
(2010) 02 P&H CK 0243
In the Punjab And Haryana At Chandigarh

Puran Singh and Others and Amarjit Singh	APPELLANT
Vs	
State of Punjab	RESPONDENT

Date of Decision : 26-02-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 173, 313
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 15, 35, 50, 54, 66

Citation : (2010) 02 P&H CK 0243

Hon'ble Judges : Jaswant Singh, J; Hemant Gupta, J

Bench : Division Bench

Judgement

Hemant Gupta, J.—This order shall dispose of Criminal Appeal Nos. 807-DB of 2003 and 851-DB of 2003 arising out of the judgment and order dated 22.9.2003 passed by the Special Judge, Moga, convicting appellants u/s 15(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'the Act') and sentencing appellant-Puran Singh to undergo RI for 15 years and to pay a fine of Rs. 1,50,000/- and in default of payment of fine to further undergo RI for one and half year; appellant-Amarjeet Singh to undergo RI for 14 years and to pay a fine of Rs. 1,50,000/- and in default of payment of fine to further undergo RI for one and half years and appellants-Amar Singh and Sukhdev Singh to undergo RI for 10 years and to pay a fine of Rs. 1 lac each and in default of payment of fine to further undergo RI for one year.

2. The prosecution case was set in motion on the statement of SI-Tehal Singh, Incharge CIA Staff Moga. He stated that while on routine patrol on 30.5.2001, a truck was seen parked on the right side of road bearing registration No. PB-05B-9981 on Moga Bhaga Purana bypass after the railway crossing. The truck was facing Moga. Four persons were setting tarpaulin over the truck because of cloudy weather. They became perplexed, on seeing the police party. They started alighting from the truck. On the basis of suspicion, he with the help of other co-officials on patrol duty apprehended them. One person succeeded to escape, whereas the other three persons were apprehended and disclosed their names as

Sukhdev Singh son of Teja Singh; Amar Singh son of Teja Singh, residents of Totiwal, Police Station Sultanpur Lodhi and Amarjit Singh son of Gurdial Singh resident of Fatehgarh Koretana, Police Station Gharkhera. The name of fourth person, who fled, was disclosed by Sukhdev Singh as his brother Puran Singh son of Teja Singh. The people, who were passing by, were requested to be witness, but they put forward their constraints and did not become witness. A person came on scooter, who was made to stop at the spot. His parentage was inquired. He disclosed himself to be Mohinder Singh son of Gurnam Singh resident of Moga. It was at about 8.45 a.m. Said Mohinder Singh was joined as as a witness. Before the search of the truck, he sought the consent of the named persons whether the search should be conducted before some Gazetted Officer or the Magistrate. The named persons gave their consent for being searched by some Gazetted Officer. Consequently, Shri Vijay Sharma, DSP, City Moga was requested to come o the spot at about 9.45 a.m. At about 10 a.m. Shri Sharma came in Gypsy and the truck was searched. The bags lying in the truck were unloaded. On opening of the 80 bags, the same were found containing poppy straw in each bag weighing 35 kgs. 250 gms of poppy straw was separated as a sample from each bag. The remaining poppy straw weighing 34 kgs 750 gms in each bag was sealed. The parcels of samples were sealed. 140 bags of Bajra were also found lying in the truck, which was taken in the police possession vide separate recovery memo. The truck bearing registration No. PB-05B 9981 along with national permit, duplicate registration certificate and goods receipt of Bajra, were taken into possession. Such report was lodged by Tehal Singh SI at 4.10 p.m. and on the basis of the said report, FIR was recorded at 6.10 p.m.

3. On completion of investigations, including the report of the Chemical Examiner, report u/s 173 of the Code of Criminal Procedure was filed. Puran Singh was granted anticipatory bail by the Special Judge, vide order dated 27.7.2001.

