

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

**Crl. Appeal No.S- 2067-SB of 2004
Date of Decision : 26.02.2015**

Rajwinder Singh @ Raju

..... Appellant

Versus

State of Punjab

..... Respondent

AND

**Crl. Appeal No.S- 1848-SB of 2007
Date of Decision : 26.02.2015**

Pritam Singh

..... Appellant

Versus

State of Punjab

..... Respondent

CORAM: HON'BLE MR. JUSTICE DARSHAN SINGH

Present : Mr. Vikas Sharma, Advocate
learned Counsel for the appellant
(in CRA-S-2067-SB of 2004).

Mr. N.S.Dandiwal, Advocate
learned counsel for the appellant
(in CRAS-1848-SB of 2007)

Mr.P.S.Paul, DAG, Punjab.

1. **Whether Reporters of 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**

DARSHAN SINGH, J.

1. This judgment shall dispose of both the appeals referred above, which have been arisen out of the same

judgment of conviction dated 30.09.2004, vide which both the appellants were held guilty and convicted for the offence punishable under Section 15 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter to be referred as 'Act') and the order of sentence of the even dated vide which both the appellants were ordered to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs. One lac each, in default of payment of fine, they were further ordered to undergo rigorous imprisonment for a period of six months.

2. The brief facts of the prosecution case are that on 2.03.2003, at about 12.30 a.m (in the night) SI Jagjit Singh, Incharge, Police Station, Bhucho alongwith other police employees was present for checking of the vehicles in connection with the Municipal Elections near the Railway Crossing Burj Kahan Singh Wala. Harwinder Singh @ Toti (DW-2) met them. A white colour Ambassador car bearing registration No. PAW-840 came from the side of Burj Kahan Singh Wala. The Investigating Officer signalled to stop the said car with a torch. The person sitting on the side of the driver jumped from the car, when it was going to be stopped and escaped. The street lights were on. The person driving the car was apprehended. He disclosed his name as appellant Pritam Singh. The person who had fled away was

identified as appellant Rajwinder Singh @ Raju by Harwinder Singh @ Toti. Appellant Pritam Singh was apprised that there was suspicion of some narcotic substance in his car and the search of the car was to be taken. He has a right to get the search of the car to be conducted in the presence of any Magistrate or Gazetted Officer. He replied that he want the search of his car to be taken in the presence of a Gazetted Officer. The consent memo Ex.PD was prepared. The Investigating Officer gave a wireless message for deputing any Gazetted Officer or Magistrate to reach at the spot. After sometime, PW-1 DSP Jaspal (Detective) Bathinda, reached at the spot. He introduced himself to appellant Pritam Singh. He also apprised appellant about his legal right to be searched in the presence of any Magistrate or Gazetted officer. Appellant opted for his search in the presence of DSP Jaspal vide memo EX.PA. Thereafter, on the directions of DSP Jaspal, SI Jagjit Singh, Investigating Officer carried out the search of car no. PAW-840. Two bags containing poppy husk were recovered from the dicky of the car. 250 gms of poppy husk was separated as sample from both the bags. The separate sealed parcels of the samples and remainder poppy husk were prepared, which were sealed by the Investigating Officer with his seal bearing impression 'JS'. The sample

seal was prepared. The seal after use was entrusted to Harwinder Singh @ Toti. The case property along with car no. PAW-840 and its registration certificate were taken into possession vide memo Ex.PB. The Investigating Officer also prepared the rough site plan of the place of recovery Ex.PG. Accused was arrested. The Investigating Officer sent ruqa Ex.PE to the Police Station, on the basis of which, the formal FIR Ex.PE/1 was registered.

