

(2008) 03 P&H CK 0213

High Court Of Punjab And Haryana At Chandigarh**Case No:** Criminal Appeal . No. 916-SB of 2002

Ramu

APPELLANT

Vs

State of Punjab

RESPONDENT

Date of Decision: March 20, 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, 54

Citation: (2008) 3 RCR(Criminal) 506**Hon'ble Judges:** Harbans Lal, J**Bench:** Single Bench**Advocate:** Jitender Dhanda, for the Appellant; Manjari Nehru, D.A.G., Haryana, for the Respondent**Final Decision:** Allowed

Judgement

Harbans Lal, J.

This appeal is directed against the judgment/order of sentence dated 24th November, 2001 rendered by the Court of learned Judge, Special Court, Mansa, whereby he convicted and sentenced the accused to undergo rigorous imprisonment for ten years and to pay a fine of Rs. 1 lac and in default of payment of fine, to further undergo rigorous imprisonment for a period of one year u/s 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for brevity 'the Act').

2. Tersely put, facts of the prosecution case are that on 29.6.2000 ASI Rajinder Singh among other police officials was proceeding from the side of village Bachhoana towards village Ralli on unmetalled passage being on patrol duty in a government canter No. PB-03-1017 driven by Constable Sukhchain Singh. When they reached the bridge of canal minor in the area of village Bachhoana, the accused was spotted sitting on the bags on the right side of the bridge of canal minor towards village

Ralli. On suspicion, the aforesaid ASI stopped the canter and apprehended the accused. Meanwhile, Bora Singh son of Gurbax Singh resident of village Mehmra came from the Ralli side. He was also joined in the police party. The aforementioned ASI told the accused that the bags were suspected to contain some contraband and asked him to tell, whether he wants the bags to be searched before a Gazetted Officer or a Magistrate. He offered the same to be searched in the presence of some Gazetted Officer. His consent memo was prepared. On receipt of message, Amrik Singh DSP (D), Mansa came at the spot in his Gypsy alongwith his gunman. He also introduced himself to the accused and asked him to tell whether he wanted the bags to be searched in the presence of a Gazetted Officer or a Magistrate. The accused expressed his faith in him. On the direction of DSP, the bags were searched by the aforementioned ASI. Three bags lay in low lying land. Equal number of bags was lying by the side of those bags. One bag was lying on the bags which lay on the low lying bags. Total bags were seven in number. On checking, the contents of these bags were found to be poppy husk. Two samples of 100 grams were drawn from each bag and converted into parcels. The residue of each bag when weighed came to 34 kgs., which was also made into parcel. Thereafter, all the parcels were sealed with seal 'RS'. The seal after use was handed over to Bora Singh. All these parcels were sized vide recovery memo. On personal search of the accused, currency note worth Rs. 65 were recovered, which were also taken into possession. Ruqa was sent to the police station. On its basis formal FIR was recorded. Rough site plan showing the place of recovery was prepared. On return, the accused and all the sample parcels were produced before ASI Paramjit Singh SI/SHO, Police Station, Budhlada, who after verification, affixed his own seal 'PS' on all the sample parcels. On receipt of the Chemical Examiner's report and after completion of investigation, charge-sheet was laid in the Court for trial of the accused. The accused was charged u/s 15 of the Act, to which he did not plead guilty and claimed trial.

3. To bring home guilt against the accused, the prosecution has examined PW1 Amrik Singh DSP (D), PW2 ASI Rajinder Singh, PW3 SI Paramjit Singh, PW4 Constable Puran Singh, PW5 HC Jagjit Singh and closed its evidence by giving up Bora Singh as having been won over by the accused.

4. When examined u/s 313 Cr.P.C., the accused denied all the incriminating circumstances appearing in the prosecution evidence against him and pleaded innocence as well as false implication. He did not lead any evidence in his defence.

5. 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 the accused as noticed at the outset. Feeling aggrieved therewith, he has preferred this appeal.

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

6. Mr. Jitender Dhanda, Advocate appearing on behalf of the appellant making a short shrift of his arguments maintained that (a) conscious possession of the accused qua the bags is not established (b) CFSL form was not prepared at the spot nor deposited in Malkhana (c) seal was returned by Bora Singh independent witness on the next day (d) the sample parcel was sent for chemical analysis on 31st July, 2000 (e) Bora Singh has not been examined (f) SI/SHO Paramjit Singh PW3 did not deposit the case property in the malkhana (g) the bags were recovered from open space accessible to all and sundry (h) question of conscious possession has not been put to the accused during his examination u/s 313 Cr.P.C. All these infirmities are cumulatively fatal to the prosecution case.

