

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

CRA-S-1041-SB-2004

Date of decision: 30.07.2014

Dara 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. C.S. Jattana, and
Mr. Harinder Singh, Advocates for the appellant.

Ms. Rimplejeet Kaur, AAG, Punjab.

DARSHAN SINGH, J.

The present appeal has been preferred against the judgment dated 11.03.2004, passed by the learned Judge, Special Court, Bathinda, vide which accused-appellant Dara 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 dated 12.03.2004, vide which the appellant has been sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.1,00,000/-, in default of payment of fine, to further undergo rigorous imprisonment for 1 ½ years.

2- As per the prosecution case, on 02.10.2001, ASI Om Parkash along with other police employees was going in canter No.PB-03-8524 for patrolling. When they were at bus stand Kothaguru, Sulakhan Singh came there and he was also joined in the party. When they were going from village Kothaguru towards village Jalal via katcha path and reached on the bridge of Kassi (minor canal), one person was seen sitting on the gunny bags towards the left side pahi (passage). On seeing the police party, he tried to slip away. On suspicion, he was apprehended. The Investigating Officer asked from him about option for his search in the presence of a Gazetted Officer or the Magistrate. Vide his consent memo Ex.PD, he opted his search in the presence of some Gazetted Officer. Jagjit Singh Deputy Superintendent of Police was called at the spot through wireless message. In his presence, the seven gunny bags in the possession of the accused were searched, which were found containing poppy husk. Out of each bag, a sample of 250 grams was separated and on weighment, each bag was found containing 30 kilograms of poppy husk. Separate sealed parcels of sample and residue opium were prepared and taken into possession vide memo Ex.PB. The seal after use was handed over to HC Hoshier Singh. The Investigating Officer sent Rukka Ex.PF to the Police Station. On the basis of which, formal FIR Ex.PF/1 was registered. The Investigating Officer prepared the site plan of the place of recovery. The accused was arrested. On return to the police station, the accused and the case property were produced before SHO Parhlad Singh, who after verification, affixed his

seal on all the parcels and sample seal and took the same into possession vide memo Ex.PD. Later on, the sample parcels were sent to the office of the Chemical Examiner. On receipt of the report of the Chemical Examiner and after completion of formalities of the investigation, the report under Section 173 of the Code of Criminal Procedure, 1973 (herein-after called the 'Cr.P.C.') was presented in the Court.

3- The accused-appellant was charge sheeted for the offence punishable under Section 15 of the Act vide order dated 01.02.2002 by the learned trial Court, to which the appellant pleaded not guilty and claimed trial.

4- In order to substantiate its case, prosecution examined as many as four witnesses.

5- When examined under Section 313 Cr.P.C., accused pleaded false implication and pleaded that he was apprehended from the house of Gogi Barar in village Bhagta. False case has been registered against him at the instance of Member Panchayat of village Kothaguru.

6- In the defence evidence, accused examined HC Karamjit Singh as DW-1, Sulakhan Singh as DW-2 and Hardev Singh alias Gogi as DW-3. Thereafter, the defence evidence was closed.

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

8- Aggrieved with the aforesaid judgment of conviction and

order of sentence, the present appeal has been preferred.

9- I have heard Mr. C.S. Jattana, Advocate assisted by Mr. Harinder Singh, Advocate, learned counsel for the appellant and Ms. Rimplejeet Kaur, learned Assistant Advocate General for the State of Punjab and have meticulously examined the record of the case.

10- Initiating the arguments, learned counsel for the appellant contended that Sulakhan Singh, the alleged independent witness, has not been examined by the prosecution, rather he has stepped into the defence evidence as DW-2 and has totally demolished the prosecution case.

11- He further contended that the recovery in this case is alleged to have been effected from a public path. It is alleged that the appellant was sitting over the bags. The Investigating Officer has not collected any evidence to connect the appellant with the said bags or place of recovery. So, it is not established that the appellant was in conscious possession of the contraband. To support his contentions, he relied upon the cases **Pappu Singh and others Vs. State of Haryana 2013(4) RCR (Criminal) 402**, **Raja alias Raj Singh alias Sukhmeet Singh Vs. State of Haryana 2009(5) RCR (Criminal) 747**, **Niranjan alias Niranjan Singh Vs. State of Haryana 2008(2) PLR 197** and **Jaswinder Singh alias Binder Vs. State of Punjab 2011(1) RCR (Criminal) 678**.

