

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

(1) CRA-S-1632-SB-2004
Date of decision: 15.12.2015

Avtar Singh Appellant

Versus

State of Punjab Respondent

(2) CRA-S-2381-SB-2004

Kali Dass alias Kali Appellant

Versus

State of Punjab Respondent

(3) CRA-S-1284-SB-2005

Jagtar 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: Ms. Aditi Girdhar, Advocate (Legal Aid Counsel)
for the appellant in CRA-S-1632-SB-2004.

Mr.B.S. Kathuria, Advocate
for the appellants in CRA-S-2381-SB-2004 and
CRA-S-1284-SB-2005.

Mr. Manjit Singh Naryal, Additional Advocate General
for the State of Punjab.

DARSHAN SINGH, J.

This judgment of mine shall dispose of all the three appeals mentioned above, which have been presented by appellants Avtar Singh, Kali Dass alias Kali and Jagtar Singh against the same judgment of conviction dated 14.08.2004, passed by the learned Judge, Special Court, Ludhiana, vide which all the three appellants were held guilty and convicted for the offence punishable under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred as the 'Act') and the order of sentence of the even dated, vide which all the appellants were sentenced to undergo rigorous imprisonment for a period of 10 years and to pay a fine of ₹ 1,00,000/-, each and in default of payment of fine, they were ordered to further undergo simple imprisonment for a period of one year, each.

2. The brief facts, giving rise to this prosecution, are that on 25.07.2002, PW6 SI/SHO Waryam Singh (the Investigating Officer of the case), along with other police officials was present on Bahadurke Road. He received a secret information that all the three accused-appellants were coming from the side of Noorwala towards Bahadurke for selling

poppy husk. They had loaded the bags of poppy husk in a rehra (cart) attached with a tractor. Then the police party proceeded towards Bahadurke. In the way, prosecution witness Chander Parkash met them and he was also joined in the police party. A Nakabandi was held on the road leading to Noorwala from Bahadurke. All the accused-appellants boarded in a tractor make Escort-335 along with cart, came from the side of Noorwala. The tractor was intercepted. It was being driven by accused-appellant Avtar Singh. Accused-appellants Kali Dass and Jagtar were sitting on the bags loaded in the cart. The Investigating Officer told the accused-appellants that he suspected some contraband in the bags loaded in the cart and he wanted to search the same. He gave option to the accused-appellants as to whether they want to get their search conducted in the presence of some gazetted officer or a magistrate, who can be called. The accused-appellants opted to get their search conducted in presence of a gazetted officer. Their non-consent memos Ex.PA to Ex.PC, respectively were prepared. Request was made to PW5 DSP (R) Manjit Singh Dhesi on mobile phone and he reached at the spot. In presence of the DSP, the Investigating Officer conducted search of the gunny bags, which were 18 in numbers and same were found containing poppy husk. On weighment, each gunny bag was found containing 40 kilograms poppy husk. Out of each gunny bag, two samples of 250 grams each were separated and converted into separate parcels. All the samples and the gunny bags containing the residue, were sealed with seals of the Investigating Officer and DSP bearing impressions 'WS' and 'MS',

respectively. Separate sample seal chit Ex.P1 was prepared. Entire case property along with the tractor and cart was taken into police possession vide recovery memo Ex.PG. Ruqqa Ex.PR was sent to the police station through Constable Surjit Ram and on the basis of which, formal FIR Ex.PR/1 was registered. The Investigating Officer also prepared the rough site plan Ex.PS of the place of recovery.

3. On returned to the police station, the Investigating Officer produced the accused and case property before ASI Tirath Singh, the officiating SHO, who verified the facts of the case and affixed his seal bearing impression 'TS' on all the parcels and sample seal chit. Then the case property was deposited with the Moharir Head Constable Puran Singh. On the next day, the Investigating Officer took the case property from the MHC and produced before the Magistrate. Thereafter, the case property was again deposited with the MHC. In due course, the sample was sent to the Chemical Examiner, who vide his report Ex.PX, opined that the contents of the sample parcels are of chura poppy heads. On completion of the investigation, the report under Section 173 Code of Criminal Procedure, 1973 (hereinafter referred as the 'Cr.P.C.') was presented in the Court.

4. The accused-appellants were charge-sheeted for the offence punishable under Section 15 of the Act vide order dated 18.11.2002, to which, they pleaded not guilty and claimed trial.

5. In order to establish its case, the prosecution examined as many as six witnesses.

6. When examined under Section 313 Cr.P.C., all the accused-appellants pleaded that they are innocent. They are not the owners of the tractor and rehra. They were picked up by the police from their respective houses in the presence of their neighbours and have been falsely implicated.

