
(2012) 07 P&H CK 0104
In the Punjab And Haryana At Chandigarh
Case No : CRA No. 324-DB of 2009 (O and M)

State of Punjab

APPELLANT

Vs

Jia Ram, Uma Nath and Bansilal

RESPONDENT

Date of Decision : 18-07-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 173, 207, 313
Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2001 — Section 18
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 18, 18(b),
35, 50, 54

Citation : (2012) 07 P&H CK 0104

Hon'ble Judges : S.S. Saron, J; S.P. Bangarh, J

Bench : Division Bench

Advocate : S.S. Dhaliwal, A.A.G., Punjab, for the Appellant; G.S. Gill, Advocate, for respondents no. 1 to 3, for the Respondent

Judgement

S.P. Bangarh, J.—The appellant State of Punjab has assailed the judgment dated 24.12.2007, passed by the learned Judge, Special Court, Ferozepur in Session Case No. 338 of 2006, Session Trial No. 105 of 2007 emanating from FIR No. 203 dated 07.09.2006, Police Station Sadar Abohar, whereby, the respondents were acquitted of charge u/s 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("Act" for short). Case of the appellant is that on 07.09.2006, Major Singh, Sub Inspector, Station House Officer, Police Station Sadar Abohar alongwith Iqbal Khan ASI and other police officials was proceeding from village Sherewala towards the culvert known as Patli in a Bollero jeep bearing registration No. MH-02-A/TR-869 being driven by HC Jalandhar Singh in connection with patrol duty and checking of suspected persons. At about 04:30 pm, when they reached near the culvert in the area of village Sherewala, one Bollero jeep bearing registration No. RJ-19UA-1203 came from the opposite side. On seeing the police vehicle, driver of that vehicle tried to retreat his vehicle and, thereupon, Major Singh SI intercepted the Bollero jeep bearing registration no. RJ-19UA-1203 with the help of other police officials. On inquiry, the driver of that

vehicle disclosed his name as Bansilal (respondent) and the other two persons who were sitting in the said vehicle disclosed their names as Uma Ram and Jia Ram (respondents).

2. Major Singh, SI then tried to join some independent witness in the police party, but no one was found available. Then Major Singh SI disclosed his identity to those persons, who are respondents herein. Then he informed them that he suspects some contraband in their possession, as also, in their vehicle, therefore, he wants their search, as also, the search of their vehicle to be conducted and they had a legal right to have their search, as also, of their vehicle conducted in the presence of some gazetted officer or Magistrate. The respondents then replied that they wanted to get their search, as also, of their vehicle conducted in the presence of some gazetted officer regarding which memo Ex.P1 of Bansilal, Ex.P2 of Jia Ram and Ex.P3 of Uma Ram were prepared, which were signed by them and attested by Iqbal Khan ASI and Sukhmander Singh ASI.

3. Thereafter, Major Singh SI sent a message to police post Bahawal through wireless set to send Amrik Singh, DSP at the spot, who reached at the spot at 6:00 pm. On reaching at the spot, he disclosed his identity to the respondents and he informed them that he suspected some intoxicant material to be in their possession, as also, in their vehicle and that they have got a legal right to get their search, as also, of their vehicle conducted in the presence of some other gazetted officer or Magistrate. Thereupon, the respondents reposed confidence in Amrik Singh, DSP in getting their search, as also, the search of their vehicle conducted by him and they signed consent memos Ex.P4, Ex.P5 and Ex.P6 respectively in this regard.

4. Thereafter, Major Singh, SI conducted the search of the vehicle, which resulted in recovery of a gunny bag containing opium in a glazed paper from underneath the middle seat of the vehicle. Two samples of 10 gms each of opium were taken out from the recovered opium and their separate parcels were prepared. The remaining opium on weighment came to 24 kgs 980 gms and its separate parcel (MO-1) was prepared. All the three parcels were sealed by Major Singh, SI and Amrik Singh, DSP with their respective seals bearing impressions "MS" and "AS" respectively and they also prepared sample seals hit Ex.P16. Major Singh, SI handed over his seal to Iqbal Khan, ASI, while Amrik Singh, DSP retained his seal with him.