12- He further contended that in spite of the fact that the independent witness was joined but the seal after use was handed over to HC Hoshiar Singh, a police official, which is also fatal to the prosecution

case. To support his contentions, he relied upon case **State of Punjab Vs. Bhag Singh alias Bhagu 2007(1) Law Herald 875.**

13- He further contended that as per the instructions issued by the Central Government, two samples should have been separated. But in this case only one sample has been separated. This violation of the instructions further renders the prosecution case doubtful. To support his contentions, he relied upon cases **Pappu Singh and others Vs. State of Haryana (supra)** and **Randhir Singh Vs. State of Haryana 2010(2) RCR (Criminal) 388.**

14- He further contended that there is delay of eight days in sending the sample to the Forensic Science Laboratory. The CFSL form was also not prepared at the spot, which further causes the dent in the prosecution case. To support his contentions, he relied upon cases **Randhir Singh Vs. State of Haryana (supra)** **Jaswinder Singh Vs. State of Punjab 2009(1) RCR (Criminal) 425.**

15- He further contended that there are some discrepancies in the statements of the prosecution witnesses, which renders their statements unworthy of credence. Thus, he contended that the learned trial Court has wrongly recorded the conviction of the appellant.

16- On the other hand, learned State counsel has pleaded that the recovery of the contraband from the possession of the appellant is fully established from the statements of PW-1 Jagjit Singh Gill the DSP and PW-2 ASI Om Parkash. Their version is fully corroborated from the testimony of PW-4 SI Parlad Singh SHO, Police Station Fatehgarh

Churian. She further contended that the case property has remained intact, which is established on record. So, mere delay in sending the sample cannot be stated to be fatal. The fact that seal had been handed over to the official witness is also no ground to render the prosecution case doubtful. She further contended that the independent witness Sulakhan Singh was won over by the accused, which is evident from the fact that he has appeared as a defence witness. Mere this fact that one sample has been separated has also not resulted in any prejudice to the accused. Thus, she pleaded that there is no legal infirmity in the conviction of the appellant.

17- I have duly considered the aforesaid contentions.

18- No doubt as per the prosecution version Sulakhan Singh, a public man, was associated as a witness in this case. But he was given up by learned Public Prosecutor as having been won over by the accused vide his statement dated 21.03.2003. The factum that he has been won over by the accused stands confirmed from the fact that he has appeared in the defence evidence as DW-2. However, in his cross-examination by learned Public Prosecutor, he had admitted that he had thumb marked the documents Ex.PA the consent memo, Ex.PB the seizure memo of the poppy straw, Ex.PC the memo of personal search, Ex.PD another consent memo and Ex.PE arrest memo. But he has alleged that his thumb impressions were obtained on the blank papers. The story that his thumb impressions were obtained by the police on blank papers has been coined only for the first time when he stepped into the witness box on

05.03.2004. He had not made any complaint against the Investigating Officer to the superior officers that his thumb impressions have been obtained by the Investigating Officer on the blank papers. Thus, the version of DW-2 Sulakhan Singh does not inspire any confidence. The non-examination of such a witness who has sided with the accused also cannot be considered to be fatal to the prosecution case. To support this view reference can be made to the cases **Banti alias Guddu Vs. State of Madhya Pradesh 2003(4) RCR (Criminal) 911** and **Karnail Singh Vs. State of Punjab 1983 Criminal Law Journal, 1218**.

19- As per the prosecution version Sulakhan Singh was associated as independent witness in this case but the seal after use has been handed over to HC Hoshiyar Singh a police official but that is also not a ground to throw away the prosecution case. A Division Bench of this Court in case **Jeet Singh Gohli and others Vs. State of Punjab 2013 (3) RCR (Criminal) 204** has laid down that handing over of the seal to the police official instead of the independent witness has no bearing on the merits of the case when no circumstance has come on record to show that the case property was tampered with. Thus, mere this fact that the seal after use has been handed over to a police official will not create any dent in the prosecution case in the absence of any proof to show the tampering with of the case property.

20- It is also not disputed that only one sample has been separated by the Investigating Officer in this case and as per the standing order No.1/89 dated 13.6.1989 issued by the Government of India two

samples should have been drawn. But that has also not resulted in any prejudice to the appellant. 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.”

21- In view of the aforesaid ratio of law of the Division Bench of this Court, the single Bench judgments titled as **Pappu Singh and others Vs. State of Haryana** (supra) and **Randhir Singh Vs. State of Haryana** (supra) relied upon by learned counsel for the appellant will be of no help to him.