4. In evidence, the prosecution sought to prove the charges against the appellants by examining PW4-SI Jasvir Singh, who on patrol duty apprehended the present appellants. PW5-SI Tehal Singh, the author of FIR; PW6-Vijay Sharma, the Gazetted Officer, before whom the search of the vehicle and the personal search of the appellants was conducted and PW8-Inspector Amarjit Singh, SHO, Police Station, City Moga, on the date of commission of the offence were examined as prosecution witnesses. The prosecution also produced the documentary evidence including the goods receipt Exhibit P.90 of Monu Transport Company dated 26.5.2001 with the name of consigner M/s Nitin & Company Chandausi (U.P.) and consignee as M/s Jagdamba Trading Company, Jalandhar, Punjab, truck No. PB0-5B-9981 and the owner of the truck as Amarjit Singh, Fatehgarh, Ludhiana. The Consignment is of 140 bags of Bajra. The goods receipt is signed by Amar Singh on the place meant for driver. Exhibit P.81 is the registration certificate of the truck showing Amarjit Singh as the owner of the same. Exhibit P.83 is the National Permit whereas Exhibits P.85, P.86, P.87, P.88 and P.89 are the documents of sale of 140 bags of Bajra.

5. PW5- SI Tehal Singh has supported narration given in the FIR and also deposed that the name of fourth person, who ran away from the spot was disclosed by accused Sukhdev Singh as Puran Singh. He has seen the same person running and can identify him in Court. He identifies the person, who ran away from the spot as accused Puran Singh, present in the Court. In cross-examination, he has deposed that accused Amarjit Singh disclosed that he is owner as well as driver of the truck and the goods receipt was in the name of Amarjit Singh and the consignment was to be delivered at Jalandhar.

6. PW4-Jasvir Singh has deposed that he was posted as SHO, Police Station, City-II Moga and he was patrolling along with SI Tehal Singh, Incharge CIA Staff, ASI Shamsher Singh, ASI Subhash Chander and other police officials in a Government vehicle. He has seen that four persons were setting the Tarpaulin on the truck. On seeing the police party, all the persons came down of the truck. Three persons were apprehended at the spot, whereas the fourth person ran away from the spot. Accused Puran Singh, present in Court was identified as the same person, who ran away from the spot. He has deposed that 140 bags of Bajra were recovered from the truck apart from the 80 bags of poppy straw weighing 35 kg each. In cross-examination, he has admitted that none of the accused was sitting in the driver seat and cabin and the fact that Amarjit was driving the truck came to be known during investigation.

7. PW6- Vijay Sharma has proved the search of the truck and the personal search of the appellants. He has deposed that he has not arranged identification parade and that Puran Singh was not arrested by him, though he was joined in investigation. PW8 is Inspector Amarjit Singh, who has filed report u/s 173 Cr.P.C. after completion of the investigation.

8. Accused-appellant Amar Singh, denied the prosecution case in his statement u/s 313 of the Code of Criminal Procedure Code. He stated that he was picked up by Police of the CIA staff, Moga on 29.5.2001 from his house at village Totiwala and a false case has been registered on the next day. Amarjit Singh denied the prosecution case, but took up a stand that he is owner of the truck, but has sent the truck with driver Totala of Ludhiana. The truck was picked up by the police while stationed near Gurdwara on 29.5.2001 and he was picked up from his house after seeing his name from the Registration Certificate of the truck, falsely. Accused Puran after denying the prosecution case took up a stand that he was admitted in hospital on 26.5.2001 and remained admitted till 4.6.2001 and he was not present in his house or at the place of recovery.

9. Appellant-Amarjit Singh examined DW1-Gurmail Singh Criminal Appeal No. 807-DB of 2003 [6] whereas DW2-Jaura Singh was examined by other accused. DW3- Parveen is a staff nurse, Civil Hospital Zira. DW4-Dr. Ashwani Kumar Ahuja, has brought bed head ticket of Puran Singh in support of his plea that he was admitted in the hospital on 26.5.2001 to 4.6.2001.

