

IN THE HIGH COURT OF PUNJAB AND HARYANA AT  
CHANDIGARH

CRA-S-4396-SB-2014 (O&M)  
Date of decision: 06.08.2018

Kewal Singh

... Appellant

Vs.

State of Punjab

... Respondent

**CORAM: HON'BLE MR. JUSTICE ARVIND SINGH SANGWAN**

Present: Mr. Sukhmeet Singh, Advocate (Legal aid counsel)  
for the appellant.

Mr. Sidakmeet Sandhu, AAG, Punjab.

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**ARVIND SINGH SANGWAN, J. (ORAL)**

Prayer in this appeal is for setting aside the judgment of conviction dated 06.08.2014 passed by the Judge, Special Court, Fatehgarh Sahib, vide which the appellant was held guilty of offence punishable under Section 15 of The Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'NDPS Act'), for having found in possession of 52 kg of poppy husk, in FIR No.104 dated 20.08.2012 under Sections 15/61/85 of NDPS Act, Police Station Sirhind and vide order of sentence of even date, he was awarded R.I. for 10 years and to pay a fine of Rs.1,00,000/-. In default of payment of fine, the appellant was further ordered to undergo one year R.I.

This appeal was filed by a legal aid counsel appointed by the High Court Legal Services Committee and is in the category of cases, which are listed on Saturdays as special category cases.

Brief facts of the case are that on 20.08.2012, ASI Sukhwinder Singh along his co-officials, while on patrol duty on a private vehicle, was

present in Village Bhamarsi near a Petrol Pump. At about 8.30 a.m., two persons were seen coming from the side of village on a scooter bearing registration No.PB-23-8613. The pillion rider was carrying a plastic bag in his lap. ASI Sukhwinder Singh signalled them to stop and on seeking the police party, both the accused tried to run away, however, the police party apprehended them. On enquiry, the person, who was driving the scooter, informed his name as Paramjit Singh @ Pamma and the pillion rider disclosed his name as Kewal Singh (appellant). Thereafter, ASI Sukhwinder Singh disclosed his identity and apprised both of them that he suspects that they are carrying contraband in their possession and he wants to conduct a search and they have a right to get themselves searched either before a Magistrate or some Gazetted Officer. On this, both the accused persons reposed confidence in the ASI and a joint consent memo Ex.PC was prepared, which was signed by both of the accused persons and it was witnessed by HC Buta Singh and HC Hans Raj. Thereafter, the search of polythene bag was conducted and poppy husk was recovered. Both the accused persons failed to give any satisfactory reply. Thereafter, two samples weighing 250 grams each were prepared and on weightment, residues came to 51 kg 500 gram. Samples and bulk residue were converted into separate parcels and ASI Sukhwinder Singh sealed the same with impression SS and prepared a sample chit Ex.PD and he handed over the seal HC Buta Singh. The recovered contraband was taken in police possession by preparing a recovery memo and a ruqa Ex.PF was sent to the Police Station through HC Hans Raj, on which of which, FIR Ex.PF/1 was registered by ASI Harminder Singh. In the personal search of co-accused Paramjit Singh, Rs.150/- were recovered vide recovery memo Ex.PG and from the personal search of

appellant, Rs.130/- were recovered vide recovery memo Ex.PH. Vide separate arrest memos, both the accused persons were arrested and the site plan was prepared and statements of the witnesses were recorded. Thereafter, ASI Sukhwinder Singh brought the case property along with accused and witnesses to the Police Station and produced them before the SI Deepinderpal Singh SHO, who verified the same and affixed his seal with impression DP as also on the sample chit Ex.PD and the case property was deposited with the MHC of the Police Station. Thereafter, both the accused persons along with case property were produced before the Illaqa Magistrate and an application Ex.PL was moved. One sample of 250 gram was taken out in the Court from the bulk and was kept as representative sample. The said sample and bulk parcel were sealed with seal of the Court. The order Ex.PL/1 was passed by the Magistrate. Thereafter, the case property was redeposited with the MHC. On 21.08.2012, ASI Sukhwinder Singh took the case property from the MHC except the sample parcels and sample chit for depositing the same in the judicial malkhana and the same was sent to the Chemical Examiner. On receipt the report from the Chemical Examiner, challan under Section 173 Cr.P.C. was presented and the charge was framed under Section 15 of the NDPS Act, to which both the accused did not plead guilty and claimed trial.

The prosecution in its evidence recorded the statement of PW1 Constable Kulwinder Singh, who tendered his affidavit Ex.PA regarding deposit of sample parcel.

