

(2009) 11 P&H CK 0167

High Court Of Punjab And Haryana At Chandigarh

Case No: Criminal Appeal No. 1396-SB of 2002

Jaswinder Singh alias Binder

APPELLANT

Vs

State of Punjab

RESPONDENT

Date of Decision: Nov. 6, 2009

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 161, 313
- Evidence Act, 1872 - Section 114, 2, 35, 54
- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 15

Citation: (2010) 1 ILR (P&H) 834 : (2011) 1 RCR(Criminal) 678

Hon'ble Judges: Harbans Lal, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Harbans Lal, J.

This appeal is directed against the judgment/order of sentence dated 29.8.2002 passed by the Court of learned Judge, Special Court, Jalandhar whereby he convicted and sentenced Jaswinder Singh alias Binder accused to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs. 1 lac u/s 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for brevity, "the Act) and in default of payment of fine, to further undergo rigorous imprisonment for three months.

2. Shortly put, facts of the prosecution case are that on 3.11.2000, Sub Inspector Manjit Singh amongst other police officials had laid "naka" in the area of Village Kot Kalan, G.T. Road. He received a secret information that the accused was indulging in the sale of poppy husk in huge quantity and if a raid is conducted on his dera, poppy husk could be recovered in huge quantity. This information was embodied into a ruqa, which was sent to the Police Station, wherein on its basis, formal FIR was recorded. The Sub Inspector informed DSP Rakesh Kaushal and requested him to

come to the spot. Sucha Singh was joined with the police party. The said DSP also came there. Thereafter, they went to conduct raid at the dera of the accused. When they were a little short of his dera, the accused was spotted approaching towards the police party. On suspicion, he was intercepted. The DSP told the accused that he was suspected to be in possession of some intoxicants and if he desires, he can have his search in the presence of a Gazetted Officer or a Magistrate. The accused offered to have his search before a Gazetted Officer. On instructions of the DSP, the search of the accused was carried out by the Sub Inspector. From the jhola (bag) which he was holding in his right hand revealed 1 Kg. of poppy husk, out of which 250 grams was separated to serve as sample and converted into a parcel. The residue was also made into a parcel by putting the same in the jhola. These parcels were sealed with seal "MS" belonging to the Sub Inspector and "RK" relating to the aforesaid DSP. The seal after use was made over to Sucha Singh. The parcels were seized vide recovery memo. On interrogation, the accused disclosed to have kept concealed eight bags of poppy husk in a room in a dera under the heap of toori (wheat chaff) and he can get the same recovered. Pursuant to his disclosure statement, he got recovered eight bags of poppy husk containing 40 Kgs. each. 250 grams of poppy husk was drawn from each bag and turned into parcels. The remnant of each bag was also made into parcels. All these parcels were sealed with afore-referred seals after taking the same from Sucha Singh. Again, the seal was returned to Sucha Singh. These parcels were also taken into possession vide memo. The accused was arrested. After completion of investigation, the charge-sheet was laid in the Court for trial of the accused.

3. The accused was charged u/s 15 of the Act, to which he did not plead guilty and claimed trial. To bring home guilt against the accused, the prosecution examined C-I Karamjit Singh PW1, Kailash Chander HC PW-2, Rakesh Kaushal DSP (now SP) PW-3, Manjit Singh SI PW4 and closed its evidence by giving up Sucha Singh PW as having been won over by the accused. When examined u/s 313 of Code of Criminal Procedure, the accused denied all the incriminating circumstances appearing in the prosecution evidence against him. Accused Jaswinder Singh alias Binder put forth as under:

I am innocent. I have been falsely implicated in this case. My residential house right from the beginning is in the Village Abadi of Salempur Masandan. We have got some ancestral land in Damodarpur Village, which falls within the jurisdiction of Police Station Sadar Jalandhar. However, we have no land within the revenue limits of Village Salempur. From the side of canal, if one has to go to our ancestral land which is jointly cultivated by my father and my uncle Bakhshish Singh, our tubewell is ahead of the tubewell dera of Gian Singh of our village. Dera of Gian Singh is at a distance of about 600 yards from our tubewell. We have never kept our residence and our cattle on our tubewell. Some poppy husk was recovered from the tubewell dera of Gian Singh, which is lying deserted. On the night of 2.11.2000 all the owners of adjoining land and adjoining tubewells were interrogated including Shangara

Singh and Gian Singh. Police of P.S. Sadar Jalandhar also came to my house in Village Salempur Masandan on the night of 2.11.2000 and started misbehaving and interrogating with all the inmates. I got offended and used abusive language to the officials of P.S. Sadar Jalandhar and I was in turn taken to the Police Station and falsely involved in this case. No recovery has been effected from my possession or at my instance. I have been falsely implicated due to inimical relations and with wrong and misguided suspicion. I have no concern with the dera of Gian Singh or with the alleged recovery.

