

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

1. CRA-S-61-SB of 2003 (O & M)
Date of decision : 20.1.2015

Mithu SinghAppellant

v.

State of PunjabRespondent

2. CRA-S-2007-SB of 2002 (O & M)

Bhola SinghAppellant

v.

State of PunjabRespondent

CORAM : HON'BLE MRS. JUSTICE RAJ RAHUL GARG

Present : Mr. H.S. Rakhra, Advocate, for appellant Mithu Singh
Mr. Surinder Garg, Advocate, for appellant Bhola Singh

Ms. Meenakshi Goyal, AAG, Punjab

1. Whether Reporters of local papers may be allowed to see the judgment? Yes/No
2. To be referred to the Reporters or not? Yes/No
3. Whether the judgment should be reported in the digest? Yes/No

Raj Rahul Garg, J. (Oral)

This order shall dispose of two appeals bearing No. CRA-S-61-SB-2003 and CRA-S-2007-SB-2002 as both the appeals arise out of one judgment.

By preferring the aforesaid appeals, both the accused-appellants have challenged the judgment and order dated 09.10.2002, whereby they have

been convicted for an offence punishable under Section 15 of the Narcotic Drugs and Psychotropic Substance Act, 1985 (for brevity 'the NDPS Act') and sentenced to undergo RI for ten years and to pay a fine of ₹ 1 lakh each, with default clause of RI for two years. It was further observed that the period of detention already undergone by them during investigation and trial, be set off from the sentence awarded.

In nutshell, the case of the prosecution is that on 14.05.1999, ASI Malkiat Singh along with HC Chaman Lal and other police officials was going by Government Canter in connection with patrolling towards village Raiya, when the police party was at a distance of 20 karms ahead of turning, Nachhatar Singh, Member Panchayat, met the police party and he was associated in the party. When the police party was talking to him, two persons were found standing in the Chari Crop and on seeing the police party, they sat down. On the basis of suspicion, police tried to apprehend them. Mithu Singh accused was apprehended at the spot while Bhola Singh accused managed to escape through the fields behind the houses. Investigating Officer having suspicion of some contraband in the nine bags lying there, gave option to accused Mithu Singh of being searched either before some Gazetted Officer or Magistrate upon which the accused consented for his search to be conducted before any Gazetted Officer. Consent statement (Ex.PL) of the accused was prepared which was signed by accused and attested by the PWs. Thereafter, on wireless message, DSP Sohan Singh reached the spot. Investigating Officer introduced the accused and independent witness to DSP Sohan Singh who also disclosed his identity as DSP and a Gazetted Officer to the accused. DSP also gave option to the accused of being searched before any other Gazetted Officer or Magistrate but the

accused reposed confidence in him. Consent memo of accused (Ex.PA) was prepared, which was signed by accused and attested by other PWs. Then on the directions of DSP, Investigating Officer conducted the search of all the nine bags which were found containing poppy husk. 250 grams of poppy husk was taken out as sample from each bag. The sample and the bags weighing 34 Kgs. 750 grams of poppy husk each were then sealed by the Investigating Officer with his seal bearing impression 'MS'. Seal impression Ex.P1 was prepared. All the parcels and sample seal were taken into possession vide memo Ex.PB attested by PWs. Personal search memo (Ex.PC) of accused Mithu Singh was prepared. Ruqa (Ex.PN) was sent to the Police Station, on the basis of which formal FIR (Ex.PN/1) was recorded. Statements of witnesses were recorded. Rough site plan (Ex.PM) was prepared and accused were arrested vide memo Ex.PD. On return to police station, the entire case property and sample seal along with accused were produced before SHO Janak Singh vide Memo (Ex.PF), who after verification of facts, affixed his seal on all the parcels and sample seal and kept the case property in custody. On the next date, SHO Janak Singh produced the accused and case property before the Illaqua Magistrate vide application (Ex.PG). On 19.5.1999, the sample parcels and sample seal were sent to the office of Chemical Examiner through Constable Kulwant Singh and on receipt of report (Ex.PK) of Chemical Examiner and after completion of investigation, challan against both the accused was presented in the court, as accused Bhola Singh was arrested in this case later on.