3. On return to the Police Station, SI Jagjit Singh produced the accused alongwith the case property before PW-5 Inspector Devinder Singh, the then SHO, Police Station Nathana. After verifying the facts, Inspector Devinder Singh affixed his seal bearing impression 'DS' on the parcels of the case property. He took into possession the case property vide memo Ex.PJ. On the same day, he produced all the parcels of the case property alongwith accused before the learned Illaqa Magistrate vide application Ex.PL, who passed the order for keeping the case property in the Malkhana. The inventory Ex.PM was also produced before the Magistrate upon which he passed the order Ex.PM/1. On the application under Section 52-A of the Act, the learned Magistrate passed the order Ex.PM/1 for the disposal of the case property.

4. On 04.03.2003, appellant Rajwinder Singh was

produced before Inspector Devinder Singh by Sarpanch Nihal Singh, who was arrested in this case. The sample parcels were sent to the Chemical Examiner, Punjab, Patiala, which were found to be of Chooria Poppy Heads vide report Ex.PT. On completion of the formalities of the investigation, the report under Section 173, Code of Criminal Procedure (for short Cr.P.C) was presented in the Court.

5. Both the accused were charge sheeted for the offence punishable under Section 15 of the Act, to which they pleaded not guilty and claimed trial.

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

7. When examined under Section 313 Cr.P.C, appellant Rajwinder Singh @ Raju pleaded that he was taken away from his house and after keeping him in illegal confinement, he was falsely implicated in this case. Nothing was recovered from him. Appellant Pritam Singh also pleaded that he was falsely implicated in this case from his village in the presence of Bhupinder Singh, Sarpanch and Gurdeep Singh Lambardar. Nothing was recovered from him. He did not know driving nor had any driving license. The car does not belong to him.

8. In the defence evidence, accused-appellant

Rajwinder Singh @ Raju examined Nihal Singh as DW-1, who had denied having produced accused-appellant Rajwinder Singh @ Raju before the police. Harwinder Singh @ Toti, who was cited as a witness of recovery by the prosecution, appeared as DW-2 and denied that he was known to appellant Rajwinder Singh @ Raju and any recovery was effected in his presence. PHG Ajit Singh was examined as DW-3 along with register no. 19 of Police Station Nathana.

9. On appreciating the evidence on record and the contentions raised by learned counsel for the parties, learned trial Court held guilty and convicted both the appellants for offence punishable under Section 15 of the Act and they were ordered to undergo 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 appeals have been preferred by both the appellants.

11. I have heard Mr. Vikas Sharma, Advocate, learned counsel for the appellant Rajwinder Singh @ Raju, Mr. N.S.Dandiwal, Advocatae, learned counsel for the appellant Pritam Singh, Mr. P.S.Paul, learned Deputy Advocate General, Punjab and have meticulously examined the record of the case.

12. Initiating the arguments, learned counsel for the appellants contended that as per the prosecution story one of the appellant has fled away from the spot, which is highly improbable. There were 6-7 police officials. It was not possible that one of the appellant could have escaped.

13. They further contended that the link evidence in this case is missing. As per the prosecution story, the case property was produced before the Magistrate. But, there was no entry in Register no. 19 for taking out the case property from the Malkhana.

14. They further contended that the car in question was owned by one Mehar Khan. The said Mehar Khan has not been examined by the prosecution nor any evidence has been collected to establish any link between the appellants, said car and its owner.

15. They further contended that Harwinder Singh @ Toti, the alleged independent witness was not examined by the prosecution. He has appeared in the defence evidence as DW-2 and categorically deposed that no recovery was effected in his presence. His signatures were obtained on the blank papers and he was also not known to accused-appellant Rajwinder Singh @ Raju. PW-1 DSP Jaspal, has also not sealed the case property.

16. They further contended that provisions of Section

50 of the Act have also not been complied with by the Investigating Officer. No option was given to appellant Rajwinder Singh as required under Section 50 of the Act.