7. In the defence evidence, accused-appellants examined Chander Parkash as DW1, Jhim Amrit Singh as DW2, Prithvi Raj as DW3, Smt. Paramjit Kaur as DW4, Constable Parshotam Lal as DW4 (*inadvertently again numbered as DW4*), Amrit Pal Singh, Ahlmad as DW5 and HC Jaspal Singh as DW6.

8. On appreciating the evidence on record and contentions raised by learned counsel for the parties, learned trial Court held guilty and convicted all the appellants for the offence punishable under Section 15 of the Act and they were awarded the sentence as mentioned in the upper part of the judgment.

9. Aggrieved with the aforesaid judgment of conviction and order of sentence, the present appeals have been preferred separately by all the three appellants.

10. I have heard Ms. Aditi Girdhar, Advocate, learned Legal Aid Counsel for appellant Avtar Singh in CRA-S-1632-SB-2004, Mr. B.S. Kathuria, Advocate, learned counsel for the appellants Kali Dass and Jagtar Singh in CRA-S-2381-SB-2004 and CRA-S-1284-SB-2005, respectively, Mr. Manjit Singh Naryal, learned Additional Advocate General for the State of Punjab and have carefully gone through the

record.

11. Initiating the arguments, learned counsel for the appellants contended that the recovery is alleged to have been effected on the basis of the secret information but the Investigating Officer has totally violated the provisions of Section 42 of the Act. He has neither reduced into writing the secret information nor the same was communicated to the superior police officers, which is fatal to the prosecution case. To support their contentions, they relied upon case ***Ajit Singh and another Vs. State of Punjab, 2010(6) RCR (Criminal) 1857.***

12. They further contended that Chander Parkash, the alleged independent witness has not been produced in the witness box by the prosecution, rather he has appeared in the defence evidence as DW1 and has totally demolished the prosecution case. His signatures have been fabricated on the recovery memo Ex.PG. He has denied his signatures on the recovery memo Ex.PG. Even the Investigating Officer has admitted that his signatures on memo Ex.PG are in different ink, which further renders the prosecution case doubtful.

13. They further contended that the seal after use has not been handed over to the independent witness, even though it is alleged that Chander Parkash was associated in the investigation, which also renders the prosecution case doubtful. To support their contentions, they relied upon case ***Jaswinder Singh and another Vs. State of Punjab 2013 (1) RCR (Criminal) 257.***

14. They further contended that the Investigating Officer has

not collected any evidence with respect to the ownership of the tractor. He has not made any effort to take in possession the registration certificate of the tractor. The owner of the tractor has not been associated in the investigation. No driving licence of accused Avtar Singh, who was allegedly driving the tractor, has been recovered. So, the accused-appellants are not connected with the tractor in question. To support their contentions, they relied upon case *Hakam Singh Vs. State of Punjab, 2008(4) RCR (Criminal) 489*.

15. They further contended that it is alleged that the cart was attached with the tractor but when the cart was produced in the Court, it was not having any hook to connect it with the tractor, which renders the prosecution case doubtful.

16. They further contended that there is also no evidence to establish the *inter se* relationship between the appellants. So, it is not believable that they will jointly indulge in such activities.

17. They further contended that it is not established that the accused-appellants were in conscious possession of the contraband. No question has been put to the accused during the course of their examination under Section 313 Cr.P.C. with respect to the conscious possession. Thus, the conscious possession of the appellants qua the contraband is not established. To support their contentions, they relied upon case *Avtar Singh Vs. State of Punjab 2002(4) RCR (Criminal) 180*.

18. They further contended that there is delay of more than 5

days in sending the sample to the FSL. As per the Standing Instructions issued by the Narcotic Bureau, the sample should have been sent to the Chemical Examiner within 72 hours, which is fatal to the prosecution case.

19. They further contended that the Investigating Officer has also violated the mandatory provision of Section 52-A (2) of the Act. The Investigating Officer has not made any application to the Magistrate for certifying the contents of the parcels. The seal of the Magistrate has also not been got affixed on the sample parcels. The representative sample was also not drawn in the presence of the Magistrate, which further vitiate the prosecution case. To support their contentions, they relied upon case ***Jaswinder Singh and another Vs. State of Punjab*** (supra).

20. They further contended that there are material contradictions in the statements of the prosecution witnesses. These contradictions are sufficient to render the statements of the police officials unworthy of credence.

21. They further contended that the accused-appellant have been falsely implicated in this case by the police. They were taken away by the police from their houses. The defence plea raised by the appellants is fully supported by the defence evidence adduced by the accused. DW4 Smt. Paramjit Kaur, the wife of accused Avtar Singh, has sent the application to the Governor, Punjab and the Chief Minister, Punjab Ex.PW4/A through post on 22.07.2012 i.e. three days before the registration of the case, which establishes that the accused-appellants

were kept in illegal detention and were subsequently implicated in this case. Thus, they pleaded that the conviction of the appellants have been wrongly recorded by the trial Court.