22- In order to establish that the case property remained intact, the reference can be made to the statements of PW-2 ASI Om Parkash, the Investigating Officer of the case. He deposed about the sealing of the case property and on reaching to the police station, he has

produced all the seized articles/parcels before PW-4 SI Parhlad Singh SHO Police Station Fatehgarh Churian. SI Parhlad Singh has appeared as PW4 and deposed that the seals were intact on all the parcels produced before him. He further deposed that on 03.10.2001 i.e. on the next day he produced all the parcels along with the sample seal before the Sub Divisional Judicial Magistrate vide application Ex.PK and the learned Magistrate passed the order Ex.PK/1. The Investigating Officer has also produced the inventory report Ex.PL before the learned Judicial Magistrate on the same day. The Magistrate passed the order Ex.PL/2 dated 3.10.2001, which reads as under :-

“The police has produced seven parcels before me duly sealed with the seals bearing impressions 'OP' 'JS' and 'PS'. The samples are packed in white cloth and all the seals are intact. The other alleged case property is packed in jute bags with the same seals, which are also intact. I have seen all the parcels. The seals are intact. I have also signed all the parcels in the court under my signatures.

The accused has been apprised of his right and the statement to this effect of the accused is also recorded separately. The accused does not want to exercise his right. The case property is ordered to be deposited with the Judicial Malkhana at Bathinda.”

23- Thus, the aforesaid order passed by the learned Magistrate after inspection of the case property shows that the seal on all the parcels of the case property were intact. Then there is statement of Constable Jaswinder Singh, who has filed his affidavit Ex.PJ. SI Parlad Singh has handed over him the sample parcels for taking the same to

FSL. In his affidavit he has categorically deposed that the sample parcels remained intact during the transit.

24- The non-preparation of the CFSL form at the spot is also no ground to discredit the prosecution. The Division Bench of this Court in case **Pipal Singh Vs. State of Punjab, Criminal Appeal No.D-1039-DB of 2007 decided on 14.11.2014** laid down as under:-

“35. Mere this fact that the CFSL form has not been prepared at the spot is no ground to throw away the prosecution's case. Learned counsel for the appellants have not been able to show us any statutory provisions/rules under the NDPS Act or the Code of Criminal Procedure that it is mandatory to prepare the CFSL form at the spot itself. Moreover, in view of the statement of MHC Gurpreet Singh, Head Constable Rajinder Singh and the report of the Chemical Examiner, the samples remained intact so the non-preparation of the CFSL form at the spot has not resulted into any prejudice to the accused and cannot throw any doubt about the intactness of the sample parcels/the case property. In the cases **Kuldip Singh versus State of Punjab, Jaswinder Singh versus State of Punjab and Gurcharan Singh versus State of Punjab** (supra) mere non preparation of the CFSL form at the spot was not the sole ground for acquittal.”

25- Learned counsel for the appellant has been able to point out only one minor discrepancy in the statements of PW-1 Jagjit Singh DSP and PW-2 ASI Om Parkash. DSP Jagjit Singh has stated that statement of PW Sulakhan Singh has recorded in his presence, whereas PW-2 ASI Om Parkash stated that statement of Sulakhan Singh was recorded later on when the DSP has left the spot. This is a minor discrepancy which has nothing to do with the recovery of the contraband.

Such type of discrepancies are bound to occur even in the statement of the truthful witness with the lapse of time. Learned counsel for the appellant has not been able to point out any material discrepancy in the statements of the prosecution witnesses with respect to the apprehension of the accused and the recovery of the contraband.

26- As per the prosecution version, when the police party reached at the bridge of Kassi, the present accused was found sitting on gunny bags towards the left side of the passage (pahi) and on seeing the police party, he tried to slip away. On suspicion, the Investigating Officer got stopped the police canter and apprehended the accused-appellant. So, the accused was found sitting on the bags containing the poppy straw. The said bags were lying towards the left side of the passage. On seeing the police party the accused has tried to slip away. Learned counsel for the appellant has vehemently contended that the appellant is not proved to be in conscious possession of the contraband. In order to establish the conscious possession, it should be coupled with the requisite mental element/awareness. Without the awareness of the nature of possession, the conscious possession cannot be presumed. In case **Megh Singh Vs. State of Punjab 2003(4) RCR (Criminal) 319**, there were the similar facts. In that case also three persons were found sitting on the gunny bags. All of them fled away from the spot but the third one i.e. appellant Megh Singh was apprehended. On search, 25 bags containing 36 kilograms 500 grams poppy husk each were recovered. In that case also, the plea was raised that the accused-

appellant was not proved to be in conscious possession of the contraband.

The Hon'ble Apex Court has laid down as under: -

“7. Whether there was conscious possession has to be determined with reference to the factual backdrop. The facts which can be culled out from the evidence on record is that the accused was sitting atop gunny bags containing the contraband articles.

8. Section 20(b) makes possession of contraband articles an offence. Section 20 appears in chapter IV of the Act which relates to offence for possession of such articles. It is submitted that in order to make the possession illicit, there must be a conscious possession.

