

Jagmohan Singh alias Jago Vs State of Punjab**Criminal Appeal No. 713-SB of 2004**

Court: High Court Of Punjab And Haryana At Chandigarh**Date of Decision:** April 25, 2007**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) â€” Section 173, 313#Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) â€” Section 15, 15(c), 50

Citation: (2007) 3 RCR(Criminal) 900**Hon'ble Judges:** Mahesh Grover, J**Bench:** Single Bench**Advocate:** Vivek Goel, for the Appellant; Praneet Grewal, A.A.G., Punjab, for the Respondent**Final Decision:** Allowed

Judgement

Mahesh Grover, J.

The present appeal is directed against the judgment of the Special Judge, Moga dated 16.2.2004 vide which the

Appellant has been convicted and sentenced to undergo RI for 10 years and to pay a fine of Rs. 1 lac u/s 15(c) of the Narcotic Drugs and

Psychotropic Substances Act, 1985 (hereinafter referred to as "the Act") and in default of payment of fine to undergo for the RI for one year.

2. According to the prosecution version, on 10.8.2000, SI Mohan Lal along with his co-officials, was proceeding in an official van from the

premises of CIA Staff, Moga towards Village Singhanwala. They were on secret duty and were checking persons on suspicion. On the way,

Jhandewala met them who was joined in the police party. After covering about 1 kilometer from village Tarewala towards Village Singhanwala,

they saw a man sitting under the Tahli tree on two gunny bags. On seeing the police party, he tried to slip away towards agricultural field. On the

basis of suspicion, SI made the van to stop. The person was apprehended by him with the help of his co-officials. He disclosed his name as

Jagmohan Singh son of Lal Singh resident of Village Jhandewala, Police Station Baghapurana. The time was about 1.30 p.m. The SI told him that

they were suspecting some intoxicating material to be present in the bags and wanted to search him. The right of the Appellant to get his search

done in the presence of a Gazetted Officer was duly intimated to him. The Appellant desired that his search be conducted before the Gazetted

Officer. His consent memo was got prepared accordingly. Wireless message was then sent to Shri Nachhattar Singh, DSP (D), Moga, requesting

him to come to the spot. On his arrival, along with his staff, he introduced himself to the accused and search of the bags was conducted. Poppy

straw was found in them. Both bags were marked as Number 1 and Number 2. From each bag, a sample of poppy straw weighing 250 grams,

was taken out. Their parcels were prepared in pieces of cloth. On weighing, remaining poppy straw came to 40 kilograms in each bag. Their

parcels were also separately prepared. The gunny bags were sealed by the SI with a seal of description ML. DSP had also put his seal of

description NS on all the parcels. Separate sample seal was prepared. SI entrusted his seal to private witness Balbir Singh after its use while DSP

retained his seal in his possession. All the sealed parcels and samples were taken into possession vide Recovery Memo. Rough site plan of the site

was also prepared. The personal search of the Appellant revealed currency notes of Rs. 30/- which were taken into possession.

3. After recording the statements of the witnesses and interrogation of the Appellant, he was formally arrested and factum of his arrest was

informed to Bachittar Singh, Ex-Sarpanch of Village. Formal FIR was also recorded. On return of the police party from the spot to the Police

Station Sadar, Moga, the accused and items of the case property were produced before Inspector Manwinder Singh, SHO. All the parcels were

sealed with the description MS and he also put impression of his seal on sample seal. The case property was taken in custody vide separate

recovery memo.

4. After completing the investigation, the challan u/s 173 of the Code of Criminal Procedure was prepared and the copies were supplied to the

accused. Charge u/s 15 of the NDPS Act was framed against the Appellant. He pleaded not guilty and claimed trial. The prosecution produced

the following witnesses:

1. HC Gamdoor Singh (PW-1)
2. Nachhattar Singh, DSP (D), Moga (PW-2)
3. Inspector Manwinder Singh, SHO (PW-3)
4. SI Balkar Singh (PW-4)
5. SI Mohan Lal, Investigating Officer (PW-5)
6. ASI Surjit Singh, (PW-6)
7. HC Jarnail Singh (PW-7)

8. C. Nachhattar Singh (PW-8)

5. Apart from the aforesaid witnesses, documentary evidence was also produced which include Ex. P-D Report of the Chemical Examiner, Ex. P-

E Consent Memo of the accused, Ex. P-F Personal Search Memo of the accused, Ex. P-H Rough Site Plan of place of recovery as also the

relevant seals. The prosecution thereafter closed its evidence and the statement of the Appellant was recorded u/s 313 of the Code of Criminal

Procedure He denied the prosecution case as well as the evidence against him and alleged that a false case has been foisted upon him. He alleged

that the contraband was actually recovered from Balbir Singh who was cited as a private witness but the recovery was shown to have been

effected from him. He also alleged that no recovery was effected from him.

6. The Appellant produced the following witnesses in his defence:

1. HC Balwinder Singh (DW-1)

2. Roop Singh (DW-2)

7. The trial Court thereafter proceeded to examine the evidence before it and finding the prosecution's case to be correct, sentenced the Appellant

u/s 15(c) of the Act and sentenced him to undergo RI for a period of 10 years and to pay a fine of Rs. 1 lac and in default of payment of fine to

undergo further RI for one year.

8. The Appellant aggrieved by the aforesaid conviction and sentence, has preferred the present appeal.

9. It is contended by the learned Counsel for the Appellant that Appellant could not be said to be in conscious possession of the contraband as

according to the allegations, he was found sitting on the bags, which were subsequently found to be containing poppy husk amounting to 80

kilograms. The prosecution has miserably failed to connect the contraband and the factum of the Appellant being in conscious possession of the

same.