22. On the other hand, learned State counsel pleaded that from the statement of PW6 SI Waryam Singh, the Investigating Officer of the case, PW1 ASI Bakshish Singh, the witness of recovery and PW5 DSP Manjit Singh, it is established that 18 bags of poppy husk containing 40 kilograms poppy husk each have been recovered from the possession of the appellants. He contended that all the three appellants were in conscious possession of the contraband. Appellant Avtar Singh was driving the tractor and appellant Jagtar Singh and Kali Dass were sitting on the bags in the cart attached with the tractor. He further contended that there is substantial compliance of the provision of Section 42 of the Act. The Gazetted Officer has reached at the spot. The search and seizure was conducted in his presence. The Investigating Officer has sent the ruqqa to the police station containing all the facts, on the basis of which the FIR was registered and copy thereof was sent to the superior police officers well within 42 hours. He further contended that when the appellants were apprehended at the spot the omission on the part of the Investigating Officer to collect evidence with respect to the ownership of the tractor is of no consequence.

23. He further contended that provisions of Section 52-A of the Act are not mandatory. The non-compliance thereof will not vitiate the conviction. He further contended that the sample parcel has remained

intact. Thus, mere delay of 5 days in sending the sample to the FSL has not resulted to any prejudice to the appellants.

24. He further contended that independent witness Chander Parkash was given up as having been won over by the accused that is why he has appeared in the defence evidence. The application Ex.DW4/A has been later on manipulated. The UPC receipt does not bear the signature of any official of the Post Office. Thus, he pleaded that there is no infirmity in the conviction of the appellants as recorded by the learned trial Court.

25. I have duly considered the aforesaid contentions.

26. No doubt as per the admitted version of the prosecution, the recovery in this case is alleged to have been effected on the basis of the secret information. PW6 SI Waryam Singh, the Investigating Officer of the case has also admitted in the cross-examination that the secret information was not reduced into writing and he did not inform any police officer immediately after receipt of the secret information. As per Section 42 Sub Section (2) of the Act, the Investigating Officer is required to send the information in writing to his immediate superior officer within 72 hours. But there is no dispute to the fact that at the time of receiving the secret information, the Investigating Officer was not present in the police station and was on move on patrol duty. The secret information received by the Investigating Officer was also for immediate action and the delay would have resulted in the accused-appellants' escaping with the contraband and would have defeated the purpose of the

Act.

27. The larger Bench of Hon'ble Apex Court in case ***Karnail Singh Vs. State of Haryana 2009 (5) RCR (Criminal) 515*** has laid down as under:-

“17. In conclusion, what is to be noticed is Abdul Rashid did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham hold that the requirements of Section 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:

(a) The officer on receiving the information (of the nature referred to in Sub-section (1) of section 42) from any person had to record it in writing in the concerned Register and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of section 42(1).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior .

(c) In other words, the compliance with the requirements of Sections 42 (1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance of requirements of sub-sections

(1) and (2) of section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending a copy of such information to the official superior forthwith, may not be treated as violation of section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of section 42 of the Act. Whether there is adequate or substantial compliance with section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to section 42 by Act 9 of 2001.”

28. As per Clause (b) reproduced above, if the information has been received by the officer when he was not in the police station and was on move either on patrol duty or otherwise and received the secret information for immediate action and any delay would have resulted in the goods or the evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given by him, in that situation, he can take the action as per clauses (a) to (d) of Section 42 sub-section (1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the officer superior. Clause (d) further laid down that the total non-compliance of the requirements of sub-sections (1) or (2) of Section 42 is impermissible but

delayed compliance with satisfactory explanation will be acceptable compliance of Section 42 of the Act.

29. A 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:-

“52. We fail to understand as to how the judgment (supra) applies to the facts and circumstances of this case to accord benefit of doubt to the appellant, especially when there was no non-compliance of Section 42 of the Act. Even, independent witness, PW-9 (Billu Ram Chowkidar) was associated in the recovery proceedings. Even, PW-12, a gazetted Officer of Haryana Government was associated at the time of recovery. The information about the recovery was sent to the police station, where formal FIR Ex.P1 was lodged regarding the recovery in question and the copy of the FIR Ex.P1 was sent to the Illaqa Magistrate, as also, to the higher police officers, as can be seen from the testimony of PW-1 (Dharam Pal Constable), which could not be shattered during cross-examination.”