17. Sh.Vikas Sharma, Advocate, learned counsel for the appellant Rajwinder Singh @ Raju contended that the identity of the appellant Rajwinder Singh @ Raju as the person who had fled away from the spot is not established. As per the FIR, he was identified by Harwinder Singh @ Toti. But, the Investigating Officer has made the improvement in his testimony while appearing in the witness box and stated that he was earlier known to appellant Rajwinder Singh @ Raju and had identified him. This improved version of the Investigating Officer cannot be taken into consideration. No test identification parade of Rajwinder Singh @ Raju has been held after his arrest. DW-1 Nihal Singh had categorically deposed that he had never produced appellant Rajwinder Singh @ Raju before the police. He was arrested after two days of the recovery. His identification for the first time in the Court by the Investigating Officer carries no evidentiary value. Thus, he contended that appellant Rajwinder Singh @ Raju is not at all connected with the recovery.

18. Learned counsel for the appellants further contended that the prosecution has also not been able to

establish that appellants were in conscious possession of the contraband. Thus, they contended that the conviction of the appellant has been wrongly recorded.

19. On the other hand, learned State counsel pleaded that the provisions of Section 50 of the Act were not applicable in this case, as the recovery was effected from the vehicle and not from the personal search of the accused. The statements of DW-1 Nihal Singh and DW-2 Harwinder Singh @ Toti carries no evidentiary value. They have been won over by the accused. They have admitted their signatures on various documents. It is not believable that they had signed the blank papers. PW-1 DSP Jaspal has supervised the search and seizure. The testimonies of PW-1 DSP, Jaspal and PW-2 SI Jagjit Singh are consistent and cogent. Their statements are also corroborated from the statements of PW-5 Inspector Devinder Singh. No material contradictions could be pointed out in their statements by the learned counsel for the appellants. Appellants are proved to be in conscious possession of the contraband. He further contended that appellant Rajwinder Singh @ Raju has been identified by SI Jagjit Singh in the Court, which is the substantive evidence on the point of identification of the accused and there is no reason to disbelieve his statement. Thus, he pleaded that there is no infirmity in the conviction

of the appellants recorded by the learned trial Court.

20. I have duly considered the aforesaid contentions.

21. Firstly, I taken up the contentions raised by Mr. Vikas Sharma, Advocate, learned counsel for the appellant Rajwinder Singh @ Raju with respect to the identity of this appellant. No doubt, appellant Rajwinder Singh @ Raju has not been apprehended at the spot and manage to escape. It is also a fact that after his arrest, no test identification parade was held. But, this lapse on the part of the prosecution may not adversely affect the prosecution case, as it is the settled principle of law that the identification of an accused in the Court is the substantive evidence. The Hon'ble Supreme Court in case **Sidhartha Vashisht @ Manu Sharma Vs. State (NCT of Delhi) 2010 (2) RCR (Criminal) 692** has laid down that it is the dock identification, which is a substantive piece of evidence. Therefore, even, where no test identification parade is conducted, no prejudice can be caused to the case of the prosecution. In case **Mulla and another Vs. State of U.P., 2010(2) RCR (Criminal) 176,** again the Hon'ble Apex Court has laid down that the necessity for holding an identification parade can only arise when the accused persons are not previously known to the witnesses. Failure to hold test identification parade does not make the evidence of

identification in the Court inadmissible, rather the same is very much admissible in law. It was further laid down that substantive evidence is the evidence given by the witnesses in the Court and if that evidence is found to be reliable, then the absence of corroboration by test identification is not material. In view of the aforesaid ratio of law, the identification of an accused by a witness in the Court is substantive evidence of the identification. If that evidence is reliable, the absence of the prior test identification parade will not adversely affect the prosecution case.

