

In the High Court of Punjab and Haryana at Chandigarh

Crl. Appeal No. S-1456-SB of 2014

Date of Decision: 11.02.2019

Gurmail Singh and another

.....Appellants

Versus

State of Punjab

.....Respondent

CORAM: HON'BLE MR. JUSTICE HARNARESH SINGH GILL

Present: Mr. Aman Dhir, Advocate
for the appellants.

Mr. B.B.Menon, AAG, Punjab.

HARNARESH SINGH GILL, J.

The present appeal arises from the judgment and order dated 17.2.2014 passed by Special Court, Barnala vide which appellants Gurmail Singh and Kulwant Singh had been convicted under Section 21 of the Narcotic Drugs and Psychotropic Substances Act. 1985 ('Act' for short) and were sentenced to undergo rigorous imprisonment for a period of ten years each and to pay a fine of Rs. 1,00,000/- each and in default, to further undergo rigorous imprisonment for a period of two years each as they were found in possession of 03 liters 360 ml of intoxicant liquid containing Codeine Phosphate and 500 intoxicant tablets containing Carisoprodal.

The brief facts of the case are that on 3.1.2012 ASI Jagtar Singh along with other police officials, when reached at link road within the revenue limits of Rureke Kalan, then from the side of Rureke Kalan, a

motor cycle came. On seeing the police party, the driver of the motorcycle sped up the motor cycle and then slowed it. Due to suspicion, motorcycle was signalled to stop. Two persons were sitting on the motorcycle and one black colour bag was lying in the lap of pillion rider. On query, driver of the motorcycle disclosed his name as Gurmail Singh, whereas the pillion rider disclosed his identity as Kulwant Singh, besides other particulars. ASI Jagtar Singh gave his identity to both the persons and stated to them that he had suspected some contraband in the bag carried by them, so he intended to get the search conducted. He also apprised the accused of their right to get the search conducted in the presence of a Gazetted Officer or Magistrate. However, the accused reposed confidence in ASI Jagtar Singh and their consent memos Ex.PA and Ex.PB were prepared. Then ASI Jagtar Singh conducted search of the bag carried by the accused which led to the recovery of a plastic can containing intoxicant liquid, out of which two samples of 180 ml each were separated and remaining on measurement, came to 03 litres which was again put in the same plastic can and its separate parcel was prepared. On further search of the bag, a polythene bag was recovered which was found containing white coloured intoxicant tablets, out of which two samples of 10 tablets each were separated and remaining on counting came to 480 and its separate parcel was also prepared. All the parcels were sealed with the seal JS. Sample seal Ex.P1 was also prepared separately. Seal after use was handed over to ASI Sukhbir Singh. From the further search of the motorcycle bearing registration no. PB-12G-7902, RC of the said motorcycle, in the name of Bogha Singh, was also recovered. Then all the parcels of intoxicant liquid and tablets and sample seal Ex. P1 along with motorcycle and its RC were taken into

possession vide recovery memo Ex. PC. From personal search of accused Gurmail Singh Rs. 200/- and from that of accused Kulwant Singh Rs. 90/- were recovered for which memo Ex. PD was prepared. Ruqa Ex. PE was sent to the police station on the basis of which a formal FIR Ex. PF was registered against the accused. Rough site plan Ex. PG was prepared. Grounds of arrest memo Ex. PH and memo of reasons for arrest Ex. PJ were also prepared. On return to the police station, ASI Jagtar Singh produced the accused, witnesses and entire case property before SHO/SI Bhupinder Singh, who verified the facts and then counter sealed and attested all the parcels and sample seal with his seal BS and he deposited the case property with MHC Baljinder Singh. Statements of the witnesses were recorded. Special report Ex. PK was also sent to the DSP who had seen the same vide his endorsement Ex. PK/1. On 4.1.2012 accused and case property were produced before the learned Ilaqa Magistrate by preparing the inventory. The learned Magistrate had taken representative sample from the plastic can after breaking the seal of it and also separated 10 tablets as sample from the bulk parcel of intoxicant tablets. Both the bulk parcels and both the representative samples were sealed by the learned Magistrate with her seal AK. The learned Magistrate had also seen and signed the remaining case property along with sample seal Ex. P1 and passed the authentication order thereon Ex. PL. Then as per the order of the learned Magistrate, ASI Jagtar Singh deposited two sample parcels with MHC along with sample seal and deposited the remaining case property in the judicial Malkhana. The sample parcels were sent to the Forensic Science laboratory, Mohali in an intact condition through HC Bhim Sain, who deposited the same in the same very condition with Forensic Science laboratory, Mohali.

