

(2006) 05 P&H CK 0244

High Court Of Punjab And Haryana At Chandigarh

Case No: Criminal Appeal No. 472-SB of 2003

Joga Singh

APPELLANT

Vs

State of Punjab

RESPONDENT

Date of Decision: May 22, 2006

Acts Referred:

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

Citation: (2006) 17 CriminalCC 973 : (2006) 3 RCR(Criminal) 480

Hon'ble Judges: Virender Singh, J

Bench: Single Bench

Advocate: A.P.S. Deol, for Joga Singh, Mr. H.S. Saggi, for Shambu Nath and Mr. H.R. Nohria, for Hansa Singh, for the Appellant; Ramandeep Sandhu, D.A.G., for the Respondent

Final Decision: Dismissed

Judgement

Virender Singh, J.

Vide this judgment, I shall be disposing of the aforesaid three appeals as the same arise out of one and the same judgment.

2. The aforesaid three appellants have suffered conviction vide impugned judgment of learned Special Judge, Moga dated 15.1.2003, u/s 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short the "Act") and have been sentenced to undergo RI for ten years each and to pay a fine of Rs. one lac each, in default thereof to further undergo RI for one year each. Sapurdari of Truck No. PAT-9106 in which the alleged contraband was being carried was also cancelled. Aggrieved by the said judgment of conviction and sentence, the aforesaid three appellants have preferred the present three different appeals.

3. The case of the prosecution in short is that on 28.8.1991, ASI Kuldip Singh PW5 who was Incharge of Police Station Badhni Kalan and ASI Tek Singh PW3 and other police officials were present on the road crossing known as Bhiana Chowk situated

on Moga-Barnala road, in the area of village Badhni Kalan in connection with nakabandi. At about 4.45 AM, one truck bearing No. PAT-9106 appeared from the side of village Badhni Kalan. A signal was given to the driver to stop the truck. The driver consequently slowed down its speed. Two persons were found sitting on front seat of the truck and one person was sitting on the backside, alighted from the truck and ran away on seeing the police party. The truck was being driven by appellant Shambu Nath and Joga Singh appellant was sitting on the front side of the truck by the side of Shambu Nath. Both of them were apprehended by ASI Kuldeep Singh with the help of other police officials. They disclosed their names and other particulars. The name of the third person known as Hansa Singh (appellant herein) was disclosed by aforesaid two persons on interrogation. ASI Kuldip Singh told them that he had suspicion that they were carrying some contraband articles in their truck and, therefore, he wanted to conduct its search. They were also apprised of their statutory right to be searched in the presence of gazetted officer or Magistrate. In the meantime, DSP Bachan Singh Randhawa PW6 also reached the spot in order to check Nakabandi. It is then the case of the prosecution that both the appellants opted to get their search conducted in the presence of Bachan Singh Randhawa DSP. In this regard their consent memo Ex.PB was prepared which was attested by ASI Tek Singh and ASI Jagtar Singh and other police officials accompanying the police party. It was also signed by appellant Shambu Nath and thumb marked by appellant Joga Singh. On the direction of DSP Bachan Singh Randhawa, ASI Kuldip Singh conducted the search of the truck and found 40 bags of poppy husk loaded in the truck under the tarpaulin. 250 grams of poppy husk was separated out of each bag as sample and the remaining poppy husk in bag on weighment came to be 40 kgs in each bag. All the samples and 40 bags containing the remainder were sealed by ASI Kuldip Singh with his seal having inscription "KS". Sample seal Ex.P1 was also prepared separately. DSP Bachan Singh Randhawa also fixed his seal on parcel and 40 bags containing the remainder with his seal bearing inscription "BSR". He also put his specimen seal on sample seal Ex.P1. The case property was then taken into possession vide recovery memo Ex.PC, attested by the aforesaid two police officials namely Tek Singh and ASI Jagtar Singh. The appellants could not produce any permit or licence for keeping the contraband. Therefore, ruqa Ex.PF was sent to the Police Station on the basis of which formal FIR Ex.PF/1 was recorded. The truck No. PAT-9106, driving licence of Shambu Nath Ex.P42 and registration certificate Ex.P43 were also taken into possession vide recovery memo Ex.PD attested by the aforesaid witnesses. Some amount was also recovered on a personal search of Shambu Nath and Joga Singh appellants. Other formalities were completed at the spot including preparation of site plan Ex.PG. On return to the Police Station, the case property was kept by ASI Kuldip Singh in his safe custody and on 29.8.1991, the same was handed over to ASI Darshan Singh who produced the appellants and the case property before the Judicial Magistrate Ist Class, Moga. After producing the case property and appellants, ASI Darshan Singh brought back the case property and deposited it with MHC with all the seals intact. After the

