joga Singh,

whereas the accused Swaran Singh was sitting on the bags loaded in the trolley. The SHO suspected the contents of the bag to be of some

contraband. He informed the accused of their right to have search of the same in the presence of a Gazetted Officer or a Magistrate. The accused

expressed their faith in the SHO. On search of the trolley, 24 bags containing poppy husk were recovered. 250 grams poppy husk was drawn

from each bag to serve as sample and converted into a parcel. The residue of each bag when weighed came to 35 Kgs. which was also converted

into a parcel. All the parcels were sealed with the seal BS. The sample seal was also prepared. The seal after use was handed over to ASI Baldev

Singh. All the parcels were seized vide recovery memo. The tractor-trolley was taken into possession vide separate recovery memo. The tractor

bore registration No. PAF-849. The SHO prepared the rough site plan showing the place of recovery, sent Ruqa to the Police Station, where on

its basis, formal F.I.R was recorded and on return to the Police Station, he retained the case property in his own custody in the Malkhana under

his own supervision. On receipt of Chemical Examiner's report and after completion of investigation, the charge sheet was laid in the court for trial

of both the accused. They were charged u/s 15 of the Act, to which they did not plead guilty and claimed trial.

2. The prosecution examined 6 witnesses and closed its evidence.

3. When examined u/s 313 of the Code of Criminal Procedure, both the accused denied all the incriminating circumstances appearing in the

prosecution evidence against them. In their defence, they examined DW-1 Balwant Singh as well as DW-2 Jagir Singh.

4. After hearing the learned Additional Public Prosecutor for the State, the learned defence counsel and examining the evidence on record, the

learned trial Court convicted and sentenced both the accused as noticed at the outset. Feeling aggrieved with their conviction/sentence, they have preferred this appeal.

5. I have heard the learned counsel for the parties, besides perusing the record with due care and circumspection.

6. Mr. K.S. Kahlon, Advocate, appearing on behalf of the appellants, urged with great eloquence that as is borne out from the prosecution

evidence, no independent witness was made to join search and seizure. The prosecution case rests merely on the statement of police officials. They

being highly interested in the success of the case, no implicit reliance should be placed on their evidence.

7. To tide over this submission, Mr. C.S. Brar, Deputy Advocate General, Punjab, appearing for the State, canvassed at the bar that it being night

time, it was very difficult to join independent witness. This contention merits acceptance.

8. There is no gain saying the fact that the recovery was effected in the wee hours and that being so, it was beyond the control of the Investigator

to associate some public man in the investigation. There is nothing on the record to show that the prosecution witnesses in any manner were biased

against the appellants or had a malice to falsely implicate them. It is a case of heavy recovery. There was no reason for the SHO to plant such a

huge quantity of contraband upon the appellants. By now, it is well settled that the evidence of police officials is as good as of others and it has to

be weighed in the same scales as of others. It would be profitable to refer to the observations rendered by the Apex Court in re Aher Raja Khima

Vs. The State of Saurashtra, . Of course, when the prosecution case hinges entirely upon the evidence of official witnesses, their evidence has to

be scrutinized with due care and caution. Here in this case, Mr. Kahlon could not refer to any material infirmity from their statements as would

require rejection of the same. So, this contention being bereft of any merit is turned down.

9. It is further argued by Mr. Kahlon that as emanates from the evidence of Amarjit Singh, Registration Clerk, Office of the District Transport

Officer, PW-1, the tractor in question is registered in the name of Tehal Singh son of Punjab Singh, resident of Kamalke as per registration

certificate PL, but he has not been joined in the investigation and, thus, the prosecution case is rendered highly doubtful. Mr. Kahlon further argued

that the recovery having been allegedly effected between sun-set and sun-rise, it was incumbent upon the Investigator to have observed the

provisions of section 42 of the Act, but as follows from the record, he did not adhere to these mandatory provisions

10. Mr. Brar countered these arguments by urging that this being a case of chance recovery, it was not imperative upon the Investigating Officer to

have recourse to the provisions of Section 42 *ibid*. There is substance in this submission.

11. As emanates from the evidence of prosecution witnesses, it was a case of chance recovery in a public place effected during routine checking.

In re: Ram Kumar v. Central Bureau of Narcotics, 2008 (3) RCR (Criminal) 600 : 2008 (4) RAJ 341, the Apex Court observed that ""it is to be

noted that this is a case of a chance recovery and Section 42 of the Act has no application."" In view of these observations, the Investigator was not

required to observe the provisions of Section 42 *ibid*.