9. It is highlighted that unless the possession was coupled with requisite mental element, i.e. conscious possession and not mere custody without awareness of the nature of such possession, Section 20 is not attracted.

10. The expression 'possession' is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different backgrounds. It is impossible, as was observed in **Superintendent & Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunja and Ors. (AIR 1980 SC 52)**, to work out a completely logical and precise definition of "possession" uniformly applicable to all situations in the context of all statutes.

11. The word 'conscious' means awareness about a particular fact. It is a state of mind which is deliberate or intended.

12. As noted in **Gunwantlal v. The State of M.P. (AIR 1972 SC 1756)** possession in a given case need not be physical possession but can be constructive, having power and control over the article in case in question, while the person whom physical possession is given holds it subject to that power or control.

13. The word 'possession' means the legal right to possession

(See **Health v. Drown (1972) (2) All ER 561 (HL)**). In an interesting case it was observed that where a person keeps his fire arm in his mother's flat which is safer than his own home, he must be considered to be in possession of the same. (See **Sullivan v. Earl of Caithness (1976 (1) All ER 844 (QBD)**).

14. 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. This position was highlighted in **Madan Lal and Anr. v. State of Himachal Pradesh (2003 (6) SCALE 483)**.

15. 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-appellant that the possession was not conscious in the logical background of Sections 35 and 54 of the Act.”

27- In the instant case also, it is established that the accused was found in possession of seven bags containing poppy straw. The conduct of the appellant shows that he was fully mentally aware that the said bags contained the poppy straw. That is why on seeing the police party, he tried to slip away but was apprehended. Thus, once it was established that the appellant was in possession of the bags containing poppy straw, it was the appellant to show that he was not in conscious possession thereof and how he came to be in possession of the said bags as the same is within his special knowledge in view of Section 35 and 54 of the Act.

28- In the instant case, in his statement under Section 313 Cr.P.C., the appellant has raised the plea of innocence and false implication and alleged that he was apprehended from the house of Gogi Brar in village Bhagta. But that plea raised by the appellant cannot be accepted in view of the cogent, convincing and reliable evidence adduced by the prosecution on the point of recovery. PW-2 ASI Om Parkash has deposed in detail in which manner the appellant was apprehended and the recovery of the contraband contained in seven gunny bags was effected from the possession of the appellant. The version of PW-2 ASI Om Parkash was fully corroborated by PW-1 Jagjit Singh Gill, the then DSP, Rampura Phul, a Gazetted Officer, who has reached at the spot on receiving the information from the Investigating Officer and has supervised the search and seizure. He has categorically deposed that when he reached at the spot, he was introduced to accused by ASI Om Parkash. The appellant has raised the defence plea that he was taken away by the police from the house of Gogi Brar. Said Hardev Singh alias Gogi has appeared as DW-3. He has stated that the appellant was his employee and used to work in his fields. In the cross-examination, he has stated that he has not brought any written document regarding employment of the accused. He also stated that he does not know the seven bags of poppy husk were recovered from the accused. DW-3 claims to be the employer of the appellant, which shows that they were having the close relations. In such circumstances, he can easily come forward to support the defence plea raised by the appellant. DW Hardev

Singh alleged the appellant to be his employee but he has not moved any representation to the higher authorities regarding his false implication and just kept silent, which is against his natural conduct. Even otherwise, there is no material on record to establish the false implication of the appellant. There is absolutely no evidence to show that PW-2 ASI Om Parkash, the Investigating Officer of the case, was having any grudge or animosity with the appellant for his false implication. Moreover, if the intention of the Investigating Officer would have been only to falsely implicate the appellant, there was no necessity to plant such a huge quantity of the poppy husk. This object could have been achieved even by planting the less quantity of the poppy husk. It is also not believable that a police official will be able to arrange seven bags containing 30 kilograms 250 grams poppy husk each from his own source. So, the defence plea raised by the appellant does not inspire any confidence. Consequently, the conscious possession of the appellant over the contraband is established beyond shadow of reasonable doubt.

29- Thus, keeping in view my aforesaid discussion the prosecution has been able to establish beyond shadow of reasonable doubt that accused-appellant was found in conscious possession of 211 kilograms 750 grams poppy husk. Thus, the learned trial Court has arrived at right conclusion. Consequently, the conviction of the appellant and sentence awarded to him by the learned trial Court is well founded and is hereby maintained.

30- Resultantly, 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, Bathinda, who shall send him to jail to undergo the remaining part of his sentence. If, he fails to surrender, the learned Chief Judicial Magistrate, Bathinda, shall take coercive steps to secure his presence and send him to jail to undergo the remaining part of the sentence.

Dated: 30.07.2014*sunil yadav***(DARSHAN SINGH)
JUDGE**