receipt of the report of the Chemical Examiner Ex.PX, Challan was presented against all the three appellants. They were charged u/s 15 of the Act and have now suffered conviction for the said charge.

4. The prosecution in support of its case has examined seven witnesses. PW1 SI Baldev Singh had prepared the challan and submitted the report u/s 173 of the Code of Criminal Procedure; PW2 HC Naib Singh proved on record his affidavit Ex.PA. PW3 ASI Tek Singh is a witness to the recovery; PW4 Devinder Kumar, Junior Assistant, Office of DTO Moga proved the registration certificate of aforesaid truck which was in the name of appellant Shambu Nath; PW5 ASI Kuldip Singh is the Investigating Officer. Bachan Singh Randhawa DSP PW6 is again a witness to the recovery; LC Pritpal PW7 proved his affidavit Ex.PA. Evidence of PW7 is to the effect that on 29.8.1991, ASI Kuldip Singh had handed over the case property for producing the same in the court along with accused and after return he had handed over the same to MHC. Affidavit Ex.PH of Gurdev Singh was tendered and report of Chemical Examiner Ex.PX and PX1 were tendered during the evidence.

5. The stand taken by the appellants as emerges from their statements recorded u/s 313 of the Code of Criminal Procedure is of total denial. They assert that they were arrested in a terrorist case and later on they were falsely implicated in this case. In defence two witnesses namely Babu Lal DW1 and Gurdip Singh DW2 were produced.

6. I have heard Mr. H.R. Nohria, representing Hansa Singh alias Harbans Singh alias Jugraj Singh appellant, Mr. A.P.S. Deol, representing Joga Singh appellant, Mr. H.S. Saggi, representing Shambu Nath appellant and Mr. Ramandeep Sandhu, DAG Punjab. With their assistance, I have gone through the entire record.

7. To start with Mr. Nohria states that there is no legal evidence with the prosecution to fix the identity of Hansa Singh appellant. He is booked in this case on the statement of his two co-accused who were allegedly apprehended at the spot and who disclosed the name of the third accused as Hansa Singh. According to the learned counsel, the said statement cannot be read into evidence. Dwelling upon his arguments, Mr. Nohria then contends that it has come in the statement of ASI Tek Singh PW3 that the police party was duly armed and it is not appealing to reason that Hansa Singh could run away after jumping from the truck on seeing the police party. The learned counsel in this regard has drawn my attention to the cross-examination of ASI Tek Singh where he has categorically stated as under :

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The police party was armed. We did not fire in the air as warning shots to stop the culprit. Again said Hansa Singh got down from the truck and ran away. I have not seen Hansa Singh running away. I did not know Hansa Singh earlier. We were not supposed to wireless regarding running away of the accused.

8. The learned counsel very fairly submits that may be ASI Kuldip Singh PW5 in his cross-examination has stated at one stage that Hansa Singh accused was known to him previously but the same would not make any difference as he has nowhere stated that he had seen Hansa Singh running. According to the learned counsel, may be that Hansa Singh was known to him earlier also but it cannot be said that the person who had fled away after seeing the police party was only Hansa Singh and none else. The learned counsel then states that ASI Kuldip Singh had stated that no identification parade of Hansa Singh was held and, therefore, the only evidence with the prosecution is the statement of two co-accused.