5. The entire case property was seized vide memo Ex.P7 alongwith Bollero jeep No. RJ-19-UA/1203 which was attested by the aforementioned officials. The respondents could not produce any valid permit or licence for keeping in their possession 25 kgs of opium. Thereupon, "ruqa" (memo) Ex.P17 was sent to Police Station through Randhir Singh, Constable, which formed the basis of formal FIR Ex.P18. On personal search of Bansilal, respondent no. 3 currency notes of Rs. 350/- were recovered alongwith one set of Nokia mobile phone-2300 and these were seized vide memo Ex.P8, which was signed by him and attested by the police officials. Personal search of Jia Ram, respondent no. 1 resulted in

recovery of Rs. 400/-and one mobile phone of Nokia 1110 which were seized vide memo Ex.P9, which was also signed by him and attested by the police officials. Personal search of Uma Ram, respondent no. 2 resulted in recovery of Rs. 315/-and one mobile phone Tata Indicom, which were seized vide memo Ex.P10, which was also signed by him and attested by the police officials.

6. Later, Major Singh SI prepared rough site plan Ex.P19 in respect of the place of recovery. He also disclosed grounds of arrest to the respondents vide memos Ex.P11, Ex.P12 and Ex.P13 respectively which were signed by them and attested by ASI Iqbal Khan, and ASI Sukhmander Singh. Registration Certificate of jeep Ex.P29 was also seized vide memo Ex.P14, which was attested by the police officials Major Singh, SI also sent the Special report Ex.P20 u/s 57 of the Act to the higher officers and intimation regarding the arrest of the respondents was also sent to their relatives.

7. On return to Police Station, Major Singh, SI kept the entire case property taken in his possession in the police "malkhana" under his supervision. On the next day, he produced the respondents and the entire case property before the learned Illaqa Magistrate by submitting applications Ex.P21, Ex.P22 and Ex.P23. The latter passed orders Ex.P24, Ex.P25 and Ex.P26 respectively thereon. Thereafter, sample parcel, sample seal chit Ex.P16 and CFSL form Ex.P15 were sent to the office of the Chemical Examiner, Amritsar by Major Singh, SI through Sukhdev Singh Constable. The report Ex.P30 of the Chemical Examiner confirmed the contents of the sample parcel to be that of opium.

8. After completion of investigation, Station House Officer of Police Station, Sadar Abohar filed police report u/s 173 of the Code of Criminal Procedure ("Cr. P.C" for short) before the learned Judge, Special Court, Ferozepur to the effect that it appeared that the respondents had committed an offence punishable u/s 18 of the Act. On presentation of police report, copies of documents, as required u/s 207 Cr. P.C were supplied to the respondents and charge u/s 18 of the Act was framed against them whereto, they pleaded not guilty and claimed trial.

9. At the trial, the appellant examined following six witnesses whose brief deposition is as under:

PW1 Iqbal Khan, ASI testified that on 07.09.2006, he was posted at Police Post Bahavwala, Police Station Abohar, on which date, he alongwith Major Singh SI/ SHO and other police officials were on patrol duty from village Sherewala of village Patli. During patrol when they reached near culvert of water course at about 04:30 pm, respondents herein, were seen coming in a Bollero jeep of silver colour bearing No. RJ-19-UA-1203 from the opposite side. On seeing the police party, driver of the vehicle got perplexed and he tried to turn back the vehicle. They were intercepted by Major Singh, SI, with their help and their names and addresses were inquired. The driver of the jeep disclosed his name as Bansi Lal. The other occupants of the jeep disclosed their names as Uma Ram and Jia Ram. Major Singh, SI made attempts to join independent witnesses, but

no one was available at that time.

10. PW1 Iqbal Khan further deposed that Major Singh, SI informed the accused that a search of their vehicle is to be conducted and they have a legal right to get their search as also of the jeep conducted in the presence of some gazetted officer or a Magistrate. The respondents stated that they want their search, as also, of the vehicle to be conducted in the presence of a gazetted officer and their memos Ex.P1, Ex.P2 and Ex.P3 respectively in this regard were prepared by Major Singh, SI. He then sent a wireless message to Amrik Singh Minhas, DSP who reached at the spot. He disclosed his identity to the respondents who gave consent of their search, as also, of their vehicle to be conducted in his presence and they signed consent memos Ex.P4, Ex.P5 and Ex.P6 respectively in this regard.

11. PW1 Iqbal Khan further deposed that then on the direction of Amrik Singh Minhas, DSP, Major Singh, SI conducted search of the jeep, from where the opium was recovered from a plastic bag and two samples of 10 gms each were drawn from the recovered opium. The remaining opium on weighment was found to be 24 kgs 980 gms, which was put in a box and converted into sealed parcels. Later all the three parcels were sealed by Major Singh, SI with his seal bearing impression "MS" and of Amrik Singh Minhas, DSP bearing impression "AS" besides, sample seal chit was also prepared. The seal after use was handed over to him by Major Singh, SI, while Amrik Singh, DSP retained his own seal. Thereafter, the case property and the jeep were seized vide memo Ex.P7. Personal searches of the respondents resulted in the recovery of Rs. 350/-and one mobile phone from Bansi Lal respondent No. 3, Rs. 400/-and a Nokia mobile phone from Jia Ram respondent No. 1 and Rs. 315/-from Uma Ram, respondent No. 2. These were seized vide separate memos Ex.P8, Ex.P9 and Ex.P10 respectively, which were signed by him, Sukhmander Singh, ASI and Amrik Singh Minhas, DSP.