12. Last of all, Mr. Kahlon had been emphatic that the conscious possession qua the poppy husk bags of either appellant having not been

established by the prosecution, the trial Court was not justified in recording conviction.

13. Mr. Brar agitated at the bar that the presumption arising u/s 35 as well as 54 of the Act being available in favour of the prosecution, the

conscious possession of the appellants is established.

14. In re: Madan Lal and another v. State of Himachal Pradesh, 2003 (4) RCR (Criminal) 100 : 2004 (1) Apex Cri 426, it was held by the Apex

Court that ""the word `conscious' means awareness about a particular fact. It is a state of mind which is deliberate or intended. Once possession is

established, the person who claims that it was not 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 statutory recognition to this position because of presumption available in law. Similar is the

position in terms of Section 54 of the Act, where also presumption is available to be drawn from possession of illicit articles. In Madan Lal and

another's case (supra), accused Manjit Singh was driving the car and the remaining 4 accused were sitting therein. One steel container (Dolu) in a

black coloured bag was recovered from the said car which contained 820 grams Charas. The accused was convicted and sentenced by the trial

Court holding that they were found in conscious possession of Charas. The Apex Court held that the trial Court was right in coming to the

conclusion that the accused were found in conscious possession of Charas as they had failed to explain as to how they were travelling in a car

together which was not a public vehicle.

15. Adverting to the facts of the instant case, Swaran Singh alias Tota Singh accused, in his statutory statement, has merely put forth that he along

with his co-accused were present in the house of one Balwant Singh at Makhu and from there they were whisked away by the Police to Police

Station, Dharamkot and they were illegally detained and falsely implicated in this case. An identical plea has been adopted by his co-accused Joga

Singh. Obviously, Swaran Singh accused, who was sitting on the bags, has not taken up the plea that he had taken lift in the tractor trolley from his

co-accused Joga Singh, who has not admitted that he was driving the tractor trolley at the time of recovery. Had they admitted these facts, only

then the onus was to shift on the prosecution to prove that they were in conscious possession. All through the trial, they were aware that there was

a charge against them that they were found in possession of poppy husk bags, When the accused travelling in the vehicle, neither takes the plea that

he had taken lift either as a gratuitous passenger or otherwise, nor leads evidence in defence in proof of such fact and the driving accused too does

not take the plea in his statutory statement that he was not made aware as to the contents of the goods loaded either by the owner thereof or by

the owner of the vehicle or the booking Transport Company, nor leads defence evidence in this behalf, nor puts such suggestions, it will have to be

presumed that his possession is established. In the absence of such pleas or defence evidence, the doctrine of mens rea as enshrined in Section 35

and 54 of the Act in search and seizure of narcotic drugs applies. The culpable mental state includes intention, motive, knowledge etc. The rule of

presumption contemplates that the statutory presumption is to be drawn and is not required to be put to the accused when examined u/s 313 of the

Code of Criminal Procedure. In re: Megh Singh v. State of Punjab, 2003 (4) RCR(Criminal) 319: 2004 (1) Apex Criminal 482, three persons

were found sitting on 25 bags containing poppy husk by the police party. It was argued on their behalf that the facts of the case bear resemblance

with that of Avtar Singh v. State of Punjab, 2002 (4) RCR(Cri) 180 (SC). The Apex Court held that ""the decision in Avtar Singh"s case (supra)

was rendered in a different factual background and rejected the argument with the observation that since the decision was rendered on

consideration of several peculiar factual aspects especially noticed in that case, it is of no assistance to the accused also."" It was held that ""in the

factual scenario of the present case (Megh Singh"s), not only possession but conscious possession has been established. It has not been shown by

the accused/appellant that the possession was not conscious in the logical background of Sections 35 and 54 of the Act.

16. Thus, on viewing the matter in the light of the above discussed authorities, there can be no escape from the finding that the accused/appellants

were in conscious possession as they had power and control over the poppy husk bags recovered from the tractor trolley and if they claim that

they were not in conscious possession, they were obligated to prove so because how they came to be in possession of the poppy husk bags was

within their special knowledge. Thus, to conclude finally, they were found in conscious possession of the recovered poppy husk bags.

No other material point was urged or agitated by either counsel.

As a sequel of the above discussion, this appeal fails and is dismissed.