9. Mr. Nohria has also drawn my attention to the statement of Babu Lal DW1 who is Assistant in the Head Post Office, Faridkot and had proved the telegram dated 27.8.91 Ex.D1 sent by Gurdev Singh alleging therein that Hansa Singh was taken into custody much prior to the date of alleged recovery from the truck.

10. In support of his contentions, Mr. Nohria relies upon Division Bench judgment of this Court rendered in Ram Pal v. State of Punjab, 2003 (3) RCR (Cri) 159 (para 15 refers).

11. From the aforesaid facts, Mr. Nohria states that the case of the prosecution qua Hansa Singh is not free from doubt and as such he deserves acquittal.

12. Mr. Deol appearing for Joga Singh appellant submits that against him also there is no clinching evidence to prove the conscious possession of the contraband. He contends that Joga Singh appellant is neither the owner nor cleaner of the truck. He is not from the village of Shambu Nath who is the registered owner of the truck and was seated on the driving seat, therefore, possibly by no stretch of imagination, he can be connected with the commission of the alleged offence. Developing his arguments, Mr. Deol then submits that it is quite possible that the third person who had allegedly run away from the spot was having the possession of the contraband (40 bags being carried in the truck) and no presumption can be drawn against Joga Singh that he was exercising the possessory right over the contraband.

13. In support of aforesaid submissions, Mr. Deol relies upon a judgment of Hon^{ble} the Apex Court rendered in Avtar Singh v. State of Punjab, 2002 (4) RCR (Cri) 180 in which their Lordships have held that possession and ownership need not always go together but the minimum requisite element which has to be satisfied is the custody and control over the goods. In order to strengthen his case on this aspect, Mr. Deol also relies upon a DB judgment of this Court rendered in Tarsem Singh v. State of Punjab, 2005 (4) RCR (Cri) 300.

14. On the point of presumption as envisaged under Sections 35 and 54 of the Act, Mr. Deol, while relying very heavily on the judgment rendered by the Full Bench of this Court in Kashmir Singh v. State of Punjab on February 22, 2006 in Criminal

appeal No. 407-DB of 1999, contends that no presumption under Sections 35 and 54 of the Act can be drawn against the accused unless he has been given an opportunity to rebut the same in his statement to be recorded u/s 313 of the Code of Criminal Procedure by being called upon to explain the circumstances which give rise to the presumption. According to Mr. Deol, when the statement of Joga Singh appellant was recorded u/s 313 of the Cr.P.C., he was not called upon to explain the circumstances giving rise to presumptions and, therefore, no presumption under Sections 35 and 54 of the Act can be drawn against him qua the conscious possession of contraband. He, therefore, deserves acquittal on these lacunae.

15. Mr. Deol also pointed out certain other infirmities in the case of the prosecution saying that even the presence of DSP Bachan Singh Randhawa PW6 is doubtful as he has not signed any memo at the spot including the sample seal Ex.P1. This shows that he was not present at the spot and ASI Kuldip Singh, the Investigating Officer purports to show that the recovery is effected in the presence of gazetted officer in order to give weight. In this regard, Mr. Deol has drawn my attention to the relevant portion from the substantive statement of the witness where he states that he is neither an attesting witness to the recovery memo nor to consent memo and other memo which were prepared moo at the spot. Mr. Deol goes to say that aforesaid Bachan Singh Randhawa rather states that his statement u/s 161 of the Code of Criminal Procedure was also not recorded. On a specific question being put to him in cross-examination, he stated that he could not assign any reason for not attesting even the seal impression Ex.P1. In order to shatter the case of the prosecution qua Joga Singh, Mr. Deol also draws attention of this Court to another relevant portion of the cross-examination where aforesaid DSP had identified Hansa Singh appellant as Joga Singh.

16. Mr. Deol also relies upon statement of Gurdip Singh DW2, a Member Panchayat who states that Joga Singh and Hansa Singh were brought from village by the police in his presence suspecting them to be terrorists and no recovery was effected from them. He also relies upon a telegram Ex.D1 saying that this document would also assume importance as the recitals of the said telegram indicate that Hansa Singh was lifted from the village on 22.8.91 from his house and both are from the same village as is clear from the statement of Gurdip Singh.

