

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

CRA-S-251-SB-2004

Date of decision: 19.02.2015

Sanjay Kumar

..... Appellant

Versus

State of Haryana

..... Respondent

And

CRA-S-448-SB-2004

Date of decision: 19.02.2015

Balbir Singh

..... Appellant

Versus

State of Haryana

..... 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.Saurabh Bajaj, Advocate
for the appellant in CRA-S-251-SB-2004.

Mr.Sukhdeep Parmar, Advocate
for the appellant in CRA-S-448-SB-2004.

Mr.Mukesh Kaushik, Deputy Advocate General
for the State of Haryana.

DARSHAN SINGH, J.

This judgment of mine shall dispose of both the appeals mentioned above, which have been presented by appellants Sanjay Kumar and Balbir Singh, against the same judgment of conviction dated 01.12.2003, passed by the learned Judge, Special Court, Kurukshetra, vide which both the appellants were 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 of sentence dated 02.12.2003, vide which the appellants were sentenced to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs.1,00,000/-, each and in default of payment of fine, they were ordered to further undergo imprisonment for a period of one year, each.

2. The brief facts, giving rise to this prosecution, are that on 24.09.2000, PW9 SI Niranjana Singh, SHO Police Station Jhansa along with PW6 ASI Om Parkash and other police employees was present at Bus Stand Hinga Kheri in connection with excise checking. He received a secret information that an Ambassador car bearing registration No.HRL-4786 carrying poppy husk was coming and if Nakabandi was held, the same can be apprehended along with narcotics. Thus, the Investigating Officer held the Nakabandi at 'Chibba Mor' within the area of village Durala. After some time, the car in question was spotted coming from the side of village Durala, which was signalled to stop. On taking the search of the car, three gunny bags were found loaded in the

dicky of the car. The Investigating Officer suspected the said gunny bags containing the narcotic substance. The driver of the said car disclosed his name as appellant Sanjay Kumar. The person accompanying him in the said car disclosed his name as appellant Balbir Singh. Thereafter, the notice under Section 50 of the Act was served upon both the accused, vide which, their options were sought as to whether they wanted the search of the said car to be conducted in presence of a Gazetted Officer or a Magistrate. The accused opted that search of the car be conducted before the Deputy Superintendent of Police. Thereafter, the police party along with accused and car No.HRL-4786 reached the office of the Deputy Superintendent of Police, Pehowa, who was apprised of the facts of the case and thereafter, on the directions of the DSP, the contents of the gunny bags were checked, which were found to contain crushed poppy husk. Out of which, 250 grams poppy husk was separated as sample from each gunny bag. On weighing, the remaining poppy husk came to be 38 Kg. in each bag. The samples and residue poppy husk were converted into parcels and the seal bearing impression 'NS' and 'CS' were affixed. The aforesaid parcels along with car No.HRL-4786 were taken into possession by the Investigating Officer, vide memo Ex.PG. The Investigating Officer sent the Ruqa Ex.PA to the police station. On the basis of which, the formal FIR Ex.PA/1 was registered. He also prepared the site plan of the place of recovery Ex.PK. The accused were arrested. On returned to the police station, the case property was deposited with the Moharir Head Constable in the intact condition. The

Investigating Officer sent the report under Section 57 of the Act Ex.PD to the DSP Pehowa. The sample parcels were sent to Forensic Science Laboratory, Madhuban for examination, which were found to be of poppy straw (Chura Post) and on completion of the investigation, the report under Section 173 Code of Criminal Procedure, 1973 (in short 'Cr.P.C.') was presented in the Court.

3. The accused-appellants were charge-sheeted for the offence punishable under Section 15 of the Act vide order dated 02.02.2001, to which, they pleaded not guilty and claimed trial.

4. In order to establish its case, prosecution examined as many as nine witnesses.

5. When examined under Section 313 Cr.P.C., the accused-appellant Sanjay Kumar pleaded that he is innocent and has been falsely implicated. Accused-appellant Balbir Singh alleging his innocence and false implication, pleaded that he was never in the company of co-accused Sanjay Kumar. He was taking a lift from the driver of some car from old Bus Stand, Kurukshetra for going to village Hinga Kheri for undergoing a 'Jhara' being held there on every Saturday and Sunday. He has no concern with Joginder Singh, the owner of the car. Nothing was recovered from his possession, conscious or otherwise.