It was further laid down as under : -

“62. In the case in hand, as already observed, compliance of Section 42 of the Act stood made by the Investigating Officer by sending ruqa Ex.P4 to the police station, where formal FIR Ex.P1 was recorded whose copies were sent to the Illaqa Magistrate, as also, to the higher police officers.

63. Indeed, PW-8 (Sandeep Singh SHO) during cross-examination testified that after receiving secret information, he did not send this information in writing to the police station, nor he sent it to higher police officials of police. Indeed, PW-8 (Sandeep Singh SHO) could not literally understand question put to him in the cross-examination and, if he had understood the question literally, then he would have said that compliance of Section 42 (1) (2) of the Act had been made, which indeed had been made in this case, as he sent ruqa Ex.P4 to police station, where formal FIR Ex.P1 was recorded and copies, thereof, were sent to the Illaqa Magistrate, as also to the higher police

officials.”

30. In a latest judgment titled as *Gurdev Kaur Vs. State of Punjab 2014(1) DC (Narcotics) 573*, Hon’ble Apex Court has laid down as under:-

“We may point out, at this stage, that the matter was referred to the larger Bench. That was the sole reason that in the special leave petition filed by the appellant leave was granted, i.e. in view of the fact that the compliance of Section 42 of the NDPS Act is mandatory or not had been referred to by larger Bench. The Constitution Bench has since decided the issue in *Karnail Singh v. State of Haryana 2009(8) SCC 539*. Not only the judgment in Sajjan Abraham case (supra) is explained, it is specifically held by the Constitution Bench that in special circumstances involving emergent situations (when the officer is on the move) and recording of information is not practical prior to search and seizure and would be detrimental to effectiveness of the search and seizure concerned, the requirement of writing down and conveying information to superior officer may be postponed by a reasonable period which may even be after the search, entry and seizure. It is further held that whether there is adequate or substantial compliance of the provisions of Section 42 of the Act or not is a question of fact to be decided in each case. It was further held that non-compliance of Section 42 may not vitiate the trial if it does not cause any prejudice to the accused.

In the present case as mentioned above, the seizure was from the open area when the officers concerned were on the move and not in their office when they received information and immediately the information was given to DSP Sushil Kumar who immediately had come to the spot. Therefore, it is clear that there was a substantial compliance of provisions of Section 42 of the Act.”

31. In view of the aforesaid ratio of law, where the recording of information is not practicable prior to search and seizure and would be detrimental to effectiveness of the search and seizure, the requirement of writing down and communicating the information to the superior officer

may be postponed by a reasonable time and said information may be sent after the search, entry and seizure. It was further laid down that where the Investigating Officer was on move and not in the office the information has been conveyed to the superior officer who had arrived at the spot. The formal FIR was lodged regarding the recovery in question and the copy thereof was sent to the superior police officers the provision of Section 42 of the Act will stand substantially complied with. Reference can also be made to case ***Bahadur Singh Vs. State of Haryana 2010(2) RCR (Criminal) 586 (SC)***.

32. As already mentioned in the instant case also, there was emergent situation. The Investigating Officer was not present in the police station and was on move on patrol duty. On receiving the secret information, he has rushed to the spot for holding the Nakabandi to apprehend the appellants along with the contraband, otherwise there was every possibility that they could have escaped along with the contraband. PW5 DSP Manjit Singh was called at the spot, who was the immediate superior officer of the Investigating Officer. He was apprised of the facts and circumstances of the case and on his direction the search and seizure was carried out. All the necessary facts with respect to the receipt of the secret information were incorporated in the ruqqa Ex.PR, on the basis of which the FIR Ex.PR/1 has been registered and copies thereof have been sent to the superior officers. The copy of the FIR was received by the Duty Magistrate on the same day i.e. 25.07.2002 at 05:20 P.M. i.e. well within 72 hours. Thus, the plea raised by learned counsel for the

appellants that the provisions of Section 42 of the Act have been violated is without any substance rather it is established that there was substantial compliance of the provision of Section 42 of the Act.

33. Chander Parkash was associated by the Investigating Officer in the investigation of the case but he was given up by the learned Public Prosecutor as having been won over by the accused vide his statement dated 22.03.2004. Due to this reason he has not been examined. That was not a hollow apprehension of the learned Public Prosecutor. The fact that said Chander Parkash has been won over by the accused stands confirmed when he appeared in the defence evidence as DW1 and deposed that the accused were not arrested in his presence nor the recovery of poppy husk was effected from them in his presence. He has taken the plea that his signatures were obtained on 6-7 blank papers by SI Waryam Singh on 24.07.2002 when he has gone to Police Station Salem Tabri in connection with some compromise between Ram Parkash and Shyam Lal. In the cross-examination he has admitted the signatures on the memos Ex.PA, Ex.PB, Ex.PC, Ex.PD, Ex.PE, Ex.PF and Ex.PH. However, he denied his signatures on memo Ex.PG. It is not believable that a respectable person will succumb to such pressure of the police officer and will sign so number of the blank papers. He has not made any complaint to any superior police officers against SI Waryam Singh for having obtained his signatures on the blank papers. It is interesting to note that the consent memos Ex.PD, Ex.PE and Ex.PF have been prepared by PW5 DSP Manjit Singh and not by SI Waryam Singh. DW1