PW2 HC Avtar Singh also tendered his affidavit Ex.PB. In the cross-examination, this witness stated that he does not know the entry number of register No.19 regarding deposit of case property. It is further stated that the

case property was sent to the Chemical Examiner through Constable Kulwinder Singh.

PW3 ASI Sukhwinder Singh deposed on the lines of the version given in the FIR and stated that he after disclosing his name, identity and designation to the accused persons, informed that he has suspicion of some contraband in their possession and apprised them of their statutory right to be searched before some Gazetted Officer or Magistrate, who can be called at the spot. Both the accused persons reposed confidence on him. Thereafter, he prepared a consent memo Ex.PC, which was signed by both the accused in Punjabi and HC Buta Singh and HC Hans Raj signed the same as witnesses. On search, poppy husk was recovered. Thereafter, he separated the samples of 250 gram each and prepared the parcels of sample and bulk and sealed with his seal impression SS and prepared sample chit Ex.PD and handed over the same to HC Buta Singh. The recovered contraband was taken in police possession vide Ex.PE, which was also signed by the aforesaid two witnesses and then ruqa Ex.PF was sent to the police station through HC Hans Raj, on the basis of which formal FIR Ex.PF/1 was registered by ASI Harminder Singh. This witness further stated that on personal search of accused Paramjit Singh, Rs.150/- were recovered vide recovery memo Ex.PG, which was signed by the accused as well as aforesaid two witnesses HC Buta Singh and HC Hans Raj. Similarly, in the personal search of appellant Kewal Singh, Rs.130/- were recovered vide recovery memo Ex.PH and attested by the same witnesses. Thereafter, arrest memo of the accused Ex.PJ, site plan Ex.PK were prepared at the spot and statements of the witnesses were recorded.

PW3 further stated that on reaching the police station, he produced

the case property, witnesses and accused before SI Deepinderpal Singh SHO, who verified the case property and affixed his seal impression DP on the same and the sample chit Ex.PD and deposited the case property with the MHC. This witness further stated that on the same day, he took the case property from the MHC and produced the accused before the Magistrate by moving an application Ex.PL for verifying the inventory and for seeking permission to deposit the case property with judicial malkhana. A sample of 250 gram was taken out in the Court from the bulk parcel and was sealed as representative sample. The said parcel and bulk parcel were sealed with seal of the Court. The concerned Magistrate passed the order Ex.PL/1 and thereafter, due to holiday, he redeposited the case property with MHC. On 21.08.2012, he had taken the case property from MHC except one sample parcel and sample chit for depositing the same in judicial malkhana and after receiving the report Ex.PM from the Chemical Examiner, he completed the investigation and challan under Section 173 Cr.P.C. was presented by SI Sukhdev Singh SHO. He produced on record the second sample as MO/1, bulk MO2, representative sample MO3, Rs.150/- MO4, Rs.130/- MO5 and scooter MO6.

In cross-examination, this witness has stated that he has mentioned the particulars of the case on each and every page of the challan and further stated that the consent memo was prepared by some another official and not by him. He further stated that the consent memo was recorded by Constable Harpreet Singh on his dictation and admitted that recovery was not effected in presence of any independent witness and even no document relating to ownership of the scooter was obtained during investigation.

PW4 HC Buta Singh also deposed on the same lines and stated that

he was a witness to the documents; consent memo Ex.PC, recovery memos Ex.PE and Ex.PG, Ex.PH and Ex.PJ and also parcels MO1 to MO6.

In cross-examination, this witness admitted that the place of recovery was a petrol pump, where many persons were coming but nobody was interested to join them. This witness failed to show ignorance about the vehicle on which the police party was on patrol duty.

PW5 Kamlesh Kumari, Clerk, DTO Office, Fatehgarh Sahib stated that scooter bearing registration No.PB-23-8613 is registered in the name of one Baljinder Singh.

PW6 SI Deepinderpal Singh deposed that he was SHO on 20.08.2012 in Police Station Sirhind and on that day, ASI Sukhwinder Singh produced the accused, witnesses and case property, which he verified and affixed his seal impression DP on the case property and sample chit.

PW7 Rajesh Kumar, a mechanic by profession, stated that he has taken the scooter from Baljinder Singh on affidavit but it was not transferred in his name.

Thereafter, the Public Prosecutor gave up PW HC Hans Raj, ASI Harminder Singh, SI Sukhdev Singh and Kulwant Singh, Photographers as unnecessary and closed the prosecution evidence.

