

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

CRA-S-2277-SB-2003

Date of decision: 05.11.2015

Amar Singh

..... Appellant

Versus

State of Punjab

..... Respondent

CORAM : HON'BLE MR. JUSTICE DARSHAN SINGH

1. Whether Reporters of the local papers may be allowed to see the judgment ? Yes
2. To be referred to the Reporters or not ? Yes
3. Whether the judgment should be reported in the Digest ? Yes

Present: Mr. B.S. Kathuria, Advocate for the appellant.

Mr. Manjit Singh Naryal, Addl. A.G., Punjab.

DARSHAN SINGH, J.

The present appeal has been preferred against the judgment of conviction dated 09.10.2003, passed by the learned Judge, Special Court, Nawanshahr, vide which accused-appellant Amar Singh has been held guilty and convicted for the offence punishable under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (here-in-after called the 'Act') and the order on quantum of sentence of the even dated, vide which the appellant has been sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of ₹ 1,00,000/-

and in default of payment of fine, to further undergo rigorous imprisonment for one year.

2- As per the prosecution case, on 21.11.1997, SI Surinder Mohan, the Investigating Officer of the case, along with other police officials was present at the bridge of the drain in the area of village Bhoran in connection with Nakabandi (interception). At about 3:00 P.M., they intercepted one tanker which was coming from the side of village Bhoran. The driver of the tanker after stopping the vehicle, suddenly jumped out of it and took to heels towards right side by taking cover of elephant-grass on the bank of the drain and was successful in slipping away. The accused-appellant was sitting on the front seat by the side of the driver. He also jumped from the tanker and tried to slip away but was apprehended by the Investigating Officer with the help of other police officials. From the seat of the tanker one driving licence bearing No.14320/91 was found which was in the name of Bhupinder Singh son of Hazara Singh, resident of village Gandhanpur, Katak (Orrisa). Accused-appellant identified the photograph of the said licence holder to be that of Bhupinder Singh alias Kala, who was his younger brother. By chance, one Mohan Lal son of Chanan Ram, resident of village Mohalon came there and showed his willingness to join as a public witness. He was accordingly joined. The accused-appellant was given option to get the search of the tanker conducted before the Investigating Officer or a gazetted officer or a magistrate but he reposed confidence in the Investigating Officer vide his consent memo Ex.PN. On checking, it was

found that the tanker was having four separate holes which were covered with lids. The lids were opened. The first and fourth holes were empty, however, the second and third holes were containing bags of poppy husk. The bags were removed from the holes and brought down on the ground. The bags were 10 in number. A wireless message was sent to Shri Harmail Singh DSP, requesting him to come at the spot. In the presence of the DSP, the Investigating Officer conducted the search of the bags and it were found containing poppy husk. 250 grams of poppy husk was separated from each bag as sample and on weighment, the residue came to be 40 kilograms and 750 grams in each bag. The samples as well as residue were sealed in separate parcels with the seals bearing impressions 'SM' and 'HS' of the Investigating Officer and the DSP, respectively. All the articles were taken into possession vide recovery memo Ex.PA. The seal of the Investigating Officer after use was handed over to HC Sarwan Dass whereas the DSP kept his seal with him. Driving licence of co-accused Bhupinder Singh was taken into possession vide recovery memo Ex.PE. Ruqqa Ex.PG was sent to the police station. On the basis of which, formal FIR Ex.PH was registered. The Investigating Officer prepared the site plan Ex.PL of the place of recovery. Accused-appellant was arrested vide memo Ex.PK.

3- On return to the police station, the Investigating Officer deposited the case property with Mohrir Head Constable Sudagar Singh. The samples were sent to the Chemical Examiner for examination and vide report Ex.PM, the same was found to be of poppy heads.

4- Co-accused Bhupinder Singh, the driver of the tanker could not be arrested despite repeated efforts and ultimately he was got declared as proclaimed offender. After completion of formalities of the investigation, the report under Section 173 of Code of Criminal Procedure, 1973 (here-in-after called 'Cr.P.C.') was presented in the Court.

