

(2008) 02 P&H CK 0332

High Court Of Punjab And Haryana At Chandigarh

Case No: Criminal Appeal No. 1893-SB of 2002

Gurmit and Others

APPELLANT

Vs

State of Haryana

RESPONDENT

Date of Decision: Feb. 28, 2008

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 15, 35, 50, 54, 55

Citation: (2008) 4 RCR(Criminal) 412

Hon'ble Judges: Harbans Lal, J

Bench: Single Bench

Advocate: Madan Sandhu, for the Appellant; Sidharth Sarup, Assistant Advocate General, Haryana, for the Respondent

Final Decision: Allowed

Judgement

Harbans Lal, J.

This appeal is directed against the judgment dated 2.9.2002/order of sentence dated 4.9.2002 passed by the Court of learned Additional Sessions Judge, Hissar, whereby he convicted and sentenced Gurmit Singh, Des Raj and Harbans Singh to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs. 1,00,000/- each and in default of payment of fine, the defaulter to further undergo rigorous imprisonment for a period of one year u/s 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, "the Act").

2. As set up by the prosecution, on 17.3.1998, a Police party headed by SI/SHO Mohinder Singh happened to be present on Mangali Kaimri Road near Mangali Bus Stand on Government Jeep bearing registration No. HR-20-D-0294 being on patrol duty. A Maruti Car of white colour bearing registration No. DL-4C-6738 was spotted approaching from the side of Village Daya to which the above mentioned Sub

Inspector gave a signal to stop. The driver of the same, instead of stopping the car, accelerated the speed and sped away towards Hissar. The police party chased the Maruti Car in the government jeep and also tried to flash a wireless message thereby informing the Control Room, but due to technical fault, it failed. The police party continued chasing the Maruti Car, which ultimately reached at Bus Stand, Hissar, where the above mentioned Sub Inspector saw a PCR Gypsy bearing registration No. HR-20-3034 lying parked. He gave a signal to the said gypsy. Thereafter, both the police parties chased the Maruti Car. The occupants of the car started pelting stones at the police vehicle. When they reached at Babbar Market, Sirsa Road, Hissar, the wind screen of the above mentioned jeep got smashed. The PCR gypsy tried to overtake the above mentioned Maruti Car from its left side but the way was not given. The Maruti Car took a sharp turn on the left side. The right side of the gypsy got struck with the left side of the Maruti Car. The side looking mirror as well as the wind screen of the police gypsy was also broken. When the aforesaid Sub Inspector Mohinder Singh failed to stop the Maruti Car, he directed the police men of PCR Van to fire at the Maruti Car. Accordingly, Constable Devi Chand fired two shots from his rifle, whereas Constable Sahib Ram fired one shot. As its consequence, the tyre of the Maruti Car got burst and it lost control and stopped in the ditches.

3. All the three occupants of the Car tried to escape but they were overpowered. In the meantime, Raj Kumar, an independent witness also came at the spot by chance. He was joined in the investigation by the police. The Sub Inspector gave a notice in writing to the accused u/s 50 of the Act calling upon them as to whether they wanted to be searched before a Gazetted Officer or a Magistrate. They submitted a reply in writing exhibiting faith in the Sub Inspector. On search of the Car, 8 bags containing poppy husk were recovered. 200 Grams of poppy husk was drawn from each bag to serve as sample. The residue of each bag, when weighed, came to 39 Kg. 800 grams. The samples as well as the remainder were converted into parcels sealed with seal bearing impression RS. All these parcels along with Maruti Car were seized vide Memo. A Ruqa was sent to the Police Station. On its basis, formal FIR was recorded. The Sub Inspector prepared the rough site plan showing the place of recovery and also sent a report to the D.S.P. Hissar. On receipt of report from the Forensic Science Laboratory and after completion of investigation, challan was laid in the Court for trial of the accused.

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

5. To bring home guilt against the accused, the prosecution has examined PW-1 ASI Khajan Singh, PW-2 Raj Kumar, PW-3 Constable Sahib Ram, PW-4 Narinder Singh DSP, PW-5 ASI Rattan Lal, PW-6 Mahinder Singh, PW-7 Head Constable Mukat Ram and closed its evidence by tendering Exhibits, PA, PA/1, PA/2, PB to PJ.