6. In the defence evidence, accused examined Ishwar Kaushik, Inspector, Haryana Roadways, Kurukshetra as DW1.

7. On appreciating the evidence on record and contentions raised by learned counsel for the parties, learned trial Court held guilty

and convicted 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. The separate proceedings under Section 60 of the Act for confiscation of the car were also ordered to be initiated.

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

9. I have heard Mr.Saurabh Bajaj, Advocate, learned counsel for appellant Sanjay Kumar in CRA-S-251-SB-2004, Mr.Sukhdeep Parmar, Advocate, learned counsel for appellant Balbir Singh in CRA-S-448-SB-2004, Mr.Mukesh Kaushik, learned Deputy Advocate General for the State of Haryana and have carefully gone through the record.

10. Initiating the arguments, learned counsel for the appellants contended that as per admitted case of the prosecution, a secret information was received by the Investigating Officer and, thereafter, the Nakabandi was held and recovery is alleged to have been effected from a conveyance i.e. the car No.HRL-4786. So, it was incumbent upon the Investigating Officer to have reduced into writing the secret information and then to forward the same to his superior officer. But in the instant case, admittedly neither the same information has been reduced into writing nor forwarded in any manner to his superior officer by the Investigating Officer. So, the mandatory provisions of Section 42 of the Act have been violated. To support their contentions, they relied upon

cases **Kishan Chand Vs. State of Haryana 2013(2) RCR (Criminal) 67, Karnail Singh Vs. State of Haryana 2009(5) RCR (Criminal) 515, Abdul Rashid Ibrahim Mansuri Vs. State of Gujrat 2000(1) RCR (Criminal) 611 and Mushtaq Shah Vs. State of Rajasthan 2000 Criminal Law Reporter (Rajasthan) 889.** They contended that the learned trial Court has wrongly held that Section 43 and not Section 42 of the Act shall be applicable. They contended that once the case is based on the secret information, it will attract Section 42 of the Act. Section 43 applies in cases where there is no secret information. Thus, they contended that the violation of the mandatory provisions of Section 42 of the Act, has rendered the prosecution and conviction vitiated.

11. They further contended that the mandatory provisions of Section 50 of the Act have also been violated. A joint option has been given to both the appellants before taking the search, which is not a valid option and shall be inadmissible in evidence. To support their contentions, they relied upon cases **Kuldeep Vs. State of Haryana 2014 (5) RCR (Criminal) 550.** The violation of mandatory provisions of Section 50 of the Act also vitiated the conviction.

12. They further contended that the recovery is alleged to have been effected at a public place. Number of independent witnesses were available but no independent person has been associated in the investigation, which is also fatal to the prosecution case. To support their contentions, they relied upon **Angrej Kaur Vs. State of Haryana 2013(1) RCR (Criminal) 601.**

13. They further contended that the statements of the appellants recorded under Section 313 Cr.P.C. are also defective. No question was put to the appellants that they were in conscious possession of the contraband. It was the duty of the prosecution to prove that accused were in conscious possession of the contraband. The omission to put a specific question in the statements under Section 313 Cr.P.C. with respect to the conscious possession, has resulted in prejudice to the defence of the accused. 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 appellants have no connection with the car No.HRL-4786. PW8 Joginder Singh has falsely deposed under pressure of the police in order to save his own skin. So, the appellants cannot be stated to be in possession of the contraband.

15. Mr.Sukhdeep Parmar, Advocate, learned counsel for the appellant Balbir Singh contended that appellant Balbir Singh had only taken the lift in the car. He had no connection with the owner or the driver of the car. He was going to village Hinga Kheri for undergoing the 'Jhara', which is held on every Saturday and Sunday. This fact is also proved from the statement of DW1 Ishwar Kaushik, Inspector, Haryana Roadways, Kurukshetra and appellant Balbir Singh has been falsely implicated.

16. With these contentions, learned counsel for the appellants pleaded that learned trial Court had erred in convicting the appellants.

17. On the other hand, learned State counsel contended that the provisions of Section 42 of the Act were not applicable in this case as the recovery has been effected at a public place. The provisions of Section 43 shall be applicable, which do not require the secret information to be reduced in writing and forwarding the same to the superior officer. To support his contentions, he relied upon case **Devinder Kumar Vs. State of Punjab 2012(1) PLR 419** and **K. Chithhayan Vs. State of Tamil Nadu 2008(3) RCR (Criminal) 195**.

18. He further contended that as the recovery has been effected from the vehicle and not from the personal search of the accused-appellants, so provisions of Section 50 of the Act were not applicable.