5- The accused-appellant was charge-sheeted for the offence punishable under Section 15 of the Act vide order dated 18.09.1998 by the learned trial Court, to which the appellant pleaded not guilty and claimed trial.

6- In order to substantiate its case, prosecution examined as many as five witnesses.

7- When examined under Section 313 Cr.P.C., the accused-appellant pleaded innocence and false implication. He stated that he was taken away by PW5 on 14.11.1997 from his village Pakhowal. He was kept in illegal confinement for seven days and later on, this false case has been foisted upon him.

8- In his defence evidence, accused-appellant examined Lehmbur Ram as DW1, he was again called with record as DW2 and Balwant Singh as DW3.

9- Appreciating the evidence on record and the contentions raised by learned counsel for the parties, the accused-appellant was held guilty and convicted for the offence punishable under Section 15 of the Act and was awarded the sentence as mentioned in the upper part of the

judgment.

10- Aggrieved with the aforesaid judgment of conviction and order of sentence, the present appeal has been preferred.

11- I have heard Mr. B.S. Kathuria, Advocate, learned counsel for the appellant, Mr. Manjit Singh Naryal, learned Additional Advocate General for the State of Punjab and have meticulously examined the record of the case.

12- Initiating the augments, learned counsel for the appellant contended that the entire case of the prosecution is based on the statement of the police officials alone. Mohan Lal was associated as an independent witness but he has not been examined.

13- He further contended that there was no secret information with the Investigating Officer against the appellant and the appellant was just travelling in the tanker. The Investigating Officer has not collected any evidence to establish the connection of the appellant with the tanker in question. PW5 SI Surinder Mohan Singh, the Investigating Officer of the case has admitted in the cross-examination that without searching the tanker, it could not be known that the poppy husk was loaded in the tanker. Thus, he contended that there is no evidence to show that the appellant knew that poppy husk was loaded in the tanker. So, it cannot be stated that the appellant was found in possession much less the conscious possession of the contraband. In order to prove the charges, the prosecution was required to establish that the appellant was in conscious possession of the contraband. The evidence of the prosecution in this

regard is totally lacking and it is not proved that the appellant was in conscious possession of the contraband. To support his contentions, he relied upon the cases *Baldev Singh Vs. State of Punjab 2005(1) RCR (Criminal) 823*, *Bhola Singh Vs. State of Punjab 2005(2) RCR (Criminal) 520* and *Sukhdev Singh alias Sukha Vs. State of Punjab 2006(1) RCR (Criminal) 4*.

14- He further contended that link evidence in this case is missing. PW4 SI Charan Singh, the witness of recovery has stated that the CSFL form with respect to the seal impressions was prepared but the said form is not available on the judicial record. He further contended that as per the Standing Orders issued by the Narcotic Control Bureau, the sample is required to be sent to the FSL within 72 hours. But in the instant case, the recovery is alleged to have been effected on 21.11.1997 and the sample has been received by the FSL on 17.12.1997. So, there was delay of 26 days in sending the sample to the FSL, which indicates that the case property was tampered with.

15- He further contended that the Investigating Officer has not followed the provisions of Section 55 of the Act as the case property was not produced before the SHO, Police Station Banga, which is fatal to the prosecution case.

16- He further contended that the case property produced by the prosecution was not connected with the instant case as the seals and case chit were missing from the gunny bags produced in the Court.

17- He further contended that the appellant has been falsely

implicated. In fact he was taken away by the police in the morning on 14.11.1997 by the police officials of CIA Staff, Nawanshahr and on 21.11.1997 he was falsely implicated in this case. Even the Gram Panchayat has passed the resolution Ex.DA to this effect. This fact is also established from the statement of DW1 Lehmbur Ram Secretary Gram Panchayat and DW2 Balwant Singh, the then Sarpanch Gram Panchayat Pakhowal. Thus, he pleaded that the conviction of the appellant has been wrongly recorded by the trial Court.