6. On close of the prosecution evidence, when examined u/s 313 of the Code of Criminal Procedure, the accused denied all the incriminating circumstances appearing in the prosecution evidence against them and pleaded innocence. In defence, they examined DW-1 Dr. Arun Kumar, DW-2 Dr. M.K. Bhadoo and also tendered documents, Exh. DA and DD.

7. After hearing the learned Public Prosecutor for the State, the learned defence counsel and examining the evidence on record, the learned trial Court convicted and sentenced all the three accused, as noticed at the outset. Feeling aggrieved therewith, they have preferred this appeal.

8. I have heard Mr. Madan Sandhu, Advocate, learned counsel for the appellants as well as Mr. Sidharth Sarup, learned Assistant Advocate General, Haryana, besides going through the record with due care and circumspection.

9. To begin with, Mr. Madan Sandhu, Advocate, on behalf of the appellants, urged with great eloquence that as per prosecution story, 8 bags of poppy husk were recovered from the Maruti Car which is unacceptable for the reason that such a number of bags cannot be adjusted in the dicky/inside the Car. He further pressed into service that the prosecution has not adduced any evidence on record to prove that the appellants were in conscious possession of the bags and furthermore, no question to the effect that they were in conscious possession of the bags, has been put to either appellant when examined u/s 313 of the Code of Criminal Procedure. He further submitted that in re: Bholu Singh v. State of Punjab, 2005 (2) RCR 520 (P&H), 14 bags of poppy husk were recovered from the trolley. Four persons sitting in trolley jumped away. It was held that the accused driver cannot be said to be in conscious possession and the conviction was set aside. He further added to it that neither the ownership of the Car nor of the poppy husk has been established.

10. To overcome these submissions, Mr. Sidharth Sarup, learned Assistant Advocate General, Haryana, pressed into service that all the three appellants were sitting in the front portion of the Car and the bags were placed in the dicky as well as rear seat and this evidence is sufficient to presume that they were the owners of the bags. This contention does not find favour with me.

11. [State of Punjab Vs. Balkar Singh and Another](#), the accused were alleged to have been sitting on bags containing poppy husk. They failed to give any satisfactory explanation for being present at that place. The Apex Court held that merely by being found to be present at the place where the poppy bags were found and the failure to give any satisfactory explanation for being so present, did not prove that the accused persons were in possession of the said poppy bags and that in fairness, the Police should have conducted further investigation (as to transportation of poppy husk bags to place of incidence, ownership of the poppy husk etc.) to prove that the accused were really in possession of the said articles. In the present case, it is unbelievable that dicky/rear seat of the Maruti Car could accommodate 8 bags of

poppy husk. Mohinder Singh, SI/SHO-PW-6 has nowhere stated that he inquired about the ownership of the poppy husk or the Car. In the absence of such evidence, it is very difficult to hold that the conscious possession of the appellants over the bags containing poppy husk has been established. Furthermore, the question of conscious possession of poppy husk bags was not put to the appellants in their examination u/s 313 of the Code of Criminal Procedure.

12. In re: Avtar Singh v. State of Punjab, 2002 (4) RCR 180 (SC) 16 bags of poppy husk were recovered from a truck. Two accused were sitting on the bags and one accused was driving the truck. The Apex Court observed that 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. 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. The High Court resorted to the presumption u/s 35 of the Act 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.

