

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

(1) CRA S-1681-SB of 2004.
Date of Decision: 07.04.2017.

Uggersain

... Appellant

Versus

State of Haryana

... Respondent

(2) CRA S-1718-SB of 2004.

Krishan Kumar

... Appellant

Versus

State of Haryana

... Respondent

CORAM : Hon'ble Mr. Justice Jitendra Chauhan

Present : Mr. Daldeep Singh, Advocate,
for the appellant in CRA S-1681-SB of 2004.

Mr. Atul Lakhanpal, Sr. Advocate with
Mr. Arjun Lakhanpal, Advocate,
for the appellant in CRA S-1718-SB of 2004.

Mr. Naveen Kaushik, Addl. AG, Haryana.

JITENDRA CHAUHAN.J.

This judgment shall dispose of afore-mentioned two appeals bearing CRA S-1681-SB of 2004 and CRA S-1718-SB of 2004 as these have arisen out of common judgment dated 07.08.2004 and order dated 09.08.2004 passed by Additional Sessions Judge, Fatehabad vide which the accused-appellants were convicted and sentenced as under:-

Offence	Sentence	Fine	In default
15 of NDPS Act	RI for 10 years	One lac	RI for one year

In brief the case of the prosecution as mentioned in the judgment passed by the trial Court is as under:-

“Brief facts of the prosecution case are that on 02.06.2003, SI Khayali Ram along with police party was present at bus sand Jandli Khurd. He was talking with one Rajinder Singh when he received a secret information that present two accused were habitual in dealing in poppy husk and both of them are today present near Chanderwal minor with three bags of poppy husk and could be caught red handed. So a raiding party was organized and they reached the spot. Both the accused were found present near the said Chanderwal minor besides three gunny bags. They were apprehended. On search of the bags, it was found containing poppy husk weighing 40 kg each. So the present case was got registered against the accused. I.O. Recorded the statements of the witnesses, prepared rough site plan, arrested the accused and on completion of investigation, present challan was filed against the accused and a copy thereof was supplied to the accused.”

On the presentation of challan, copies of documents as required under Section 207 Cr.P.C were supplied to the accused free of cost.

Charge under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short “the Act”) was framed against the accused to which the accused pleaded not guilty and claimed trial.

In order to prove its case, the prosecution examined PW-1, SI Shamsheer Singh, PW-2, ASI Ajad Singh, PW-3 HC Ramesh Chander, PW-4 HC Kheta Ram, PW-5 ASI Chhelu Ram, PW-6 Ram Ji Lal, PW-7 HC Gurcharan Singh, PW-8 SI Khayali Ram and thereafter closed its evidence.

The statements of accused were recorded under Section 313 Cr.P.C in which all the incriminating circumstances appearing in the prosecution evidence were put to the accused which the accused denied and pleaded false implication.

No defence evidence was led by the accused.

After appraisal of the evidence, the trial Court vide impugned judgment dated 07.08.2004 and order dated 09.08.2004, convicted and sentenced the accused as narrated above.

Feeling aggrieved against the judgment dated 07.08.2004 and order dated 09.08.2004, passed by the trial Court, the accused have filed the instant two appeals.

On behalf of accused-appellant, Uggersain, it is

submitted that there is contradiction in the statements of the witnesses.

PW-8, SI Khyali Ram, who has stated that the weighing material was with the police party at the time of raid whereas, PW-7, HC Gurcharan Singh has deposed that the driver of the vehicle had brought the weighing material from village Jandli Khurd. It is further contended that accused Uggarsain was not found in conscious possession of the contraband because as per the case of the prosecution, Uggarsain was sitting near the bags. It is further contended that there is violation of Section 52(3)(a) of the Act as after the arrest, the accused ought to have been produced before the Officer in charge of the Police Station. Independent witness, Rajinder Singh was not examined in the Court. The statement of the accused recorded under Section 313 Cr.P.C wherein no question with regard to conscious possession was put to the accused. The seal after use was handed over to HC Gurcharan Singh which was returned to the I.O after a week. The sample was sent for analysis on 10.06.2003 i.e. after eight days of the recovery. The seal was with the investigating officer on 10.06.2003. Form No.29 was not filled in on the spot.

On behalf of accused-appellant, Krishan Kumar, it is contended that it was a case of secret information. As per the provisions of Section 42 of the Act, information was required to be sent to the higher officer(s). The provision of Section 42 of the Act has not been complied with. It is further contended that the the investigating officer has failed to enquire about the source of the contraband. The

investigating agency was obliged to inquire about the ownership of the contraband.

