

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

(I) CRA-S-1829-SB of 2010
Date of Decision : 28.01.2015

Sukhchain Singh @ Jagga

.....Appellant

Versus

State of Punjab

.....Respondent

(II) CRA-S-1841-SB of 2010
Date of Decision : 28.01.2015

Bhagwan Singh @ Bhana

.....Appellant

Versus

State of Punjab

.....Respondent

(III) CRA-S-1942-SB of 2010
Date of Decision : 28.01.2015

Roor Singh

.....Appellant

Versus

State of Punjab

.....Respondent

(IV) CRA-S-2168-SB of 2010
Date of Decision : 28.01.2015

Gurmail Singh

.....Appellant

Versus

State of Punjab

.....Respondent

(V) CRA-S-2196-SB of 2010
Date of Decision : 28.01.2015

Nirmal Singh

.....Appellant

Versus

State of Punjab

.....Respondent

CORAM:- HON'BLE MR. JUSTICE JITENDRA CHAUHAN

Present: Mr. H.S. Rakhra, Advocate for the appellants,
in CRA-S-1829-1841-SB-2010.

Mr. Inderjeet Sharma, Advocate for the appellant,
in CRA-S-1942-SB-2010.

None for the appellant in CRA-S-2168-SB-2010.

None for the appellant in CRA-S-2196-SB-2010.

Mr. Luvinder Sofat, AAG, Punjab.

JITENDRA CHAUHAN, J.

The above noticed five criminal appeals have been preferred against the common impugned judgment and order dated 14.07.2010, passed by the learned Judge, Special Court, Moga, (hereinafter referred to as the trial Court), whereby, the appellants have been convicted for the commission of offence punishable under Section 15(c) of the Narcotic Drugs and Psychotropic Substances Act, (for short, 'the Act') and sentenced to undergo rigorous imprisonment for a period of ten years and to

pay a fine of Rs.1,00,000/-, and in default of payment of fine, to further undergo rigorous imprisonment for a period of one year each.

2. Briefly stated facts of the present case are that on 23.09.2008, PW-4, Rajesh Hasthir, along with SI Ranjit Singh, ASI Darshan Singh and other police officials had set up a naka in the area of Vilage Dina Sahib, at the bridge of seepage drain. At about 7.00 a.m., Mahindra Pick Up Jeep, bearing registration No.PB-11-U-6846, was intercepted. The driver of the jeep along with two persons was sitting in the cabin of the Jeep, whereas, three persons were sitting on the bags loaded in its rear portion. However, the driver and the person sitting on the right side of front seat succeeded in fleeing away. They were identified as Bhana Singh, being the driver and Naib Singh, being co-passenger by HC Baljinder Singh (PW8). The persons sitting in the rear portion over the bags loaded in the jeep were apprehended along with the person sitting on the front left side seat in the Cabin of the Jeep, along with driver Bhana Singh alias Bhagwan Singh and Naib Singh, who were sitting on the right side in the cabin of the jeep. In the meanwhile, one passerby, namely, Jalour Singh, who came to the spot, was joined in the investigation. The person sitting in the cabin disclosed his name as Nirmal Singh. The persons apprehended sitting on the bags in the rear portion of the Jeep disclosed their names as Roor Singh,

Gurmail Singh alias Gela and Sukhchain Singh alias Jagga. The Investigating Officer suspected some contraband in the bags. Therefore, he apprised all the four accused of their right of search of the bags before a Gazetted Officer or a Magistrate. All the accused opted search before a Gazetted Officer. Consent memos were prepared. As such, intimation was sent to the police station and in the meanwhile Shri Bulla Singh, DSP, reached at the spot. The DSP again apprised the accused of their right of getting the bags searched before him or before any other Gazetted Officer or a Magistrate. However, all the accused had given their consent of search before the DSP. Consent memos were recorded. Then, in the presence and under the instructions of DSP, all the bags kept in the jeep were unloaded which were 27 in number. All the bags were opened which led to the recovery of poppy straw. The bags were given numbers 1 to 27. One sample containing 250 grams of poppy straw was drawn from each bag and these were converted into separate 27 parcels. Each parcel was given numbers 1 to 27 denoting the number of the bag from which it was taken out. Remaining poppy straw weighed 34 Kgs. 750 grams in each bag. All the 27 bags containing bulk contraband were converted into separate parcels. All the parcels were sealed with the seal of the investigating officer bearing impression RH as well as seal of DSP bearing impressions HS. The investigating officer handed over his seal to SI Ranjit Singh at the spot. Sample seal was

prepared. However, the DSP kept his seal with him.