12. PW1 Iqbal Khan further testified that ground of arrest memos Ex.P11, Ex.P12 and Ex.P13 of the respondents respectively were prepared separately which were signed by the respondents in Hindi and attested by him and Sukhmander Singh ASI. He also testified that registration certificate of jeep was also seized vide memo (Ex.P14) which was signed by him and his statement was recorded.

13. PW2 Sukhdev Singh, Constable testified that on 12.09.2006, he was posted at Police Station Sadar Abohar and on that date, Major Singh, SI handed over to him sample seal, sample parcel and CFSL form Ex.P15 alongwith sample seal chit Ex.P14 for deposit, thereof, in the office of the Chemical Examiner at Amritsar. On 13.09.2006, he deposited the same with the Chemical Examiner at Amritsar and on return, handed over the receipt to Major Singh SI/SHO. He also testified that, so long as, the case property remained in his custody, no one tampered with it. He further testified that his statement was recorded.

14. PW3 Major Singh, SI testified that on 07.09.2006, he was on patrol duty near

the culvert of water course in the revenue limit of village Sherewala. At about 04:30 pm, the respondents came in a Bollero jeep bearing No. RJ-19UA-1203 from the opposite side. The driver-respondent of the said jeep got perplexed and he tried to retreat the jeep. They were intercepted and the driver of the jeep revealed his identity as Bansi Lal (respondent) and others revealed their identities as Uma Ram and Jia Ram (respondents). He made efforts to join independent witnesses, but none was available. Then he told the respondents that there is some intoxicant substance in their jeep and a search is to be conducted. They have a legal right to get it conducted in the presence of a Magistrate or a gazetted officer. Thereupon, the respondents signed memos Ex.P1, Ex.P2 and Ex.P3 mentioning, therein, that they want the search to be conducted in the presence of a gazetted officer.

15. PW3 Major Singh further testified that then he sent a wireless message and Amrik Singh, DSP on receipt of message, reached at the spot. He on reaching at the spot disclosed his identity to the respondents, who opted for search through memos Ex.P4, Ex.P5 and Ex.P6 respectively in his presence. Later on his direction, he (PW3) conducted search of the jeep which resulted in recovery of opium wrapped in a plastic bag, which was underneath the middle seat of the jeep. Two samples of 10 gms each were drawn from that plastic bag and the remaining opium on weighment came to 24 kgs 980 gms. All the three parcels were sealed by him with seal bearing impression "MS" and with seal of Amrik Singh, DSP bearing impression "AS" and sample seal chit Ex.P16 was also prepared at the spot. He also testified that he seized the entire case property alongwith sample seal chit and jeep bearing registration No. RJ-19UA-1203 vide memo Ex.P7. He then conducted search of the respondents, which resulted in recovery of currency notes and mobile phones and these were seized vide separate memos Ex. P8, Ex.P9 and Ex.P10 respectively, then a "ruqa" (memo) Ex.P17 was sent to Police Station through Randhir Singh, Constable, which formed the basis of FIR Ex.P18. He also prepared site plan Ex.P19.

16. He also prepared arrest memos Ex.P11, Ex.P12 and Ex.P13 of the respondents respectively, besides, he sent special report Ex.P20 u/s 57 of the Act and information regarding the arrest of the respondents was also sent. He kept the case property in an intact condition in the police "malkhana" under his own supervision. On the next day, he produced the respondents and the case property before the Illaqa Magistrate vide requests Ex.P21, Ex.P22 and Ex.P23. The latter passed orders Ex.P24, Ex.P25 and Ex.P26 respectively and sample seal chit was also signed by the Illaqa Magistrate Ex.P27. On return to the Police Station, he kept the case property in the "malkhana" under his own supervision and on the next day, he deposited the case property in the judicial "malkhana", as per order of the Magistrate.

17. He also testified that bulk parcel (MO1) and representative sample (MO2), were deposited in the "malkhana" under the charge of Chief Judicial Magistrate, Ferozepur. On 12.09.2006, he handed over sample parcel of opium to Sukhdev

Singh, Constable for deposit, thereof, with the Chemical Examiner at Amritsar. The Constable deposited the parcel in the office of the Chemical Examiner on 13.09.2006. He also testified that, so long as, the case property remained in his possession, no one tampered with it.