7. To controvert these contentions, Ms. Manjari Nehru Deputy Advocate General, Punjab on behalf of the State contended that the accused was found sitting on the bags, which in itself is enough to hold the conscious possession. She further pressed into service that a glance through FSL report Ex.P1 would reveal that the seal affixed on the sample parcels tallied with the sample seal, which obviously, rules out the possibility of tampering with the contents of the sample parcels.

8. I have given a deep and thoughtful consideration to the rival contentions. [State of Punjab Vs. Balkar Singh and Another](#), the accused were sitting on about 100 bags of poppy husk. He did not give any satisfactory explanation for being present at that place. The Apex court ruled that merely by being found to be present at the place where the poppy husk was 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 bags. In fairness, the police should have conducted further investigation (as to transportation of bags, place of incident, ownership of the poppy husk etc.) to prove that the accused were really in possession of the said articles.

9. Coming to the facts of the instant case, as alleged by the prosecution, the accused was sitting on the bags. Thus, if the matter is viewed in the background of the above extracted observations, the mere presence of the accused on the bags and his failure to give any satisfactory explanation for being so present do not prove that he was in possession thereof. ASI Rajinder Singh PW2 Investigator is absolutely silent about his having inquired into the ownership or the mode of transportation of these bags to that place. In the absence of such evidence, it is very difficult to say that the accused was the owner of these bags.

10. More to the point, recovery has been effected from an open place. There is nothing on record to show that the accused was the owner of the same. This being an open space might be accessible to all and sundry. In re: Avtar Singh and others v. State of Punjab, 2002 (4) RCR (Crl.) 180 (SC), the Apex Court has 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. Non- application of mind to the material factors has thus vitiated the judgment under appeal."

11. Coming to the facts of the present case, the only question put to the accused in his cross-examination u/s 313 of Cr.P.C. is that "you were seen sitting on bags towards village Ralli." The possession or conscious possession of the bags in question has not been put to him in his statutory statement, though, in view of the above extracted observations from the case of Avtar Singh and others (supra), the question of possession was required to be put to him. Therefore, the presumption arising u/s 34 or 54 of the Act cannot be drawn against the accused. Thus, it boils down that the prosecution has not established conscious possession of the accused qua these bags. In re: Bhola Singh v. State of Punjab, 2005 (2) RCR (Crl.) 520, it has been held that where the seal remained with the police after its use and the CFSL form was neither prepared on the spot nor deposited in the malkhana, such circumstance would be fatal to the prosecution case. The filling 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 FSL. In the present case, the seal was allegedly handed over to Bora Singh, a publicman, who has been given up on the pretext of his having been won over by the accused. It is not to be lost sight of the fact that as surfaced in the cross-examination of ASI Rajinder Singh PW2, the seal was returned to him by Bora Singh on the next day at about 10 AM. According to the FSL report, the sample parcels were received in the laboratory on 4.7.2000. The recovery was effected 29.6.2000. As the seal was received back on the next day, so the possibility of the contents of the sample parcels being tampered with cannot be ruled out. It is also worth pointing out here that Paramjit Singh SI/SHO PW3 has admitted in his cross-examination that the Court directed him to deposit the case property in judicial malkhana, but without obtaining specific order from the Court, he kept the same in his possession. It is also in his evidence that he did not bring the fact of scarcity of space in the judicial malkhana to the notice of the Court. It implies that the case property remained in his possession and it was never deposited in the malkhana. This evidence further probablises the tampering of the contents of the sample parcels. This circumstance, is most fatal to the prosecution. It is in the cross-examination of ASI Rajinder Singh PW2 Investigator that on interrogation by him, the accused had told that someone canter wala had thrown the poppy straw bags on the bridge of canal minor. This evidence further indicates that the accused was not the owner of the bags.

In view of the preceding discussion, this appeal is accepted by setting aside the impugned judgment/order of sentence. Sequelly, the appellant is hereby acquitted of the charged offence. His bail bond shall stand discharged.