

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

**CRA No.S-2117-SB-2003 (O&M)
Date of decision:20th October, 2015**

Bawa Singh

...Petitioner

Versus

State of Punjab

.... Respondent

CORAM: Hon'ble Mr. Justice P.B. Bajanthri

1. Whether Reporters of local papers may be allowed to see the judgment?
2. Whether to be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

Present: Mr. P.S.Sekhon, Advocate for the appellant.

Mr. Yogesh Gupta, AAG, Punjab.

P.B. Bajanthri, J.

This criminal appeal is directed against the judgment of conviction and order of sentence dated 7th November, 2003 passed by the learned Judge, Special Court, Sangrur, whereby the appellant has been convicted for offence punishable under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter for short referred as the 'NDPS Act') and sentenced to undergo rigorous imprisonment for 8 months and to pay fine of Rs.2000/- and in default, to further undergo rigorous imprisonment for one month. The period for which the appellant has already remained under detention during the trial proceedings was ordered to be set off against the substantive sentence.

2. The prosecution case, as unfurled, is that on 11th March, 1999 ASI Sukhdev Singh, SHO, P.S.City, Sunam along with HC Gurjant Singh and other police officials was out on patrolling duty in an official vehicle

bearing registration no. PB-13-B-1583, being driven by Constable Mann Singh and was proceeding from Rest House, Sunam towards Sheron crossing, when the police party reached at the bridge of seepage drain, in the area of town Sunam, accused was sighted coming from the side of Lakhmirwalla road, carrying a white bag, who on seeing the police party got perplexed and tried to back track. On suspicion, accused was apprehended by the Investigating Officer with the help of other members of the police who were accompanied. In the meanwhile PW Sukhdev Singh s/o Puran Singh, Jat resident of Village Ugrahan came there, who was associated with the police team. Being interrogated, name of the accused came to be known as Bawa Singh son of Yupa Singh, resident of Balianwali, P.S.Sadar, Mansa. Investigating Officer told the accused that he is suspected of carrying some intoxicant in the bag and search of the same was to be conducted and if he so desired then any Gazetted Officer or Magistrate could be called at the spot. Since appellant reposed confidence in the Investigating Officer, as such, consent statement of accused EX.PB was recorded, which was thumb marked by accused and attested by PW Sukhdev Singh and HC Gurjant Singh. When bag of the appellant was searched, poppy husk was found. 250 grams of poppy husk packets were prepared for examination and remaining poppy husk to the extent of 7.5 kg were kept in the bag and seized in accordance with sealing procedure.

3. Recovery memos were drawn and eventually they were sent for chemical examination. Appellant- Bawa Singh was arrested on 11.03.1999 by ASI Sukhdev Singh, PW-2. In the course of investigation, the investigating agency recorded statements of certain witnesses, obtained FSL

report and ultimately placed the charge sheet before the jurisdictional magistrate, who in turn committed the matter to the Special Court, Sangrur, under the NDPS Act. The appellant pleaded not guilty and claimed to be tried in the matter.

4. The prosecution in order to substantiate the charge, examined as many as 7 witnesses. The prime witnesses are PW-2 -Investigating Officer [Sukhdev Singh -ASI] and PW-7-Independent witness - [Sukhdev Singh]. The accused-appellant took the plea that PW-7 was brought as witness, since he was cited as witness in other cases also. Therefore appellant was falsely implicated in the case and there was no recovery effected from him. The defence in support of its stand examined Ex.D1 and Ex.D2.

5. The learned trial court after appreciating the evidence on record found appellant guilty of the offence and sentenced him, as has been stated hereinbefore. Being not satisfied with the judgment of conviction and order of sentence, the appellant preferred this criminal appeal.

6. The learned counsel Mr. P.S.Sekhon for appellant contended that sentencing appellant is wrong, illegal, contrary to factual aspects and evidence on file. Judgment of the trial court is based on presumptions and assumptions. Hence Judgment is to be set aside. Independent witness PW -7 is an interested witness as is evident that he has been cited as witness in some other cases also. Therefore his evidence is unbelievable. It was further contended that provisions of NDPS Act have not been complied like Section 50 and there is a delay in sending seized poppy husk to chemical examiner. Lastly it was contended that he was in custody for about 5 months 19 days as per the custody certificate filed by Sh.Sher Singh Sodhi, Deputy

Superintendent, District Jail, Sangrur as on 11.02.2015. Therefore the sentenced be reduced to the extent he was already in custody.

7. Per contra, learned State Counsel has opposed the appeal contending that possession and recovery of poppy husk of about 8 kg from the appellant was undisputed. Once it is established that an accused is in possession of contraband substance, the burden to prove that he had no knowledge of the same, shifts to the accused/appellant to prove the same. However, in the present case, the appellant has failed to establish that he did not possess the contraband substance.