Chander Parkash has admitted his signatures on these documents so his version that his signatures were obtained by SI Waryam Singh stands falsified. It is a fact of common knowledge that people are generally averse to depose in favour of prosecution as they are afraid of the fact that deposition in favour of the prosecution may expose them to the serious consequences and they do not want to earn the wrath of the accused, who generally belong to their area. In these circumstances, the non-examination of Chander Parkash by the prosecution and his appearance in the defence evidence is no ground to discard the testimonies of the official witnesses. It is well settled principle of law that evidence of the police officials is as good as the evidence of any other witness and the same has to be weighed in the same scale like the evidence of any other witness. There is no rule that a police officer cannot be cited as a witness. If the testimonies of the police officers appear to be reliable, then the Court can act upon the same. The police witnesses cannot be viewed with distrust every time. Reference can be made to case ***Kashmiri Lal Vs. State of Haryana (2013) 6 SCC 595***. In a recent case titled as ***Kulwinder Singh & Anr. Vs. State of Punjab 2015(2) RCR (Criminal) 918***, two independent witnesses were associated in the investigation but they were not examined by the prosecution as they were won over by the accused. The Hon'ble Apex Court held that no adverse inference can be drawn for non-examination of the said witnesses and the case of the prosecution cannot be rejected solely on the ground that those independent witnesses have not been examined when, on

perusal of the evidence the court finds that the case put forth by the prosecution is trust worthy. There is no reason not to rest the conviction on the basis of the statements of the official witnesses when they are trustworthy and credible. In view of the aforesaid factual and legal position the non-examination of PW Chander Parkash, who was won over by the accused is no ground to discredit the testimonies of the official witnesses.

34. Admittedly, Chander Parkash was associated as an independent witness in the investigation of the case but seal after use was handed over by the Investigating Officer to PW1 ASI Bakshish Singh the police official and as already discussed said Chander Parkash has not been examined by the prosecution and was given up as having been won over by the accused. A Full Bench of this Court in case ***Piara Singh versus State of Punjab 1982 Criminal Law Journal 1176*** has laid down as under :-

“In the absence of any mandatory or even a directory provision in the whole of Criminal P.C. and the Punjab Police Rules requiring that the seal used by the Investigating Officer for sealing case property must be handed over to a third person forthwith and further that in cases where it might at all have been so done then the non-official must be put into the witness-box and any failure to do so would vitiate the whole proceedings, it is incorrect to say that it is mandatory for the Investigating Police Officer to hand over the seal used by him for sealing the incriminating articles and the samples to a non-official immediately or soon thereafter and that the non-appearance or non-production of such a non-official who was entrusted with the seal would by itself be fatal to the prosecution case.”

35. The same ratio of law has been reiterated by the Division Bench of this Court in ***Jit Singh alias Goli and others Vs. State of Punjab 2013(3) RCR (Criminal) 204***. Thus the non-entrustment of the seal to the independent witness and his non-examination is also no ground to reject the prosecution case.

36. No doubt the Investigating Officer of the case has not collected any evidence with respect to the ownership of the tractor in question which was being used to transport the contraband. That was a lapse on the part of the Investigating Officer, which cannot be a ground for any concession to the appellants. The Hon'ble Apex Court in case ***V.K. Mishra and another Vs. State of Uttrakhand and another 2015(3) RCR (Criminal) 899*** has laid down that any omission on the part of the Investigating Officer cannot go against the prosecution. The interest of justice demands that such act and omission of the Investigating Officer should not be taken in favour of the accused otherwise it amount to placing the premium upon such omissions. This lapse on the part of the Investigating Officer is no ground to record the acquittal of the appellants when the recovery of the contraband from their possession is otherwise establish. The non-collection of any document with respect to the ownership of the vehicle was not the only ground for acquittal in case ***Hakam Singh Vs. State of Punjab*** (supra) relied upon by learned counsel for the appellants.

37. Mere this fact that the hook of the cart was found broken when the same was produced in the Court during the trial is also no

ground to doubt the prosecution version. The recovery in this case was effected on 25.07.2002. The cart was produced in the Court after about two years. During this period the cart remained parked in the police station which has no proper place of parking, which may result in some damage to the cart. The factum that the 18 bags containing poppy husk were loaded in the cart and were being transported with the help of the tractor is established from the consistent statements of PW1 ASI Bakshish Singh, PW PW6 SI Waryam Singh and PW5 DSP Manjit Singh Dhesi.