18- On the other hand, learned State counsel contended that from the consistent statement of PW1 DSP Harmail Singh, PW4 SI Charan Singh the recovery witness and PW5 SI Surinder Mohan, the Investigating Officer, it is established that 10 bags containing 41 kilograms poppy husk each were recovered from the possession of the present appellant and his brother Bhupinder Singh, who had fled away from the spot and was declared proclaimed offender. He contended that from the evidence on record it is established that the case property remained intact, so mere delay in sending the samples to the office of Chemical Examiner will not create any dent in the prosecution case. He further contended that the provisions of Section 55 of the Act are not mandatory. He further contended that with the passage of time the seal and case chit can disappear and their absence thereon is no ground to disbelieve the substantive evidence adduced by the prosecution.

19- I have duly considered the aforesaid contentions.

20- Admittedly, one Mohan Lal was joined in the

investigation of the case as an independent witness but as per the statement of learned Public Prosecutor dated 03.08.1999, said Mohan Lal had died and due to this reason, he could not be examined. Thus, no adverse inference can be drawn against the prosecution for non-production of Mohan Lal in the witness box as he had already expired. So, there is no reason to disbelieve the statement of the official witnesses. Moreover, it is settled principle of law by this time that the testimonies of the officials witnesses carry the same evidentiary value as that of any other witness. Mere official designation of the witnesses *ipso facto* is no ground to disbelieve their testimony. There is no absolute command of law that police officials cannot be cited as witnesses and their testimonies should always be treated with suspicion. If the testimonies of the police officials are found reliable and trustworthy, the Court can definitely act upon the same. To support this view, reference can be made to case ***Kashmiri Lal Vs. State of Haryana 2013(2) RCR (Criminal) 259 (SC)***.

21- I do not find any substance in the plea raised by learned counsel for the appellant that the appellant was not proved to be in possession and conscious possession of the contraband. As per the testimonies of PW4 SI Charan Singh, the witness of recovery and PW5 SI Surinder Mohan, the Investigating Officer of the case, while the Naka was being held at the bridge of the Bein in the area of village Bhoran. At about 03:30 P.M., a tanker was spotted coming from the side of village Bhoran. The Investigating Officer signalled it to stop. The moment the tanker was stopped, its driver jumped out and ran away. The appellant

who was sitting on the seat adjoining to driver's seat also jumped and tried to run but was apprehended. So, appellant Amar Singh was also travelling in the tanker in which the contraband was loaded and was being transported. The conduct of the appellant shows that he was fully aware about the contraband loaded in the tanker, otherwise there was no reason for him to jump from the seat and try to run away. The driving licence of Bhupinder Singh the driver of the tanker was recovered from the tanker itself which is Ex.PD who was none else than the real brother of the present appellant. Thus, it cannot be stated that the appellant has no connection with the tanker in question as the real brother of the appellant was driving the tanker in question and appellant was travelling therein. From the statements of PW4 SI Charan Singh and PW5 SI Surinder Mohan it comes out that the accused-appellant was travelling in the tanker in question along with his brother Bhupinder Singh when he was apprehended by the police. On making an inquiry by the Investigating Officer as to what was there in the tanker and why the other person had run away, the appellant had replied that there was poppy husk in the tanker. The Investigating Officer has given option to the appellant for the search to be conducted by himself or a gazetted officer or a magistrate. The accused has reposed the confidence in the Investigating Officer vide memo Ex.PH. Ten gunny bags containing poppy husk were found loaded in the holes in the body of the tanker. After taking out the said gunny bags, the Investigating Officer gave information to PW1 Harmail Singh DSP who reached at the spot and supervised the search and seizure. All

the gunny bags were found containing 41 kilograms poppy husk each. In his statement under Section 313 Cr.P.C., the appellant has taken the plea that he was taken away from his village Pakhowal on 14.11.1997 by PW5 SI Surinder Mohan. He was kept in illegal confinement for 07 days and then falsely implicated in this case. Nothing was recovered from him. So, it was not the case of the appellant that he was not aware of the contraband loaded in the tanker and he was just travelling therein, rather he has set up the plea of false implication, which appears to be an afterthought.

