

IN THE PUNJAB & HARYANA HIGH COURT AT CHANDIGARH

CRA-S-1549-SB-2003
Date of decision : 21.01.2015

Surjit Singh and another

... Appellants

Versus

State of Punjab

... Respondent

CORAM: HON'BLE MRS. JUSTICE REKHA MITTAL

Present: Ms.Aarti, Advocate
for Mr.Rajiv Kataria, Advocate
for the appellants.

Mr.Ankur Jain, AAG, Punjab.

REKHA MITTAL, J.

The present appeal has been directed against the judgment of conviction and order of sentence dated 07.07.2003 passed by the Judge, Special Court, Patiala whereby the appellants have been convicted and sentenced for commission of offence punishable under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short 'the Act') pertaining to FIR No.474 dated 21.06.2001 registered in Police Station Samana, Patiala in regard to recovery of five bags of poppy husk containing 35 kgs. each, extracted hereinbelow:-

Name of Convict	Under Section	Sentence (R.I.)	Fine(in Rs.)	In Default (R.I.)
Surjit Singh	15 Narcotic Drugs and Psychotropic Substances Act, 1985	10 years	1 lac	6 months

Name of Convict	Under Section	Sentence (R.I.)	Fine(in Rs.)	In Default (R.I.)
Nidhan Singh	15 Narcotic Drugs and Psychotropic Substances Act, 1985	10 years	1 lac	6 months

The facts relevant for disposal of the present appeal are that on 21.06.2001, ASI Deva Singh along with police party was on patrol duty. When they reached short of revenue limits of village Kukka, the accused were seen sitting on the bags lying on the kacha path leading to right side fields. On seeing the police party, they tried to run away but on suspicion, they were apprehended. They disclosed their names, parentage and address etc. PW Darshan Singh came there on the scooter and he was joined. ASI Deva Singh told the accused that if they so desire, search of the bags can be conducted in presence of some gazetted officer or Magistrate and the accused opted to be searched in presence of a gazetted officer. Their statement to this effect was recorded, signed by them and attested by witnesses. DSP Ashwani Kumar arrived at the spot in pursuance of request made to the Incharge Police Station. The DSP asked the accused that he wanted to conduct search of the bags to which they agreed. Statement of the accused was recorded. On directions of the DSP, ASI Deva Singh conducted search of all the five bags which were found to contain poppy husk. On weighment, each bag contained 35 kgs. of poppy husk. Two sample of 250 grams from each bag were separated and made into parcels. The parcels were sealed with the seal bearing impression 'DS' of ASI Deva Singh and 'AK' of DSP Ashwani Kumar. Specimen seal impression was also prepared.

ASI Deva Singh sent ruqa to the Police Station for registration

of case on the basis whereof, formal FIR was recorded. Site plan of the place of occurrence was prepared, statement of witnesses were recorded and the accused were arrested after serving grounds of arrest. On return to the Police Station, ASI Deva Singh produced the accused along with case property before SHO Balwinder Singh who verified the investigation and put his seal bearing impression 'BS' on the entire case property. The case property was deposited with MHC with seals intact. On the next day, both the accused along with case property were produced before the Duty Magistrate, Patiala and on return to the Police Station ASI Deva Singh deposited the case property with MHC with seals intact. On receipt of report of Forensic Science Laboratory and completion of necessary investigation, challan was presented in the Court for commencement of trial.

The accused were supplied with copies of documents as envisaged under Section 207 Cr.P.C. Finding a prima-facie case under Section 15 of the Act, the accused were charged for the aforesaid offence to which they pleaded not guilty and claimed trial.

To prove its case, the prosecution examined as many as six witnesses namely DSP Ashwani Kumar PW1, HC Sahib Singh PW2, ASI Deva Singh PW3, HC Satnam Singh PW4, Inspector Balwinder Singh Bajwa PW5 and Constable Daljit Singh PW6.

Both the accused were separately examined under Section 313 Cr.P.C. and in their statements, they denied incriminating circumstances appearing in evidence against them and pleaded their innocence and false implication. However, they did not examine any witness in defence.

On a careful scrutiny of the evidence adduced by the

prosecution and bestowing thoughtful consideration to rival submissions made by counsel for the parties, the trial Court held that the prosecution has successfully proved the charge beyond shadow of reasonable doubt and accordingly the accused were convicted and sentenced, noticed hereinbefore.

Feeling aggrieved by the judgment of the learned trial Court, the present appeal was preferred in the year 2003 which has now matured for hearing.

Counsel for the appellants would submit that case of the prosecution is not free from lacunae, flaws and embellishments and benefit thereof is liable to be extended to the appellants, the real brothers falsely involved in the crime at the behest of DSP Ashwani Kumar who was hostile towards father of the accused. To bring home his contention, counsel had assailed judgment of the trial Court on different counts.

