

(2008) 04 P&H CK 0143

High Court Of Punjab And Haryana At Chandigarh

Case No: Criminal Appeal No. 1298-SB of 2004

Jarnail Singh

APPELLANT

Vs

State of Punjab

RESPONDENT

Date of Decision: April 28, 2008

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Evidence Act, 1872 - Section 114
- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 15, 34, 35, 50, 54

Citation: (2008) 4 RCR(Criminal) 294

Hon'ble Judges: Harbans Lal, J

Bench: Single Bench

Advocate: B.S. Kathuria and Mr. Rajiv Vij, for the Appellant; Manjari Nehru, D.A.G., Punjab, for the Respondent

Final Decision: Allowed

Judgement

Harbans Lal, J.

This judgment will dispose of Criminal Appeal No. 1298-SB of 2004 preferred by Jarnail Singh alias Jaila and Criminal Appeal No. 83-SB of 2005 filed by Jasvir Singh against the judgment/order of sentence dated 1 April, 2004 rendered by the Court of learned Judge, Special Court, Jalandhar whereby he convicted and sentenced both the above mentioned accused/appellants to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs. 1 lac each and in default of payment of fine, the defaulter to further undergo rigorous imprisonment for a period of six months u/s 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for brevity "the Act").

2. The miniature of facts is that on 16.8.2000, Inspector Wazir Singh, the then Officer Incharge of the Police Station Phillaur alongwith other police officials happened to

be present at Nawanshahar Adda Phillaur, where he received secret information to the effect that Jasvir Singh, Jarnail Singh and Deep Singh (Proclaimed Offender) were found in possession of poppy husk in truck bearing registration No. PB-08-6852, parked on the road leading from Ganna Pind to Bhaini. Ruqa Ex.PF was sent to the police station. On its basis formal FIR Ex.PF/1 was registered. The police party immediately proceeded towards the disclosed place. On the way, it joined Nirpal Singh Sarpanch. On reaching at the spot, the police party found the abovementioned truck lying parked on Bhaini road near the turning. The occupants of the same were apprehended. The accused Jasvir Singh was sitting on the driver seat whereas Jarnail Singh and Deep Singh were seated beside him. The Investigating Officer told the above said trio that he had suspected of there being some contraband in the truck and therefore, he wanted to take search of the same. He apprised the accused of their rights of search of their truck in the presence of a Gazetted Officer or a Magistrate. They offered the search of the truck to be made in the presence of a Gazetted Officer. On receipt of message, PW Sajjan Singh Cheema, DSP Phillaur came at the spot, introduced himself to the accused and informed them of their rights to have the search of their truck in the presence of a Magistrate. The accused reposed their confidence in him. On search of the truck, 200 bags of salt and 30 bags of poppy husk concealed beneath the salt bags were recovered. Two samples of 250 grams each were drawn from each bag and converted into parcels. The residue of each bag when weighed, came to 34.500 grams, which were also made into parcels and sealed with seals 'WS' and 'SS'. The Investigator after use, entrusted his seal to ASI Kewal Singh whereas DSP Sajjan Singh retained his seal with him. All the sample parcels along with the sealed bags as well as the truck were seized vide recovery memo Ex.PE. Wazir Singh Investigator prepared the rough site plan showing the place of recovery, arrested the accused and on return to the police station, deposited the case property with MHC Jaswinder Singh. On receipt of chemical examiner's report and after completion of investigation, the charge-sheet was laid in the Court for trial of the accused.

3. The accused were charged u/s 15 of the Act, to which they did not plead guilty and claimed trial. During the pendency of the trial, the accused Deep Singh escaped from the custody of the police on 3.2.2000 while being produced before the Judicial Magistrate, 1st Class, Nakodar and subsequently, he was declared Proclaimed Offender on 13.7.2000.

4. To bring home guilt against the accused, the prosecution has examined PW11 Lehambhar Ram Clerk, District Transport Officer, Jalandhar, PW2 Amar Singh, Lambardar, PW3 Sajjan Singh Cheema, DSP, PW4 ASI Kewal Singh, PW5 Inspector Wazir Singh, Investigating Officer, PW6, MHC Jaswinder Singh, PW7, Constable Bawa Singh and closed its evidence.

