

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

Reserved on 30.03.2022

Judgment pronounced on 20.04.2022

CRA-D-288-DB-2012

Raj Bilamber Singh

....Appellant

Versus

State of Punjab

.....Respondent

CRA-D-295-DB-2012 (O&M)

Raj Bilamber Singh

....Appellant

Versus

State of Punjab

.....Respondent

**CORAM: HON'BLE MR. JUSTICE TEJINDER SINGH DHINDSA
HON'BLE MR. JUSTICE PANKAJ JAIN**

Present: Ms. Aashna Gill, Advocate,
for the appellant.

Mr. H.S.Sullar, Deputy Advocate General, Punjab
for the respondent.

PANKAJ JAIN, J.

These are two appeals arising out of different FIRs. In both cases the appellant has been convicted for offences punishable under provisions of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the NDPS Act'). For convenience, the details are being tabulated as under :-

Sr. No.	Appeal No.	FIR/Date	Convicted under
1	CRA-D-288-DB-2012	FIR No.90 dated 24.09.2004	Convicted for offence punishable under Section 15 of the NDPS Act and awarded sentence of RI 12 years plus fine of Rs.1 lakh.
2	CRA-D-295-DB-2012	FIR No.91 dated 25.09.2004	Convicted for offence punishable under Section 18 of the NDPS Act and awarded sentence of RI 14 years plus fine of Rs.1.5 lakh.

2. Ball was set rolling on registration of FIR No.89 dated 23.09.2004, registered for offence punishable under Section 15 of the NDPS Act. One Amrik Singh son of Jaskaran Singh was arrested. 35 Kgs. of poppy husk was recovered from him. In connection thereto, house of the appellant was raided on 24.09.2004 but he was not found present. As per prosecution, the appellant was later apprehended. In custody, he suffered disclosure statement Ex.P-9. He disclosed having concealed 29 bags of poppy husk in his shop bearing No.108 in New Grain Market, Fazilka. The accused was apprised of his legal right. Exercising his right, he opted to get his shop searched in the presence of a Gazetted Officer vide Ex.P11 which was attested by a private witness namely Vikram Kumar. DSP Swarandeeep Singh, a Gazetted Officer, apprised the appellant of him still having an option to get search conducted in the presence of a Magistrate. However, the appellant reposed faith in DSP Swarandeeep Singh vide Ex.P2. As per prosecution, accused unlocked his shop taking out key from his pocket. 29

bags of poppy husk were recovered from the store of the shop. All the bags were numbered by the Investigating Officer from 1 to 29. On weighing, each bag was found containing 35 Kgs. of poppy husk. 2 samples of 250 grams of poppy husk each were separated from each of the bags and their separate parcels were prepared. All the 29 bags were also converted into separate parcels. All the sample parcels and parcels of bulk contents were sealed by Inspector Devinder Singh and DSP Swarandeeep Singh with their respective seals bearing marks DS and SDS. They also prepared sample of their respective seals on chit Ex.P3. Inspector Devinder Singh handed over his seal after its use to DSP Swarandeeep Singh. The entire case property was taken into police custody vide recovery memo Ex.P4. The accused was arrested in this case and was apprised of the grounds of his arrest vide memo Ex.P6 which was signed by the accused. Accused could not produce any valid permit or licence for retaining the aforesaid 29 bags, each containing 35 Kgs. of poppy husk, due to which ruqa Ex.P10 was sent to the police station for registration of a case on the basis of which FIR Ex.P11 i.e. FIR No.90 dated 24.09.2004 was registered by ASI Nachhatar Singh.

3. On the next day the accused suffered another disclosure statement to the effect that he had kept concealed 05 Kgs. of opium in the same shop i.e. Shop No.108, New Grain Market, Fazilka, in the bathroom situated in the back side of the shop by digging a pit. On the basis of the said disclosure statement available on record as Ex.P13, separate FIR No.91

dated 25.09.2004 was registered.