3. All the parcels and sample seals were taken into possession vide recovery memo Ex.P14. Thereafter, personal search of the accused was conducted. The accused were also apprised of the grounds of arrest vide memo Ex. P15. Rs. 400/- were recovered from Gurmail Singh vide his personal search memo Ex. P16, Rs. 200/- were recovered from the personal search of Nirmal Singh vide memo Ex. P17, Rs. 1100/- were recovered from the personal search Sukhchain Singh vide memo Ex. P18 and Rs. 600/- were recovered from the personal search of Roor Singh vide memo Ex.P19. Intimation of arrest of the accused was given to Kaka Singh son of Dhian Singh of Village Wander Doad, vide memo Ex. P20.

4. Upon presentation of challan, copies of the documents relied upon by the prosecution were supplied to the accused.

5. The learned trial Court, after finding prima facie case against the accused, charged them for commission of the offence punishable under Sections 15, of the NDPS Act, to which they pleaded not guilty and claimed trial.

6. In order to substantiate its case against the accused, the prosecution examined following witnesses:-

PW1 - HC Sukhmander Singh, deposited the sample parcels with Assistant Chemical Examiner, Punjab, Chandigarh.

PW2 - Raj Singh was the MHC of the police Station. He testified that the case property was deposited with him in an intact condition.

PW3 - Inspector Pushpinder Singh was the SHO of the police station. He deposed that on 23.09.2008 SI Rajesh Hasthir produced before him the articles of the case property as well as the accused in an intact condition and kept the case property in his custody on that day; he produced the case property before Area Magistrate on 24.09.2008 in an intact condition.

PW4 - Rajesh Hasthir is the investigating Officer. He reiterated the version of the FIR and testified that 27 bags each containing 35 kg. of poppy straw were recovered from the conscious possession of the accused.

PW5 - SI Ranjit Singh is the witnesses of search, seizure and recovery. Seal after use was handed over to him by the IO at the spot.

PW6 - Ashok Kumar photographer had snapped the photographs when the case property was produced before the Area Magistrate on 24.09.2008 and proved photographs Ex. P25 and Ex.P26 and their negatives Ex.P27 and Ex.P28.

PW7 - DSP Bhulla Singh was present at the spot being Gazetted Officer of the Government of Punjab and the search, seizure and recovery was effected in his presence.

PW8 - HC Baljinder Singh was present at the spot. He identified accused Bhana Singh and Naib Singh, who had fled away from the spot.

7. During their examination under Section 313 Cr.P.C., appellants Sukchain Singh, Bhagwan Singh and Nirmal Singh, pleaded false implication. It was stated that no recovery was effected from them. Appellant Roor Singh took the following plea:-

“I am innocent. I have been falsely implicated in this case. In the days of alleged occurrence a Samagam of Sacha Sauda sect, was going on at Village Slabatpura. The Dera of Slabatpura of Sacha Sauda sect is the biggest Dera of Punjab State Sacha Sauda Sec. I along with Gurmail Singh and other joined that Smagam and remained there for 2/3 days. On the alleged date of recovery, there was a huge rush at bus stop Slabatpura from where we had to return to our respective villages by means of transport. Since there was huge rush and the bus service was not sufficient to transport the Mela people to their destinations. So, the people of Sacha Sauda sect were boarding every kind of private vehicles by stopping the same at bus stop chowk of Slabatpura. That Chowk is situated near the Dera of Sacha Sauda. When we were waiting for a vehicle there in the mean while a Mahindra Pick up jeep which was already loaded with some gunny bags came there. Myself, Gurmail Singh, Naib Singh and others gave signal to the occupants of that vehicle to stop the same and they stopped the vehicle. We requested them for

lift up to Nihal Singh Wala and they agreed. Accordingly, we boarded that vehicle and started towards Nihal Singh Wala. On they way, the vehicle was stopped by the police but the occupants of that vehicle who gave lift to us ran away; from the spot. We were having no knowledge as to what the gunny bags were containing as opening of those bags were already tied. On the fleeing of occupants of the vehicle who were carrying the same we were apprehended by the police, brought to the police station and were falsely implicated in this case. No recovery was effected from our possession as the bags and the vehicle was belonging to the persons who ran away from the spot after leaving the same. Our relations narrated the whole episode to the police but not body was ready to listen them.”