38. There was no mandate that the prosecution was also required to establish the *inter se* relations between the accused - appellants. It is not necessary that these type of activities can only be carried out by the persons related to each other. Moreover, in the instant case appellant Avtar Singh and Jagrat Singh alias Tara are residents of the same village i.e. Panglian. Appellant Kali Dass alias Kali is also residing in the area of the same police station i.e. Sahnewal, so they must be acquainted to each other.

39. Learned counsel for the appellants have pointed out certain discrepancies in the in the statement of official witnesses. They pointed out that P1 ASI Bakshish Singh has stated that the statements of the accused were recorded in the presence of PW5 DSP Manjit Singh but DSP Manjit Singh has denied this version. It is pertinent to mention that the statements of the accused have been recorded twice, first by the Investigating Officer in order to know their option about their search

which are Ex.PA, Ex.PB and Ex.PC. Those statements were recorded before the arrival of the DSP and then PW5 DSP Manjit Singh has also recorded the memos Ex.PD, Ex.PE and Ex.PF in order to know the option of the accused-appellants for their search in his presence. So, both set of statements of the appellants are available on record which were recorded in the presence and absence of the DSP. Thus, it cannot be stated to be a contradiction. Learned counsel for the appellants further pointed out that PW3 SHO Thirth Singh and PW5 DSP Manjit Singh have stated that samples were firstly wrapped in the polythene paper and then cloth bag and whereas, PW6 SI Waryam Singh has stated that sample parcels were prepared in stitched cloth bags. They further pointed out that PW1 Bakshish Singh has stated that the DSP has remained at the spot for 2/2 ½ hours, whereas, PW5 DSP Manjit Singh Dhesi stated that he remained at the spot for 7 hours. PW1 ASI Bakshish Singh said that the police party was in a private gypsy, whereas, PW5 DSP Manjit Singh stated that writing work was done in the government gypsy of the Investigating Officer. They have also pointed out the contradiction about the preparation of the arrest memos. These discrepancies pointed out by the learned counsel for the appellants are bound to occur even in the statements of the truthful witnesses with the lapse of time. It is not expected that the witnesses will give the parrot like version. These type of discrepancies are natural and add to the intrinsic evidentiary value of their testimonies. Moreover, the police officials take part in several raids as a part of their duty in routine. It is not expected that they will

remember the minute detail of each and every raid. The discrepancies pointed out by learned counsel for the appellants do not go to the root of the case. The statements of the prosecution witnesses are consistent with respect to the receipt of the secret information, the apprehension of the appellants along with contraband, their search and seizure and consequent recovery of the contraband from their possession. Thus, the discrepancies pointed out by learned counsel for the appellants are immaterial and cannot dislodge the testimonies of the prosecution witnesses.

40. From the consistent testimonies of PW6 SI Waryam Singh, the Investigating Officer of the case and PW1 ASI Bakshish Singh the witness of recovery and PW5 DSP Manjit Singh, it is established that the accused-appellants were apprehended while they were going on the road leading to Noorwala from Bahadurke in the tractor-rehra loaded with 18 gunny bags containing 40 kilograms poppy husk in each. The case of the prosecution is further corroborated from the testimony of PW3 ASI Tirath Singh, the then officiating SHO Police Station Salem Tabri, before whom the accused and the case property were produced immediately after the recovery. He has also verified the facts of the case, interrogated the accused, thereafter put his seals on the parcels of the case property. Thus, from the aforesaid evidence it is established that the accused-appellants was in possession of 18 gunny bags containing 40 kilograms poppy straw each.

41. Moreover, once it is established that the appellants were

in possession of the contraband, it is for them to show that they were not in conscious possession thereof because how they came to be in possession is within their 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.”

42. 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."

43. 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."

44. Thus, in view of the aforesaid ratio of law once the possession is established, it is for the accused to show as to how they came to be in possession of the contraband as this fact is specially within

their knowledge. The presumption under Section 35 of the Act arises against them 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.

45. In case *Megh Singh Vs. State of Punjab 2003(3) RCR (Criminal) 319*, the accused was found sitting on the gunny bags containing poppy straw. The Hon'ble Apex Court held that the accused was in conscious possession of the contraband. As the accused has not been able to show that the possession was not conscious in the logical background of Section 35 and 54 of the Act. In case *Balbir Kaur Vs. State of Punjab 2009(3) RCR (Criminal) 580* the accused was found sitting on 2 bags on the road. On seeing the police party she behaved in a suspicious manner. The Hon'ble Apex Court held that she was found to be in conscious possession of the contraband.