The accused closed his defence evidence by tendering Ex.D4 as well as Ex.D5, the copies of jamabandi.

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 the accused as noticed at the outset. Feeling aggrieved therewith, he has come up in appeal.

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

6. Learned Counsel for the Appellant eloquently urged that the record is quite barren to show that the alleged place of recovery was the ownership of the Appellant. According to Ex.D3, the order passed by the learned Judicial Magistrate, the case property was produced before him and it was sealed by the Court and this fact has also been mentioned in Ex. D1, the relevant entry in Register No. 19, but when the case property was produced in the Court, the same did not bear the seal of the Court, which clearly shows that the case property of some other case has been produced and consequently, it does not lie in the mouth of the prosecution to contend that it has been able to connect the case property with the Appellant. It has been further argued that Sucha Singh to whom the seal after use was entrusted has been held back by the prosecution with the result, the Appellant has been deprived of his valuable and indefeasible right to cross-examine him. On perusing the evidence of DSP Rakesh Kaushal PW3, it transpires that he was not present at the time of alleged recovery. This witness has testified that the accused had made disclosure statement, but it does not find so mentioned in his statement recorded u/s 161 of Code of Criminal Procedure Furthermore, Ex.D4, the copy of jamabandi shows that Resham Singh, father of the accused is having land in Village Damodarpur and this apart, Ex. D5, the copy of the jamabandi tends to show that Gian Singh is having his land in Village Damodarpur. The residential house of the Appellant is in Village Abadi of Salempur Masandan arid he is having his ancestral land in Damodarpur. He has no land in Village Salempur. He further pressed into service that some poppy husk was recovered from the tu-bewell dera of Gian Singh, which is lying deserted. As a matter of fact, on the night of 2.11.200, all the owners of the adjoining land including Shangara Singh and Gian Singh were interrogated and the police of Police Station Sadar, Jalandhar came to the house of the Appellant

in Village Salempur Masandan on the said night and they started misbehaving and interrogating all the inmates and due to that reason, the Appellant got offended and used abusive language to the police officials and in these circumstances, he was whisked away to Police Station Sadar, Jalandhar, wherein he was falsely implicated in this case. It has been further canvassed at the bar that the Appellant has no concern with the dera of Gian Singh or with the alleged recovery.

7. As against this, the learned State Counsel maintained that by no stretch of speculation, such a huge recovery could have been planted by the Sub Inspector. That being so, the version proffered by the prosecution cannot be disbelieved or discredited.

8. I have well considered the rival contentions. In the order dated 4.11.2000 Ex.D3 purportedly passed by the learned Judicial Magistrate Ist Class, Jalandhar, it has been mentioned with specificity that "case property produced before me and the same sealed by the Court." This order finds place on the back of remand paper Ex. D2. In Ex. D1, the photostat copy of relevant entry existing in Register No. 19 also it has been mentioned that the case property as well as the sample parcels were produced in the Court of Mr. K.K. Kakkar, Judicial Magistrate Ist Class who affixed his seal as well as signatures on it. As per this documentary evidence, the case property was sealed and signed by the aforesaid Magistrate. It is in the cross-examination of SP Rakesh Kaushal PW3 that "I have seen ExP1 today in the Court. The particulars of case are not legible on Ex. PI and no malkhana No. is also available in legible condition and that is also washedand are faded one. Again said only 750 grams, RK & MS are legible. SHO PS Sadar 3.11.2000 NDPS Act, 750 grams are legible. It is correct that on Ex. PI the seal RK is legible whereas the other seal is not legible and there are only two seals on Ex.P1. There are only two types of seals RK and MS on the case property andthere is no other seal of any word. I have seen register No. 19 of malkhana P.S. Sadar Jalandhar. At Sr. No. 784, there is entry regarding deposition of case property of this case. Ex.D1 is the entry of photocopy of the said entry. There is no seal of the court before whom the case property was produced volunteered Investigating Officer can explain about it. The bags Ex.P2 to Ex.P9 do not contain the seal and initials of the court at present before whom the case property was produced at the time of remand. The sample i.e. samples are initialed by the Magistrate. The entry is made in the DDR that the case property was removed from the malkhana for producing in the court and it is not mentioned in register No. 19. It is correct that in register No. 19, there are columns regarding withdrawal of case property, sending of sample to Chemical Examiner and regarding any other withdrawal of the case property. There is no such entry in register No. 19." This evidence leave no scope for doubt that the case property did not bear the seal or initials of the learned Magistrate when the same was produced in the Court. Arguedo, the learned State Counsel could not furnish any plausible explanation as to how the seal and initials of the learned Magistrate existing on the case property went missing. In these premises, it would not be in the right perspective to hold that

the case property produced in the Court was the same as was recovered from the Appellant or in pursuance of his disclosure statement. To put it differently, it appears that the case property of some case other than the present one has been produced at the trial. Thus, there can be no escape from the finding that the prosecution has dismally failed to connect this case property with the Appellant.