In the statement under Section 313 Cr.P.C., both the accused persons were put to the incriminating evidence, which has come on record against them and they denied the same and pleaded false implication by the police officials.

Thereafter, the trial Court vide impugned judgment of conviction and order of sentence held the appellant guilty and convicted him under Section

15 of the NDPS Act and ordered to undergo 10 years R.I. and to pay a fine of Rs.1.00 lac.

Learned counsel for the petitioner has submitted that admittedly, it is a case of joint offer given to both the accused persons vide consent memo Ex.PC and in fact the offer as well as the consent are recorded on a single document Ex.PC from both the accused persons and therefore, the mandatory provisions of Section 50 of NDPS Act are not complied with. In this regard, learned counsel for the appellant has relied a judgment of the Hon'ble Supreme Court in **State of Rajasthan Vs. Parmanand and another, 2014 (2) RCR (Crl.) 40**, wherein it is held that consent taken from two accused persons by way of a joint consent memo do not meet the requirement of Section 50 of NDPS Act, as in view of the stringent provisions of the NDPS Act, both the accused have a right to be informed separately about their right to be searched before a Magistrate or a Gazetted Officer.

Learned counsel for the appellant has further submitted that when the application Ex.PL was moved before the Magistrate, following order was passed by the Magistrate: -

*“An application has been moved by the prosecution for authentication of the case property as it is to be disposed off by the committee framed under the Rules. Case property containing 51 kg 500 grams poppy husk produced before me which is sealed with seals SS & DP. Two samples containing 250 grams each of poppy husk also produced before me which are also sealed with seals SS & DP. The case property opened in the presence of the undersigned and one sample of 250 gram of poppy husk is*

*separate from the case property and is to be kept on record as proof of the case property. The same is sealed with seal of this court bearing impression DG. Remaining case property is repacked in the white colour cloth and then put in polythene bag and is sealed with the seal of this court bearing impression DG. Photographs as prescribed have been taken in open court. Case property as well as one sample out of two earlier samples, one sample drawn is ordered to be deposited in the judicial malkhana. One sample out of the earlier drawn samples is handed over to ASI Sukhwinder Singh on his request. Case property be disposed off by the committee as per rules and authentication certificate is accordingly given.*

Sd/-  
Deepti Gupta  
JMIC/Fatehgarh Sahib (Duty) ”

Dt. 20.8.2012

No.29, it is mentioned that the sample parcel, which was sent to the Chemical Examiner, bears the seals SS & DP, which also shows that the said sample was never verified by the Magistrate by putting her seal.

Learned counsel for the appellant has next argued that it has come in the statement of the Investigating Officer ASI Sukhwinder Singh PW3 that after preparing the consent memo Ex.PC, he effected the recovery by preparing the sample parcel and bulk parcel and sealed the same and prepared the sample chit Ex.PD. The contraband was recovered vide recovery memo Ex.PE and only thereafter, a ruqa/information Ex.PF was sent to the police station for registration of the FIR. It is further argued that as per endorsement on Ex.PF, the ruqa was sent at 10.00 a.m. and thereafter, the aforesaid FIR No.104 was registered by ASI Harminder Singh. It is thus submitted that a perusal of the aforesaid documents Ex.PD, Ex.PE, Ex.PG, Ex.PH and Ex.PJ shows that these bear the case number and the prosecution has failed to explain as to how prior to registration of the FIR, when these documents were already prepared, the FIR number is mentioned on these documents. In this regard, learned counsel has relied upon **Ajay Malik and others Vs. State of U.T., Chandigarh, 2009 (3) RCR (Cr1.) 649**, wherein this Court has held that when the FIR number find mentioned on the documents prepared at the spot, which were prepared prior to registration of the FIR, if the prosecution failed to explain the circumstances in this regard, it raises a suspicion over the investigation. It is further argued that none of the prosecution witnesses have explained in their statements that in what manner, FIR number was mentioned on the documents Ex.PD to PJ, which according to the statement of PW3, were prepared much before sending the ruqa to the police station and only thereafter, FIR No.104 was registered by

ASI Harminder Singh and therefore, there is no explanation how FIR number was mentioned on these documents.

Learned counsel for the appellant has further contended that the place of recovery, being public place (petrol pump), the police did not make any effort to join an independent witness.

Learned counsel for the appellant has further submitted that on the same set of allegations, the trial Court has acquitted co-accused Paramjit Singh, who was driving the scooter, by giving the benefit of doubt that no presumption can be drawn against him as he was not aware of the contents of the bag carried by co-accused/appellant Kewal Singh.