1. The prosecution has failed to prove one of the essential ingredients of the crime that the appellants were in conscious possession of the contraband.
2. There is delay of 13 days in sending the samples to Forensic Science Laboratory, therefore, possibility of samples being tampered with cannot be ruled out.
3. Darshan Singh, a public witness purportedly associated during investigation was not examined which creates a doubt in story of the prosecution.
4. There is no evidence that the appellants or their family are owners of the place where the bags of poppy husk were

lying on which the accused were statedly sitting. The land owners of adjoining land came to the spot but the investigating officer did not obtain their signatures on any of the documents allegedly prepared at the time of recovery.

5. Form No.29 (FSL) was not filled in by the investigating officer, on the spot.

Counsel for the State, on the other hand, has supported the judgment of the trial Court with the submissions that grounds on which the appellants have challenged the judgment of the trial Court do not invite consideration much less being meritorious. It is further submitted that minor contradictions in the case of the prosecution cannot outweigh the material evidence adduced as the prosecution is not expected to prove culpability of the accused by mathematical demonstration. There is no error much less illegality in the findings of the learned trial Court, therefore, the judgment of conviction and order of sentence are liable to be affirmed.

I have heard counsel for the parties and perused the records.

To prove recovery of suspect material from the appellants, the prosecution examined DSP Ashwani Kumar PW1, HC Sahib Singh, a marginal witness of recovery PW2, ASI Deva Singh, the investigating officer. These material witnesses were subject to cross-examination at length but nothing tangible and material has been elicited during their cross-examination to create doubt in the alleged recovery from the accused on the fateful day. I would hasten to add that the accused have raised defence plea that a false case has been registered against them as father of the accused failed to oblige DSP Ashwani Kumar for giving his tractor for the third time

to be used for agricultural operations in the land belonging to aforesaid DSP. DSP Ashwani Kumar was the first witness examined in the case and this plea was raised during his cross-examination but he altogether denied the facts put to the witness. The same plea was reiterated by the accused in their statements under Section 313 Cr.P.C. There is nothing on record to suggest that the appellants or their family members ever raised their grievance against false implication of the accused at the behest of DSP Ashwani Kumar by submitting any applications before higher police authorities much less before this Court. The father of the appellants did not appear in the witness box to substantiate plea of the accused that DSP Ashwani Kumar ever asked for his tractor or was actually given tractor two times and on refusal for third time, he invited wrath of said Ashwani Kumar resulting in false implication of his sons in the present case.

The accused in their statement under Section 313 Cr.P.C. in concluding para stated, quoted thus:-

“The police party came to our village on 22.06.2011 and in the presence of Sarpanch, Panch, Lambardar and other respectable of the vilalge, our father and relatives took us to the police station for interrogation at about 11/12 noon. Thereafter, they did not release us from custody and planted this false case on both of us. Police never came to our village in the mid night of 21.06.2001 and no such incident has ever happened. DSP Ashwani Kumar, who owns the land in our adjoining villages, had earlier taken away the tractor trolly of our father Raghbir Singh, who obliged him twice for cultivation of the land. It is only on account of refusal for the third time to give him tractor and trolly and plough for the purpose of cultivation and then the present case was

falsely implanted upon us.”

There is no evidence on record as to in which village, DSP Ashwani Kumar is owning land. The accused have not examined the Sarpanch, Panch, Lambardar or any other respectable of the village to probablise their plea that they were taken to the police station on 22.06.2001 and later false recovery has been planted against them. In this view of the matter, I find myself unable to accept submission of counsel for the appellants that the accused have been falsely indicted in the crime and a huge recovery of 175 kgs. of poppy husk was planted against them.

This brings the Court to challenge opened on certain legal issues raised by counsel for the appellants. As per case of the prosecution, the accused were found sitting on the bags of poppy husk lying on kacha rasta leading to fields of right side. On seeing the police party, they tried to escape. As the accused were found sitting on the bags of poppy husk without any explanation as to the circumstances under which they were present there and sitting on those bags, evidence on record is sufficient to establish that the accused were found in possession of incriminating recovery. So far as the contention of learned counsel that the prosecution is enjoined upon to prove the factum of conscious possession and failure to do so would enure to benefit of the accused, the same is misconceived and liable to be rejected. This issue cropped up before Hon'ble the Apex Court in ***State of Punjab Vs. Hari Singh and others, 2009(2) RCR (Criminal) 143.*** In the said case, a question was raised in similar circumstances, whether the accused were found in conscious possession of contraband.

Hon'ble the Supreme Court in paras 13 to 17 has held, quoted hereinbelow:-

“13. The expression ‘possession’ is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different backgrounds. It is impossible, as was observed in Superintendent & Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunja and Ors. (AIR 1980 SC 52), to work out a completely logical and precise definition of “possession” uniformly applicable to all situations in the context of all statutes.