18. PW4 Rajinder Mathur testified that vehicle No. RJ-19-UA-1203 is registered in the name of Jugal Kishore Rathee w.e.f 03.08.2006. He proved an attested copy of the entry of the register Ex.P28. He also proved original registration certificate Ex.P29, issued in the name of Jugal Kishore Rathee and identified the signatures of Shrikanti Lal Dave, RTO, Jodhpur, as he had worked under him.

19. PW5 Jugal Kishore testified that in the month of August 2006, he sold this vehicle bearing registration No. RJ-19-UA-1203 to Vastu Devi for Rs. 4, 90, 000/- and payment was to be made by instalments. Regarding sale of the vehicle, he had entered into agreement of sale deed dated 08.08.2006 and the said agreement of sale was got attested from the Notary Public, Jodhpur on 08.09.2006. He proved the copy of the same as mark PW5/A.

20. PW6 Amrik Singh Minhas, DSP also testified likewise and corroborated the testimony of PW3 Major Singh SI and PW1 Iqbal Khan, ASI.

21. After the closure of the prosecution evidence, respondents were examined u/s 313 Cr. P.C, wherein, they denied the allegations of the prosecution. They pleaded innocence and false implication in this case. They opted to lead defence, but closed the same without examining any witness in defence.

22. After hearing both the sides, the learned trial Court, vide its impugned judgment acquitted the respondents of the charge framed against them. Aggrieved, therefrom, the appellant-State of Punjab has come up in this appeal with prayer for acceptance, thereof, and for convicting and sentencing the respondents, who were accused before learned trial Court, for commission of offence punishable u/s 18 of the Act, for which they were charged by the learned trial Court.

23. Learned Additional Advocate General, Punjab for the appellant and learned counsel for the respondents have been heard and record of the learned trial Court perused with their able assistance.

24. Learned Additional Advocate General, Punjab contended that all the prosecution witnesses examined in the case unanimously supported the case of the prosecution and that the chain of link evidence is complete. It was further contended that although the jeep, from which recovery was effected, was not owned by the appellants, but it is fully proved on the record that the respondents were apprehended while they were travelling in the said jeep knowing fully well that opium was being carried therein. He also contended that even otherwise, it cannot be said that the respondents were not having knowledge of such huge quantity of opium lying in the jeep, in which, they were travelling. It was also contended that the search was conducted in accordance with law and the

respondents were apprised of their right for the search being conducted in the presence of a gazetted officer, so the compliance of Section 50 of the Act was duly made by the investigating Officer by requesting PW6 Amrik Singh Minhas, DSP to be present at the time of search of the vehicle, wherein, opium was lying, as also, at the time of personal search of the respondents.

25. It was further contended that the case law referred to in the impugned judgment is not applicable to the facts and circumstances of the case. It was also argued that the minor discrepancies after passage of time are bound to occur. So, it was contended that the recovery of 25 kgs of opium from the respondents has been duly proved on the record, and the learned trial Judge wrongly acquitted the respondents by relying upon minor discrepancies in the testimonies of the witnesses. It was also contended that Amrik Singh Minhas, DSP while appearing as PW6 identified the respondents in the Court and due to minor discrepancies about the disclosure of their names, on account of passage of time, should have been treated as insignificant. So, in the end it was submitted that the impugned judgment may be set aside and the respondents be convicted and sentenced for commission of offence punishable u/s 18(b) of the Act.

26. In response, learned counsel for the respondents contended that the impugned judgment is well reasoned which is not liable to be set aside. He also contended that there was violation of Section 50 of the Act at the time of alleged search and the link evidence in the case is also missing. He also contended that PW6 Amrik Singh Minhas, DSP received a message that a jeep had been standing abandoned in the area of village Sherewala and when he visited the spot, the respondents were found present. So, he contended that had the respondents been apprehended by PW3 Major Singh, SI, in that event, he would have flashed the message to PW6 Amrik Singh Minhas, DSP to the effect that the respondents had already been apprehended alongwith the jeep. He also contended that the recovery of the opium was not from the conscious possession of the respondents.

27. PW1 Iqbal Khan, ASI, PW2 Sukhdev Singh, Constable and PW6 Amrik Singh Minhas, DSP whose testimonies have been reproduced in the earlier part of this judgment in candid words testified that all the respondents were found travelling in jeep No. RJ-19-UA-1203, whose search resulted in recovery of 25 kgs of opium. These witnesses were subjected to searching cross examination by learned counsel for the respondents before the learned trial Court, but despite the lengthy cross examination failed to elicit anything worth the name, which would possibly cause any dent in their testimonies.

