

(2010) 04 P&H CK 0033
In the Punjab And Haryana At Chandigarh

Balwinder Singh, Baljinder Singh and Des Raj	APPELLANT
Vs	
State of Punjab	RESPONDENT

Date of Decision : 23-04-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 173, 313

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 15, 35, 54

Citation : (2010) 04 P&H CK 0033

Hon'ble Judges : Mohinder Pal, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Mohinder Pal, J.—This judgment will dispose of the afore-stated three appeals as they arise out of the same First Information Report.

2. Balwinder Singh, Baljinder Singh and Des Raj (appellants) have filed these appeals against the judgment of conviction and the sentence order

dated 11.9.2004 passed by the learned Special Court, Barnala, whereby they were convicted u/s 15 of the Narcotic Drugs and Psychotropic

Substances Act, 1985 (hereinafter referred to as 'the Act') and sentenced to undergo rigorous imprisonment for a period of ten years and to pay

Rs. 1 lac each, as fine, in default whereof to undergo further rigorous imprisonment for a period of six months.

3. As per allegations of the prosecution, on 20.08.2000, a police party headed by Station House Officer Surinderpal Singh of Police Station

Kotwali Barnala was present near the bridge of canal minor near Guru Gobind Singh College, Sanghera on Sanghera-Raikot road in connection

with VIP duty. Gajjan Singh (P.W) came there. Police party was talking to Gajjan Singh. The vehicles were also being checked by the police

party. In the meantime, Tata 407 bearing No. HR 46/4053 (Canter) came from the Barnala side, which was signalled to stop. On enquiry, driver of the Canter disclosed his name as Des Raj (appellant). One another person who was sitting by side of appellant DesRaj disclosed his name as Balwinder Singh (appellant), who was owner of the canter. On checking, gunny bags were found to be loaded in the canter. One another person namely Baljinder Singh (appellant) was also present in the canter and was sitting on the gunny bags. Investigating Officer Surinderpal Singh suspected that bags contained some incriminating article and showed his intention to the accused to search the same. Thereafter, the accused were apprised of their right to be searched before a Gazetted Officer or Magistrate. The accused replied that they wanted the bags to be searched before a Gazetted Officer. Separate Consent Memos of the accused in this regard were prepared, which were signed by the accused and attested by the witnesses namely Gajjan Singh and Assistant Sub Inspector Manjit Singh. Deputy Superintendent of Police Balwant Singh was summoned to the spot. On reaching the spot, the Deputy Superintendent of Police disclosed his identity to the accused. On the direction of Deputy Superintendent of Police, Investigation Officer searched the bags. Bags were found to be six in numbers. They were found to contain 35 Kgs of poppy husk in each bag. Two samples of 250 grams were separated from each of the bags. The samples and the remaining poppy husk contained in the bags were separately sealed by the Investigation Officer with his seal bearing impression SPS and the seal of Deputy Superintendent of Police Balwant Singh bearing impression BS and were taken into possession by the police. Ruqa was sent to the Police Station and on its basis formal First Information Report was registered against the accused u/s 15 of the Act. Rough site plan of the place of recovery was prepared.

4. After registration of the case against the accused, they were formally arrested and memos containing grounds of their arrest were prepared.
5. After completion of investigation and on receipt of the report of the Chemical Examiner, report u/s 173 of the Code of Criminal Procedure was presented in Court against the appellants.
6. Charge was framed against the accused for the offence punishable u/s 15 of the Act. They did not plead guilty to the charge and claimed trial.

7. At the trial, the prosecution examined Inspector Surinderpal Singh (P.W.1), Assistant Sub Inspector Manjit Singh (P.W.2), Deputy

Superintendent of Police Balwant Singh (P.W.3), Head Constable Ajaib Singh (P.W.4), Constable Buta Singh (P.W.5), Sanjiv Kumar, Dealing

Clerk (P.W.6) and Pushpinder Singh, Junior Assistant (P.W.7).

8. Gajjan Singh, the independent witness, was given up as having been won over by the accused.

9. In their statements recorded u/s 313 of the Code of Criminal Procedure, the appellants denied the prosecution allegations and pleaded false

implication.