10. Learned trial Court took into consideration Section 35 of the Act, providing

presumption of culpable mental state against an accused facing trial under the Act and that presumption of truth is attached to the documents in terms of Section 66(c)(i) of the Act. The Court has also taken into consideration the presumption attached about the possession of illicit articles unless contrary is proved, when person from whom a contraband is recovered fails to account the same satisfactorily in terms of Section 54 of the Act.

11. The Court found that the truck was parked on the side of the road and four persons were setting Tarpaulin on it. Three of them were apprehended whereas fourth succeeded to escape. The Court found the provisions of Section 50 of the Act are not attracted in respect of the search of the truck. The Court also found that non-examination of the independent witness is not fatal to the prosecution case as the sole independent witness has been won over. The Court also negated the argument that the possession of the appellants over the contraband was not conscious possession. The Court noticed that Amarjit Singh was owner of the Truck in which 80 bags of poppy straw were being carried. Therefore, it cannot be assumed that Amarjit Singh was unaware as to what was lying in the truck. The Court has taken into consideration that the plea of the other accused is not that they were setting Tarpaulin on the trucks on the asking of the driver. The act of Puran Singh in running away and escaping from the arrest shows strong culpable mental state. Since Puran Singh, Amarjit Singh and Sukhdev Singh, are real brothers, therefore, they cannot be presumed to have no connection with the truck as well as the poppy straw lying in the truck. On the basis of report of Chemical Examiner Exhibit CE, Exhibit PX and Exhibit PX/1 and the other evidence, it was found that the material contained in the gunny bags of the case property was not substituted and it was contraband within the meaning of the Act. In respect of an argument of learned Counsel for Puran Singh that no identification parade was held, it was held that there was sufficient convincing material in the prosecution evidence to establish the identify of the accused Puran Singh, who has absconded from the place of recovery. The Court found that the disclosure of name of Puran Singh by Sukhdev Singh is relevant piece of evidence and when the plea of alibi raised by Puran Singh has not been found to be substantiated in view of the overwriting and abnormalities on the cover page of the Bed Head Ticket including overwriting in the name of Puran Singh. It was also found that the Bed Head Ticket of Puran Singh describes disease as "enteric fever" which is not a disease of serious nature and in ordinary course there cannot be a necessity of hospitalisation as an indoor patient for a long period. The Court concluded that document Exhibit DD-Bed Head Ticket, is a manipulated document. Number of circumstances were given to the effect that Exhibits DD and DE are the fabricated document.

12. Learned Counsel for the appellants have vehemently argued that the prosecution has not proved that the transportation of the contraband in the truck was at the instance of any of the appellants. It is argued that the consigner and consignee were not associated in the investigation. Therefore, the fact that 80 bags of poppy straw were loaded in the truck, cannot be said to be at the

instance of Amarjit Singh, who is not proved to be the driver of the vehicle. Learned Counsel for the appellants relies upon Avtar Singh v. State of Punjab 2002 (4) RCR (Crl.) 180 (SC), to contend that mere fact that the appellants were setting Tarpaulin, will not render the appellants in possession of the contraband so as to make them liable for an offence u/s 15 of the Act. It is also argued that none of the appellants have been confronted about the possession of the contraband in statements u/s 313 of the Code of Criminal Procedure. Therefore, the finding that the appellants were in possession of a contraband is not not tenable. Reference is made to State of Punjab v. Hari Singh and Ors. 2009 (2) RCR (Crl.) 143 (SC). It is further argued that no test identification parade was held for the purposes of identification of Puran Singh. Therefore, identification in Court is not legally tenable.