A prima facie case for an offence under Section 15 of the NDPS Act was found out against both the accused and they were accordingly charge sheeted to which they pleaded not guilty and claimed trial.

After taking prosecution evidence, statements of accused under Section 313 Cr.P.C. were recorded to which both the accused denied each allegation of the prosecution and pleaded their innocence. Accused Mithu Singh stated that he is falsely implicated at the instance of Nachhattar Singh PW. Accused Bhola Singh took the defence that Sadhu Singh resident of his village was Namberdar of his patti. He was inimical towards him. He had a fight with him. He was a tout of the police. He was indulging in nefarious activities. For that reason he was suspended from Namberdari. He thought that the appellant was instrumental in his suspension in collusion with police. He got him involved in this case. As per Bhola Singh, field in question does not belong to him nor he had sown chari crop there. He has no connection or link with co-accused nor he had run away from the spot. He being a bulkyman was suspected by large number of young police officials. As such, they have implicated him falsely in this case at the instance of Namberdar Sadhu Singh.

In defence, the appellant examined Nachhattar Singh son of Karnail Singh as DW1 and Veer Singh son of Bhajan Singh as DW 2.

After hearing learned Public Prosecutor for the State and both the counsel for the appellants and appraisal of entire evidence and material coming on record, the learned trial Court recorded the judgment of conviction which is dated 9.10.2002 and rendered order on sentence of the even date whereby, they were sentenced to undergo RI for 10 years each and to pay fine of ₹ One lakh each with default clause of RI for 2 years for committing an offence punishable under Section 15 of 'the NDPS Act'. Benefit of Section 428 of Cr.P.C. was also given to the appellants.

Assailing the impugned judgment of conviction and order on

sentence dated 9.10.2002, the appellants have come up in this Court by filing two separate appeals.

I have heard Mr. Surinder Garg, Advocate for appellant Bhola Singh, Mr. H.S. Rakhra, Advocate, for appellant Mithu Singh besides Ms. Meenakshi Goyal, AAG, Punjab and have also appraised the entire material coming on record.

Mr. H.S. Rakhra, Advocate for appellant Mithu Singh contended that the appellant cannot be said to be in conscious possession of the contraband. Mere presence at the spot is not enough to prove the conscious possession of the appellant. Place from where the recovery was effected, belongs to Bhola Singh appellant. As such, the possession of appellant Mithu Singh cannot be said to be in conscious possession.

Mr. Surinder Garg, Advocate for appellant Bhola Singh contended that there is no material on the file to show the khasra numbers of the land where the alleged contraband was said to be lying. In the absence of the same, it cannot be said that the land/field where the contraband was lying, belongs to Bhola Singh appellant. Above all, Bhola Singh was not apprehended at the spot. He has been falsely implicated at the instance of Sadhu Singh, Nambardar of his patti with whom he was having inimical relations as he was suspecting that his Namberdari was suspended on account of Bhola Singh appellant.

The above contentions of learned counsel for the appellants, is not sustainable. Of course, it is the prosecution case that on seeing the police party, the appellants concealed themselves in chari crop by sitting down. On suspicion, when the police party was going near them, one of them had fled away from the spot whereas the other one i.e. Mithu Singh appellant was

apprehended at the spot. It is not the case of the prosecution that Bhola Singh was not known to the police party or that they could not identify him. ASI Malkiat Singh as PW 4 categorically stated that the person who had fled away from the spot, was known to him personally. He was Bhola Singh son of Bachan Singh resident of village Raiya. As such, the contention of learned counsel for appellant Bhola Singh that since the Investigating Officer admitted that he did not register a case against Bhola Singh prior to the present case and had also not interrogated him in any other case nor kept him as witness nor raided his house, therefore, he cannot identify Bhola Singh appellant at the spot, is not sustainable. In *ruka Ex.PN*, on the basis of which formal FIR *Ex.PN/1* was recorded, there is a mention about the name of Bhola Singh appellant as the one who had fled away from the spot. Thus, when the name of Bhola Singh appellant appeared in the FIR itself and when later on he was arrested in this case, there remains no doubt about the identity of Bhola Singh appellant. Under these circumstances, the contention of learned counsel for appellant Bhola Singh that since he had fled away from the spot, therefore, in the absence of identification parade, it cannot be said that Bhola Singh is the one who was actually present at the spot or that he is one who had fled away from the spot, is not sustainable.