22- To prove his defence plea, the appellant has examined DW1 Lehmber Ram who has simply proved the copy of the resolution dated 14.12.1997 passed by Gram Panchayat village Pakhowal Ex.DA. DW3 Balwant Singh was the Sarpanch of Gram Panchayat Pakhowal at the relevant time and he deposed that he knew accused Amar Singh of his village. He has seen the resolution dated 14.12.1997, which was written by Gulshan Rai, the then Panchayat Secretary. The proceedings were correctly recorded in his presence and besides Mohan Lal Panch, Dass Ram Panch, Gurmit Singh Panch and lady Panch were also present. The said resolution was written in their presence which bears his signatures as well as the signature of other Panchayat Members. In the cross-examination, he admitted that they did not send the resolution to the Deputy Commissioner or other higher officers. However, he said that they had met the SSP. He admitted that page 119 of the proceedings register was lying blank, whereas this resolution was recorded at page

No.120. Moreover, the recovery in this case has been effected on 21.11.1997 and the resolution is Ex.DA has been passed on 14.12.1997 i.e. after 23 days of the occurrence. The plea that the appellant was illegally detained for 07 days and then the false case was foisted upon him, does not appeal to the reasons. If that would have been so, naturally some family members of the accused might have moved some application to the higher police authorities or any Court of law with respect to the illegal detention of the appellant. But no such steps were taken by the family members of the appellant. So, it appears that the defence plea raised by the appellant is an afterthought. The resolution Ex.DA appears to be an effort by the co-villagers of the appellant to create some document in order to save the appellant. Such resolution has no sanctity as the copy thereof was not forwarded to the Deputy Commissioner and the higher authorities for proper action. So, the plea raised by the appellant that he was falsely implicated in the instant case after his seven day's illegal confinement is not established. Consequently, from the evidence adduced by the prosecution it is established that accused-appellant was found in possession of 10 bags containing 41 kilograms poppy husk each.

23- The conduct of the appellant, as he tried to run away when the tanker was signaled to be stopped by the Investigating Officer, shows that he was fully aware of the contraband being transported in the vehicle. Only he and his brother Bhupinder Singh were present in the tanker. His brother Bhupinder Singh was driving the tanker. Even his

driving licence has been recovered from the tanker in question and the present appellant was travelling in the said tanker. Word “conscious” is a state of mind it is deliberately or intended and means awareness about a particular fact. As already discussed, the appellant was fully aware about the contraband present in the tanker. So, it cannot be stated that the appellant was not in conscious possession of the contraband.

24- Moreover, once it is established that the appellant was in possession of the contraband, it is for him to show that he was not in conscious possession thereof because how he came to be in possession is within his special knowledge. Hon'ble Supreme Court in case ***Madan Lal and Anr. Vs. State of Himachal Pradesh 2003(4) RCR (Criminal) 100***, has laid down as under :-

“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.”

25- In case ***Dharampal Singh Vs. State of Punjab, 2010(4) RCR (Criminal) 504***, the Hon'ble Apex Court has laid down as under :-

“9. ***** In the context of Section 18 of the Act once possession is established the accused, who claims that it was not a conscious possession has to establish it because it is within his special knowledge. Section 54 of the Act raises presumption from possession of illicit articles. It reads as follows :

"54. Presumption from possession of illicit articles. - In trials under this Act, it may be presumed, unless and until

the contrary is proved, that the accused has committed an offence under this Act in respect of -

(a) any narcotic drug or psychotropic substance or controlled substance;

(b) any opium poppy, cannabis plant or coca plant growing on any land which he has cultivated;

(c) any apparatus specially designed or any group of utensils specially adopted for the manufacture of any narcotic drug or psychotropic substance or controlled substance; or

(d) any materials which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance or controlled substance, or any residue left of the materials from which any narcotic drug or psychotropic substance or controlled substance has been manufactured, for the possession of which he fails to account satisfactorily."

