

(2008) 03 P&H CK 0229

High Court Of Punjab And Haryana At Chandigarh**Case No:** Criminal Appeal No. 1061-SB of 2001 and Criminal Appeal No. 1165-SB of 2001

Jasbir Singh alias Jassa

APPELLANT

Vs

State of Haryana

RESPONDENT

Date of Decision: March 26, 2008**Acts Referred:**

- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 15

Hon'ble Judges: Harbans Lal, J**Bench:** Single Bench**Advocate:** Jagjeet Beniwal, for Mr. Jagbir Malik in Cr. A. No. 1061-SB of 2001 and Mr. Navkiran Singh in Cr. A. No. 1165-SB of 2001, for the Appellant; Manjari Nehru, Dy. Advocate General, for the Respondent**Final Decision:** Allowed

Judgement

Harbans Lal, J.

This judgment shall dispose of Criminal Appeal No. 1061 -SB of 2001 preferred by Jasbir Singh alias Jassa and Criminal Appeal No. 1165-SB of 2001 filed by Sinder Singh alias Sindhu against the judgment/order of sentence dated 30.07.2001 rendered by the Court of learned Judge, Special Court, Patiala, whereby he convicted and sentenced the accused-appellants to undergo rigorous imprisonment for 10 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 6 months u/s 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for brevity, "the Act").

2. The facts, in brief, of the prosecution case are that on 04.07.1996, ASI Jagjiwan Singh along with other police officials was returning after patrolling in a vehicle Allwyn Nissan bearing registration No. PB-11 -C-9682 being driven by Constable Sukhdev Singh. When the police party reached in the area of village Sagra, Joginder Singh PW met the police party. When he was chattering (chatting ?) with the police party, meanwhile from Tharua side a bullock cart was spotted coming on the kacha

path. On catching sight of the police party, the person who was driving the bullock cart, stopped the same and made an attempt to turn back. On suspicion, he along with other person, who was sitting on the bags in the bullock cart, were intercepted. They disclosed their names as Jasbir Singh alias Jassa and Sinder Singh alias Sindhu. They were asked to tell whether they wanted the bags lying in the bullock cart to be searched in the presence of a Magistrate or a Gazetted Officer. They offered the same to be searched in the presence of a Gazetted Officer. On receipt of wireless message, DSP Samana Narinderpal Kaushal came at the spot. On his directions, the search of 6 bags was carried out. On search, the same were found containing poppy husk. Two samples of 250 grams each were drawn from each bag to serve as sample and the same were converted into parcels. The residue of each bag, when weight, came to 34.500 kg. which was also made into parcel. Thereafter all the parcels were sealed with the seal JS and NP. The sample seal was prepared. The seal after use was handed over to Constable Jaspal Singh. All the parcels were seized vide recovery memo. Ruqa was sent to the Police Station. 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. The accused were charged u/s 15 of the Act to which they did not plead guilty and claimed trial. In order to substantiate its allegations, the prosecution has examined PW1 HC Mewa Singh, PW2 DSP Narinder Pal Kaushal, PW3 ASI Jagjiwan Singh and closed its evidence.

3. When examined u/s 313 of the Code of Criminal Procedure, both the accused denied all the incriminating circumstances appearing in the prosecution evidence against them and pleaded innocence. Jasbir Singh alias Jassa came up with the plea that he was arrested from his House in the presence of respectable and this case was planted upon him. His co-accused Sinder Singh alias Sindhu has also adopted this plea. In defence, they examined DW1 Constable Punjab Singh and DW2 Joginder Singh.

4. After hearing the learned Additional Public Prosecutor, the learned defence counsel and examining the evidence on record, the trial Court convicted and sentenced both the accused as noticed at the outset. Feeling aggrieved with their conviction/ sentence, they have preferred these appeals.

5. I have heard the Learned Counsel for the appellants as well as Ms. Manjari Nehru, Deputy Advocate General, Punjab, besides going through the record with due care and circumspection.