The sample parcels were analyzed by the Assistant Director, Forensic Science laboratory, Mohali and it was opined that the contents of the white colour tablets were found to be of Carisoprodol and contents of liquid were found to contain Codeine Phosphate.

After completion of investigation and necessary formalities, challan was submitted against the the appellants.

Charge under Sections 21/22 of the Act was framed against the appellants.

To prove its case, prosecution examined PW-1 ASI Jagtar Singh, who is the Investigating Officer. He deposed that on 3.1.2012, he along with the other police officials when reached near the link road within the revenue limits of Rureke Kanal, they saw a motorcycle coming from the side of village Rureke Kalan. On query, the driver of the motorcycle disclosed his name as Gurmail Singh and the pillion rider disclosed his identity as Kulwant Singh. Investigating officer ASI Jagtar Singh gave his identity and stated that he had suspected some contraband in the black coloured bag carried by them. Both the appellants were apprised of their right that they could get the search conducted in the presence of a Gazetted Officer or a Magistrate. However, both the appellants reposed confidence in the Investigating Officer and on search, 03 litres 360 ml of intoxicant liquid containing Codeine Phosphate and 500 intoxicant tablets containing Carisoprodol were recovered from them. After taking the samples, the same were sealed and on further search of the motorcycle bearing No. PB-12G-7902, RC of the said motorcycle in the name of Bogha Singh was also recovered. On 4.1.2012, both the appellants and the case property were produced before the Illaqa Magistrate. The samples were sealed by the

Magistrate and thereafter the samples were sent to the Forensic Science Laboratory, Mohali through Head Constable Bhim Sain.

Head Constable Bhim Singh had also appeared as PW-3.

Prosecution had also examined PW-4 Bogha Singh, who was the owner of the motorcycle and as per his statement, he had already sold his motorcycle to one Harbhajan Singh.

Sub Inspector Bhupinder Singh was examined as PW-5, before whom both the appellants and two sample parcels of intoxicant liquid and two sample parcels of intoxicant tablets were produced by ASI Jagtar Singh.

PW-6 Harbhajan Singh stepped into the witness box and stated that he had purchased the motorcycle No. PB-12G-7902 from Bogha Singh, who later on sold the same to Gurmail Singh son of Kaka Singh i.e. appellant No.1.

Prosecution had also relied upon the statement of PW-7 HC Baljinder Singh and PW-8 Kamal Kumar Junior Assistant, DTO Office, Bathinda regarding registration certificate of the motorcycle in question.

After closure of the prosecution evidence, the appellants were examined under Section 313 of the Code of Criminal Procedure ('Cr.P.C.' for short) in order to afford them an opportunity. Both the appellants took the plea that they had been falsely implicated. They stated that they were not present at the place of occurrence.

In defence, the appellants examined DW-1 Hardev Singh who stated that Gurmail Singh was at Gurudwara Baba Natha Singh, Dhanaula on 1.1.2012 and when he along with appellant Gurmail Singh were coming back, Gurmail Singh had been apprehended by the police and nothing was recovered from him.

Similarly, DW-2 Bant Singh deposed that appellant Kulwant Singh had been falsely implicated by the police and all the police officials were in civil dress when they nabbed Kulwant Singh.

The appellants had also examined DW-3 HC Rajiv Kumar and DW-4 HC Gurjit Singh, in defence.

After taking into consideration the evidence on record, the Special Court, Barnala found both the appellants guilty of having in possession of 03 liters 360 ml of intoxicant liquid containing Codeine Phosphate and 500 intoxicant tablets containing Carisoprodal and vide judgment/order dated 17.2.2014 convicted and sentenced them to undergo rigorous imprisonment for a period of ten years each and to pay a fine of Rs. 1,00,000/- each under Section 21 of the Act and in default, to further undergo rigorous imprisonment for a period of two years.

At the outset, learned counsel for the appellants has argued that recovery in the present case was effected on 3.1.2012 whereas the samples were sent to the Chemical Examiner on 16.1.2012. As such, there is delay of 13 days in sending the samples to the Chemical Examiner. The other aspect argued by the learned counsel for the appellants is that there is no independent witness in the present case and there is a plea of *alibi* by both the appellants as DW-1 Hardev Singh and DW-2 Bant Singh had specifically stated before the trial Court that the appellants were not present at the place of occurrence and were apprehended later on.