19. He further contended that mere non-joining of independent witness is no ground to reject the prosecution story, as the search and seizure have been conducted in the presence of a Gazetted Officer. He further contended that the prosecution has led sufficient evidence to establish the recovery of the contraband from the possession of the appellants. Once the possession is established, it was for the appellants to show that they were not in conscious possession of the contraband. Mere omission in the statement under Section 313 Cr.P.C. with respect to the conscious possession is of no legal consequence. To support his contentions, he relied upon cases **Gian Chand and others Vs. State of Haryana 2013(3) RCR (Criminal) 916**. He further contended that from the statement of PW8 Joginder Singh, it is established that both the accused were travelling in the said car at the

time of the occurrence. Thus, he contended that there is no infirmity in the conviction of the appellants.

20. I have duly considered the aforesaid contentions.

21. Learned counsel for the appellants have vehemently contended that the mandatory provisions of Section 42 of the Act have been violated. As a result thereof, the trial/conviction stands vitiated. No doubt, as per the prosecution story, the recovery is alleged to have been effected on the basis of a secret information. It is pertinent to mention that the secret information, received by the Investigating Officer, was only with respect to the transportation of the poppy husk in car No.HRL-4786, without mentioning the name of the culprits. It is also not disputed that before conducting the search and seizure, the secret information has not been reduced into writing, nor the same has been conveyed to his immediate superior officer by the Investigating Officer. But at the same time, from the facts of the case, it is evident that it was a case of emergency. The accused were carrying the poppy husk in car No.HRL-4786. At the time of receiving the secret information, the Investigating Officer was not present in the police station, rather he was on excise checking near Bus Stand, Hinga Kheri along with his fellow police officials. In view of the emergent condition, he started Nakabandi at Chibba Mor within the area of village Durala to apprehend the accused along with contraband. As per the statement of PW9 SI Niranjan Singh, the Investigating Officer, he received the secret information at about 10:15 a.m. when he was present at Bus Stand, Hinga Kheri. They left for

the place of Nakabandi i.e. Chibba turning at 10:30 a.m. and reached there within 10 minutes. After half an hour, the car in question was spotted coming and it was apprehended. It shows that if the Investigating Officer would have wasted time in reducing the secret information into writing and then sent the same to his superior police officers before proceeding to the place of recovery/apprehension, there was every possibility that the accused might have escaped along with the contraband. So, certainly it was a case of emergency.

22. Section 42 of the Act reads as under:-

“42. Power of entry, search, seizure and arrest without warrant or authorisation. - (1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from persons knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under

Chapter V A of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V A of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

Provided that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under subsection (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.

23. As per Section 42 sub-section (2), the Investigating Officer is required to send the information in writing to his immediate

superior officer within 72 hours.

24. Learned counsel for the appellants have relied upon case **Abdul Rashid Imrahim Mansuri Vs. State of Gujrat** (supra), which has been dealt with in detail by the Constitution Bench of Hon'ble Apex Court in case **Karnail Singh Vs. State of Haryana** (supra). Another case relied upon by learned counsel for the appellants titled as **Kishan Chand Vs. State of Haryana** (supra) is based on the ratio of law laid down by the Constitution Bench in case **Karnail Singh Vs. State of Haryana** (supra). So, the basic authority referred by learned counsel for the appellants is **Karnail Singh Vs. State of Haryana** (supra), wherein the Hon'ble Apex Court after taking note of the findings of the Hon'ble Apex Court in cases **Abdul Rashid Imrahim Mansuri Vs. State of Gujrat** (supra) and **Sajan Abraham Vs. State of Kerala 2001(3) RCR (Criminal) 808** has reconciled the legal position with respect to Section 42 of the Act as under:

“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.”

25. 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.

26. A Division Bench of this Court in case **Jarnail Singh s/o Jawara Ram Vs. State of Haryana 2013(2) RCR (Criminal) 580**, after taking into consideration the ratio of law laid down in cases **Abdul Rashid Ibrahim Mansuri Vs. State of Gujrat (supra)**, **Sajan Abraham Vs. State of Kerala (supra)**, **Karnail Singh Vs. State of Haryana (supra)** and **Kishan Chand Vs. State of Haryana (supra)** 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.

27.

It was further laid down that:-

“54. Section 42 of the Act can be divided into two parts, first if the power of entry, search, seizure and arrest without warrant or authorisation, as contemplated under sub-section (1) of the said Section. Second is reiterating any information in writing under sub-section (1) of the Act.