28. Regarding minor contradictions in their testimonies, suffice it to say that human memory is fallible and erodes with the passage of time. Such minor contradictions are likely to occur in the testimonies of witnesses after a passage of time. Moreover, witnesses are not alleged to have any animus or hostility towards the respondents. Therefore, no motive can be ascribed to the prosecution witnesses to implicate the respondents falsely in this case or depose falsely against them before the learned trial Court.

29. Regarding non association of non official witnesses, or independent witnesses, suffice it to say that people in the rural areas are generally reluctant and averse to join the police in such like cases, as they are afraid of the fact that joining the police and deposing in favour of prosecution may expose them to serious consequences and create permanent enmity with the accused. In *Dharampal Singh Vs. State of Punjab*, it was held that the evidence of prosecution witnesses showed that attempt was made to join persons from public at the time of search, but none was available. Therefore, mere absence of independent witnesses at the time of search, seizure did not render case of the prosecution unreliable. In the present case also, efforts were made by Major Singh, the Investigating Officer (PW3) to join independent witnesses, but none was available. So, evidence of prosecution witnesses (supra) examined in this case cannot be discarded or repelled due to non association of non official or independent witnesses.

30. The learned trial Court rejected the case of the prosecution inter alia on the ground that PW6 Amrik Singh, DSP had smashed the whole case of the prosecution by testifying that it was conveyed to him on wireless message that some jeep was standing in an abandoned condition near police post Bahawala in the area of village Sherewala, but when he reached the spot, he asked the Investigating Officer PW3 Major Singh, SI to search the occupants of the jeep, as also, the driver, thereof, who had abandoned it there. This contradiction was not suffice for rejection of the case of the prosecution by learned trial Court, as in the wireless message on a "walkie talkie", it was not required by PW3 Major Singh SI to send a detailed message. Probably he would have informed that a jeep had been recovered and he would have inadvertently missed out to give details of the respondents who were travelling in it.

31. The learned trial Court in fact categorically held that at the time of search of the jeep, Section 50 of the Act was not required to be complied with. If it is so, the presence of PW6 Amrik Singh Minhas, DSP, a gazetted police officer was not even required. However, as an abundant caution, PW3 Major Singh, SI, asked PW6 Amrik Singh Minhas, DSP to reach at the spot for conducting personal search of the respondents, which resulted in recovery of currency notes and a mobile phone from each of them. Therefore, the provisions of Section 50 of the Act in any case were complied with by the Investigating Officer in this case.

32. Learned trial Court relied upon the case of *Dilip and another v. State of M.P.*, 2007 (1), RCR (Cri) 586 (SC), wherein, recovery of opium was effected from a scooter, but before search of the scooter, the personal search of the accused was conducted and the Hon'ble Supreme Court held that provisions of Section 50 of the Act were to be complied with.

33. The ratio of the said judgment would be inapplicable to the present case as the opium was recovered from the search of the jeep No. RJ-19-UA-1203 when PW6 Amrik Singh Minhas, DSP, a gazetted officer was already there, besides, he was present even when personal search of the respondents was conducted,

Therefore, the learned trial Court erred in giving benefit of doubt to the respondents on the basis of the ratio of the said judgment.

34. In *Jarnail Singh v. State of Punjab*, (2011) 3 SCC, 521, it was held that Section 50 of the Act can be invoked only in cases where drug/narcotic/NDPS substance is recovered as a consequence of body search of the accused. In case recovery of narcotic is made from a container being carried by an individual, provisions of Section 50 of the Act would be attracted. In the present case, however, opium was recovered, as already held, from a bag being carried by the respondents in jeep No. RJ-19UA-1203. Therefore, Section 50 of the Act would not be attracted.

35. Section 55 of the Act enjoins that an officer-in-charge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that police station and which may be delivered to him, and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station. The said provision has been complied with in this case, as the Station House Officer himself was the Investigating Officer of this case, who kept the case property in his possession throughout till deposit, thereof, in the "malkhana" as also, till deposit of sample parcel in the office of the Chemical Examiner through PW2 Sukhdev Singh, Constable.

36. Identification of Jia Ram as Bansi Lal and Bansi Lal as Uma Ram in the Court by PW6 Amrik Singh, DSP was in the facts and circumstances not a sufficient ground for rejection of the case of the prosecution especially when this witness identified the respondents in the court during his deposition as can be seen from his examination in chief. Human memory is fallible and it can be said that it was very difficult for PW6 Amrik Singh Minhas, DSP to remember the identity of each respondent with the passage of time. A police officer in his duties does encounter many public persons and criminals and other miscreants and over a period of time he may not remember them. He only named one of the respondents as the other and it is not as if he totally failed to identify any of them. Therefore, in the facts and circumstances, not much weightage or significance is to be attached to the same.