17. On the basis of the aforesaid submissions, Mr. Deol prays for acquittal of Joga Singh appellant.

18. Mr. Saggu appearing for Shambu Nath appellant submits that his case cannot be segregated from aforesaid Joga Singh and Hansa Singh appellants as the very case set up by the prosecution is that three persons were travelling in the truck, two were nabbed at the spot and the identity of third person who escaped from the spot was disclosed by other two as Hansa Singh. According to Mr. Saggu, once the court feels that Joga Singh and Hansa Singh are falsely implicated, the case of the prosecution qua Shambu Nath also falls on the ground and he too deserves acquittal, may be

that he was on the steering of the truck and happens to be the registered owner of the same.

19. Mr. Saggu also relies upon the infirmities pointed out by Mr. Deol in the case of the prosecution and states that even qua Shambu Nath appellant, judgment of Full Bench rendered in Kashmir Singh's case (supra) is applicable with full force.

20. Mr. Saggu in order to strengthen his case relies upon a judgment of Hon"ble Supreme Court rendered in State of Punjab v. Balkar Singh and another, 2004 SCC (Cri) 838, stating that merely Shambu Nath appellant was allegedly found carrying contraband (40 bags of poppy husk) in his truck, it cannot be said that he was in conscious possession of the same. It is quite possible that the contraband allegedly recovered belonged to other two persons who were from the same village and were travelling together in the truck driven by Shambu Nath appellant. Mr. Saggu then submits that another possibility can also be not ruled out that the person who had fled away from the truck could be in the possession of the same and, therefore, in all fairness, the police should have conducted further investigation with regard to the transportation of poppy husk to the place of incident and ownership thereof to prove that who in fact was having possessory right over the said contraband. The same being not done in the instant case by the investigating agency, no presumption can be drawn against the driver-cum-owner especially when the circumstances were not put to him at the time of recording of statement u/s 313 of the Code of Criminal Procedure to rebut the presumption. Therefore, the prosecution case qua Shambu Nath appellant is also not free from doubt and he, too, deserves acquittal.

21. Repudiating the submissions made by learned counsel for all the three appellants, Mr. Sandhu submits that telegram Ex.D1 does not strengthen the case of Hansa Singh or Joga Singh appellant as the exact timing of sending the telegram is not mentioned. He then states that Joga Singh and Hansa Singh are from the same village and were travelling together. This important fact cannot be ignored. Even otherwise all the three appellants are from same district (Distt. Bathinda). This is the reason that on interrogation, Joga Singh and Shambu Nath disclosed the identity of Hansa Singh. According to Mr. Sandhu, the driver of a truck does not go all alone. He always carries with him a second driver (co-driver) or a cleaner and, therefore, Joga Singh who was found sitting by the side of Shambu Nath can be said to be a cleaner, if not co-driver, for the reason that no recovery of the licence of Joga Singh is effected at the spot. All these factors when taken collectively lead to the conclusion that all the three appellants were aware of the fact that they were carrying 40 bags of poppy husk in the truck and, therefore, their joint possession over the contraband can very well be presumed in this case. All the three appellants, thus, cannot escape from their liability.

Dealing with the case of Hansa Singh appellant :

22. The only evidence brought on record as is clear from the statement of the Investigating Officer, is that when he interrogated Joga Singh and Shambu Nath, they disclosed the identity of third person who had fled away from the spot after seeing the police party was Hansa Singh appellant. There cannot be any dispute that this statement is inadmissible in evidence. May be that the said statement could help the prosecution agency for the purposes of investigation but in my considered view, the same has no strength in law. The admitted case of the prosecution is that beyond the aforesaid statement of the co-accused, the prosecution has not collected any evidence to connect Hansa Singh with the recovery of contraband and, therefore, he cannot be said to be in conscious possession of the same. On the basis of the aforesaid weakness in the case of the prosecution, even presumption under Sections 35 and 54 of the Act qua Hansa Singh appellant cannot be drawn and the net result is that the case of the prosecution against him is not proved to the hilt. He, therefore, deserves acquittal.