Learned counsel for the appellants has further argued regarding the conscious possession of the contraband with the appellants. As per the counsel for the appellants, the contraband was alleged to be kept by the appellants in the lap of the pillion rider and regarding the conscious

possession, no specific question had been put to the appellants while recording their statements under Section 313 Cr.P.C. Learned counsel has drawn the attention of this Court to the statements of Gurmail Singh son of Kaka Singh and Kulwant Singh son of Mukhtiar Singh wherein the question regarding conscious possession had not been put to them. Learned counsel for the appellants has also argued that there are discrepancies in the statements of the prosecution witnesses and the prosecution case has not been proved beyond the shadow of reasonable doubt.

Per contra, learned counsel for the State has argued that the appellants were caught red handed while carrying the contraband on the motorcycle and it was only after they had disclosed their identity, they were taken into custody. So far as non-joining of the independent witness is concerned, learned State counsel has submitted that since it is not a case of secret information and rather a case of chance recovery, no independent witness joined. Learned counsel for the State has further submitted that from the evidence produced by the prosecution itself, it stands established that nobody had tampered with the sample parcels until the same had reached the office of Chemical Examiner and the prosecution had produced the evidence with complete link and the appellants have been rightly convicted. Learned State counsel has further submitted that the discrepancies pointed out by the learned counsel for the appellants had not caused any dent in the case of prosecution as these type of minor discrepancies are bound to occur with the passage of time regarding the truthfulness in the statements of witnesses.

I have heard the learned counsel for the appellants and the learned counsel for the State and have gone through the record.

As far as the discrepancies in the statements of the witnesses are concerned, this Court is of the view that with the passage of time, some discrepancies do occur but after going through the evidence on record and the statements recorded by the prosecution witnesses, I do not find any major flaw in the statements. Hence, this argument of the learned counsel for the appellants on this count is rejected.

So far as the argument raised by the learned counsel for the appellants qua conscious possession is concerned, no question in this regard was put to the appellants in their statements recorded under Section 313 Cr.P.C.

In the statement recorded under Section 313 Cr.P.C., appellant Gurmail Singh had stated as under:-

“I am innocent and falsely implicated in this case by the police. No recovery has been effected from me as alleged by the prosecution. I came from Akhand Path Bhog Attar Singh Wala Gurudwara Sahib on 2.1.2012 and at that time, Hardev Singh son of Pala Singh and Janak Singh son of Jagan Dass resident of Bhaini Fatta was present, where the police took me in custody in the presence of above said witness.”

Appellant Kulwant Singh, when examined under Section under Section 313 Cr.P.C., had stated as under:-

“I am innocent and falsely implicated in this case by the police. No recovery has been effected from me as alleged by the prosecution. I was present in Baba Girdhari Lal Dera, Bhaini Fatta 2.1.2012 and at that time, Bant Singh son of Kaka Singh and Darshan Singh son of Lal Singh, resident of Bhaini Fatta was present, where the police took me in custody in the presence of above said witness.”

Section 313 Cr.P.C. is reproduced hereunder for ready

reference:-

“313. Power to examine the accused-

(1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court-

(a) may at any stage, without previously warning the accused, put such questions to him as the Court considers necessary;

(b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case: Provided that in a summons- case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).

(2) No oath shall be administered to the accused when he is examined under sub- section (1).

(3) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.

(4) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.”

It is not disputed that presumption of culpable mental state and presumption of possession can be raised against accused person, but where these presumptions are raised, the accused has a right to rebut the presumptions by pleading in his defence that he has no such mental state with respect to the act charged as an offence or that he has been able to satisfactorily account for the possession.

Thus, the trial Court was duty bound to frame a specific

question regarding the presumption either under Section 35 or Section 54 of

the Act when examining the accused under Section 313 Cr.P.C.

Section 35 of the Act reads as under:-

“35. Presumption of culpable mental state.

(1) In any prosecution for an offence under this Act which requires a culpable mental state of the accused, the Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution. Explanation. [I]n this section [] culpable mental state [] includes intention, motive knowledge of a fact and belief in, or reason to believe, a fact.

(2) For the purpose of this section, a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability.”