37. The other contention that rough notes papers Ex.D1 and Ex.D2 were found in the possession of PW6 Amrik Singh Minhas, DSP, at the time of his deposition, wherein, he had written certain points is also not of much consequence as it is not shown that he deposed by reading those papers or rough notes. He may have refreshed his memory and noted down points outside the Court and the papers where he had written some points of cross examination could not lead to rejection of the prosecution case, as this witness was not seen reading from these exhibits at the time of his deposition before the learned trial Court.

38. It is also to be seen as to whether the respondents were found in the conscious possession of the opium for which they were charged. There is unanimous evidence of PW1, PW3 and PW6 that respondents were found in possession of the opium lying in the jeep. They were travelling in a private jeep, which was not a public carrier. Only respondents were travelling in the jeep. It is highly arduous to hold that they were unaware or could not spot the bulk opium lying in the jeep. If there would have been some other passengers in the jeep, then it could be said that this opium belonged to other persons. When respondents only were travelling in this jeep, they ought to have been held to be the occupiers and in possession of the contraband by the learned trial Court. Since they were found travelling in the jeep alongwith opium, it follows that they had either hired this jeep or they had borrowed it from the original owner.

39. Even the respondents themselves have not stated that they were not travelling in jeep No. RJ-19-UA-1203 and the opium lying, therein, did not belong to them. They have simply taken the defence that they were implicated falsely. This defence is perfunctory in nature. The appellant by examining PW1, PW3 and PW6 have proved the recovery of jeep No. RJ-19UA-1203 from the respondents, the respondents have been proved to be travelling in the jeep and in which 25 kgs of opium was lying, which was recovered.

40. In Jagdish Rai Vs. State of Punjab, the appellant in the said case was coming on a motor cycle and he was intercepted by the police party, the other accused therein was riding pillion and was carrying 4 kgs of opium in a bag. It was held that the High Court rightly held that conscious possession of the contraband by the appellant in the said case was fully established.

41. The ratio laid down in the said judgment was wrongly not taken into account in its correct perspective by the learned trial Court and it wrongly concluded that the conscious possession of the respondents in respect of the opium has not been proved, as the same was recovered in between the seats of the jeep.

42. This Court in Swaran Singh v. State of Punjab, 2011 (5) RCR (Cri), 802 (P&H) held that it is not imperative for the Presiding Officer to use words "conscious possession" in statement of accused u/s 313 Cr. P.C. If charge and statement u/s 313 Cr. P.C state that accused was found in possession of poppy husk or a contraband article and recovery of same was effected and samples were drawn, the requirement of law is fulfilled. It was further held that once an accused is made aware of possession of the contraband article, it is for him to explain that he never knew the contents of the article which was found in possession. In the present case also, at the time of framing charge against the respondents, they were made aware of their conscious possession of the opium. In the charge that was framed, it was alleged that on 07.09.2006 in the area of village Sherewala, Jia Ram, Uma Ram and Bansi Lal (respondents) were found in conscious possession of 25 kgs of opium without holding any valid permit or licence for keeping the same in their possession (emphasis added). Therefore, it was for them (respondents) to explain that they never knew about the contents of the

plastic bag which was found in their possession in the jeep No. RJ-19-UA-1203.

43. In *Surender v. State of Haryana*, 2011 (1) RCR (Cri) 370, it was held by this Court that once a person is found to be in possession of an illicit article, he may be presumed, unless and until the contrary is proved that he had committed an offence under the Narcotic Drugs and Psychotropic Substances Act, according to Section 54, thereof.

44. In *Bahadur Singh Vs. State of Haryana*, , six bags each containing 32 kgs of poppy husk were recovered from the premises of the petitioner in the said case from a room which was opened by him with a key in his possession, It was held that the petitioner was, thus, in conscious possession of the contraband.

45. The ratio of the said two judgments fully support the case of the appellant as the respondents were apprehended from a jeep containing a bag of opium.

46. In *Dharampal Singh Vs. State of Punjab*, , a search of the boot of the car of the appellants in the said case, in which they were travelling, led to recovery of a gunny bag containing 65 kgs of opium, which was not a public transport vehicle. It was held that u/s 18 of the Act, once possession is established, the accused, who claims that it was not in his conscious possession, has to establish that it was not within his special knowledge. It was held that to attract presumption u/s 54 of the Act initially burden of proof of proving possession lies on prosecution. Once that is discharged, legal burden shifted on the appellant/accused.