Adverting to the case of Joga Singh appellant :

23. The evidence brought by the prosecution is that he was apprehended at the spot while sitting by the side of Shambu Nath driver-cum-owner of truck No. PAT-9106. Obtaining of thumb impression of Joga Singh and signature of Shambu Nath appellant on the consent memo, in my view, would not make any difference as the prosecution has to prove the possessory title over the contraband of the accused in order to draw the presumption as envisaged under Sections 35 and 54 of the Act and till the said exercise is done by the prosecution, the conviction cannot be maintained.

24. In Avtar Singh's case (supra) rendered by Hon"ble Apex Court, there was recovery of 16 gunny bags from a truck. Two accused were sitting on the bags and one was driving the truck. Their Lordships held that it is not proved that the accused in fact had the custody and control over the bags. The conviction was, therefore, set aside. It was then observed in the aforesaid judgment that possession and ownership need not always go together but the minimum requisite element which is to be satisfied is the custody or control over the goods. For reference, the relevant para No. 6 from the aforesaid judgment is reproduced as under :

6. Possession is the core ingredient to be established before the accused in the instant case are subjected to the punishment u/s 15. If the accused are found to be in possession of poppy straw which is a narcotic drug within the meaning of Clause (xiv) of Section 2, it is for them to account for such possession satisfactorily; if not, the presumption u/s 54 comes into play. We need not go into the aspect whether the possession must be conscious possession. Perhaps taking clue from the decision of this Court in [State of Uttar Pradesh Vs. Lakshmi Brahman and Another](#), arising under the Opium Act, the learned trial Judge charged the accused of having conscious possession of poppy husk. Assuming that poppy husk comes within the expression poppy straw, the question, however, remains whether the prosecution

satisfactorily proved the fact that the accused were in possession of poppy husk. Accepting the evidence of PW-4 the Head Constable, it is seen that appellant No. 3 (accused No. 4) was driving the vehicle loaded with bags of poppy husk. Appellants 1 and 2 (Accused Nos. 1 and 2) were sitting on the bags placed in the truck. As soon as the vehicle was stopped by ASI (PW-2), one person sitting in the cabin by the side of the driver and another person sitting in the back of the truck fled. No investigation has been directed to ascertain the role played by each of the accused and the nexus between the accused and the offending goods. 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 persons 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 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 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 the Evidence Act nor is it (sic) to conclude that the prosecution established beyond 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.

25. In Tarsem Singh's case (supra) relied upon by the learned counsel for the appellant, there was recovery of 20 gunny bags each containing 40 packets from tractor trolley. Accused was sitting in the trolley. He was not owner of the tractor or trolley. No evidence was led by the prosecution that he was actually the owner of said poppy husk. He was also not found to be driver of the tractor. The Bench observed that it cannot be inferred that the accused was exercising the possessory right over the contraband and the conviction was set aside. In the aforesaid judgment, the Division Bench has relied upon another Single Bench judgment of this Court rendered in Criminal Appeal No. 298-SB of 1999 decided on 12.5.2005, in which this Court while discussing the the charge of possession observed as under :

The substratum of the charge is that the appellant and his co- accused were found in possession of 5 quintals and 52 Kgs. of narcotic substance but unfortunately there is no evidence as regards the nature of their possession. The word "possession", according to the Shorter Oxford English Dictionary, Volume II, Third Edition means :-

The visible possibility of exercising over a thing such control as attaches to lawful ownership; the detention or enjoyment of a thing by a person himself or by another in his name; the relation of a person to a thing over which he may at his pleasure exercise such control as the character of the thing admits, to the exclusion of other persons; esp. the having of such exclusive control over land, in early instances sometimes used in the technical sense of SEISIN 1535.