Section 54 of the Act reads as under:-

54. Presumption from possession of illicit articles-

[I]n trials under this Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under this Act in respect of []

(a) any narcotic drug or psychotropic substance or controlled substance;

(b) any opium poppy, cannabis plant or coca plant growing on any land which he has cultivated;

(c) any apparatus specially designed or any group of utensils specially adopted for the manufacture of any narcotic drug or psychotropic substance or controlled substance; or

(d) any materials which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance or controlled substance, or any residue left of the materials from which any narcotic drug or psychotropic substance or controlled substance has been manufactured, for the possession of which he fails to account satisfactorily

Thus, in my view, unless a specific question is raised, presumption under Section 35 or Section 54 of the Act cannot be used against the accused. In the present case also, in the statements of the appellants recorded under Section 313 Cr.P.C., no specific question regarding conscious possession had been put to them. Thus, the presumption was not available to the prosecution and the prosecution has failed to prove that Gurmail Singh and Kulwant Singh-appellants were having conscious possession of the contraband which was lying in between them while they were intercepted on the motor cycle.

In ***Raj Kumar versus State of Punjab, 2005(1) R.C.R. (Criminal) 70***, this Court has held as under:-

“It would, therefore, be apparent that presumption of culpable mental state and presumption of possession can be raised against accused persons but where these presumptions are raised the accused has a right to rebut the presumptions by pleading in his defence that he has no such mental state with respect to the act charged as an offence or that he has been able to satisfactorily account for the possession. Accused can give his counter explanation. It is necessary for the trial Court to frame a specific question regarding the presumption which is sought to be raised either under Section 35 or Section 54 when examining the accused under Section 313 Criminal Procedure Code and seeking his explanation. Unless this is done the presumption under Sections 35 and 54 cannot be used against the accused. Consequently, in the present case, the presumptions were not available to the prosecution. Furthermore, the prosecution had failed to prove that either Raj Kumar (driver) or Hawa Singh (passenger) were in possession of the opium recovered from the bag which was lying in-between them on the seat of the jeep.”

In **Kashmir Singh versus State of Punjab 2006(2) R.C.R.**

(Criminal) 477, it has been held as under:-

“12. When the Trial Judge records the statement of an accused person under Section 313 Criminal Procedure Code with regard to the circumstances which have appeared in evidence against him, the learned Judge gives the accused an opportunity to explain those circumstances. The accused generally denies the prosecution case against him but it is an opportune moment for him to plead any type of defence that he may like to take. Therefore, by extending the provisions of Section 313 Criminal Procedure Code and on first principles of fair trials as well, there is need to give every accused person an opportunity to explain the case against him. Wheresoever the presumption under Sections 35 & 54 is to be raised, it would be advisable for the Trial Court to frame a question under Section 313 Criminal Procedure Code in order to give the accused a fair opportunity to rebut the presumption. Indeed Sections 35 and 54 do entitle the accused to rebut the presumptions but it is strange that Trial Courts do not give the accused this opportunity. Unless the accused have been given the opportunity to prove that he had no such mental state as presumed under Section 35 or that he had satisfactorily accounted for the possession which was being presumed against him under Section 54, the respective presumptions cannot be raised against the accused.

x x x x

17. The Division Bench of this Court in **Raj Kumar v. State of Punjab, 2005(1) RCR(Crl.) 70** recorded the following reasons for acquitting the accused :-

"It would, therefore, be apparent that presumption of culpable mental state and presumption of possession can be raised against accused persons but where these presumptions are raised the accused has a right to rebut the presumptions by pleading in his defence the

he has no such mental state with respect to the act charged as an offence or that he has been able to satisfactorily account for the possession. Accused can give his counter explanation. It is necessary for the trial Court to frame a specific question regarding the presumption which is sought to be raised either under Section 35 or Section 54 when examining the accused under Section 313 Criminal Procedure Code and seeking his explanation. Unless this is done the presumption under Sections 35 and 54 cannot be used against the accused. Consequently, in the present case, the presumptions were not available to the prosecution. Furthermore, the prosecution had failed to prove that either Raj Kumar (driver) or Hawa Singh (passenger) were in possession of the opium recovered from the bag which was lying in between them on the seat of the jeep". "

In my view, it is well settled proposition of law that under Section 313 Cr.P.C., accused is to be given a fair opportunity to explain the case against him so as to rebut the presumption. In the present case, no such procedure has been adopted by the trial Court.

Resultantly, the appeal is allowed. The impugned judgment/order dated 17.2.2014 of conviction and sentence of the appellants, are set aside. Consequently, The appellants are acquitted of the charges framed against them.

(HARNARESH SINGH GILL)
JUDGE

February 11, 2019
Gurpreet

Whether speaking/reasoned : Yes
Whether reportable : Yes