4. Again on giving the option, the appellant opted to get search of the shop conducted in the presence of a Gazetted Officer. The same Gazetted Officer i.e. DSP Swarandeeep Singh, Fazilka, came present and after accused posed faith in him, search was conducted. The accused got opium wrapped in the polythene bag recovered from the bathroom built in the back portion of his shop. On weighing, opium turned out to be 05 Kgs. On the direction of the DSP, SI Devinder Singh separated two samples of 10 grams each from the recovered contraband and were converted into parcels. Separate parcel of the bulk opium MO-1 was also prepared. All the aforesaid parcels were sealed by SI Devinder Singh and DSP Swarandeeep Singh with their respective seals bearing marks DS and SDS. SI Devinder Singh and DSP Swarandeeep Singh also prepared the sample of their respective seals.

5. On completion of investigation, report(s) under Section 173 Cr.P.C. were presented in both the cases and the appellant was put to trials.

6. Ld. Trial Court found appellant guilty in both the FIRs (i.e. FIR No.90 dated 24.09.2004 and FIR No.91 dated 25.09.2004). The appellant stands convicted in both the cases.

7. Ld. Counsel for the appellant has attacked the findings of the Ld. Trial Court with respect to possession of the contraband. She submits that in order to prove guilt of the appellant, it was incumbent upon the

prosecution to prove that the appellant was in conscious possession of the contraband. She submits that since the contraband is alleged to have been recovered from Shop No.108, New Grain Market, Fazilka, the appellant cannot be said to be in conscious possession of the contraband till his possession over the said shop is proved. She argues that the shop in question was in possession of a tenant namely Som Parkash son of Chandi Ram resident of Chak Banwala since 2001. Tenant is running business in the name and style of M/s Chandi Ram Som Parkash. He is a commission agent having licence under Punjab Agricultural Produce Markets Act, 1961. The same has been proved on record. Thus, the shop being under possession of the tenant, the story of recovery of the contraband from the shop as projected by the Prosecution is false. She further submits that falsity of the case projected by Prosecution is evident from the difference in the Site Plans of the two cases. The Counsel has further asserted that non-production of the samples of contrabands during trials has caused prejudice to the appellant. As per her, with the non-production of the samples of contrabands, the most vital link has gone amiss and, thus, these are fit cases where the appellant ought to have been acquitted. In the alternate, she has submitted that the sentences awarded to the appellant in both the appeals be reduced in view of the fact that the factors required under Section 32B of the NDPS Act for imposing higher punishment is lacking.

8. She further prays that the sentences awarded to the appellant in

both the appeals be ordered to be run concurrently. For this prayer, a misc. application bearing CRM No.27561 of 2017 has also been filed, which is also listed along with the present appeal (CRA-D-295-DB-2012). In order to impress upon her argument, Ld. Counsel for the appellant has relied upon the judgments passed by the Supreme Court in '**Anil Kumar vs. State of Punjab**' (2017) 5 SCC 53, '**V.K. Bansal Vs. State of Haryana and another**' (2013) 7 SCC 211 and '**Benson v. State of Kerala**' (2016) 10 SCC 307.

9. While supporting the order of conviction, Ld. Advocate General, Punjab argues that conjoint reading of FIR No.89, FIR No.90 and FIR No.91 will show that it is a complete chain of events which fully nails the offence of the appellant. He submits that ownership of the shop, in question, is not in dispute. The plea of the same being in possession of a tenant cannot even be looked into as there is no document on record to support the claim of the appellant. Ld. Trial Court has rightly held the appellant to be in conscious possession of the contraband. In order to support the judgment of conviction, Ld. State Counsel places reliance upon Section 54 of the NDPS Act to argue that onus lay heavily upon the appellant to rebut the presumption in favour of the Prosecution.

10. We have heard Counsel for the parties and have carefully gone through the record. For convenience reference is being made from record of CRA-D-288-DB of 2012.