10. That apart, it was next contended that recovery in this case was effected on 10.8.2000 and the sample was sent on 22.8.2000 after 12 days of

unexplained delay.

11. In support of his contention, learned Counsel for the Appellant relied upon 2006 (1) RCR (Cri) 4 : 2006(3) RCR (Cri) 16 : 2004 (4)

RCR(Cri) 260.

12. On the other hand, learned Counsel for the State could not controvert the aforesaid contentions either factually or legally but it was sought to

be contended by him that the conviction was just and appropriate.

13. I have heard learned Counsel for the parties and have perused the records.

14. Concededly as per the version given out by the prosecution, the Appellant was found sitting under a tree on the gunny bags, which were

alleged to be containing the contraband. No evidence has been adduced by the prosecution to establish that the bags belonged to the Appellant

specially when the site from where the contraband was recovered, was a thorough fare and accessible to many other people. Even though an

independent witness namely Balbir Singh, who was said to have been associated with the raiding party but for the reasons best known to the

prosecution, he has not been examined. This is not to imply that conviction cannot be based on the statement of the official witness. But considering

the fact that the Investigating Officer has not taken any pains to establish and link the contraband with the factum of conscious possession of the

Appellant, no presumption can be drawn against him. The observations of the Division Bench of this Court in Sukhdev Singh alias Sukha v. State

of Punjab, 2006 (1) RCR (Cri) 4 and Bikkar Singh v. State of Punjab, 2006 (3) RCR (Cri) 16 are straightway attracted to the facts of the present

case.

It is to be noticed that the observations of the Apex Court were made by placing reliance on State of Punjab v. Balkar Singh, 2004 SCC (Cri.)

838 wherein it was observed as follows:

We heard the counsel for the Appellant. The High Court by the impugned judgment stated that the prosecution failed to prove that these

Respondents were in conscious possession of the poppy husk recovered by the police. The evidence by the prosecution consisted of the testimony

of PW-1 Balbir Singh and PW-2 ASI Jarnail Singh. Both these witnesses deposed that they found the Respondents sitting on the bags of poppy

husk. The recovery was effected from a field in Village Lohgarh. The Respondents belonged to different villages. The Respondent Balkar Singh is

a resident of village Bira Bedi in District Hisar while Respondent Munish Chand is a resident of Farukhabad. The police did not make any

investigation as to how these 100 bags of poppy husk were transported to the place of incident. They also did not adduce any evidence to show

the ownership of the poppy husk. The presence of the Respondents at the place from where the bags of poppy husk were recovered itself was

taken as possession of these bags by the police. In fairness, the police should have conducted further investigation to prove that these accused

were really in possession of these articles. The failure to give any satisfactory explanation by the accused for being present on that place itself does

not prove that they were in possession of these articles. Though the Respondents raised a plea before the Sessions Court, the same was not

considered by the Sessions Judge in the manner in which it should have been considered. We do not think that the High Court erred in holding that

there was no evidence to prove that the Respondents were in conscious possession of the poppy husk recovered by the police. The prosecution

failed to discharge its obligation to prove the possession of the poppy husk by the Respondents. We do not find any infirmity in the judgment

passed by the High Court.

15. The Full Bench of this Court in Mohan Singh v. State of Punjab, 2004 (4) RCR (Cri) 260 (FB) has observed as follows:

The possession of the narcotic(s) or psychotropic substance(s) should be a visible possession and must be on the person of the suspected

individual. Holding and retention of the substance in one's control directly relatable to the body of the individual, would be search of the person.

Once the bag or an article is at any distance and is not directly held by the individual, the protection available u/s 50 of the Act would be of no

relevant consideration. The possession has to be conscious possession and possession of such a material which is punishable under the statute,

then charged person must be in control over it and has the right to exclude others. It would be limited to personal custody. In this regard reference

can be made to Words and Phrases by West Publishing Company. In the case of Sanjay Dutt Vs. State through C.B.I., Bombay, the Supreme

Court explained the word "possession" as under:

In the context (context ?) the word "possession" must mean possession with the requisite mental element, that is, conscious possession and not

from custody without the awareness of the entry of such possession. There is a mental element in the concept of possession. Accordingly, the

ingredient of "possession" in Section (sic) of the TADA Act means conscious possession. This is how the ingredient of possession in similar context

of a statutory offence imparting strict liability on account of mere possession of an unauthorised substance has been understood. The unauthorised

possession in the context means without the authority of law.

In other words, before a person can claim benefit of the protection or safe- guards provided u/s 50 of the Act and its strict compliance, the person

must be possessed of the psychotropic substance or narcotic drug on his body with him. If the article, or a bag is lying even at a possible shortest

distance from the suspect, but is not being physically carried on his person by the suspect, the statutory protection of Section 50 would not be

available to such an accused. This will be equally true in the case where such a substance is found in the baggage of a suspect passenger.

16. The conclusion that the Appellant has not been shown to be in conscious possession of the contraband is therefore, inescapable. That apart

concededly, the sample was sent after 12 days of delay, which has been unexplained. The possibility of the contraband having been tampered with

cannot be ruled out and in such a situation, the benefit but naturally has to go to the accused.

17. Having regard to the aforesaid contentions raised by learned Counsel for the Appellant, which are not misplaced and for the foregoing reasons,

the present appeal is accepted and the sentence and conviction awarded to the Appellant is hereby set aside.