47. In the present case, respondents could not satisfactorily account for possession of opium. So, once possession of opium with the respondents was established which was in jeep No. RJ-19-UA-1203, wherein, they were travelling, learned trial Court ought to have presumed that the appellants had culpable mental state u/s 35 of the Act and had committed the offence. So, the learned trial Court over looked this aspect. In the facts and circumstances, conscious possession of the appellants in respect of the opium that was recovered was established and they were unable to rebut the presumption u/s 35 of the Act and they were liable to be convicted and sentenced by the learned trial Court in view of the aforementioned position.

48. Learned counsel for the respondents has placed reliance upon the case; *State of Punjab vs. Surjit Singh*, 2008 (1) RCR (Cri) 266 (DB) (P&H), wherein, opium was recovered from a car being driven by the accused and person of the accused was also searched but no recovery was effected from personal search. The provisions of Section 50 of the Act were, however, not complied with and the acquittal of the accused therein was upheld. However, the said judgment is not helpful to the respondents, as in the present case when the jeep No. RJ-19UA-1203 was searched, wherein, respondents were travelling, a gazetted officer of the police namely PW6 Amrik Singh Minhas, DSP was present and the searches of the respondents were conducted in his presence.

49. Learned counsel for the respondents also places reliance upon Dilip and

another vs. State of M.P, 2007 (1) RCR (Cri) 586, passed by the Hon''ble Supreme Court of India. The scooter of the accused in the said case was searched and opium was recovered. It was held that in such a case, provisions of Section 50 of the Act were required to be complied with, even if the recovery was effected from scooter.

50. The respondents can get no benefit of the said judgment especially when PW6 Amrik Singh Minhas, DSP, a gazetted officer of the police remained present at the time and place of recovery. Search of jeep No. RJ-19-UA-1203, wherein, respondents were travelling and that of the persons of the respondents were conducted in his presence.

51. Learned counsel for the respondents has also placed reliance on Bikkar Singh v. State of Punjab, 2006 (3) RCR (Cri) 16 (DB)(P&H) wherein, the accused was sitting on 120 bags of poppy husk lying in the sugarcane field. It was held that the custody and control of the accused over the substances was not proved beyond doubt. Besides, the accused was not given an opportunity to explain his stand qua the gunny bags containing contraband substance over which he was found sitting at time of occurrence.

52. The ratio of the said judgment does not help the respondents, especially when the facts of the present case are not similar to the said case. In the present case, the recovery was effected from the jeep in which the respondents were travelling. Besides, at the time of recovery, they had failed to account for its possession.

53. Learned counsel for the respondents has also placed reliance on Raj Kumar vs. State of Punjab, 2005 (1) RCR (Cri) 70 (DB) (P&H), wherein, two accused were charged for possessing opium while travelling in a jeep. In statement of accused u/s 313 Cr. P.C, no question was asked that they were in conscious possession of opium. It was held that neither presumption u/s 35 nor u/s 54 of the Act would be attracted and conviction was set aside. In the said case, eye witness to the recovery was a stock witness who had already been cited as a witness in ten other cases of recovery. The whole investigation was discarded as tainted one and the conviction was set aside.

54. The said judgment is inconsequential to the facts of the present case, as no such stock witness was joined in the investigation. Besides, in the charge, it was categorically stated to the respondents that they were found in conscious possession of 25 kgs of opium. Therefore, they were apprised of the allegations against them and they were well aware that the prosecution is to establish its case as regards the respondents being in conscious possession of the contraband.

55. Learned counsel for the respondents has also placed reliance on State of Punjab Vs. Balkar Singh and Another, , wherein, it was held by the Hon''ble Supreme Court that merely because the accused is alleged to have been found sitting on 100 bags of poppy husk, they could not be held to be in conscious possession of the apprehended substance.

56. The said judgment is also inconsequential for the respondents, as they were not found sitting on the bags of opium, while on the contrary, they were found travelling in jeep No. RJ-19UA-1203 wherein, opium was lying. So, they were in conscious possession of the opium.