46. It is not disputed that in the statement of appellants under Section 313 Cr.P.C., no specific question has been put to them with respect to their conscious possession but that omission in the statement under Section 313 Cr.P.C. is also no ground to vitiate the conviction. The Hon'ble Supreme Court in case *Paramjeet Singh @ Pamma Vs. State of Uttarakhand 2010(4) RCR (Criminal) 548* after considering large number of cases on this issue authoritatively laid down as under:-

“Thus, it is evident from the above that the provisions of Section

313 Cr. P.C make it obligatory for the court to question the accused on the evidence and circumstances against him so as to offer the accused an opportunity to explain the same. But, it would not be enough for the accused to show that he has not been questioned or examined on a particular circumstance, instead he must show that such non-examination has actually and materially prejudiced him and has resulted in the failure of justice. In other words, in the event of an inadvertent omission on the part of the court to question the accused on any incriminating circumstance cannot *ipso facto* vitiate the trial unless it is shown that some material prejudice was caused to the accused by the omission of the court”

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

“So far as Section 313 Cr.P.C. is concerned, undoubtedly, the attention of the accused must specifically be brought to inculcable pieces of evidence to give him an opportunity to offer an explanation if he chooses to do so. A three-Judge Bench of this Court in ***Wasim Khan v. The State of Uttar Pradesh, AIR 1956 SC 400***; and ***Bhoor Singh & Anr. v. State of Punjab, AIR 1974 SC 1256*** held that every error or omission in compliance of the provisions of Section 342 of the old Cr.P.C. does not necessarily vitiate trial. The accused must show that some prejudice has been caused or was likely to have been caused to him.”

48. In view of the aforesaid consistent rule of law, every error or omission in the statement under Section 313 Cr.P.C. does not necessarily vitiate the conviction/trial. The accused has to further show as to what prejudice has been caused to him due to such non-examination and how it has resulted in failure of justice. These aspects are totally lacking in this case. In view of the latest and consistent view of the Hon'ble Apex Court in the cases referred above, case ***Avtar Singh Vs.***

State of Punjab (supra) relied upon by learned counsel for the appellant cannot advance the case of the appellants.

49. Admittedly, the recovery in this case has been effected on 25.07.2002. As per the report of the FSL Ex.PX the sample parcels have been received in the laboratory on 30.07.2002. So, there was a delay of five days in sending the sample to the Laboratory. The Hon'ble Apex Court also in case *State of Orrisa Vs. Kanduri Sahoo 2004(1) RCR (Criminal) 196* has 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. The same ratio of law has been reiterated by the Division Benches of this Court in cases *Mohan Singh Vs. State of Punjab 2007(4) RCR (Criminal) 705* and *Baggar Singh alias Gaggi Vs. State of Haryana 2009(4) RCR (Criminal) 183*. The Hon'ble Supreme Court in case *Hardip Singh Vs. State of Punjab, 2008(4) RCR (Criminal) 97* has also laid down that where the seals were intact when the samples reached the office of the Chemical Examiner, the delay of about 40 days in sending the samples did not and could not have caused any prejudice to the appellants. In the instant case also the prosecution has adduced sufficient evidence to show that there was no tampering with of the sample parcels. 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. PW6 SI Waryam Singh, the Investigating Officer of the case, has stated that the case property was deposited with MHC Puran Singh. Then the prosecution examined the

then MHC Puran Singh as PW2, who has filed his affidavit Ex.PW2/A and deposed that the case property remained intact in the Malkhana. PW4 Constable Om Parkash, who has carried the sample parcels to the Chemical Examiner, has deposed that he deposited the sample parcel along with the sample seal chit in the office of the Chemical Examiner, Patiala. He deposed that the sample parcel remained intact. Ex.PX 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. Thus, it is established from the evidence available on record that the sample parcels remained intact and were not tampered with at any stage and the seals were found intact when the samples reached in the laboratory. So, mere delay of 5 days in sending the sample has not resulted in any prejudice to the appellants and cannot create any dent in the prosecution case.

50. The Division Benches of this Court in cases ***Cyril Archibong Vs. State of Union Territory, Chandigarh 2003(2) RCR (Criminal) 211 (DB)*** and ***Ajmer Singh Vs. State of Punjab 2003(2) RCR (Criminal) 256 (DB)*** have laid down that the provisions of Section 52-A of the Act are directory and not mandatory in nature. The non-compliance thereof will not vitiate the trial at all. In view of the aforesaid consistent rule of law laid down by Division Bench of this Court the non-compliance of Section 52-A of the Act by the Investigating Officer is also no ground to vitiate the prosecution. The judgment of the Single Bench of this Court in case titled as ***Jaswinder Singh Vs. State of Punjab***

(supra) relied upon by learned counsel for the appellants is of no help to the appellants in view of the consistent view of the Division Bench of this Court in the cases referred above.