13. Exhibit P.90 is the goods receipt of transportation of 140 bags of Bajra from M/s Nitin & Company Chandausi (U.P.) to M/s Jagdamba Trading Company, Jalandhar, Punjab. The goods receipt bears the truck number and the name of Amarjit Singh as the owner. At the place meant for driver, Amar has signed. Amarjit Singh was apprehended at the spot as well. Amarjit Singh is the owner of the vehicle and also possessed of a national permit. PW4- Jasvir Singh and PW5- Tehal Singh, have deposed that during investigation, it was found that Amarjit Singh was the driver and owner of the vehicle. DW1-Gurmail Singh has not said even a word in respect of the fact that Amarjit Singh was not the driver of the truck or somebody else was engaged by Amarjit Singh to drive the truck. Therefore, it cannot be said that Amarjit Singh was not the driver of the truck at the time of search of the vehicle simply for the reason that he was not sitting on the driver seat.

14. The other accused-appellants are residents of village Totiwala in District Kapurthala. It is not the stand of the appellants that they were engaged by Amarjit Singh either for payment of or for gratis to adjust tarpaulin on the truck. The village of the said appellants is at a distance of 50 kilometres, from the place of recovery. The place of recovery is not near any market or a tea stall, but is on a highway. There is no explanation as to how the appellants, other than Amarjit Singh, happen to be at the place of occurrence.

15. The truck had 140 bags of Bajra, which is legal and valid consignment in view of the goods receipt Exhibit P.90. But 80 bags of poppy straw are unaccounted. Since Amarjit Singh has not produced any document of carrying the said 80 bags, it is for Amarjit Singh to explain the consignment of 80 bags. Since there is no explanation on behalf of Amarjit Singh in respect of 80 bags of poppy straw in the truck, the offence u/s 15 of the Act stands proved beyond a reasonable doubt.

16. Similarly, the other accused were setting Tarpaulin on the truck. Such act was to protect the consignment from damage on account of rain as the weather was cloudy. Such act shows that the appellants were aware of the contents of the consignment, which led to an act of protection by way of Tarpaulin.

17. In Avtar Singh's case's (supra), the accused were not the only occupants of the vehicle as one was sitting in the cabin and another person was sitting on the back of the truck, who made themselves scarce after seeing the police. The prosecution could not establish their identity. In view of the said fact, the said judgment is of no help as the appellants were the only occupants and all accused except Puran Singh, were apprehended at the spot.

18. In Abdul Rashid Mansuri v. State of Gujarat AIR 2000 Supreme Court 821, the scope of Section 35 of the Act, has been examined by the Hon'ble Supreme Court. It was held to the following effect:

21. No doubt, when the appellant admitted that narcotic drug was recovered from the gunny bags stacked in the auto-rickshaw, the burden of proof is on him to prove that he had no knowledge about the fact that those gunny bags contained such a substance. The standard of such proof is delineated in Sub-section (2) as "beyond a reasonable doubt". If the Court, on an appraisal of the entire evidence does not entertain doubt of a reasonable degree that he had real knowledge of the nature of the substance concealed in the gunny bags then the appellant is not entitled to acquittal. However, if the Court entertains strong doubt regarding the accused's awareness about the nature of the substance in the gunny bags, it would be a miscarriage of criminal justice to convict him of the offence keeping such strong doubt dispelled. Even so, it is for the accused to dispel any doubt in that regard.

22. The burden of proof cast on the accused u/s 35 can be discharged through different modes. One is that, he can rely on the materials available in the prosecution evidence. Next is, in addition to that he can elicit answers from prosecution witnesses through cross-examination to dispel any such doubt. He may also adduce other evidence when he is called upon to enter on his defence. In other words, if circumstances appearing in prosecution case or in the prosecution evidence are such as to give reasonable assurance to the Court that appellant could not have had the knowledge or the required intention, the burden cast on him u/s 35 of the Act would stand Criminal Appeal No. 807-DB of 2003 [11] discharged even if he has not adduced any other evidence of his own when he is called upon to enter on his defence.

19. However, in the present case from the prosecution evidence including the cross-examination, the appellants have not been able to rebut the presumption nor the evidence in defence is sufficient to rebut the presumption of culpable mental state.