5. When examined u/s 313 Cr.P.C., both the accused denied all the incriminating circumstances appearing in the prosecution evidence against them. The accused

Jasvir Singh came up with the following plea:

"I am innocent. I have been falsely implicated in this case. No recovery was effected from me. Moreover, the truck number from which recovery is alleged to have been made is wrong and non-registration of the case regarding forgery of the truck number clearly shows that the truck in question though alleged to bearing the scooter number yet no action was taken."

6. Accused Jarnail Singh has put forth that "I am innocent. I have been falsely implicated in this case. No recovery was effected from me." They did not lead evidence in defence.

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

8. I have heard the learned counsel for the parties and perused the record with due care and circumspection.

Learned counsel for the appellants making a short shrift of their arguments maintained that (a) as alleged the recovery was effected in the presence of Nirpal Singh, an independent witness but as per the evidence of Wazir Singh, Investigator, the seal after use was handed over to ASI Kewal Singh whereas, the law requires that in the presence of a public man, the seal after use, should not be handed over to an official witness to rule out the possibility of tampering with the contents of the sample parcel; (b) there was a delay of 13 days in despatch of the sample parcels, though, as per the standing instruction No. 1/88 dated 15.3.1988 of the Narcotic Control Bureau, New Delhi, the sample parcel should be sent for the chemical examination within 72 hours; (c) the conscious possession of the accused has not been established in view of the observations made in re: Avtar Singh and another v. State of Punjab, 2002 (4) RCR (Crl.) 180 (SC) and these infirmities are fatal to the prosecution case.

9. To overcome these submissions, Ms. Manjari Nehru, Deputy Advocate General, Punjab on behalf of the State maintained that there is no legal mandate that the seal after use necessarily should be handed over to the independent witness. As regards delay in despatch of the parcels, the chemical examiner's report reveals that when the sample parcels were received in his office, the seal affixed thereupon tallied with the sample seal and the same were intact and thus, the link evidence is complete in this case. She further argued that as regards conscious possession, the accused were found present in the cabin of the truck. Thus, in view of the provisions enshrined in Section 35 as well as Section 54 of the Act, the presumption is available to the prosecution that they were in the conscious possession of the bags. These contentions are unacceptable for the discussion to follow hereinunder:

10. Allegedly, the seal after use was handed over to ASI Kewal Singh instead of Nirpal Singh PW, who was joined in the investigation. In re Ramji Singh v. State of Haryana and Sukhvinder Singh v. State of Haryana, 2007 (3) RCR (Cr.) 452, the seal was not given to independent witness but remained with police. The samples were sent to the chemical examiner after 8 days of recovery. It was held that where the seal remains with the police after use and the sample has been sent after a delay of 72 hours, this circumstance would be fatal to the prosecution.

11. The standing instruction No. 1/88 dated 15.3.1988 issued by the Narcotic Control Bureau, New Delhi reads in the following terms:

"1.13 Mode and Time limit for despatch of sample to Laboratory.

The samples should be sent either by insured post or through special messenger duly authorised for the purpose. Despatch of samples by registered post or ordinary mail should not be resorted to. Samples must be despatched to the Laboratory within 72 hours of seizure to avoid any legal objection."

12. It is abundantly clear from the above instruction that the sample should be despatched within 72 hours of seizure whereas, in the instant case, the sample parcels were sent after 13 days from the date of the recovery qua which no luculent or cogent explanation has been given by the prosecution. The record is quite barren to show that CFSL form was filled at the spot or deposited in the malkhana. The handing over of the seal to the abovementioned police official, sending all the sample parcels for chemical examination after 13 days coupled with non-preparation of CFSL form at the spot or its deposit in the malkhana are cumulatively fatal to the prosecution case. An identical view was taken in Ramji Singh's case (supra).

13. As emanates from PW Wazir Singh's evidence, the accused was sitting on driver seat whereas Jarnail Singh accused was seated by his side alongwith Deep Singh. The Apex Court in re: Avtar Singh and another (supra) held as under:

"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 person 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 Cr.P.C. 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 safe 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."