55. It may be mentioned here that sub-section 2 was amended by the Parliament vide Act No. 9 of 2001 w.e.f. 02.10.2001. In the case in hand the information was received by PW-8 (Sandeep Singh SHO) on 29.01.2000 and he immediately, reached the place of recovery. If, he had not reached the place of recovery immediately after the receipt of information, and if, he had consumed time in obtaining the search warrant, in that event, the appellant could escape from the place of recovery.

56. So, keeping in view the facts and circumstances of this case, PW-8 pondered it apt to enter and search the place of recovery without obtaining search warrant. The whole purpose of the secret information would have been disconcerted, if he had not acted upon this information immediately after receipt, thereof.

57. Section 42 (1) (d) of the Act empowered PW-8 (Sandeep Singh SHO) to search the place of recovery and arrest the appellant, as obtaining of search warrant would have afforded opportunity to the appellant for concealment of the contraband, as

also, for his escape. The information, as already held about this recovery was sent by PW-8 (Sandeep Singh SHO) to the Illaqa Magistrate, as also to the higher police officers. So, no benefit of Kishan Chand's judgment (supra) can be accorded to the appellant.

28. It was further laid down that:-

“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.”

29. In a latest judgment titled as **Gurdev Kaur Vs. State of Punjab 2014(1) DC (Narcotics) 573**, Hon'ble Apex Court also after taking note of cases **Karnail Singh Vs. State of Haryana** (supra) and **Sajan Abraham Vs. State of Kerala** (supra), 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.”

30. In view of the aforesaid ratio of law laid down by the Division Bench of this Court and the Hon’ble Apex Court in the latest judgment that where the recording the information is not practicable 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 the superior officer may be postponed by a reasonable period, which may be after the search, entry and seizure.

31. It was further laid down that where the Investigating

Officer was on move and not in the office and information has been conveyed to the superior police officer, who arrived at the spot, formal FIR was lodged regarding the recovery in question, a copy of the FIR was sent to the Illaqa Magistrate as also to the superior police officers, the provision of Section 42 of the Act stands complied with.

32. In the instant case also, the Investigating Officer was on move and due to emergent situation, he had to immediately rush to the spot for holding the Nakabandi and to apprehend the appellants along with the contraband, otherwise there was every possibility of the appellants having escaped along with the contraband. The accused along with the case property were taken to the office of PW7 Charanjit Singh DSP, the immediate superior officer of the Investigating Officer. The facts of the case were disclosed to him and, thereafter, on his direction, the search and seizure was carried out. All the facts with respect to the secret information were incorporated in the Ruqa Ex.PA, which was sent to the police station, on the basis of which FIR Ex.PA/1 was registered and the copy thereof was forwarded to the Illaqa Magistrate, Superintendent of Police, Kurukshetra and DSP Pehowa, the superior officers of the Investigating Officer. The copy of the FIR has been forwarded to the superior police officers on 24.09.2002 itself i.e. immediately after the search and seizure. Thus, it cannot be stated that the provisions of Section 42 of the Act have been violated, rather it is clear that there was the substantial compliance of the provision of Section 42 of the Act.

33. 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**. In view of these authoritative pronouncements of Hon'ble Apex Court, case **Kuldeep Singh Vs. State of Haryana** (supra) a Single Bench authority of this Court, is no help to the appellants.

34. No doubt the recovery in this case has been effected at a public place on the basis of a secret information. But no independent witness has been associated in the investigation of the case. PW9 SI Niranjan Singh the Investigating Officer of the case has categorically deposed that he has tried to join some independent persons in the investigation at Bus Stand, Hinga Kheri and also on Chibba turning but they refused to join the investigation and showed their inability. He further categorically deposed that he had asked Karnail Singh, Ex-Sarpanch, village Hinga Kheri, Balkar Singh and many other persons to join the investigation. So, it is not a case where no effort at all has been made by the Investigating Officer to rope in the independent witnesses