9. The rough site plan Ex.PE in fact relates to the recovery of 1 Kg. of poppy husk. A meticulous perusal of the entire trial Court's record would reveal that the site plan showing the recovery of eight bags has not been produced and proved on the record for the reasons best known to the prosecution. During the arguments, the learned State Counsel was also asked to draw attention of the Court towards such site plan. He regretted his inability in this behalf. Thus to say the least of it, such site plan is not on the record. Had such site plan been produced on the record, only then, it would have been inferred as to whether the place of recovery did belong to the Appellant or Gian Singh. On behalf of the Appellant, it has been argued that as a matter of fact, this recovery was effected from the dera of Gian Singh. As per Ex.D5, the copy of jamabandi for the year 1997-1998, Gian Singh is the owner of the land measuring 21 kanal 15 marlas in Village Damodar-pur from where the recovery is alleged to have been effected. Needless to say, the prosecution has to prove its case beyond any reasonable doubt. Here in this case, to its utter dismay, as noted supra, even the place of recovery of eight bags has not been pinned down by way of documentary evidence.

10. Rakesh Kaushal (sic.) under the stress of cross-examination has testified that "I had not mentioned in my statement u/s 161 of Code of Criminal Procedure that the accused disclosed that he had concealed eight bags containing poppy husk in his house in the dera in a room under the heap of chaff towards Western side and which he could get recovered." If such statement of this witness had verily been recorded at the spot, this fact would have certainly been mentioned therein. It is in his further cross-examination that "It is mentioned in my statement u/s 161 Code of Criminal Procedure that seals after use were given to Sucha Singh so far as recovery of 1 Kg. is concerned, but it is not mentioned in my statement u/s 161 Code of Criminal Procedure that seal after use of 8 bags was given to Sucha Singh. It is not mentioned in my statement u/s 161 Code of Criminal Procedure that the sample seal was prepared." Had this witness been present at the time of recovery, by all probabilities, these facts would have found place in his said statement. Thus, his presence at the material time is rendered highly doubtful.

11. Sub Inspector Manjit Singh PW4 has deposed that "the raiding party was on a four wheeler make Tata. However, I do not recollect its registered number. It was a private vehicle and it was driven by a private driver. The case property was not brought to the Police Station on the said four wheeler only. The said four wheeler and its driver remained along with the raiding party on the spot till our arrival in the police station." On evaluating this evidence, it emanates that the driver of this

vehicle was readily available with the police party at the time of recovery. The Investigator has not apportioned any reason for non-joining of this driver in the recovery proceedings. That being so, on this score as well, it can be said that the prosecution version become suspect.

12. State of Punjab Vs. Hari Singh and Others, , it has been held by the Supreme Court that "When the accused was examined u/s 313 Code of Criminal Procedure, the essence of accusation was not brought to his notice, more particularly, that possession aspect, as was observed by this Court in Avtar Singh v. State of Punjab. The effect of such omission vitally affects the prosecution case." In re: Avtar Singh v. State of Punjab, 2002 (4) RCR (Cri) 180, the Apex Court has observed as under:

Possession is the core ingredients to be established before the accused in the instant case are subjected to the punishment u/s 15. If the accused are found to be in possession of poppy straw which is a narcotic drug within the meaning of Clause (xiv) of Section 2, it is for them to account for such possession satisfactorily; if not, the presumption u/s 54 comes into play. We need not go into the aspect whether the possession must be conscious possession. Perhaps taking clue from the decision of this Court in Inder Sain Vs. State of Punjab, arising under the Opium Act, the learned trial Judge charged the accused of having conscious possession of poppy husk. Assuming that poppy husk comes within the expression poppy straw, the question, however, remains whether the prosecution satisfactorily proved the fact that the accused were in possession of poppy husk. Accepting the evidence of PW-4 the Head Constable, it is seen that Appellant No. 3 (accused No. 4) was driving the vehicle loaded with bags of poppy husk. Appellants 1 and 2 (Accused Nos. 1 and 2) were sitting on the bags placed in the truck. As soon as, the vehicle was stopped by ASI (PW-2), one person sitting in the cabin by the side of the driver and another person sitting in the back of the truck fled. No investigation has been directed to ascertain the role played by each of the accused and the nexus between the accused and the offending goods. The word "possession" no doubt has different shades of meaning and it is quite elastic in its connotation. Possession and ownership need not always go together by the minimum requisite element which has to be satisfied in custody or control over the goods. Can it be said, on the basis of the evidence available on record, that the three Appellants -one of whom was driving the vehicle and other two sitting on the bags, were having such custody or control? It is difficult to reach such conclusion beyond reasonable doubt. It transpires from evidence that the Appellants were not the only occupants of the vehicle. One of the persons who was sitting in the cabin and another person sitting at the back of the truck made themselves scarce after seeing the police and the prosecution could not establish their identity. It is quite probable that one of them could be the custodian of goods whether or not he was the proprietor. The persons who were merely sitting on the bags, in the absence of proof of anything more, cannot be presumed to be in possession of the goods. For instance, if they are labourers engaged merely for loading and unloading purposes and there is nothing to show that the goods were

at least in their temporary custody, conviction u/s 15 may not be warranted. At best, they may be abettors, but, there is no such charge here. True, their silence and failure to explain the circumstances in which they were travelling in the vehicle at the odd hours, is one strong circumstance that can be put against them. A case of drawing presumption u/s 114 of the Evidence Act could perhaps be made out then to prove the possession of the accused, but, the fact remains that in the course of examination u/s 313 Code of Criminal Procedure, not even a question was asked that they were the persons in possession of poppy husk placed in the vehicle. The only question put to them was that as per the prosecution evidence, they were sitting on the bags of poppy husk. Strangely enough, even the driver was questioned on the same lines. The object of examination u/s 313, it is well known, is to afford an opportunity to the accused to explain the circumstances appearing in the evidence against him. It is unfortunate that no question was asked about the possession of goods. Having regard to the charge of which Appellants were accused, the failure to elicit their answer on such a crucial aspect as possession, is quite significant. In this state of things, it is not proper to raise a presumption u/s 114 of Evidence Act, nor is it after to conclude that the prosecution established beyond reasonable doubt that the Appellants were in possession of poppy husk which was being carried by the vehicle. The High Court resorted to the presumption u/s 35 which relates to culpable state of mind, without considering the aspect of possession. The trial Court invoked the presumption u/s 54 of the Act without addressing itself to the question of possession. The approach of both the courts is erroneous in law. Both the courts rested their conclusion on the fact that the accused failed to give satisfactory explanation for travelling in the vehicle containing poppy husk at an odd hour. But, the other relevant aspects pointed out above were neither adverted to, nor taken into account by the trial Court and the High Court. Non- application of mind to the material factors has thus vitiated the judgment under appeal.

13. Adverting to the present one, a meticulous perusal of the Appellant's statutory statement would reveal that the question of possession as was observed by the Supreme Court in Avtar Singh's case (supra) was not put to him while being examined u/s 313 of Code of Criminal Procedure. That being so, in view of Hari Singh and others' case (supra), this omission vitally affects the prosecution case. To put it differently, it renders the prosecution case vulnerable on this aspect. In re: Kashmir Singh v. State of Punjab 2006 (2) RCR (Cri) 477, the Full Bench of this Court has ruled that "no presumption can be raised against the accused person under Sections 35 or 54 of the NDPS Act or even u/s 114 of the Evidence Act that he was in conscious possession of the alleged contraband unless a specific question has been put to him regarding conscious possession u/s 313 of Code of Criminal Procedure" In view of these observations, a specific question was required to be framed and put to the Appellant with regards to his being in conscious possession of the recovered poppy husk bags when he was being examined u/s 313 of Code of Criminal Procedure

Thus, on viewing the matter in background of the afore-quoted law, the conscious possession of the Appellant is not established.

14. It is apt to be borne in mind that as per prosecution version, the accused was noticed coming towards the police party. If at that time, he was carrying one Kg. poppy husk in the bag in his possession, he in the normal course of conduct would have not been advancing towards the police party. Further more, statedly, the seal after use was entrusted to Sucha Singh, an independent witness, who has not been produced at the trial. In the absence of his examination, it is very difficult to infer as to whether the seal was returned by him before or after the dispatch of sample parcels. If the same was given back before the sample parcels were forwarded to the Chemical Examiner, then the possibility of their contents being tampered with cannot be ruled out.

15. As a sequel of the above discussion, this appeal is accepted, setting aside the impugned judgment/order of sentence. The Appellant is hereby acquitted of the charged offence.