14. In re: Raj Kumar v. State of Punjab, 2005 (1) RCR (Crl.) 70, the bag containing 8.250 grams of opium was lying on the seat between the two accused. They both were charged for possession of opium, but neither of them had been asked any question in their statements u/s 313 of Cr.P.C. that they were in conscious possession of opium. It was held by the Division Bench of this Court that neither the presumption u/s 35 nor u/s 54 of the Act would be attracted, as it was necessary for the trial Court to frame a specific question regarding the presumption which is sought to be raised either u/s 35 or Section 54 of the Act when examining the accused u/s 313 of Cr.P.C. But no such question was framed or put to the accused regarding their conscious possession. It was held that their conscious possession is not established.

15. In re: Buddharam and another v. State of Madhya Pradesh, 2007 (3) RCR (Crl.) 168, two accused while coming on motorcycle were intercepted. One was riding and the other one was the pillion rider from whom a bag containing opium was

recovered. The prosecution did not prove that the accused who was on the motorcycle had knowledge of the fact that the pillion rider was carrying opium. In the face of these circumstances, the conviction of motorcycle rider was set aside, though, the conviction of the pillion rider was upheld.

16. In *re: Kashmir Singh v. State of Punjab*, 2006 (2) RCR (Crl.) 477, contraband was recovered from the possession of the accused. It was held that there is presumption of culpable mental state and conscious possession on the part of the accused under Sections 35 and 54 of the Act, but these presumptions are rebuttable and the same will not be available to the prosecution unless trial judge gives an opportunity to accused to rebut the same by putting questions u/s 313 of Cr.P.C.

17. It can be culled out from the conspectus of the afore-quoted authorities that the presumptions arising u/s 35 *ibid* as well as 54 *ibid* would be available to the prosecution only if a specific question regarding these presumptions arising under these Sections qua conscious possession is formed and put to the accused when he is being examined u/s 313 of Cr.P.C. The rationale or philosophy lying behind the formulation of such question is to afford an opportunity to the accused to explain about his conscious possession qua the recovered contraband. It is an abstract rule of law that every presumption is rebuttable.

18. Coming to the facts of the present case, it is put to the accused Jasvir Singh in his statutory statement that "He (referring to DSP Sajjan Singh) had a suspicion of narcotic." So is the question in the statement of Jarnail Singh accused. On going through their statutory statements, it follows that no specific question has been formed and put to these accused that they were in conscious possession. It has not been put specifically that they were in conscious possession of the poppy husk bags allegedly recovered from the vehicle. Thus, in view of the law discussed hereinbefore, the presumption arising under Sections 34 or 54 of the Act is not available to the prosecution.

19. It is in the cross-examination of DSP Sajjan Singh Cheema PW3 that "some of the seals on the bags are broken and not legible." Thus, the case property has not connected with the accused. It is in his further cross-examination that "the number written on the truck has been duly written on the back side (dalla) but it is subsequently painted and now the legible letters are PAT 71 and digit 71 is legible and two digits before 71 are not legible. No registration number plate is affixed on the truck. However, it appears that registration number was written on the bumper which is not legible today." This evidence gives an inkling that the alleged truck produced at the trial was not the same from which the recovery was allegedly effected. This witness has also stated that "it is correct that no gunny bags containing salt, tarpal have been produced today." Thus, complete case property was also not produced. It is in the further cross-examination of this witness that "it is correct that memos Ex.PC, Ex.PD and Ex.PE are not signed by Wazir Singh Investigating Officer. Wazir Singh signed on my statement Ex.DA." He has not given