but the independent witnesses expressed their inability to join. So, the Investigating Officer was left with no option, but to proceed further by joining the police officials. It is well settled by this time that the testimonies of the official witnesses also carries the same evidentiary value and their testimonies cannot be discarded merely on the ground of their official designation. The learned defence counsel has not been able to point out any material contradiction in the statements of the prosecution witnesses. They also have not been able to point out any animus or motive for the false implication of the appellant. PW7 Charanjit Singh DSP, a Gazetted Officer has supervised the search and seizure. It is not expected that a senior police officer will become a party to support the false version of his subordinates. The Hon'ble Supreme Court in case **Akmal Ahmed Vs. State of Delhi, 1999(2) RCR (Criminal) 265** has laid down that the evidence of search or seizure made by the police will not become vitiated solely for the reason that same was not supported by any independent witness. The same ratio of law has been laid down by the Hon'ble Apex Court in case **State of NCT of Delhi Vs. Sunil (2000) 1 Supreme Court cases 748, Rohtash Vs. State of Haryana, 2013(3) RCR (Criminal) 355, M.Prabhulal Vs. Assistant Director, Directorate of Revenue Intelligence, 2004(1) RCR (Criminal) 160 and Ravinderan @ John Vs. Superintendent of Customs, 2007 (3) RCR (Criminal) 80**. Thus, the non-joining of independent witness is also no ground to discredit the prosecution version.

35. From the cogent, consistent and reliable testimonies of PW6 Om Parkash ASI, the witness of recovery, PW7 DSP Charanjit Singh, under whose supervision the search and seizure was conducted and PW9 SI Niranjana Singh, the Investigating Officer of the case, it is established that both the accused-appellants were apprehended while travelling in Ambassador car No.HRL-4786 and on the search of the car, they were found in possession of three bags containing 38.250 Kg. poppy husk, each. From the statement of PW8 Joginder Singh, the owner of the car, it comes out that appellant Sanjay Kumar was employed by him as driver of his car and appellant Balbir Singh also used to accompany Sanjay Kumar sometimes. He has categorically deposed that on 24.09.2000, accused appellant Sanjay Kumar and Balbir Singh took the car from Karnal to Hinga Kheri without any permission and knowledge and he came to know that three gunny bags of poppy husk were recovered from that car from possession of Sanjay Kumar and Balbir Singh. This fact is not disputed that PW8 Joginder Singh is one of the registered owners of car No.HRL-4786. He has categorically deposed that appellant Sanjay Kumar was employed by him as a driver and appellant Balbir Singh also used to accompany him sometimes. He has categorically stated that on 24.09.2000 both the appellants have taken his car from Karnal to Hinga Kheri. The statement of PW8 Joginder Singh corroborates the version of the prosecution that on the date of recoveries, appellants were in possession of car No.HRL-4786 belonging to him and the bags containing poppy husk were recovered from the said car. The

plea raised by appellant Balbir Singh that he had taken the lift and had no connection with the owner and driver of the said car, carries no substance, in view of the statement of PW8 Joginder Singh. Thus, from the aforesaid evidence, it is established that three bags containing 38.250 Kg. poppy husk were recovered from the possession of the appellants. Once the possession of the contraband is established, the presumption under Sections 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 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**.

36. The omission in the statement under Section 313 Cr.P.C. with respect to the conscious possession has also not resulted in any prejudice to the appellants. The recovery in this case has been effected from a private car, which was in exclusive possession of both the appellants. Nobody other was travelling in that car at the relevant time. So, it was only they, who were in possession of the contraband. While

framing the charges against the appellants, it was categorically mentioned that they were found in conscious possession of the contraband. So, the appellants were very much aware of the fact that they have been charged for having been found in conscious possession of the contraband. Thus, mere omission of the specific question to the conscious possession, is no ground to conclude that appellants were not properly examined under Section 313 Cr.P.C. To support this view, reference can be made to case **Jarnail Singh s/o Jawara Ram Vs. State of Haryana** (supra), a Division Bench judgment of this Court. The Hon'ble Apex Court also in case **Gian Chand and others Vs. State of Haryana** (supra) laid down that every error or omission in the statement of accused does not necessarily vitiate the trial, unless the accused is able to show that the same has resulted in prejudice to him. In the instant case, as already discussed, the accused were aware from the very beginning that they have been charged for having been found in conscious possession of the contraband. So, there was no question of any prejudice to the appellants in view of the omission with respect to conscious possession in the statement under Section 313 Cr.P.C. In view of the judgment of the Division Bench of this Court and the Hon'ble Apex Court, case **Jaswinder Singh and another Vs. State of Punjab** (supra), relied upon by learned counsel for the appellants is of no help to the appellants.

37. 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 114.750 Kg.

poppy husk. 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.

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

Dated: 19.02.2015
sunil yadav

(DARSHAN SINGH)
JUDGE