22. In the instant case, the evidence adduced by the prosecution with respect to the identity of the appellant Rajwinder Singh @ Raju is cogent and reliable and in my opinion there was no necessity of holding any test identification parade. The name of appellant Rajwinder Singh @ Raju alongwith all the particulars clearly figures in the Ruqa Ex.PE, on the basis of which the formal FIR has been registered. So, accused-appellant was very much named in the FIR itself. PW-2, SI Jagjit Singh, the Investigating Officer of the case has categorically deposed that accused Pritam Singh present in the Court was apprehended, who was driving the car. Rajwinder Singh @ Raju present in the Court ran away from the car. He identified him at the spot and accused present in the Court

is the same person who had ran away from the spot. He further deposed that independent witness Harwinder Singh @ Toti also identified accused Rajwinder Singh @ Raju at the spot. As per the statement of PW-2 SI Jagjit Singh, he has gave the signal to stop the car with a torch. In the ruqa EX.PE, it is also mentioned that the street light was also on. So, even though the occurrence has taken place in the night. PW-2 SI Jagjit Singh, had sufficient light and opportunity to identify the accused. In the cross-examination PW-2 SI Jagjit Singh has stated that he was earlier known to accused Rajwinder Singh @ Raju as he remained posted at Police Station Nathana, CIA Staff, Bathinda etc. However, he had admitted that he never remained posted in Police Station Dyalpur and the village of accused Rajwinder Singh @ Raju falls in the jurisdiction of Police Station Dyalpur. But, there is no denial to the fact that PW-2 SI Jagjit Singh has remained posted in CIA Staff, Bathinda. It is a fact of common knowledge that CIA Staff has a jurisdiction to investigate the criminal cases in the entire District. The village of accused also falls in District Bathinda. Thus, as per the cross-examination of PW-2 SI Jagjit Singh he was previously known to appellant Rajwinder Singh @ Raju and he had identified him at the spot and thereafter, he identified him in the Court at the

time of his statement.

23. It is settled principle of law that the FIR is not an encyclopedia containing all the facts. No doubt in the FIR, this fact is not mentioned that PW-2 SI Jagjit Singh was earlier known to the appellant. But, in his statement in the Court, he has categorically deposed that he was earlier known to accused Rajwinder Singh @ Raju and had identified him at the spot. This version of SI Jagjit Singh has gone totally unchallenged. He was not even confronted with the facts mentioned by him in the ruqa Ex.PE. The Hon'ble Supreme Court in case **Raj Kishore Jha Vs. State of Bihar and others AIR 2003 S.C 4664**, has laid down that the statement of a witness made in the Court would not be vitiated on account of inconsistency with the previous statement until the procedure prescribed in the second limb of Section 145 of the Evidence Act is complied with. But, in the instant case, PW-2 SI Jagjit Singh has not been confronted at all with the facts mentioned in the ruqa Ex.PE. So, there is no reason to ignore the statement made by SI Jagjit Singh in the Court with respect to the identity of appellant Rajwinder Singh.

24. From the statement of PW-5 SI Devinder Singh, it comes out that on 04.03.2003 i.e. just two days after the occurrence, appellant Rajwinder Singh @ Raju was

produced before him by DW-1 Nihal Singh, Sarpanch. Nihal Singh was cited as a witness by the prosecution, but was given up as having been won over by the accused by the learned Public Prosecutor, vide statement dated 29.05.2004 and he had appeared in the defence evidence as DW-1. But, in the cross-examination by the learned Public Prosecutor, he admitted his signatures on the memo of personal search Ex.PO, memo of arrest Ex.PQ and memo with respect to intimation of arrest Ex.PR. He further admitted that these documents were prepared in the Police Station. Though, he alleged that his signatures were obtained on blank papers. DW-1 Nihal Singh is the Sarpanch of the village. He has signed all these documents in English and appears to be an educated person. It is not believable that a person holding a responsible post of the Sarpanch of the village will sign the blank papers at the dictate of the police. So, there is no reason to doubt the testimony of PW-5 Inspector Devinder Singh that appellant Rajwinder Singh @ Raju was produced before him by DW-1 Nihal Singh, Sarpanch of the village. The appearance of appellant Rajwinder Singh @ Raju before the subsequent Investigating Officer of the case in this manner through the Sarpanch of the village further corroborates the prosecution case with respect to the identity of appellant and his involvement in the present

case. Thus, from the aforesaid evidence, it is established that it was appellant Rajwinder Singh @ Raju who had fled away from the spot and there is no doubt about his identity and involvement.