51. The defence plea raised by the appellants that they were picked up by the police from their houses and were falsely implicated in this case does not inspire any confidence. DW1 Chander Parkash, as already discussed, was a witness to recovery but has sided with the accused. DW2 Jhim Amrit Singh who was a Member Panchayat of village Panglian has stated that the wife of accused Avtar Singh had come to him on 22/23.7.2002 at about 09:00 P.M. and told that some police official from Police Station Salem Tabri, Ludhiana had come to their house to arrest her husband. He accompanied her and visited their house. The police officials searched the house of the accused and in the presence of other villagers but nothing was recovered. The police official took accused with them and on enquiry they told that accused has to be interrogated by the senior police officers as there was an information against him. They had assured to release the accused after interrogation by the police officials. He further deposed that thereafter he came to know that he has been falsely implicated. DW3 Pirthvi Raj has also put forward the similar version with respect to the visit of the police officials to the house of the appellant Kali Dass and taking him away forcibly by disclosing that the was required in some inquiry being conducted by the senior police officers. He also deposed that he along with other Members of the Panchayat and Sarpanch Smt. Ramesh Rani had passed the

resolution, the carbon copy Mark-A. He further deposed that nothing was recovered when Kali Dass was taken in custody by the police officers. DW4 Smt. Paramjit Kaur is the wife of appellant Avtar Singh. She also deposed about the taking away of her husband by the police on the pretext of interrogation. She further deposed that she has sent the application to the Governor, Punjab and Chief Minister, Punjab, the carbon copy of the same is Ex.DW4/A. She also placed on record the postal receipt Ex.DW4/B. So, the accused have taken the plea that they were taken away from their houses and were falsely implicated.

52. The resolution Mark-A produced by DW3 Pirthvi Raj carries no evidentiary value. He has admitted in the cross-examination that he has not seen the original copy of the resolution Mark-A. He also admitted that there was no date under the signature of the Sarpanch and other members on the said resolution. Even there was no serial number on the said resolution. It appears that this document has been created just to project the defence of the appellant Kali Dass.

53. There is a clear contradiction in the statements of DW2 Jhim Amrit Singh and DW4 Paramjit Kaur the wife of appellant Avtar Singh. DW2 has stated that the wife of Avtar Singh had come to him on 22/23.07.2002 at 9:00 P.M. and on that day, the police officials had come to the house of appellant Avtar Singh but DW4 Smt.Paramjit Kaur the wife of appellant Avtar Singh has stated that ASI Waryam Singh along with other police employees came to their house on 21.07.2002 at 9:00 P.M. and searched their house. Much reliance has been placed on the

application Ex.DW4/A. The same is alleged to have been sent to the Governor Punjab, Chandigarh and copy thereof to the Chief Minister, Punjab on 22.07.2002. This application also falsify the statement of DW2 Jhim Amrit Singh, who has deposed that police party visited the house of appellant Avtar Singh on 22/23.07.2002 at 09:00 P.M. No evidentiary value can be attached to the application Ex.DW4/A. This type of document can be created at any time to project the defence. The UPC receipt Ex.DW4/B does not bear the signatures of any official of the Post Office concerned. Such receipt can be manipulated at any time. Thus, the defence evidence adduced by the appellants can not dislodge the consistent, cogent and reliable testimonies of the prosecution witnesses. Moreover, if the motive of the police officials would have only been to falsely implicate the appellants, there was no need to plant such a heavy quantity of the poppy husk. That object could have been achieved even by planting the lesser quantity. It is also not possible that such huge quantity of the poppy husk can be planted by the police officials from their own source. Thus, the plea of the appellants with respect of their false implication has no legs to stand.

54. Thus, keeping in view my aforesaid discussion, the prosecution has been able to establish beyond shadow of reasonable doubt that appellants were found in conscious possession of 18 bags containing 40 kilograms poppy husk in each. Thus, I do not find any illegality, infirmity or impropriety in the conviction and sentence of the appellants as recorded by the learned trial Court and the same is hereby

maintained and affirmed.

55. Resultantly, present appeals have no merits and the same are hereby dismissed. The accused-appellants are on bail. Their bail stand cancelled. They shall surrender within 15 days from the date of this judgment before the learned Chief Judicial Magistrate, Ludhiana who shall send them to jail to undergo the remaining part of their sentence. If, they fails to surrender, the learned Chief Judicial Magistrate, Ludhiana shall take coercive steps to secure their presence and send them to jail to undergo the remaining part of the sentence.

Dated: 15.12.2015
sunil yadav

(DARSHAN SINGH)
JUDGE