10. Accused-appellant Des Raj, in his statement recorded u/s 313 of the Code of Criminal Procedure, stated as under:

I am owner of Canter. On 20.8.2000 at about 10.00 a.m my driver Balwinder Singh told me that he is going to Raikot to unload the cattle feed. In

the afternoon a police man came to me at Malaut and told me that my vehicle is in police custody and he is wanted there. I came to Barnala, where

police arrested me. Nothing was recovered from my possession or from my vehicle. I have been falsely involved in this case. I would lead defence.

11. Accused-appellant Baljinder Singh, in his statement recorded u/s 313 of the Code of Criminal Procedure, stated as under:

I am innocent. I got a lift on the canter of Balwinder Singh at Barnala, who was falsely involved in this case. I would lead defence.

12. Accused-appellant Balwinder Singh, in his statement recorded u/s 313 of the Code of Criminal Procedure, stated as under:

I am innocent. Baljinder Singh belongs to my village. He told me to unload the cattle feed at Raikot. He told me to pay fare and I accompanied him

to Raikot. The loaded material was told to be animal feed. The police made a false case against us and animal feed was told to be poppy husk. I

was not knowing or I was told as to what was in the bags. I have been falsely involved in this case. I would lead defence.

13. The Trial Court after scrutinizing the evidence held that the prosecution was able to prove its case beyond reasonable doubt and that 6 bags,

each containing 35 Kgs of poppy husk were recovered from the appellants. The trial Court convicted and sentenced the appellants, as mentioned

above.

14. I have heard Mr. H.R. Nohria, Advocate, appearing for appellant Baljinder Singh and Mr. Vishal Munjal, Additional Advocate General,

Punjab and have gone through the records of the case.

15. Learned Counsel for appellants Balwinder Singh and Des Raj did not appear in Court when the matter was taken up for hearing inspite of the

fact that their presence was requisitioned by the Reader of this Court by displaying their names in the notice board through the Computer installed

in the Court.

16. Learned Counsel for the appellants, by placing reliance on the authorities reported as Avtar Singh v. State of Punjab 2002 (4) R.C.R

(Criminal) 180, State of Punjab v. Hari Singh and Ors. 2009 (2) R.C.R (Criminal) 143 and Dayal Singh and Anr. v. State of Punjab 2007 (2)

R.C.R (Criminal) 596 argued that the object of examination of the accused u/s 313 of the Code of Criminal Procedure is to afford an opportunity

to the accused to explain the circumstances appearing in the evidence against him, but in this case no question was put to them (accused) during

their such examination that they were in conscious possession of the contraband. Learned Counsel for the appellants argued that the recovery in

this case was allegedly made from the Canter, which was occupied by three persons. However, it was presumed that the appellants were in

possession of the contraband without calling upon them to explain the circumstances giving rise to such presumption. According to the learned

Counsel, it makes the case of the prosecution untrustworthy and entitles the accused to acquittal.

17. I have given my careful thought to the argument raised by learned Counsel for the accused. However, I do not find any substance in this

argument. Each case has its own facts. Therefore, no hard and fast rule can be laid down to define what is or what is not ""possession"" of a narcotic

substance. In the case of Madan Lal and Anr. v. State of Himachal Pradesh 2003 (4) R.C.R (Criminal) 100 wherein recovery of contraband was

made from the search of a car in which five persons were travelling and one of them had stated that the contraband (i.e 820 grams charas

contained in one steel container (dolu) in a black coloured bag, which was recovered from the said car) belonged to him, it was held by the

Hon"ble Supreme Court that this statement of the accused was totally out of

context and no credence could at all be attached to the statement

because in his statement recorded u/s 313 of the Code of Criminal Procedure, he (the said accused) did not state that he alone was in possession

of the contraband. In Madan Lal's case (supra), all the accused were held responsible for possession. In Paras 20, 27 and 28, the Apex Court, in

the said case, observed as under:

20. Whether there was conscious possession has to be determined with reference to the factual backdrop. The facts which can be culled out from

the evidence on record is that all the accused persons were travelling in a vehicle and as noted by the Trial Court they were known to each other

and it has not been explained or shown as to how they travelled together from the same destination in a vehicle which was not a public vehicle.