It is lastly submitted by learned counsel for the appellant that as per allegations in the FIR, the polythene bag was kept between both the accused persons and therefore, the appellant was not in conscious possession of the contraband.

Learned counsel for the appellant has further argued that the appellant has already undergone 04 years of actual sentence and he is not involved in any other case. It is also submitted that in the statement recorded under Section 313 Cr.P.C. of the appellant-accused Kewal Singh, no specific question was put that the appellant was in conscious possession of the contraband, which was recovered jointly from appellant Kewal Singh as well as co-accused Paramjit Singh, who stands acquitted. It is further submitted that even in the statement under Section 313 Cr.P.C., it is put to both the accused persons that a consent memo of both the accused persons was prepared, which was signed by both of them. It is thus submitted that it is the case of the prosecution that both the accused persons were in joint possession of the

contraband recovered from them, thus, the prosecution has failed to prove that the appellant alone was in individual conscious possession of the contraband, as erroneously recorded by the trial Court.

Learned counsel for the appellant has relied upon **Avtar Singh Vs. State of Punjab, 2002 (4) RCR (CrI.) 180**, in which the Hon'ble Supreme Court has held that where in course of cross-examination under Section 313 Cr.P.C., no specific question is put regarding conscious possession, to afford such accused an opportunity to explain the circumstances appearing in the evidence against him, no presumption can be drawn under Section 114 of the Evidence Act to prove the conscious possession of the contraband. The operative part of this judgment is reproduced as under: -

*“Possession is the core ingredient to be established before the accused in the instant case are subjected to the punishment under Section 15. If the accused are found to be in possession of poppy straw which is a narcotic drug within the meaning of Clause (xiv) of S. 2, it is for them to account for such possession satisfactorily; if not, the presumption under Section 54 comes into play. We need not go into the aspect whether the possession must be conscious possession. Perhaps taking clue from the decision of this Court in Inder Sain Vs. State of Punjab, 1973 (2) SCC 372 arising under the Opium Act, the learned trial Judge charged the accused of having conscious possession of poppy husk. Assuming that poppy husk comes within the expression poppy straw, the question, however, remains whether the prosecution satisfactorily proved the fact that the accused were in possession of poppy husk. Accepting the evidence of PW 4 the Head constable, it is seen that appellant No.3 (Accused No.4) was driving the vehicle loaded with bags of poppy husk. Appellants 1 and 2 (Accused Nos. 1 and 2) were sitting on the bags placed in the truck. As soon as the vehicle was stopped by ASI (PW 2), one person sitting in the cabin by the*

*side of the driver and another person sitting in the back of the truck fled. No investigation has been directed to ascertain the role played by each of the accused and the nexus between the accused and the offending goods. 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 but the minimum requisite element which has to be satisfied is custody or control over the goods. Can it be said, on the basis of the 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 custody or control? It is difficult to reach such conclusion beyond reasonable 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 the custodian of goods whether or not he was the proprietor. The persons who were merely sitting on the bags, in the absence of proof of anything 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 traveling 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 S.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 Evidence Act nor is it safe to conclude that the prosecution established beyond reasonable 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 35 which relates to culpable state of mind, without considering the aspect of possession. The trial court invoked the presumption under S.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 travelling in the vehicle containing poppy husk at an odd hour. But, the other relevant aspects pointed out above were neither adverted to nor taken into account by the trial court and the High Court. Non-application of mind to the material factors has thus vitiated the judgment under appeal.”*

In reply, learned State counsel has, however, argued that it is proved from the statements of the prosecution witnesses that the appellant was in possession of the poppy husk and recovery was effected after giving a notice under Section 50 of NDPS Act. It is further argued that the case property was produced before the Illaqa Magistrate, who had verified the same and thereafter, on receiving the FSL report, the challan was presented. It is also submitted that the delay in sending the sample parcel to the FSL occurred on account of a

holiday.

However, the learned State counsel, on the basis of custody certificate, has not disputed the fact that the appellant has already undergone 04 years of actual sentence out of 10 years R.I. awarded by the trial Court.