8. Similar plea had been taken by the appellant Gurmail Singh and other appellants also stated regarding there false implications. In defence, the appellants examined the following witness:-

DW1 - Surjit Singh, deposed that there was smagam in the Dera at Salabatpura and due to that reason on the intervening night of 22/23.09.2008 he along with Roor Singh accused remained their in the Dera and early in the morning at about 6.00 a.m. the followers started towards their village after attending the Smagam. They reached bus stop Salabatpura and after

some time one Jeep was loaded with some bags and Roor Singh requested for lift and he sat on the rear seat of the jeep and also stated that some other persons also boarded in that jeep who were followers of the Dera.

DW2 - Gurjit Singh stated that accused Gurmail Singh boarded in the jeep after attending the Smagam in the morning time and as there was heavy rush in the bus stop.

DW3 - HC Ajmer Singh stated that they reached at the place of recovery at 11.30 p.m. at night on 23.09.2008.

DW4 – C. Gurjinder Jit Singh, driver of Bhulla Singh DSP PW-7 and he stated that DSP reached at about 7.50/7.55 a.m. on 23.09.2008.

DW-5 Surjan Singh deposed regarding accused Nirmal Singh and stated that he was the accused Nirmal Singh was Karyana Merchant.

9. After hearing learned counsel for both the parties and considering the evidence on record, the learned trial Court convicted and sentenced the accused-appellants as detailed at the outset of this judgment.

10. Hence, the present appeals, by the accused-appellants.

11. It is contended that the prosecution has failed to prove conscious possession of the contraband by the appellants. There is no investigation with regard to either the ownership of the jeep in question or the source of the contraband allegedly recovered

therefrom, thus, the link evidence is missing in the instant case. There is an unexplained delay of more than 10 hours in sending the ruqa to the police station and further delay of 6 days in sending the samples for chemical examination. The alleged independent witness, Jalaur Singh, was not examined by the prosecution. It is further contended that there are material contradictions in the statements of the prosecution witnesses. The alleged recovery was effected in the morning at about 7.00 AM, on the contrary, SI Rajesh Hastir, the Investigating Officer, has deposed that the naka was laid at about 7.00 AM, whereas, the jeep of the accused was apprehended at about 8.30 AM. The special report with regard to the recovery of the contraband was not sent to the superior authority.

12. On the other hand, the learned State counsel, submits that heavy quantity of contraband was recovered from the accused appellants.

13. I have heard the learned counsel for the parties and perused the record.

14. The first and foremost question for determination of this Court is whether the accused appellants were in conscious possession of the contraband or not. When examined under Section 313 Cr.P.C., appellants Gurmail Singh and Roor Singh took specific stand that they took lift in the jeep. They did not have any knowledge as to what was lying in the bags. They have

also examined DW1 Surjit Singh and DW2 Gurjit Singh in this regard. The conscious possession of the appellants over the bags was not proved by the prosecution. The Hon'ble Supreme Court in case of *Avtar Singh vs. State of Punjab, 2002 (4) CRC (Crl.) 180* held in a case of recovery of 16 bags of poppy husk from a truck where two accused were sitting on the bag and one accused was driving the truck. It was not proved that the accused had custody and control of the bags and the conviction was set aside. It was further held that possession and ownership need not always go together but the minimum requisite element which has to be satisfied is custody or control over the goods. It was held thus:-

“The word possession no doubt has different shades of meaning and it is quite elastic in its connotation. Possession and ownership need not always go together by the minimum requisite element which has to be satisfied in evidence available on record, that the three appellants – one of whom was driving the vehicle and other two sitting on the bags, were having such doubt. It transpires from evidence that the appellants were not the only occupants of the vehicle. One of the persons who was sitting in the cabin and another person sitting at the back of the truck made themselves scarce after seeing the police and the prosecution could not establish their identity. It is quite probable that one of them could be custodian of goods whether or not he as the proprietor. The persons who were merely