any satisfactory explanation as to why these documents did not bear the signatures of Wazir Singh, though, he was the Investigating Officer. It is in his further cross-examination that "at the time of preparing Ex.PC, Ex.PD and Ex.PE, I was suspecting that accused were having poppy husk in the truck but the word 'suspect' inadvertently has been left Ex.PC, Ex.PD and Ex.PE. Particulars of the case are not mentioned in Ex.PC, Ex. PD and Ex.PE. I did not prepare any case diary regarding this case. Ruqa was not written in my presence, therefore, I cannot tell the contents of the same." This evidence further makes the Court to look upon the alleged recovery with suspicion. It is in the examination-in-chief of ASI Kewal Singh PW4 that "during investigation of this case on 10.11.2K, I verified the registration from the D.T.O. Office, Jalandhar, regarding the ownership of the truck, which revealed that the truck was bearing fictitious registration number and in fact this number belongs to a scooter. My report to this effect is Ex.PJ." In the face of this evidence, the real owner of the truck was also required to be challaned whereas the record is barren in this behalf. According to the aforesaid ASI "on 17.8.2000, MHC Jaswinder Singh entrusted to him the case property along with the accused for producing the same before the Illaqa Magistrate and after producing the same, he again deposited the same with the MHC." It is in his cross- examination that "I had stated in my statement recorded by Wazir Singh on 17.8.2K that Jaswinder Singh had given me the case property on that day. Statement Ex.DB has been read over to the witness wherein it is not so recorded that case property was handed over to me by Jaswinder Singh, whereas it is recorded that case property was handed over to me by Wazir Singh alongwith the accused for producing in the court." Thus, in the face of this evidence, it is every difficult to believe that the case property was produced before the Illaqa Magistrate. The Investigating Officer Wazir Singh PW5 has stated in his cross-examination that "it is correct that in Ex.DB, the date of giving case property to Kewal Singh is not mentioned. It is also correct that in Ex.DB, it is mentioned that I myself had handed over the case property to ASI Kewal Singh for the production of the same before the Area Magistrate alongwith the accused." It is in his further cross-examination that "I did not hand over the case property to Kewal Singh, on 17.8.2K, for producing before the Illaqa Magistrate." This evidence gives an inkling that either ASI Kewal Singh was telling a lie or it has been recorded incorrectly. It is also in the cross-examination of Wazir Singh (sic) that "the accused were not challaned under Motor Vehicles Act or under I.P.C. for placing wrong number plate on the truck." As surfaces in the cross-examination of Wazir Singh (sic) "it is correct that it is not mentioned in the consent memos Ex.PG, Ex.PH and Ex.PI that the accused had right to be searched before a Gazetted Officer or a Magistrate. It is correct that the number which was to be searched is not mentioned." It is in the examination-in-chief of Inspector Wazir Singh PW5 that "I apprised the accused that I had a suspicion that there was some narcotic substance in their truck and they have the right for their search to be conducted in the presence of Gazetted Officer or a Magistrate." On reading between the lines, it is deducible from this evidence that the person of the accused was also offered to be searched before the Gazetted

Officer or a Magistrate. In re: Dilip & Anr. v. State of M.P., 2007 (1) RCR (Crl.) 586 : 2007 (1) RAJ 235 (SC) the contraband was recovered from the scooter. The person of the accused was also searched. The Apex Court observed that in view of the fact that the person of the accused was also searched, it was obligatory to comply with the provisions of Section 50. In view of these observations, if the person of the accused in the instant case was searched, in that the mandatory provisions of Section 50 were required to be observed in their letter and spirit, whereas according to the above evidence, the mandatory provisions of Section 50 have also been given a go-bye. Furthermore, it is in the cross-examination of PW6 MHC Jaswinder Singh, with whom the case property was allegedly deposited, "it is not mentioned in Ex.DC (police statement of this witness) that sample seals were also deposited by the I.O. in the malkhana. It is not also mentioned that the sample seals were sent to Area Magistrate." This evidence shows that the sample seals were not deposited with the MHC. If so, it has been left in the womb of mystery as to whence the sample seals came for being sent with the sample parcels to the chemical examiner. Thus, patently the link evidence is missing. It is in the cross-examination of PW7 Constable Bawa Singh who carried the sample to the office of Chemical Examiner, "it is not mentioned in my affidavit regarding total number of samples handed over in the office of Chemical Examiner." This further causes dent in the prosecution case. In view of the infirmities enumerated above, these appeals succeed and are accepted. Sequently, the impugned judgment of conviction/order of sentence is hereby set aside and the appellants are hereby acquitted of the charged offence.