From a plain reading of the aforesaid it is evident that it creates a legal fiction and presumes the person in possession of illicit articles to have committed the offence in case he fails to account for the possession satisfactorily. Possession is a mental state and Section 35 of the Act gives statutory recognition to culpable mental state. It includes knowledge of fact. The possession, therefore, has to be understood in the context thereof and when tested on this anvil, we find that the appellants have not been able to account for satisfactorily the possession of opium. Once possession is established the Court can presume that the accused had culpable mental state and have committed the offence."

26- The Hon'ble Apex Court has again reiterated the same legal position in case ***Gian Chand and others Vs. State of Haryana 2013(3) RCR (Criminal) 916*** and laid down as under:-

"14. From the conjoint reading of the provisions of Section 35 and 54 of the Act, it becomes clear that if the accused is found to be in possession of the contraband article, he is presumed to have committed the offence under the relevant provisions of the Act

until the contrary is proved. According to Section 35 of the Act, the court shall presume the existence of mental state for the commission of an offence and it is for the accused to prove otherwise.

Thus, in view of the above, it is a settled legal proposition that once possession of the contraband articles is established, the burden shifts on the accused to establish that he had no knowledge of the same.”

27- Thus, in view of the aforesaid ratio of law once the possession is established, it is for the accused to show as to how he came to be in possession of the contraband as this fact is specially within his knowledge. The presumption under Section 35 of the Act arises against him in the absence of any explanation and the Court shall presume the existence of the mental state for commission of the offence. Similar is the position in terms of the provisions of Section 54 of the Act, where also such presumption is to be drawn from the possession of the contraband.

28- As already discussed, in the instant case the accused-appellant has alleged his false implication which is not established and appears to be an afterthought. So he has not rendered any explanation in order to rebut the presumption under Sections 35 and 54 of the Act. Consequently, it is established that the appellant was in conscious possession of the contraband.

29- The recovery in this case has been effected on 21.11.1997. As per the report of the F.S.L., the sample parcel has been received in the laboratory on 17.12.1997. So, there is delay of 26 days in sending the sample to the laboratory. In case ***Mohan Singh Vs. State of***

Punjab 2007(4) RCR (Criminal) 705, there was delay of 10 days in sending the sample to the F.S.L. The Division Bench of this Court held that mere delay in sending the sample to the laboratory is not fatal where there is evidence that the seized articles were kept in proper and safe custody. The Hon'ble Apex Court also in case *State of Orrisa Vs. Kanduri Sahoo 2004(1) RCR (Criminal) 196* has also laid down that mere delay in sending the sample to the laboratory is not fatal where there is evidence that the case property was kept in proper and safe custody. In case *Baggar Singh alias Gaggi Vs. State of Haryana 2009(4) RCR (Criminal) 183*, there was delay of 18 days in sending the sample to the F.S.L. and the another Division Bench of this Court held that it would not render the case of the prosecution doubtful if the seals remain intact when the sample reached to the F.S.L. In the instant case also, there is no material on record to establish that the sealed articles were tampered with. Rather, from the evidence on record it comes out that the sealed articles were kept in proper and safe custody and reached the F.S.L. in intact condition. PW5 Inspector Surinder Mohan, the Investigating Officer of the case, has stated that the case property was deposited with MHC Saudagar Singh. Then the prosecution examined the then MHC Saudagar Singh as PW-3, who has filed his affidavit Ex.PC and deposed that the case property remained intact in the Malkhana. PW2 Constable Kamal Singh, who has carried the sample parcels to the Chemical Examiner, has filed his affidavit Ex.PB mentioning therein that the sample parcels remained intact. Ex.PM is the report of the Assistant

Chemical Examiner, which also depicts that the sample parcel was properly sealed and seals tallied with the specimen seal impression.