sitting on the bags, in the absence of proof of any thing more, cannot be presumed to be in possession of the goods. For instance, if they are labourers engaged merely for loading and unloading purposes and there is nothing to show that the goods were at least in their temporary custody, conviction under Section 15 may not be warranted. At best, they may be abettors, but there is no such charge here. True, their silence and failure to explain the circumstances in which they were travelling in the vehicle at the odd hours, is one strong circumstance that can be put against them. A case of drawing presumption under Section 114 of the Evidence Act could perhaps be made out then to prove the possession of the accused, but the fact remains that in the course of examination under Section 313, Cr.P.C. not even a question was asked that they were the persons in possession of poppy husk, placed in the vehicle. The only question put to them was that as per the prosecution evidence, they were sitting on the bags of poppy husk. Strangely enough, even the driver was questioned on the same lines. The object of examination under Section 313, it is well known, is to afford an opportunity to the accused to explain the circumstances appearing in the evidence against him. It is unfortunate that no question was asked about the possession of goods. Having regard to the charge of which appellants were accused, the failure to elicit their answer on such a crucial aspect as

possession, is quite significant. In this state of things, it is not proper to raise a presumption under Section 114 of the Evidence Act nor is it after to conclude that the prosecution established beyond doubt that the appellants were in possession of poppy husk which was being carried by the vehicle. The High Court resorted to the presumption under Section 34 which relates to culpable state of mind, without considering the aspect of possession. The trial Court invoked the presumption under Section 54 of the Act without addressing itself to the question of possession. The approach of both the Courts is erroneous in law. Both the Courts rested their conclusion on the fact that the accused failed to give satisfactory explanation for traveling in the vehicle containing poppy husk at an odd hour. But, the other relevant aspects pointed out above were neither adverted nor taken into account by the trial Court and the High Court.”

15. Furthermore, neither the ownership of the alleged vehicle i.e. Mahindra Pick-up Jeep was proved by the prosecution, nor the owner of the alleged vehicle was made accused under Section 25 of the NDPS Act, nor he was examined during the trial. PW-3 SI Pushpinder Singh admitted in his cross-examination that he did not collect any documentary evidence regarding the ownership of the jeep in question. There is no

investigation with regard to the source of the alleged contraband. Thus, the link evidence is missing in the instant case.

16. As per prosecution version Jalour Singh was joined as independent witness but the seal after use was handed over to SI Ranjit Singh. If at all, Jalour Singh was joined as independent witness then the seal ought to have been handed over to him. This clearly proves that no witness was joined at the time of recovery and there is every possibility of tampering with the seals and case property. The Division Bench of this Hon'ble High Court in case of *Didar Singh @ Dara Vs. State of Punjab, 2010(3) RCR (Crl.) 337* has held that when there was an independent witness to the recovery but sample seal was handed over to the police officials, who was part of the investigating team, the seal remained with the police and the chance of changing the sample by tampering the seal of reaffixing it cannot be ruled out. Similar view was taken by Division Bench in case of *Sukhdev Singh @ Sukha Vs. State of Punjab, 2006(1) RCR (Crl.) 4*, wherein, seal was given to SI of the police and not to independent witness. It was held that possibility of seal being tampered with, substances being changed and containers being resealed cannot be ruled out and conviction was set aside inter-alia on this ground.

17. In the present case, no independent witness was examined by the prosecution. As per prosecution story, one Jalour Singh son of Basant Singh was joined in the police party as

independent witness but interestingly he was given up during the trial. The non-examination of independent witness is fatal to the prosecution case.

18. The alleged recovery was effected in the morning at about 7.00/8.00 AM. As per statement of PW4 SI Rajesh Hastir, the Investigating Officer, nakabandi was held in the area of village Dina at the bridge canal at about 7.00 a.m. At about 8.30 AM, one Mahindra Pick up Jeep bearing number PB-11-U-6846, was signaled to stop. The ruqa in the present case was sent at 7.00 p.m. There is a delay of more than 10 hours in sending the ruqa to the police station. This long delay in sending the ruqa to the police station creates serious doubt in the prosecution case and proves that FIR was registered after due deliberations and considerations.