25. The recovery has been effected in the night. The prosecution story that appellant Rajwinder Singh @ Raju had fled away from the spot is not impossible or improbable. The police officials present at the spot may not be apprehending anything incriminating being transported in the car and may not be so alert as to prevent the escape of the occupant of the car. In these circumstances, accused-appellant Rajwinder Singh @ Raju had every opportunity to give a ditch to the police officials and to escape from the spot.

26. There is no omission in the link evidence. As per the testimonies of PW-2 SI Jagjit Singh and PW-5 Inspector Devinder Singh, the case property was produced by SI Jagjit Singh on the same day before PW-5 Inspector Devinder Singh and on 2.03.2003 itself, PW-5 Inspector Devinder Singh further produced the case property before the learned Illaqa Magistrate, who passed the order Ex.PL/3 for keeping the case property in the Malkhana and also certified the inventory vide order Ex.PM/1. The learned Illaqa Magistrate also pass the order Ex.PN/1 with respect to the disposal of

the case property. After completion of these proceedings, the case property was kept in the Malkhana under the supervision of PW-5 Inspector Devinder Singh. So, there is no possibility of any entry in the Register no. 19 of the Police Station for taking out the case property for production before the Magistrate, as by that time the case property was not even deposited in the Malkhana and it was deposited only after the passing of order by the Magistrate.

27. From the statement of PW-3 Jarnail Singh, Steno, Office of D.T.O, Bathinda, it comes out that one Mehar Khan son of Mehnga Khan resident of village Dyalpura Bhaika, District Bathinda was the registered owner of the car. This person has not been examined. But, there is no denial to the fact that appellant Pritam Singh also belongs to village Dyalpur and in his statement under Section 313 Cr.P.C, he has mentioned his profession as a driver. At the time of apprehension also appellant Pritam Singh was driving the said car and appellant Rajwinder Singh @ Raju was also the occupant of the said car. In these circumstances, when appellant Pritam Singh belongs to the village of Mehar Khan, the registered owner of the car and was a driver by profession and the car no. PAW-840 loaded with the contraband has been recovered from the possession of the appellants, the non-examination of the registered owner of

the car will be of no consequences. Moreover, it is not the case of the appellants that they were ignorant that contraband was loaded in the dicky of the car, rather they have pleaded total false implication.

28. Harwinder Singh @ Toti, who was associated in the investigation of the case as the independent witness of recovery was given up as having been won over by the learned Public Prosecutor vide statement dated 17.08.2004. This statement of the learned Public Prosecutor stands certified from the fact that Harwinder Singh @ Toti has appeared in the defence evidence as DW-2 and denied the prosecution version with respect to the apprehension of the accused, identification of appellant Rajwinder Singh @ Raju and recovery of the contraband. He also alleged that his signatures were obtained by the police on the blank papers. In the cross-examination, he has admitted that he is 5th class pass. He identified his signatures on the documents i.e. consent memo Ex.PA, recovery memo Ex.PB, memo of personal search Ex.PC, another consent memo Ex.PD and arrest memo Ex.PF. He further categorically deposed that he had never signed the blank papers at the instance of anybody. In view of this assertion of this witness, it is not believable that he would have signed the blank papers at the instance of PW-2 SI Jagjit Singh. DW-2 Harwinder Singh

@ Toti is an educated person and was working as Octroi Clerk. He has alleged that he has gone to the Police Post, Bhucho with respect to some election dispute in which the compromise was effected between the parties. But, he has not specifically named what was that dispute and who were the parties having such dispute. He has gave a vague statement to show his presence in the Police Post. Thus, the testimony of DW-2 Harwinder Singh @ Toti is not believable. It shows that he had colluded with the accused and had made the false statement to favour them. Moreover, all these documents have also been attested by DSP, Jaspal, a Gazetted Officer, who has categorically deposed about the presence of Harwinder Singh @ Toti at the spot and the attestation of the aforesaid documents by this witness. The testimony of such a witness can not be relied upon to disbelieve the cogent and credible prosecution version.