30- The Division Bench of this Court in case ***Jarnail Singh s/o Jawara Ram Vs. State of Haryana 2013(2) RCR (Criminal) 580*** has laid down as under:-

“50. The learned counsel for the appellant also contended that only one sample was drawn from each bag against the mandatory requirement of drawing two sample, as per standing order No. 1/89 dated 13.06.1989 issued by the Government of India. He also placed reliance upon Jaswinder Singh and another v. State of Punjab; 2013 (1) RCR (Criminal) 257; passed by this Court. This standing order No.1/89 (supra) is not mandatory, as the same was not passed by the Parliament under a statute. In the Act, there is no such mandate that two samples from each bag of contraband should be taken. No prejudice has been caused to the appellant with the drawal of one sample from each bag, as he has no right to get the second sample analyzed from the Forensic Science Laboratory. When that was, so, no prejudice can be said to have been caused to the appellant.”

As per the aforesaid ratio of law, the standing instructions that sample should be sent to the chemical examiner within 72 hours is not mandatory.

31- Thus, from the aforesaid evidence, it is established that the sample parcel remained intact and was not tampered with at all at any stage of the proceedings. So, mere delay of 26 days in sending the sample will not create any dent in the prosecution case.

32- The provisions under Section 55 of the Act are not mandatory. The Hon'ble Supreme Court in case ***Babubhai Odhavji Patel, etc. etc. Vs. State of Gujarat 2005(4) RCR (Criminal) 858*** has

categorically laid down that the provisions under Sections 52, 55 and 57 of the Act are not mandatory. They are only directory. So, the plea raised by learned counsel for the appellant that the Investigating Officer has violated the provisions of Section 55 of the Act also cannot vitiate the conviction.

33- The recovery in this case was effected on 21.11.1997. The statement of the Investigating Officer has been recorded on 07.02.2003. During the course of his statement, the case property has been produced in the Court. So, the case property has been produced in the Court after more than five years of the recovery. It is a fact of common knowledge that there is no proper place for storage of the case property in the Malkhanas and due to this reason the seals on the gunny bags can break and the case chit can also be removed due to moisture etc. Moreover, the case property is only a corroborative evidence, when the substantive evidence adduced by the prosecution is cogent, convincing and reliable to establish the recovery of the contraband, even the non-production of the case property will be no ground to reject the prosecution case. Thus, the absence of seals and the case chit over the gunny bags produced in the Court is also no ground to discard the prosecution version.

34- The contradiction in the statements of PW4 SI Charan Singh and PW5 SI Surinder Mohan with respect to the CSFL form as to whether it was a printed proforma or a plain paper is immaterial, as from the evidence on record it is established that the case property has

remained intact throughout and was not tampered with. Learned counsel for the appellant has not been able to point out any other discrepancy in testimonies of the prosecution witnesses. The statements of all the prosecution witnesses are consistent, cogent and reliable, which are sufficient to establish beyond shadow of reasonable doubt that accused-appellant was found in conscious possession of ten bags containing 41 kilograms poppy husk in each. Thus, the conviction of the appellant as recorded by the learned trial Court and the sentence awarded to him is well founded and is hereby maintained and upheld.

35- Consequently, present appeal has no merits and the same is hereby dismissed. The accused-appellant is on bail. His bail stand cancelled. He shall surrender within 15 days from the date of this judgment before the learned Chief Judicial Magistrate, Nawanshahr, who shall send him to jail to undergo the remaining part of his sentence. If, he fails to surrender, the learned Chief Judicial Magistrate, Nawanshahr, shall take coercive steps to secure his presence and send him to jail to undergo the remaining part of the sentence.

Dated: 05.11.2015

sunil yadav

(DARSHAN SINGH)
JUDGE