19. There is a delay of 6 days in sending the samples to the office of the Chemical Examiner. The recovery was effected on 23.09.2008, whereas, the samples were sent on 29.09.2008 for examination. Thus, there was sufficient time for the prosecution to tamper with the samples. This Court, in ***Malkiat Singh alias Kala V. State of Punjab, 2009(1) R.C.R. (Criminal) 353***, has held as under:-

“11. It was next submitted by the Counsel for the appellant, that though the alleged recovery was effected on 03.07.1997, yet the samples

were sent to the office of the Chemical Examiner on 08.07.1997 and, thus, the delay of 5 days, in sending the same to the office of the Chemical Examiner, remained unexplained and, as such the possibility of tampering with the same, until the same reached the Laboratory, could not be ruled out. No explanation, whatsoever, was furnished, as to why the samples were not sent to the office of the Chemical Examiner, for about 05 days. Had any explanation been furnished, the matter would have been considered, in the light thereof, but in the absence of any explanation, having been furnished, in this regard, the Court cannot coin any of its own.

In Gian Singh Vs. State of Punjab 2006(2) RCR (Criminal) 611, there was a delay of 14 days, in sending the sample to the office of the Chemical Examiner. Under these circumstances, it was held that the possibility of tampering with the sample, could not be ruled out, and the link evidence was incomplete. Ultimately, the appellant was acquitted, in that case. In State of Rajasthan Vs. Gurmail Singh

2005(2) RCR (Criminal) 58, (Supreme Court), the contraband remained in the Malkhana for 20 days. The malkhana register was not produced, to prove that it was so kept in the malkhana, till the sample was handed over to the Constable. In these circumstances, in the aforesaid case, the appellant was acquitted. In Ramji Singh Vs. State of Haryana 2007 (3) RCR (Criminal) 452, the sample was sent to the office of the Chemical Examiner after 72 hours, the seal remained with the police official, and had not been handed over to any independent witness. Under these circumstances, it was held that this circumstance would prove fatal to the case of the prosecution. No doubt, the prosecution could lead other independent evidence, to prove that none tampered with the sample, till it reached the office of the Forensic Science Laboratory. The other evidence, produced by the prosecution, in this case, to prove the link evidence, is not only deficient, but also unreliable. In the instant case, the principle of law, laid down, in the aforesaid authorities, is fully applicable to the facts of the present case.

The delay of 05 days, in sending the samples to the office of the Chemical Examiner, and non-strict proof, by the prosecution, that the same was not tampered with, till it was deposited, in that office, must prove fatal to the case of the prosecution, as the possibility of tampering with the same, could not be ruled out. The submission of the Counsel for the appellant, in this regard, being correct, is accepted.”

20. This Bench, in *Amrit Singh Vs. State of Punjab, 2014 (3) RCR (Criminal) 615*, has held as under:-

“15. ASI Ashwani Kumar in his cross-examination admitted that the sample parcels were sent to the CFSL, Chandigarh on 15.3.2001, through Constable Bikramjit Singh. The recovery was effected on 9.3.2001. There is no explanation with regard to the delay of six days in sending the sample to the laboratory. In *Buta Singh v. State of Punjab, 2006(1) Recent Criminal Reports (Criminal) 835*, as many as 18 bags of poppy husk were recovered. The prosecution failed to explain delay of 8 days in despatch of sample to the Forensic Science

Laboratory for chemical analysis. It was held that such a delay is fatal and the same is also in violation of the Standing Instruction No.1/88 dated 15.3.1988 (Narcotic Control Bureau, New Delhi).”

21. It has also come on record that appellant Bhagwan Singh along with Ranjit Kaur and Jagtar Singh filed criminal petition bearing No.CRM-M-3902 of 2008, before this Court against the police officials of CIA Staff Moga as they wanted to take forcible possession of 2 acres of commercial land of Ranjit Kaur, the mother of appellant (Bhagwan Singh) in her village. PW-4 SI Rajesh Hastir, who was investigating officer was also confronted in cross examination with the orders passed by the Hon’ble High Court. Due to this, the police officials were nursing grudge against the appellants.

22. In view of the above discussion, this Court feels that the prosecution has failed to prove its case against the accused-appellants beyond a shadow of reasonable doubt. Accordingly, the present appeals are allowed; impugned judgment and order passed by the learned trial Court, is hereby set aside; and the appellants are acquitted of the charges framed against them. The appellant, Bhagwan Singh @ Bhana, be set at liberty forthwith, if not required in any other case. The appellants Sukhchain Singh

@ Jagga, Roor Singh, Gurmail Singh and Nirmal Singh, are
stated to be on bail, their bail bonds shall stand discharged.

28.01.2015
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(JITENDRA CHAUHAN)
JUDGE

Note: Whether to be referred to reporter? Yes / No