13. Coming to the instant case, it is not the prosecution case that the appellants were sitting on the bags. Rather, they were allegedly sitting on the front seat of the Car. Thus, the present one is on a better footing than Avtar Singh's case (supra). It is in the cross-examination of Mohinder Singh (Investigator) PW-6 that first shot was fired at Maruti Car after covering a distance of 3/3-1/2 Kms. from Hissar; that total three shots were fired on Maruti Car; that 2 shots were fired by Constable Devi Chand and one was fired by Constable Sahib Ram. It is in his further cross-examination that he did not prepare any recovery memo. regarding the empty cartridges nor he took into his possession the fired cartridges. Under the stress of cross-examination, he has admitted that counted number of cartridges are supplied to police officials and they are to be deposited with the MHC. From this evidence, it is discernible that the empties were not taken into possession. As per rules, every police official to whom cartridges/rounds are supplied in the official capacity, if he makes use of the same, in turn, he is obligated to deposit the empties with the MHC. Further, it is the prosecution case that the appellants had thrown stones on the police jeep of which wind screen got broken. It is in the cross-examination of Mohinder Singh SI that he did not take broken glass pieces into possession. To substantiate this story, it was obligatory upon him to seize the pieces of broken glasses and this apart, he was also required to get the jeep as well as the Car photographed. It is un-understandable as to from where the appellants captured the stones for being pelted on the police jeep, as according to the prosecution version, the appellants remained on the run as they were being chased by two police vehicles. There being no photographs as well as the empties, it is too hard to swallow the version as projected by the prosecution. Furthermore, Devi Chand

Constable as well as Constable Sahib Ram, who had allegedly fired upon the Car, ought to have been examined in corroboration of the allegations of the prosecution. Raj Kumar, PW-2, an independent witness testified in his chief examination that SI took the search of the Maruti Car and found 8 bags of poppy husk lying in the Maruti Car. When this examination-in-chief was tested in cross-examination, he took a somersault by stating that the poppy husk was not recovered in his presence and it had already been recovered from the Car and the same was lying at the spot. He has admitted in categorical terms that the police officials asked him to sign on the papers that they had recovered the articles from the Car. Towards the end of his cross examination, he has deposed that " I did not see the accused at the place of recovery near Babbar market." Thus, he wipes out his entire examination in chief. It is in his cross-examination that his tea stall is situated opposite Police Station Sadar, Hissar and that some times some police officials send for tea from his shop. Thus, he was acquainted with the police officials. So, it was not difficult for the Investigator to obtain his signatures on certain documents showing the alleged recovery.

14. As is borne out from the testimony of Mohinder Singh, PW-6 (Investigator), seal after use, was handed over to Rattan Lal ASI though the prosecution case is that the recovery was effected within the view of Raj Kumar, independent witness. The handing over of the seal to a police official in the presence of an independent witness further falsifies the presence of Raj Kumar for the reason that had he been there, the seal would have been handed over to him.

15. At this juncture, it deserves to be pointed out here that sample parcels were sent to Forensic Science Laboratory after 8 days though as per the standing instructions of Narcotic Control Bureau Centre, the same should be sent within 72 hours. There is also nothing on record to show that the C.F.S.L form was filled at the spot and deposited in the Malkhana. All these flaws when put together leads to the conclusion that there could be every possibility of the contents of the sample parcels being tampered with. In re: Bhola Singh (supra), it has been observed that where the seal remained with the police after use and the C.F.S.L form was neither prepared at the spot nor deposited in the Malkhana, such circumstance would be fatal to the prosecution case. Filling up of such form at the spot is a very valuable safeguard to ensure that the seal sample is not tampered with till its analysis by the Forensic Science Laboratory. In re: Bhola Singh (supra), also the seal was not given to an independent witness but the same was kept by the Investigating Officer. It was held that if the seal remained with the police, the possibility of seal, contraband and the sample being tampered with, cannot be ruled out. There is also no charge u/s 8 of the Act against the appellant who was driving the vehicle. As per evidence of the Investigator, only one sample was drawn from each bag though the Act contemplates that 2 samples should be drawn. Furthermore, the testimony of the Investigating Officer is also silent on the aspect that the case property was produced before the learned Magistrate in adherence to the provisions of section 55 of the Act. A meticulous perusal of Exh. PB, notice u/s 50 of the Act would reveal that a

composite notice was served upon all the three appellants, whereas each of the appellant was required to be served individually with such notice. Thus, by a composite notice, the appellants have been prejudiced in their right.

16. For the reasons enumerated above, this appeal succeeds and is accepted, setting aside the impugned judgment/order of sentence. The appellants are hereby acquitted of the charged offence.