14. The word ‘conscious’ means awareness about a particular fact. It is a state of mind which is deliberate or intended.

15. As noted in Gunwantlal v. The State of M.P. (AIR 1972 SC 1756) possession in a given case need not be physical possession but can be constructive, having power and control over the article in case in question, while the persons whom physical possession is given holds it subject to that power or control.

16. The word ‘possession’ means the legal right to possession (See Health v. Drown (1972) (2) All ER 561 (HL). In an interesting case it was observed that where a person keeps his fire arm in his mother’s flat which is safer than his own home, he must be considered to be in possession of the same. (See Sullivan v. Earl of Caithness (1976 (1) All ER 844 (QBD).

17. Once possession is established the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles. This position was highlighted in Madan Lal and Anr. v. State of Himachal Pradesh (2003 (6) SCALE 483).”

A perusal of the observations made by Hon'ble the Supreme Court would reveal that once possession is established, the person, who claims that it was not a conscious possession, has to establish it, because how he came to be in possession is within his special knowledge. The Court has relied upon the presumptions available in favour of the prosecution under sections 35 and 54 of the Act.

The samples were sent to the Forensic Science Laboratory 13 days after the alleged recovery on 21.06.2001. The case property was initially sealed with the seals bearing impression 'DS' of ASI Dewa Singh and 'AK' of DSP Ashwani Kumar. On the very same day, the entire case property was produced before Inspector Balwinder Singh Bajwa for verification of investigation and he affixed his seal on the case property. There is nothing on record to suggest that the investigating officer ever had an opportunity to get hold of seal of DSP Ashwani Kumar and Inspector Balwinder Singh Bajwa before the samples were sent for analysis by the MHC of the police station concerned. This apart, the report of the Forensic Science Laboratory proves that seals on the sample were found intact and tallied with the sample seals when the parcels were received in the laboratory. In absence of any evidence that seals were not intact or tampered with, delay of 13 days in sending the sample to the laboratory is of no significance much less fatal to the prosecution. In this context, reference can be made to judgment of Hon'ble the Supreme Court of India ***Hardip Singh Vs. State of Punjab, 2008(4)RCR (Criminal) 97*** wherein it has been held that delay of 40 days cannot be said to be fatal to the prosecution case when there was sufficient link evidence led by the prosecution to prove that seal on the sample parcel remained intact and contents thereof were not

tampered with. In view of the enunciation of law laid down by Hon'ble the Supreme Court of India, there is no gainsaying that mere delay in sending the sample to the chemical examiner would not enure to benefit of the accused nor he can be acquitted on this ground provided that there is sufficient link evidence to demonstrate that the contents of the sample parcel(s) were not tampered with.

Darshan Singh, a public witness was associated during investigation but he was given up having been won over by the accused. It is unfortunate that invariably people from public do not agree to associate during police investigation, may be because of fear of animosity against the accused or harassment during trial. Conversely, if a public witness agrees to join, he seldom comes forward to depose in the Court much less in favour of the prosecution as he is easily accessible to the accused. The Court cannot turn a blind eye to this hard reality, therefore, non examination of the public witness cannot be taken seriously unless there are other materials on record to entertain the prosecution case with suspicion. The accused in the case have raised a plea that DSP Ashwani Kumar was annoyed with his father for his refusal to give the tractor trolley but there is no evidence to substantiate plea of the accused. As has been noticed hereinbefore, father of the accused did not appear in the witness box to state these facts on oath providing an opportunity to the prosecution to challenge his veracity and correctness of his plea. This apart, there is no evidence on record that father of the accused was owning a tractor trolley at the time of occurrence or prior thereto. There is no dispute that if the prosecution hinges on testimony of official witnesses only, their statements are to be scrutinized with more care and

caution to rule out possibility of false implication. Equally true is that statements of the official witnesses cannot be discarded merely because they are members of the police force. There is no principle in law that if statements of official witnesses inspire confidence in the mind of the Court and worthy of reliance, conviction cannot be based upon their testimony without looking for corroboration. In this view of the matter, I do not find any fault in the judgment of trial Court on the premise that Darshan Singh, a public witness has not been examined.

Counsel has submitted that the prosecution has not proved ownership of the place from which the recovery has been effected. It is not the case of the prosecution that the said area belongs to a private person. Even otherwise, once the recovery has been effected from the accused who were noticed sitting on the bags, the contention raised by the appellants is untenable.

Counsel has made a feeble attempt to point out that form No.29 was not filled in by the investigating officer at the place of recovery. It is not mandatory that Form No.29 must be filled in by the investigating officer at the place of recovery. Therefore, failure of the investigating officer to fill in form No.29 at the spot assumes no consideration.

No other point has been raised.

In view of what has been discussed hereinabove, finding no merit, the appeal fails and is accordingly dismissed. The accused, if on bail, be taken into custody to suffer the remaining sentence.

(REKHA MITTAL)
JUDGE

January 21, 2015.

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