27. Once possession is established the person who claims that it was not a conscious possession has to establish it, because how he came to be in

possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of presumption available in

law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles.

28. In the factual scenario of the present case not only possession but conscious possession has been established. It has not been shown by the

accused-appellants that the possession was not conscious in the logical background of Sections 35 and 54 of the Act.

18. In the case of Avtar Singh v. State of Punjab 2002 (4) RCR (Criminal) 180, the Apex Court observed 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 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.

19. In *Megh Singh Vs. State of Punjab*, the decision of the Apex Court in *Avtar Singh's* case (supra) was discussed in the following terms but the Court relying upon the principle of circumstantial flexibility, came to the conclusion that in the factual scenario of *Megh Singh's* case (supra), the accused had failed to show that his possession was not conscious. It was held as under:

Once possession is established, the person who claims that it was not a conscious possession has to establish, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles.

20. In view of the above, it cannot be concluded that huge haul of six bags of poppy husk contained in the Canter escaped notice of the accused.

It was within special means of knowledge of the accused as to how six bags of poppy husk were found in the Canter and to which destination they were being taken. The facts of this case, as mentioned above, disclose that there is no doubt about the fact that the accused-appellants were in conscious possession of the quantity of poppy husk recovered from their possession. Once possession of the contraband by the accused is established on record and the accused had been given sufficient opportunity u/s 313 of the Code of Criminal Procedure to explain the position, microscopic scrutiny of every judicial action cannot be permitted and the accused cannot be given benefit of hypothetical assumptions. Besides, it is well-settled that omission to bring the attention of the accused to an

inculpatory material does not ipso facto vitiate the proceedings. The accused must show that failure of justice was occasioned by such omission. The facts and circumstances of the case, discussed above, do not show that any prejudice was caused to the accused in this case by not putting a particular question to the accused during examination u/s 313 of the Code of Criminal Procedure regarding conscious possession of the contraband. Under the circumstances, taking into account the totality of the evidence led on record by the prosecution, I have no hesitation in holding that the accused were in conscious possession of the contraband.

21. Learned Counsel for the accused also argued that the case of the prosecution is based only on the statements of the official witnesses and the independent person, namely, Gajjan Singh was not examined by the police party and was given up as having been won over by the accused.

According to the learned Counsel, the police witnesses being interested in the success of the case, their statements should not be trusted without corroboration from an independent source. It has been submitted that non-examination of independent witness, namely, Gajjan Singh, has upset the balance of the prosecution case, making the alleged recovery doubtful.

22. After giving a careful thought to the argument raised by the learned Counsel, I do not find any force therein in the presence of cogent and trustworthy evidence put forth by the prosecution. Recovery in this case was effected per chance while the police party was patrolling the area.

Otherwise also, normally the independent witnesses do not support the prosecution case as they reside in the same area where the accused- persons reside and they fear to create ill-will and enmity with criminals. In this case, the official witnesses have fully supported the prosecution case

and no material contradiction, worth the name, has been pointed out in their statements. The accused-appellants have also not alleged any enmity

with them (police officials). In this background, merely the fact that the independent witness Gajjan Singh was not examined in this case, is not a

good ground to discard the testimonies of the official witnesses. It is well-settled that the prosecution story cannot be discarded on the ground that

independent witness has not been examined. In fact, the apprehension of the prosecution that independent witness Gajjan Singh had been won

over by the accused proved to be correct as he (Gajjan Singh) appeared in

defence of the accused as D.W.2. To cap it all, the fact of recovery of six bags of poppy husk, each containing 35 kilograms of poppy husk, from the accused, which cannot be planted by the police, weighs with the argument raised by the learned Counsel with regard to the non-examination of any independent witness.

23. For the aforesaid reasons, I do not find any merit in these appeals. The same are, accordingly, hereby dismissed. The Canter, in question, is ordered to be confiscated to the State.