On the other hand, the learned State counsel contends that the prosecution has successfully established its case against both the accused. The Court below has rightly convicted and sentenced the accused/appellants. There is no major contradiction. The accused have not led any evidence to disprove the case of the prosecution.

I have heard the learned counsel for the parties and have gone through the case file.

The foundation of the instant case has been laid on the secret information passed on by Rajinder Singh, Ex. Sarpanch that Krishan Kumar and Uggarsain deals in the business of selling poppy husk. On the basis of the same, a raid was conducted and the accused/appellants were nabbed. As per the case of the prosecution, Krishan Kumar was sitting on the bags whereas, Uggarsain was sitting nearby the bags. While appearing in the witness box, I.O. Khyali Ram, PW-8 deposed that the weighing material was with the police party whereas, PW-7 HC Gurcharan Singh, a witness of the recovery deposed that the weighing material was arranged from village Jandli Khurd. Further, the conscious possession of the accused-appellants has not been proved. Accused Krishan Kumar was allegedly sitting on one of the bags whereas, the remaining two bags were not in his possession. Accused Uggarsain is stated to have been there near the bags. PW-7, HC Gurcharan Singh, a recovery witness, has admitted that no evidence

was collected on the spot except that the accused was seen sitting on the bags. Further no question was put to the appellants in the statements recorded under Section 313 Cr.P.C that they were allegedly found in conscious possession of the three bags of poppy husk allegedly recovered from the spot. This has resulted in prejudice to the defence of the appellants. Reliance in this regard can be placed on the judgment passed by this Court in **Jaswinder Singh @ another vs. State of Punjab 2013(1) RCR (Criminal) 257 P&H.** The relevant portion of the judgment is as under:-

“Similarly in the statements of the accused recorded under Section 313 Cr.P.C., the word 'conscious' is missing. The prosecution is not only to prove that the accused were in possession of the contraband, but it is the bounden duty of the prosecution to specifically prove that the accused were in 'conscious' possession of the contraband. The accused were not put to question as to whether they were in 'conscious possession' of the poppy husk. This omission has resulted in prejudice to the defence of the accused-appellants.”

The accused cannot be said to be in conscious possession of the contraband. Hon'ble the Supreme Court in **State of**

Punjab vs. Balkar Singh 2004(3) SCC 582 wherein two persons were

found sitting on 100 bags of poppy husk held as under:-

“the police did not make any investigation as to how these 100 bags of poppy husk were transported to the place of incident. They also did not adduce any evidence to show the ownership of the poppy husk. The presence of the respondent at the place from where the bags of poppy husk recovered itself was taken as possession of these bags by the police. In fairness, the police should have conducted further investigation to prove that these accused were really in possession of these articles. The failure to give any satisfactory explanation by the accused for being present on that place itself does not prove that they were in the possession of these articles. Though the respondents raised this plea before the Sessions Court, the same was not considered by the Sessions Judge in the manner, in which it should have been considered. We do not think that the High Court erred in holding that there was no evidence to prove that the respondents were in conscious possession of the poppy husk recovered by the police. The prosecution failed to discharge its obligation to prove the possession of the poppy husk by the

respondents.”

Further, on 10.06.2003 when the sample was sent for analyses, the seal was with the I.O. The possibility of tampering with the samples by the police officials cannot be ruled out. In **Didar Singh @ Dara vs. State of Punjab 2010(3) RCR (Criminal) 337** Hon'ble the Division Bench of this Court held that where the seal remained with the police official after use and the CFSL form was not prepared at the spot, it creates a serious doubt in the prosecution case as filing of such form is a very valuable safeguard to ensure that the sealed sample is not tampered with till the contraband is analyzed by the Forensic Science Laboratory. It was further held that the seal not given to the independent witness but kept with the investigating officer or with the raiding party is also fatal to the prosecution case as in that situation, the possibility of the sealed contraband and the sample being tampered with, cannot be ruled out.

Even the secret information suggests that the appellants are habitual offenders whereas, as per the record, the appellants are not involved in any other case. This being so, this Court feels that the prosecution has failed to prove its projected case beyond shadow of reasonable doubt. Consequently, the present appeals are allowed. The impugned judgment and order are set aside. The accused/appellants are acquitted of the charges framed against them.

The bail-bonds and surety bonds stand discharged.

Both the appeals are allowed.

07.04.2017.
SN

(JITENDRA CHAUHAN)
JUDGE

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No