According to Websters Third New International Dictionary, Volume II, the word "possession" means :

the act or condition of having in or taking into one's control or holding at one's disposal.

The word "possession" according to The New Encyclopaedia Britannica, Volume 9, 15th Edition means :

the acquisition of either a considerable degree or physical control over a physical thing, such as land or chattel, or the legal right to control intangible property, such as a credit - with the definite intention of ownership.

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Thus, possession tends to be regarded as prima facie evidence of the right of ownership; it gives this right against everyone except the rightful owner. Mere

possession by a father is sufficient to provide grounds for an action against one who deprives him of the object with no better right than his own.

The meaning of word "possession" is given in Halsbury's Laws of England, Volume 35, Fourth Edition as under :

Possession may mean legal possession; that possession which is recognised and protected as such by law. The elements normally characteristic of legal possession are an intention of possessing together with that amount of occupation or control of the entire subject matter of which it is practically capable and which is sufficient for practical purposes to exclude strangers from interfering. Thus, legal possession is ordinarily associated with de facto possession; but legal possession may exist without de facto possession, and de facto possession is not always regarded as possession in law. A person who, although having no de facto possession, is deemed to have possession in law is sometimes said to have constructive possession."

In Corpus Juris Secundum, Volume LXXII, the word "possession" means :- "In law, the term is defined as meaning an act, fact, or condition of a person having such control of property that he may legally enjoy it to the exclusion of others having no better right than himself; the physical control of a thing which belongs of right to unqualified ownership in such a manner as to exclude control by other persons.

From the above, it is clear that the word "possession" would necessarily imply some degree of control over the goods possessed. The investigating agency in its wisdom has chosen not to lead evidence to prove that the capacity in which these three persons were connected with the truck, which was carrying the narcotic substance. There is no evidence to show the manner in which one of the accused had exercised actual control over the goods recovered for in law possession, as already indicated, would necessarily imply power or control similar to lawful ownership, which enables the person in control to deal with the articles possessed and not mere custody on behalf of some one else as may be inferable in case a person is transporting a consignment for the actual owner.

In case the facts of the case in hand are appreciated in the light of the aforesaid judgment, it can be safely said that the prosecution has not brought any convincing evidence to show that Joga Singh appellant was having possession over the contraband except that he is from the village of Hansa Singh who was allegedly shown sitting on the back of the truck. In my considered view, the said evidence cannot be said to be clinching for the purpose of proving the conscious possession qua the contraband.

26. Mr. Sandhu has not been able to bring to my notice any judicial precedent which would enable me to take a contrary view except that he has made an attempt to show that Hansa Singh and Joga Singh appellants are from one village Salbara and even Shambu Nath is also from the same district and, therefore, conscious

possession of all the three appellants qua the contraband should be presumed. I do not find substance in the arguments advanced by Mr. Sandhu in this regard.

27. The view taken by Full Bench in Kashmir Singh's case (supra) also comes to the rescue of Joga Singh appellant. I have gone through his statement recorded u/s 313 of the Code of Criminal Procedure in which he has not been called upon to explain the circumstances giving rise to the presumption except that in one of the questions put to him that the truck was loaded with bags of poppy husk and after unloading those bags they were found to be 40 in number. The last question put is "have you anything to say". This, in my considered view, does not amount to calling upon the accused to explain circumstances which would give rise to the presumption to be drawn under Sections 35 and 54 of the Act. The view being taken by me on this legal aspect of the matter is based on the peculiar facts of this case and cannot be taken as precedent. The ultimate analysis would be depending upon the facts of each case. In Kashmir Singh's case (supra), the question which was referred to the Full Bench for its decision was regarding correct meaning of "possession" in the context of Act and under what circumstances and in what manner presumption of culpable mental state is to be raised u/s 35 of the Act. Furthermore, under what circumstances, the Court has to presume that the accused committed offence in respect of possession of any contraband which he fails to account for satisfactorily. The Hon'ble Full Bench while concluding its judgment finally observed that the ultimate analysis would depend upon the facts of each case and, therefore, no hard and fast rule can be laid down to define as to what is or what is not possession of a drug or narcotic substance.