29. I also do not find any substance in the plea raised by learned counsel for the appellants that the provisions of Section 50 of the Act have been violated, because the recovery in this case has been effected from the dicky of the car and not from the personal search of the appellants. Thus, the provisions of Section 50 of the Act are not attracted. To support this view reference can be made to cases **State of Himachal Pradesh Vs. Pawan Kumar 2005**

Supreme Court Cases (Criminal) 943, Ajmer Singh Vs. State of Haryana (2010)3 Supreme Court Cases 746 and Ram Swaroop Vs. State (Government of NCT of Delhi) (2013) 14, Supreme Court Cases 235.

30. I also do not found any substance in the plea raised by learned counsel for the appellants that the prosecution has not been able to establish that appellants were in conscious possession of the contraband. From the statement of PW-1 DSP Jaspal and PW-2 SI Jagjit Singh, the Investigating Officer of the case, it is established that two bags containing 35 kg of poppy husk each were recovered from the dicky of the car no. PAW-840, which was being driven by appellant Pritam Singh and appellant Rajwinder Singh @ Raju was also the occupant in the said car. The conduct of appellants is also very important. The escape of appellant Rajwinder Singh @ Raju from the spot when the signal to stop was given by the Investigating Officer, clearly indicates the guilty conscious of the appellant and that they were knowing well that the contraband was being transported by them in the car. Otherwise, there was no reason for appellant Rajwinder Singh @ Raju to fled away from the spot. The search and seizure has been conducted in the supervision of a Gazetted Police Officer i.e. PW-1 Jaspal. The prosecution case further stands corroborated

from the testimony of PW-5 Inspector Devinder Singh, the then SHO, Police Station Nathana, before whom accused Pritam Singh alongwith case property was produced immediately after the recovery. Learned counsel for the appellants have not been able to point out any material discrepancy in the statements of the aforesaid prosecution witnesses, even though, they have been cross-examined at length. So, from the consistent and reliable evidence of the aforesaid prosecution witnesses, it is established that both the appellants were found in possession of 70 kg of poppy husk. Once the possession of the contraband is established, the presumption under Section 35 and 54 of the Act arises against the accused. The Hon'ble Supreme Court in case **Madan Lal Vs. State of Himachal Pradesh 2003(4) RCR (Criminal) 100** has laid down that once the possession is established, the person who claims that it was not a conscious possession, has to establish it, because how was he came to be in possession is within his special knowledge. It was further held that 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 of the Act, where also presumption is available to be drawn from the possession of illicit article. Similar ratio of law has been laid down by Hon'ble Supreme

Court in case **Gian Chand and others Vs. State of Haryana 2013(3) RCR (Criminal) 916.** The accused-appellants have not rendered any explanation as to how they were found present in the car in which the contraband was being transported. They have also not explained under what circumstances the poppy husk was found loaded in the car in which they were traveling. Though, these circumstances were in their special knowledge. So, presumption under Section 35 and 54 of the Act arises against the appellants and there is no escape from the conclusion that the appellants were in conscious possession of the contraband.

31. 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 70 kg of poppy husk. Thus, there was no illegality or impropriety in the impugned judgment of conviction and order of sentence and the same are hereby maintained and affirmed.

30. Resultantly, both the 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, Bathinda, who shall send

them to jail to undergo the remaining part of their sentence.
If, they fails to surrender, the learned Chief Judicial Magistrate, Bathinda, shall take coercive steps to secure their presence and send them to jail to undergo the remaining part of the sentence.

February 26, 2015

s.khan

**(DARSHAN SINGH)
JUDGE**