11. In our opinion, the pertinent question on which fate of these appeals hinges is whether the appellant is said to be in conscious possession of the contraband or not. Ld. Trial Court while returning finding on possession of the contraband with the appellant, held that -

“23. It is the defence of the accused that shop No.108 from which the recovery was effected is owned by him and his son but he has given this shop on rent to Som Parkash son of Chandi Ram resident of Chak Banwala in December, 2001 and he is running his commission agency in the shop in the name and style of M/s Chandi Ram Som Parkash vide licence No.3999 which was valid with effect from December 2001 to December 2007. In this regard he has examined DWI Sunil Kumar, Mandi Supervisor Market Committee, Fazilka, who has produced and proved the documents Ex.DW1/A copy of form “Urdha” which has been moved by Som Parkash for getting licence for running commission agency shop, copy of affidavit of Som Parkash Ex.DW1/B regarding getting of licence, copy of surety bonds Ex.DW1/C furnished by Kharait Lal, affidavit of accused Raj Bilamber Ex.DW1/D regarding giving of shop in question on rent to Som Parkash and copy of form “Eidee” regarding issuance of licence of grain market, Fazilka to M/s Chandi Ran Som Parkash and Sons which renewed upto 31.3.2015. On the basis of these documents it has been submitted by the learned counsel for the accused that since accused was not in possession shop No.108 from which the recovery was effected, therefore, the recovery of the contraband cannot be said to be effected from his possession. I have considered this submission of the learned counsel for the accused but do not find any merit in the same. Apart from examining DWI Sunil Kumar, who has produced the above

referred documents, no other witness has been examined by the accused to prove that he had actually given shop in question on rent to Som Parkash. Even neither the said tenant Som Parkash has been examined by the accused nor any other person from the grain market has been examined to prove that the shop in question was actually in possession of Som Parkash as tenant when the recovery of the contraband was effected in this case, DW1 Sunil Kumar in his cross-examination has stated that he has never visited the shop No.108 in New Grain Market, Fazilka. It is not out of place to mention here that it is the accused and his son who are owners of shop No.108 in question and this fact has not been denied by the accused. Further-more the prosecution has also produced and proved on the record certificate Ex.P9 issued by Administrator New Mandi Township, Punjab, Chandigarh to prove the ownership of the accused and his son over the shop in question. Further-more the affidavit of the accused produced by DW1 Sunil Kumar Ex.DW1/D does not bear any date. Further-more it is in the evidence of PW4 Inspector Devinder Singh that it is the accused who in pursuance of his disclosure statement Ex.P9 has got recovered the commercial quantity of poppy husk from his shop No.108. It is also in his evidence that it is the accused who himself unlocked shop No.108 and had opened the door of the store in which the poppy husk was kept. Had it been in possession of Som Parkash alleged tenant then the accused would not have unlocked the shop in question. The fact that the shop in question was unlocked and opened by the accused in pursuance of his disclosure statement has not been challenged by the accused in the cross-examination of any of the witnesses of the prosecution. Therefore, it cannot be said that shop No.108, New Grain Market, Fazilka was not in

possession of the accused on the day, the recovery was effected.”

(emphasis supplied)

12. The aforesaid finding when analyzed in the light of evidence on record, seems to be a result of misreading of evidence and, thus, perverse. It is apposite to note here that accused examined Sunil Kumar, Mandi Supervisor, Market Committee, Fazilka as DW-1, who deposed as under :-

“I have brought the summoned record of shop no.108, Grain Market, Fazilka and also the register regarding allotment of licence No.3999 to Som Parkash son of Chandi Ram, resident of Banwala in the name of M/s Chandi Ram Som Parkash, Commission Agency, Fazilka from the year December 2001 onwards. I have brought the original affidavit and surety bonds concerning the shop No.108, Grain Market, Fazilka. Ex.DW1/A is the attested photostat copy of Form Uda, which was moved to Punjab Mandi Karan Board for getting commission agency licence by Som Parkash. Ex.DW1/B is the photostat copy of the attested copy of affidavit of Som Parkash regarding getting licence. Ex.DW1/C is the attested copy of the surety bonds furnished by Kharaiti Lal son of Satnam Dass, original of which I have brought today. Ex.DW1/D is the affidavit of Raj Bilambar Singh son of Harbans Singh, resident of Fazilka, regarding giving of shop No.108, Grain Market, Fazilka, to Som Parkash on rent. Ex.DW1/E is the attested photostat copy of Form Idee regarding issuing of licence of grain market, Fazilka to M/s Chandi Ram Som Parkash and Sons from 21.12.2001 to 31.03.2004 and then renewed from 1.04.2004 to 31.03.2007

and further renewed from 01.04.2007 to 31.03.2010 and then renewed from 01.04.2010 to 31.03.2015. As per record of Market Committee, Fazilka, M/s Chandi Ram Som Parkash Firm is working in Shop No.108, Grain Market, Fazilka at licence No.3999 from 21.12.2001 till today.