57. The learned trial Court also held that the chain of link evidence in this case was missing. It placed reliance on Mann Singh vs. State of Haryana, 2006 (1) RCR (Cri) 335 (P&H), wherein, the Investigating Officer (SHO) was himself the complainant and he did not deposit sample of opium, besides sample of seal and the case property was not given to some other police officer but was directly deposited with Mahavir Head Constable. It also placed reliance on Ajaib Singh vs. State of Punjab, 2006 (2) RCR (Cri) 547 (P&H), wherein, 3.5 kg of opium was recovered by the Investigating Officer who was himself SHO of police station. He kept the samples and case property within his box instead of depositing the same in the "malkhana". The accused therein was acquitted on this ground. In the present case, there was no independent witness, therefore, the seal could not be handed over to an independent witness. So far as the seal used by PW3 Major Singh, SI is concerned, he indubitably, handed over the same to PW1 Iqbal Khan, ASI. No circumstance has come on the record that during investigation till the deposit of sample with the Chemical Examiner, the seal was taken back by PW3 Major Singh, SI from PW1 Iqbal Khan, ASI. All the three parcels also were not sealed with the seal bearing impression "MS" of PW3 Major Singh, SI alone. Even the seal of PW6 Amrik Singh Minhas, DSP bearing impression "AS" was also used in sealing the three parcels of the opium. At the most, when the case property was in possession of PW3, he could tamper his seal only and not that of PW6 Amrik Singh Minhas, DSP. As regards the Investigating Officer being the complainant it was held by the Hon"ble Supreme Court in Bhaskar Ramappa Madar and Others Vs. State of Karnataka, that merely because the complainant conducted the investigation, that would not be sufficient to cast doubt on the prosecution version to hold that the same makes the prosecution version vulnerable. The matter has to be decided on a case-to-case basis without any universal generalisation.

58. PW2 Sukhdev Singh, constable and PW3 Major Singh, SI were only custodians of the case property, who in their deposition unanimously testified that, so long as, case property remained in their possession, no one tampered, therewith. Their testimonies on this point could not be shattered in cross examination.

59. Recovery in this case was effected on 07.09.2006. PW3 Major Singh, SHO kept the case property with him till production thereof, before the duty Magistrate on 08.09.2006, on which date, he moved an application Ex.P23 before the learned Duty Magistrate for deposit of two parcels of opium i.e one bulk parcel and other second sample parcel in the "malkhana", Ferozepur and in this very application, he sought permission for sending one sample parcel to the Chemical Examiner for analysis. Learned Duty Magistrate passed order dated

08.09.2006 Ex.P26 and allowed this application, The case property was allowed to be deposited in judicial "malkhana" under rules. It was ordered to be deposited on that day itself. PW3 Major Singh was, therefore, allowed to deposit one parcel obviously containing 10 gms of opium with the Chemical Examiner and remaining in the "malkhana" at Ferozepur.

60. PW3 Major Singh, SI testified that on return to Police Station, he kept the case property in police "malkhana" under his supervision in an intact condition and on the next date, he deposited the case property in the Judicial "malkhana" as per order of the Illaqa Magistrate, who ordered deposit of MO1 and MO2 in the "malkhana" under the charge of Chief Judicial Magistrate, Ferozepur and on 12.09.2006, he handed over one sample parcel of opium containing 10 gms of opium bearing seal impressions "MS" and "AS" alongwith sample chit Ex.P16 which was affixed on CFSL form Ex.P15 for deposit, thereof, in the office of Asstt. Chemical Examiner, Amritsar to PW2 Sukhdev Singh, Constable. There is only delay of four days in sending the sample and that cannot be said to be inordinate and benefit of doubt is not be accorded to the respondents on this aspect.

61. PW2 Sukhdev Singh, Constable candidly testified that on 02.09.2006, Major Singh, SI PW3 handed over parcel of this case alongwith CFSL form Ex.P15 and sample seal chit (Ex.P16) and he deposited those in the office of Chemical Examiner at Amritsar on 13.09.2006 and obtained receipt from that office and handed over the same to Major Singh SI PW3. He testified in candid words that, so long as, case property remained in his possession, no one tampered, therewith. Evidence of PW2 Sukhdev Singh, Constable could not be shattered in the cross examination. So, it follows that from the time of recovery of opium from the respondents, till deposit of sample parcel with Chemical Examiner, no one tampered, therewith. So, link evidence in the case was wrongly held to be missing by the learned trial Court and this finding of the learned trial Court also requires to be reversed and it is held that the sample parcel was kept in intact condition till deposit, thereof, in the office of Chemical Examiner who vide report (Ex.P30) found contents of the sample parcel to be opium.

62. In an appeal against acquittal, interference by a higher court is quite seldom. However, in the facts and circumstances and the cogent and convincing evidence on record, there are substantial and compelling reasons for doing so as the learned trial Court failed to correctly appreciate the evidence on record, besides, misconstrued the law. Resultantly, appeal is allowed; impugned judgment and order of the learned trial Court is set aside and the respondents are convicted for commission of offence punishable u/s 18(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985 and sentenced to undergo rigorous imprisonment for a period of ten years each and to pay fine of Rs. 1, 00, 000/- each and in default of payment of fine to further undergo rigorous imprisonment for six months each.