As both the appellants were found present near contraband, which was 9 bags of poppy husk, each bag containing 35 Kgs.; and further, as they were hiding themselves behind the aforesaid bags of poppy husk on seeing the police party, therefore, the appellants are the one who were in conscious possession of 9 bags of poppy husk. The Investigating Officer got prepared site plan of the spot as *Ex.PR* from Patwari Halka Mehraj Patti, Saul. After seeing

Akshlatha of village Raiya, he prepared the site plan showing Mustil No. 108 Khasra No. 22/2 as the land where the contraband was allegedly lying. At the instance of the witnesses of this case, PW5 prepared the site plan. Ex.PS-Jamabandi for the year 1995-96 shows Bhola Singh appellant as one of the owners of Rectangle No. 108, Killa No. 22/2. Thus, with this evidence on the file, prosecution has succeeded in showing that the land in which contraband was found, is owned by Bhola Singh appellant. DSP Sohan Singh as PW1 also deposed during the cross examination that the owner of the field from which recovery effected, was Bhola Singh accused, present in Court. Thus, when 9 bags of poppy husk each containing 35 Kgs. were recovered from the field belonging to Bhola Singh who was also found near the contraband along with co-accused Mithu, both the appellants are proved to be in conscious possession of 9 bags of poppy husk each containing 35 Kgs.

The contention of learned counsel for appellant Mithu Singh that mere presence is not enough to prove the conscious possession of Mithu Singh appellant is not sustainable as he was also present near the contraband and on seeing the police party, he also hide himself behind the 9 bags of poppy husk, therefore, he is also said to be in conscious possession of the same.

In view of the judgment of **“Gian Chand and others v. State of Haryana, AIR 2013 SC 3395”** it is settled preposition of law that once possession of the contraband article is established, the burden shifts on the accused that he has no knowledge of the same. The accused has to establish how he came to be in possession of the same as it is within his special knowledge and therefore, the case falls within the ambit of the provisions of Section 106 of the Indian Evidence Act, 1872. In this very judgment it was also

observed that from the conjoint reading of the provisions of Sections 35 and 54 of the NDPS Act, it becomes clear that if the accused is found to be in possession of the contraband articles, 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 Indian Evidence 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. This very judgment is also on the point that where all the relevant circumstances are put to the accused, no prejudice can be said to have caused to them if fact of “conscious possession” was not put to them in a case under NDPS Act, while recording statements of accused under Section 313 Cr.P.C.. As such, the contention of learned counsel for the appellants that the factum of conscious possession was not put to the accused while recording their statements under Section 313 Cr.P.C. is also devoid of any force.

It was next contended by learned counsel for the appellants that Nachhattar Singh son of Karnail Singh, Member Panchayat, whose wife is Sarpanch of the village, was joined by the prosecution as witness in this case but did not examine him in the Court. He was given up as having been won over by the accused. He was examined as witness by the police as DW 1. Nachhattar Singh categorically stated that on the day of occurrence, police had come to their village by a Cantre. They were 6-7 in numbers. They made him sign some blank papers, however no recovery was effected from the accused in his presence nor they were arrested by the police in his presence. Thus, statement of Member Panchayat cannot be said to be not reliable. Thus, relying upon his statement, the prosecution case becomes doubtful.