6. Learned Counsel for the appellants, maintained that as per prosecution story, the bullock cart was being driven by Jasbir Singh accused, whereas Sinder Singh alias Sindhu accused was sitting on the bags, but the prosecution has not accused any evidence to the effect that they were the owners of the bags or they were in conscious possession thereof and furthermore no specific question has been put to either accused in examination u/s 313 of the Code of Criminal Procedure that they were in possession/conscious possession and thus, their conviction is not

maintainable in view of the observations made by the Division Bench of this Court in re : Raj Kumar v. State of Punjab, 2005 (1) CCC 368 (P&H) : 2005 (1) RCR (Cri.) 70.

7. Ms. Manjari Nehru on behalf of the State pressed into service that in view of the provisions of Section 35 as well as 54 of the Act, the presumption arises of their being in conscious possession of the poppy husk bags. This contention merits rejection.

8. In Re: Raj Kumar v. State of Punjab, 2005 (1) RCR (Cri) 70, the bag containing 8.250 kgs. of opium was lying on the seat between the two appellants. Both the appellants had been charged for possession of opium, but neither of them had been asked any question in their statements u/s 313 of the Code of Criminal Procedure 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. Further held that it is 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 when examining the accused u/s 313 Cr.P.C. and seeking his explanation. Unless this is done the presumption under Sections 35 and 54 cannot be used against the accused.

9. Learned Counsel for the appellants further canvassed at the bar that it is in the cross-examination of AS1 Jagjiwan Singh, PW3 (Investigator) that "it is correct that there are holes in the bags about 6 inches. Voluntarily stated that it has happened due to lapse of time. There are seals on the case property and some of them are broken." It is in his further cross-examination that "I cannot tell if any DDR or any note has been made by MHC regarding the damage of the property." This evidence probalilise tampering with the contents of the case property.

9. Ms. Manjari Nehru submitted that the explanation given by the witness may be accepted. This contention merits rejection. If the holes in the bags of poppy husk had occurred due to lapse of time, it was imperative upon the concerned MHC to record DDR in this behalf. But to the utter dismay of the prosecution, there is no such DDR or any other record showing that the holes had come to occur in the bags due to passage of time. Further, some of the seals affixed on the bags were in broken condition. In such a state of affairs, it is very difficult to say that the case property produced at the trial was the same which was allegedly recovered form the accused. It is in the statement of the Investigating Officer that the seal after use was handed over to Constable Janpal Singh, who has not been produced at the trial as he has been given up. In the absence of his examination, it is very difficult to assume that the seal was returned by him after the dispatch of the sample parcels for chemical analysis. Only his examination would have revealed the truth as to whether the seal was given to him or the Investigator was lying in the witness box on this aspect. For his keeping off the witness box, an adverse inference has to be drawn u/s 114(g) of Indian Evidence Act. Furthermore, Constable Balbir Singh No. 2353 by whom the samples were sent for chemical analysis to the office of the

Chemical Examiner, has not been examined due to his untimely death. Thus, the link evidence is obviously missing.

10. It is in the cross-examination of PW2 Narinder Pal Kaushal DSP that "the seals after use were handed over to Janpal Singh Head Constable. At that time, Joginder Singh, private witness was also present." The prosecution has not furnished any explanation for handing over the seal to a police official instead of independent witness Joginder Singh. In *Re : Sukhdev alias Sukha v. State of Punjab*, 2006 (1) RCR (Cri.) 4, the seal was given to the SI of police and not to the independent witness. It was held by the Division Bench of this Court that the possibility of seal being tampered with, substance being changed and the containers being re-sealed, cannot be ruled out. The conviction was set aside inter alia on this ground. In view of these observations, the conviction is also liable to be set aside.

In view of the formatives enumerated above, both these appeals are accepted, setting aside the impugned judgment/order of sentence. The accused-appellants are hereby acquitted of the charged offence.