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Jaswinder Singh alias Binder Vs State of Punjab

Criminal Appeal No. 1396-SB of 2002

Court: High Court Of Punjab And Haryana At Chandigarh

Date of Decision: Nov. 6, 2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) â€" Section 161, 313#Evidence Act, 1872 â€" Section 114, 2, 35, 54#Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) â€" 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 ruga, 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 Vollage 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 1st

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 lst 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. Pl 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. Pl 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. Arguendo, 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 Jo 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 omis sion 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.