28. In the instant case, under the present set of circumstances, when the prosecution has failed to prove the element of custody or control over the contraband qua Joga Singh appellant, the benefit is being extended to him as the view taken by the Full Bench, in Kashmir Singh's case (supra) lends advantage to his case.

29. To be fair to Mr. Deol, I am, however, not agreeing with the arguments advanced by him with regard to the presence of DSP Bachan Singh Randhawa. May be that he has not signed any recovery memo or even the memo having seal impression but the same irregularity cannot be said to be vital infirmity as to discard the case of the prosecution in toto. All the samples and the bags containing remainder of poppy husk bore the seal impression (KS). He has stated on oath that when he reached the spot, the recovery was effected in his presence. He has also categorically stated that recovery memo was signed by ASI Jagtar Singh and ASI Tek Singh. It is quite possible that ASI Kuldip Singh, the Investigating Officer did not feel the necessity of getting signatures of DSP Bachan Singh Randhawa on the memos as the same were signed by ASI Jagtar Singh and ASI Tek Singh who were also present at the time of naka and recovery. Therefore, in my considered view, this aspect cannot dent the case of the prosecution on any count.

30. The net result is that the case of the prosecution is on slippery footing with regard to Joga Singh appellant as it has not proved the conscious possession of the contraband (40 bags of poppy husk) qua him. He, therefore, earns acquittal.

Let us advert to the case of Shambu Nath appellant.

31. In my view, the prosecution has been able to prove the conscious possession of the contraband qua him. As per the case set up by the prosecution he was on the steering of truck No. PAT-9106 in which contraband was allegedly recovered. He is also proved to be the registered owner of the truck as is clear from the statement of PW4 Devinder Kumar, Junior Assistant, DTO Office, Bathinda who has stated that truck bearing registration No. PAT- 9106 was transferred in the name of Shambu Nath son of Sham Lal resident of village Bhai Rupa on 20.8.1991. Registration certificate Ex.PW4/A is proved on file. In the statement recorded u/s 313 of the Code of Criminal Procedure of the present appellant, a specific question was put to him that truck No. PAT-9106 was owned by him as per the registration certificate, the answer to the said question was "it is incorrect". Another specific question has been put to him that from the aforesaid truck his driving licence, RC Chit were recovered and the same were taken into possession, the answer again was "it is incorrect". Another question was also put to him that from truck No. PAT-9106 poppy husk (40 bags) were recovered. This all shows that complete incriminating evidence was to put to him and he was called upon to explain the circumstances which give rise to the presumption to be drawn against him under Sections 35 and 54 of the Act. In other words, an opportunity was given to him to lead evidence in support of his stand and defence. However, the record reveals that no evidence has been led by him. This shows that he has not rebutted the presumption. The judgment cited by Mr. Saggu in Balkar Singh's case (supra) is distinguishable on facts. In the instant case, there was no need for the prosecution to investigate its case further qua the present appellant with regard to the place of incident or even ownership of poppy husk.

32. At the same time, the learned counsel cannot derive any benefit from the view taken by Full Bench in Kashmir Singh's case (supra).

33. On the basis of the aforesaid facts, it can be safely concluded that the case of Shambu Nath appellant is segregateable from his other two co-accused namely Hansa Singh and Joga Singh and the prosecution, in my considered view, has been able to prove the conscious possession of the contraband (40 bags of poppy husk) qua him. Therefore, his conviction and sentence as recorded by the trial court deserves to be upheld.

34. The final result now emerges is that Criminal Appeal No. 472-SB of 2003 and Criminal Appeal No. 465-SB of 2004 are hereby allowed. Appellants Joga Singh and Hansa Singh alias Harbans Singh alias Jugraj Singh are acquitted of the charge. They are stated to be in custody and shall now be released forthwith if not required in any

other case.

35. However, Appeal No. 770-SB of 2003 filed by Shambu Nath appellant is hereby dismissed being devoid of any merit in it.