

(2008) 01 P&H CK 0260

High Court Of Punjab And Haryana At Chandigarh**Case No:** Criminal A. No. 546-SB of 2000

Jaswinder Singh

APPELLANT

Vs

State of Punjab

RESPONDENT

Date of Decision: Jan. 25, 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, 35, 54

Citation: (2009) 1 RCR(Criminal) 425**Hon'ble Judges:** Harbans Lal, J**Bench:** Single Bench**Advocate:** Rajiv Vij, for the Appellant; K.S. Pannu, Assistant Advocate General, Punjab, for the Respondent

Judgement

Harbans Lal, J.

This appeal is directed against the judgment/order of sentence dated 2nd May, 2000 rendered by the Court of learned Special Judge, Ferozepur whereby he convicted and sentenced the accused/appellant to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs. 1 lac and in default of payment of fine, to further undergo rigorous imprisonment for one year and u/s 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for brevity 'the Act').

2. The brief facts giving rise to this case are that on 21st March 1995, SI/SHO Major Singh in the accompany of other police officials, while in a government gypsy was standing on triangular link road leading from village Toothgarh to Zindra Chak Tara Wala etc., being on patrol duty. At about 4 PM one Ambassador car bearing registration No. DHD-8586 being driven by accused Jaswinder Singh came from the side of village Toothgarh. On suspicion that there were some intoxicants in the car, the same was made to stop. The accused was apprehended. He was offered to be

searched before a Gazetted Officer or a Magistrate. He reposed his confidence in the aforesaid SI. His consent memo was prepared. On search of the car, three bags containing poppy husk were recovered. Two bags lay in the dicky whereas one bag was lying on the rear seat of the car. A sample of 250 grams was drawn from each bag to serve as sample. The same were converted into parcels. The residue of each bag when weighed came to 30 kgs. The same were also made into parcels. Thereafter, all the parcels were sealed with seal 'MS'. The specimen seal impression was prepared. The seal after use was handed over to ASI Niranjan Singh. All the sample parcels were seized vide separate memo. Ruqa was sent to the police station. On its basis formal FIR was registered. On personal search of the accused, currency notes worth Rs. 70/- were recovered. The same were also seized vide separate memo. The grounds of arrest were disclosed to the accused vide separate memo. The aforesaid SI prepared the rough site plan showing the place of recovery, recorded the statements of the witnesses and on return to the police station, the case property was kept in the malkhana under the supervision of aforesaid SI. On receipt of the Forensic Science Laboratory's report and after completion of investigation, the charge-sheet was laid in the Court of learned Illaqa Magistrate, who committed the case to the Court of Sessions for trial of the accused. On commitment, the accused was charged u/s 15 of the Act, to which he did not plead guilty and claimed trial.

In order to substantiate its allegations, the prosecution has examined PW-1 Constable Kulwinder Singh, PW-2 ASI Niranjan Singh, PW-3 SI/SHO Major Singh, Investigator, PW-4 ASI Suba Singh and closed evidence.

3. 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. In defence he examined DW-1 HC Mehal Singh.

4. 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 with the judgment/order of sentence, he preferred this appeal.

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

6. Mr. Rajiv Vij, Advocate appearing on behalf of the appellant canvassed at the bar that as is borne out from the evidence of SI Major Singh PW-3, Investigator, only two bags i.e. Ex.MO/1 and Ex.MO/2 were produced at the trial, though, as per the prosecution story three bags were allegedly recovered from the car and furthermore, the recovery was allegedly effected on 21st March, 1995, though the sample was despatched for chemical analysis after 8 days. To add further to it, CFSL Form was neither prepared nor deposited in the malkhana and on taking all these

circumstances into consideration, it transpires that the possibility of tempering with the contents of the sample parcels cannot be ruled out.

7. Mr. K.S. Pannu, assistant Advocate General, Punjab representing the State could not controvert this contention in a successful manner.

8. Strangely enough that only two bags were produced at the trial, though, allegedly three bags were recovered from the car. The prosecution has not given any explanation in relation to the third bag. On appraising the evidence of the Investigator, the case property indeed remained in his possession throughout except the day on which, it was produced before the learned Illaqa Magistrate through ASI Suba Singh. The case property as well as the sample parcels were also sealed with his own seal 'MS'. The seal after use remained in the custody of ASI Niranjana Singh. CFSL form was neither prepared nor deposited in the malkhana. In re: Bholu Singh v. State of Punjab, 2005 (2) RCR(Cr.) 520 (P&H); as many as 14 bags of poppy husk were recovered from the trolley. It was held by this Court that "where the seal remained with the police after 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. Filling of such form at the spot is very valuable safe-guard to ensure that the seal sample is not tampered with till its analysis by the FSL". In view of these observations, the above narrated circumstances herein are fatal to the prosecution case.

As projected by the prosecution, the bags were recovered from the car. In re: Avtar Singh and others v. State of Punjab, 2002 (4) RCR(Cr.) 180 (SC), as many as 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 Hon'ble Supreme Court 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 but the minimum requisite element which has to be satisfied is 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 traveling in the vehicle at the odd hours, is one strong circumstance that they can be put against than. 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....."

9. Adverting to the facts of the instant case, the car was being driven by the accused. In his statutory statement u/s 313 of Cr.P.C., it has been merely put that two bags of poppy husk were lying in the dicky of the car and one was lying on the rear seat of the car. It has not been put that these bags were in his conscious possession. Consequently, in view of the afore-extracted observations the alleged bags cannot be deemed to be in the custody or control of the accused. There is also nothing on record to show as to who was the owner of the car. There is a glaring aspect in this case. In his examination-in-chief Kulwinder Singh PW-1 testified that three sample parcels containing poppy husk weighing 250 grams each were handed over to him by S1 Major Singh Investigator with a direction to deposit the same in the office of the Chemical Examiner, whereas in his cross-examination, he went on to say that Surinder Singh MHC had handed over to him the sample parcels after drawing the same from the malkhana. The keys of the malkhana were with him (MHC). It is pertinent to point out here that Surinder Singh has not been examined. This evidence causes a dent in the prosecution and demolishes the case like a House of cards.

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