After hearing learned counsel for the parties, I find merit in the present appeal, for the following reasons: -

(a) Admittedly on the same set of evidence, co-accused Paramjit Singh stands acquitted by the trial Court holding that it could not be proved that he was in possession of the contraband jointly recovered from appellant Kewal Singh and co-accused Paramjit Singh. A perusal of the notice under Section 50 of the NDPS Act shows that a joint offer was given to both the accused persons by the Investigating Officer intimating them their right, therefore, the case of the prosecution was that both the accused persons were in joint possession of the contraband. In view of the judgment of the Hon'ble Supreme Court in **State of Rajasthan Vs. Parmanand and anr., 2014 (2) RCR (Crl.) 40**, wherein it is held that in view of the provisions of Section 50 of NDPS Act, the right available to an accused person, to be searched before a Gazetted Officer or a Magistrate, will be frustrated in case, a clear, unambiguous and individual offer is not given. It is also held in this judgment that a joint communication of a right may not be a clear or unequivocal offer as it may create confusion and may result in diluting the right. Since a joint offer was given to avail the right under Section 50 of the NDPS Act and even the consent was taken jointly, the trial Court failed to appreciate that while acquitting co-accused Paramjit Singh, charge against whom was that he was in joint possession, conviction of the appellant cannot be upheld in view of judgment of the Hon'ble Supreme Court

in **Parmanand**'s case (supra).

(b) It has come in the statement of ASI Sukhwinder Singh PW3 that after preparing the joint consent memo Ex.PC, he effected the recovery and by preparing the sample and bulk parcels, he sealed them and then prepared a sample chit Ex.PD. The recovered contraband was taken in possession vide recovery memo Ex.PE and thereafter, the information/ruqa was sent to the police station vide Ex.PF at 10.00 a.m. Only thereafter, FIR No.104 was registered by ASI Harminder Singh, which find mentioned on these documents, raises a suspicion over the investigation conducted at the spot. In view of the judgment of this Court in **Ajay Malik**'s case (supra), since the prosecution has failed to explain, in what circumstances, FIR number was recorded in these documents and none of the prosecution witnesses has explained this aspect of the case.

(c) A perusal of the order dated 20.08.2012 passed by the Magistrate shows that when the case property was produced before the Magistrate, it consisted the bulk parcel containing poppy husk, which was sealed along with two sample parcels with seal impressions SS & DP. The bulk parcel was opened in the presence of the Magistrate and one more sample of 250 gram of poppy husk was separated and was kept as a proof of case property and the same was sealed with impression DG of the Court. The remaining case property was repacked and sealed with impression DG and it was ordered that the case property as well as one sample out of earlier two samples and one sample drawn before the Court be deposited in the judicial malkhana. One sample out of earlier drawn sample was handed over to ASI Sukhwinder Singh on his request. Thereafter, he kept the said sample parcel with him and the same was

sent to FSL for examination and thus, a perusal of the FSL report Ex.PM shows that the sample parcel, which was received by the Chemical Examiner bears the seal impressions SS & DP, meaning thereby, this sample was never verified by the Magistrate by putting her counter seal DG, which shows that the Magistrate has not followed the proper procedure by not verifying the said sample parcel, which was sent to FSL. A perusal of the order further shows that this sample was never deposited in the judicial malkhana and remained in possession of PW3 Sukhwinder Singh, the Investigating Officer and therefore, in the absence of seal of the Magistrate DG, the sample parcel bearing seal impressions SS & DP, which were of the police officials and remained in possession of the Investigating Officer itself for a period of two days, before it was sent to FSL. It has also come in the statement of PW3 that after sealing the sample parcels, the original seal was handed over to HC Buta Singh, a police official.

(d) The co-accused of the appellant namely Paramjit Singh has already been acquitted of the charges and in the statement recorded under Section 313 Cr.P.C., it was put to both the accused persons i.e. appellant- Kewal Singh and co-accused Paramjit Singh that they were found in joint possession of the poppy husk and no specific question was put to any of them that they were in conscious possession of the same. In view of the judgment of the Hon'ble Supreme Court in **Avtar Singh's** case (supra), the prosecution has failed to prove that the appellant was in conscious possession of the poppy husk.

(e) The place of recovery is petrol pump, a public place, however, no independent witness was joined, though it is well settled principle of law that mere non-joining of an independent witness is not fatal to prosecution version under the NDPS Act. However, in peculiar circumstances of this case, when the

prosecution has to prove conscious possession of the recovered contraband, the non-joining of an independent witness raise a doubt over prosecution version.

In view of the above, this appeal is allowed. The impugned judgment of conviction dated 06.08.2014 and the order of sentence of even date passed by the Judge, Special Court, Fatehgarh Sahib are set aside and the appellant is acquitted of the charges framed against him.

Since the appellant is on bail, his bail/surety bonds are also discharged.

**[ ARVIND SINGH SANGWAN ]**  
**JUDGE**

06.08.2018  
*vishnu*

Whether speaking/reasoned : Yes/No

Whether Reportable : Yes/No