8. I have considered the rival submissions made by learned counsel for the parties and perused the records.

9. No dispute has been raised regarding recovery of puppy husk from the appellant/accused. Further the appellant did not challenge the result shown in the FSL report.

10. The appellant was in possession of the poppy husk for about 8 Kgs and the same was not doubted in any manner by the appellant. Therefore, once the possession of the accused and his control over the contraband, was proved, then statutory presumption under Section 54 and 35 of the Act operated against him, that he was in conscious possession thereof. Thereafter, it was for him to rebut the statutory presumption, by leading cogent and convincing evidence. However, the appellant failed to rebut the said presumption either during the course of cross examination of the prosecution witnesses, or by leading defence evidence.

11. Further the appellant in his statement under Section 313 Cr.P.C., took the plea of falsely implicating him and he miserably failed to

rebut the statutory presumption. Therefore, statement under Section 313 do not support the plea of the appellant.

12. The appellant's contention that PW7-independent witness is an interested witness since he has been cited as witness in other cases. PW7-independent witness may be cited as witness in some other cases, that itself is not a good ground in the present case, for the reasons that recovery of poppy husk of 8 kgs from the appellant is undisputed. Therefore, even if the evidence of PW7 is discarded it is evident that possession of poppy husk by the appellant is not disputed, which is sufficient to punish him.

13. The Apex Court in the case of ***Madan Lal and another versus State of Himachal Pradesh***, 2003(4) RCR (Criminal) 100, observing that Section 20(b) makes possession of contraband articles an offence. Section 20 appears in Chapter IV of the Act, which relates to offences and penalties for possession of such articles. Undoubtedly, in order to bring home the charge of illicit possession, there must be conscious possession. The expression 'possession' has been held to be a polymorphous term having different meanings in contextually different backgrounds. Therefore, its definition cannot be put in a straitjacket formula. The word 'conscious' means awareness about a particular fact. It is a state of mind which is deliberate or intended. Possession in a given case need not be actual physical possession and may be constructive i.e. having power and control over the article in case in question, while the person to whom physical possession is given holds it subject to that power or control. It was further held as under:-

“Once possession is established the persons 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 is 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... It has not been shown by the accused-appellants that the possession was not conscious in the logical background of Sections 35 and 54 of the Act.”

14. From reading of the provisions of Section 35 and 54 of the Act, it is crystal clear that if the accused is found to be in possession of the contraband article, he has presumed to have committed the offence under the relevant provisions of the Act. Having regard to the Section 35 of the Act, the court shall presume the existence of a mental state for the commission of an offence and it is for the accused to prove otherwise.

15. In view of the above, it is settled and legal proposition that once possession of the contraband articles is established, the burden shifts on the accused to establish that he had 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 knowledge and therefore, the case falls within the ambit of the provisions of Section 106 of the Evidence Act, 1872. Recovery proceedings are in accordance with law. Prosecution case has been supported by PW2 and PW7 evidences. PW7 is an independent witness. More so, appellant/accused is supposed to explain his conduct while making his statement under Section 313 Cr.P.C. particularly where there are certain presumptions against him under Section 35 of the Act.

16. The learned counsel for the appellant contended that appellant has been sentenced on 07.11.2003 and this Court granted bail on 23.01.2004

therefore, the appellant was in custody for a period of 5 months and 19 days i.e. 2 months and 22 days (custody as under trial) and 2 months and 27 days (custody after conviction). Therefore, the penalty be reduced from 8 months to already undergone imprisonment of 5 months and 19 days. He further contended that the appellant is not involved in any other case therefore, he be released on probation.

17. The appellant has undergone imprisonment for a period of 5 months and 19 days. He is not involved in any other offences from 2003 till 11.02.2015 as per the custody certificate of Sher Singh Sodhi, District Superintendent, District Jail Sangrur. No doubt leniency in the matter is not attracted having regard to the offence and penal provisions is concerned. Since the appellant is required to undergo remaining sentence of 2 months and 11 days. At this distance of time, it is not fair to send the appellant to undergo the remaining period of 2 months and 11 days since, the charge relate back to 11.03.1999 , convicted on 07.11.2003 and sentence was stayed by this Court in 2004. Hence, the rigorous imprisonment of 8 months is reduced to 5 months and 19 days for period which the appellant has already undergone imprisonment. However, imposition of fine of Rs.2000/- by the trial Court is enhanced to Rs.25,000/- from the appellant. If the fine of Rs.25,000/- is not paid, the concerned authority/authorities is/are directed to take the appellant into custody to serve the remaining sentence period of 2 months and 11 days.

18. Accordingly appeal is disposed of.

20th October, 2015
pooja saini

(P.B.BAJANTHRI)
JUDGE