20. In Madan Lal and Another Vs. State of Himachal Pradesh, , the Court has held that the expression "possession" is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different backgrounds. Possession in a given case need not be physical possession but can be constructive, having power and control over the article in the case in question, while the person to whom physical possession is

given holds it subject to that power or control. It was held to the following effect:

26. 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 the 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.

27. 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.

21. The recovery of contraband is from the possession of the accused-appellants. The appellants have not rebutted the Criminal Appeal No. 807-DB of 2003 [12] presumption of culpable mental state in terms of Section 35 of the Act or Section 54 of the Act.

22. The argument that no incriminating circumstances of possession were put to the witness is again devoid of any merit. In fact, question No. 1 in statement u/s 313 Cr.P.C. is that the accused were setting Tarpaulin on the truck and on seeing the police party, all the persons came down from the truck. Three persons were apprehended at the spot, whereas the fourth person ran away from the spot. The said question is nothing but a fact of possession of the contraband. Merely because the word possession has not been used in the question, is not material as the factors constituting possession were put to to the accused. The judgment in Hari Singh's case (supra) relied upon by the learned Counsel for the appellants is distinguishable and not applicable to the facts in the present case.

23. Puran Singh was not arrested from the spot. He was granted anticipatory bail. Since he was not arrested, the conduct of Test Identification Parade was not necessary. The learned trial Court has rightly found that there was sufficient convincing material in the prosecution evidence to establish the identify of the accused Puran Singh, who has absconded from the place of recovery. The disclosure of name of Puran Singh by Sukhdev Singh is relevant piece of evidence and when the plea of alibi raised by Puran Singh has not been found to be substantiated in view of the overwriting and abnormalities on the cover page of the Bed Head Ticket including overwriting in the name of Puran Singh. The Bed Head Ticket of Puran Singh describes disease as "enteric fever" which is not a disease of serious nature. In ordinary course, there would not be a necessity of hospitalisation as an indoor patient. Accused-appellant Puran Singh has set up a plea of alibi that he was admitted in the hospital. However, there is overwriting in the names of the patient and interpolation in the name of the village. The general case sheet does not shows that the patient was under any active treatment, except the advice of medicines.

24. DW4-Dr. Ashwani Kumar Ahuja, does not know Puran personally. The record

pertains to Civil Hospital, Zira, whereas in cross-examination, the witness has admitted that there is Civil Hospital and other private hospitals providing sufficient treatment at Kapurthala. He has admitted that there is no primary Health Centre at Kot Ishe Khan, which 2-1/2 kilometres from Daulewala, the village mentioned in Bed Head Ticket. He has admitted that all entries in Exhibit DD were written with one instrument and with the same ink. The Court concluded that document Exhibit DD-Bed Head Ticket, is a manipulated document. Number of circumstances were given to the effect that Exhibits DD and DE are the fabricated document.

25. In view of the above, we do not find any illegality in the conviction of the appellants for the offence u/s 15(c) of the Act.

26. However, Puran has been sentenced to undergo RI for 15 years and accused Amarjit Singh to undergo RI for 14 years besides fine of Rs. 1,50,000/- each, whereas Accused Amar and Sukhdev Singh have been sentenced to undergo RI for 10 years each, apart from payment of fine of Rs. 1 lac. Since Puran Singh escaped his arrest from the spot, therefore, the learned trial court has granted severe punishment to him as against Sukhdev Singh and Amar Singh. The role of each of the appellants is the same. Thus, we are of the view that in the matter of sentence, parity is required to be maintained.

27. Consequently, while dismissing the appeals on behalf of Amar Singh and Sukhdev Singh, the appeals on behalf of Puran Singh and Amarjit Singh, are partly allowed and they are sentenced to undergo RI for 10 years each and to pay fine of Rs. 1 lac each. In default of payment of fine, they shall further undergo further RI for one year.

28. Appeals stand disposed of accordingly.