The above contention of learned counsel for the appellants is again

not sustainable. Of course, DW 1 Nachhattar Singh has been examined as witness by the appellants, yet it will be of no help to the case of the appellants. Nachhattar Singh was given up as having been won over by the accused. He also identify his signatures on consent memo Ex.PA, recovery memo Ex.PB, personal search memo Ex.PC, arrest memo Ex.PD and consent memo Ex.PL. DW 1, being Member Panchayat and his wife being Sarpanch, did not pass any resolution in connection with the false implication of the appellants in this case. Had that been the position, they would have done so. Even otherwise in the presence of Nachhattar Singh, Member Panchayat of the village, planting of 9 bags of poppy husk on the appellants is not possible. Veer Singh, DW 2, though deposed in favour of the appellants to the effect that Mithu Singh appellant was arrested by the police at 7.00 A.M. from his house in his presence yet he deposed so as Mithu Singh is his nephew. Thus, being relation witness, he was interested in Mithu Singh appellant. As such, statements of above discussed two DWs is of no help to the case of the appellants and, at least, do not create doubt in the prosecution case, which is otherwise fully established case in view of the statements of ASI Malkiat Singh-Investigating Officer, PW4, DSP Sohan Singh, PW 1 and SI Janak Singh, PW3. The statements of these 3 witnesses are quite consistent and inspire confidence in the mind of the Court regarding guilt of the accused.

The next contention raised by Mr. H.S. Rakhra, Advocate for Mithu Singh appellant that Investigating Officer did not investigate the source of recovered contraband, as such, this also shows the falsity of the prosecution case.

This contention of learned counsel for the appellant is also of no

help to the case of the appellants. It is for the prosecution to investigate to know the source of the contraband but if that is not done, it cannot be said that 9 bags of poppy husk were not recovered from the conscious possession of the appellants. It was also contended by Ms. Meenakshi Goyal, AAG, Punjab that it is very common that the persons who are indulging in narcotic substances bring the narcotic substances in bulk and keep the same temporarily in the fields so that the real culprit may be able to escape as and when need so arises. Nobody would allow these professionals to place contraband in their fields. Of course, this contention of Ms. Meenakshi Goyal, AAG, Punjab carries weight yet for recording conviction it has to be proved beyond reasonable doubt that the appellants were found in conscious possession of 9 bags of poppy husk which the prosecution has succeeded in doing so in this case.

The contention of learned counsel for Bhola Singh appellant that Investigating Officer ASI Malkiat Singh, PW4, deposed that he did not send any special report in this case to any superior officer; is not sustainable as SI Janak Singh, PW 3, categorically stated that special report Ex.PJ was sent by him to senior officers.

The discrepancy pointed out by learned counsel for the appellants on the point of weights and scale and regarding sending of special report, do not create doubt in the genuineness of the prosecution case. The discrepancy regarding weights and scale is minor discrepancy. It hardly makes any difference, if Malkiat Singh, PW4, deposed that the weights and scale were brought by constable after arrival of DSP whereas DSP Sohan Singh states that those were already with the Investigating Officer when he reached there. These are such a spontaneous acts, which if not noticed by Sohan Singh, PW1, a

police officer of the rank of DSP, cannot be said to be fatal for the prosecution case.

No other point was urged before me.

For the reasons recorded above, maintaining the judgment of conviction dated 9.10.2002 and order on sentence of the even date, these appeals are ordered to be dismissed. If the appellants are already on bail, their bail bonds shall stand cancelled and they be taken in custody for serving the remaining period of their sentence. The Chief Judicial Magistrate concerned shall take necessary steps to comply with the judgment, with due promptitude, keeping in view the applicability of the provisions of Section 428 Cr.P.C., and submit compliance report to this Court, within a period of two months from the date of receipt of a copy thereof.

The District & Sessions Judge concerned shall ensure that the directions are complied with, within the time frame and the compliance report is submitted immediately thereafter.

The Registry shall keep track of the submission of compliance reports and put up the papers whether the reports are received or not within the time frame, immediately after the expiry thereof.

(RAJ RAHUL GARG)
JUDGE

20.1.2015
Ashwani