Xxn (by Shri NK Girdhar, Addl. P.P. for the State)

I am deposing as per record produced by me. I have no personal knowledge regarding the above said facts. I never visited shop no.108 in New Grain Market, Fazilka. As per record Raj Bilambar accused is owner of the shop. It is wrong that I have deposed falsely.”

13. DW-1 Sunil Kumar has proved Ex.DW1/A application form submitted by Som Prakash seeking licence under the provisions of the Punjab Agricultural Produce Market Act, 1961. On the basis of this application, licence was granted to Som Prakash from 21.12.2001 to 31.03.2004 *qua* shop in question. He also proved document Ex.DW-1/E which is a copy of register maintained under Section 10 of the 1961 Act to show that aforesaid Som Prakash was licensee *qua* premises contained in Shop No.108, Fazilka Mandi from 21.12.2001 to 31.03.2004. This licence *qua* the same premises was further renewed from 01.04.2004 to 31.03.2007 and thereafter, from 01.04.2007 to 31.03.2010 and later on from 01.04.2010 to 31.03.2015.

14. Once the aforesaid evidence is read in the light of the provisions of the Punjab Agricultural Produce Markets Act, 1961 and the Rules framed thereunder, the finding recorded by the Trial Court to the

effect that, “*apart from examining DWI Sunil Kumar, who has produced the above referred documents, no other witness has been examined by the accused to prove that he had actually given the shop in question on rent to Som Parkash*”, cannot be sustained. It has been proved from the record maintained by none else but a State instrumentality that Som Parkash was licensee for the shop, in question, and that too continuously from December, 2001 to March, 2015. Thus, it can be safely inferred that the shop was in possession of Som Parkash even though owned by the appellant. There is another angle which needs to be analyzed. As per Prosecution FIR No.90 was lodged on the basis of disclosure statement suffered by the appellant in FIR No.89. The said disclosure statement in FIR No.89 (Ex.P-9) reads as under :-

“...Memo for disclosure statement U/s 27 of Evi Act.

In the presence of the following witnesses, during investigation of Raj Bilambar Singh aforesaid has made a disclosure statement. “I have kept concealed 29 bags of powder of poppy husk in the store constructed in my shop No.108 New Grain Market Fazilka, to whom I am in the knowledge of them. I can get recover the same on pointing out.” Memo for disclosure statement is prepared.

Sd/-

Sd/-

Bikram Kumar s/o Tek Chand Raj Bilamber Singh aforesaid
r/o Malkana Mohalla (In English)

Fazilka (In English)

Sd/-

ASI Gurdev Singh

PS City Fazilka (In English) Sd/-

SHO

PS City Fazilka

Dt.24.9.04

(In English)..."

15. It is stated to be a disclosure statement under Section 27 of the Evidence Act. Meaning thereby, that at the time the aforesaid statement was made, the appellant was in police custody. In case, the petitioner was under arrest in FIR No.89, he must have been searched. In compliance of Section 51 Cr.P.C. articles seized from him must have been taken in possession by the Police Officer concerned. Memo in writing must have been prepared. Such memo is missing though memo prepared on arrest of the appellant in FIR No.90 is on record as Ex.P-5.

16. The fact that the appellant was in police custody in FIR No.89 dated 23.09.2004 before making disclosure statement and the version of prosecution regarding the key of the shop being in pocket of the appellant while leading police to recovery of contraband, are not incongruous.

17. The cumulative effect of the aforesaid facts puts cloud on the story projected by the prosecution. The fact of contraband having been recovered from Shop No.108, New Grain Market, Fazilka even if held to be proved, the same does not lead up to the appellant. Ld. State Counsel relies upon Section 54 of the NDPS Act to submit that the presumption is against the appellant and he was required to rebut the same. In our considered opinion, Section 54 of the NDPS Act does not support the case of the

prosecution. Section 54 of the NDPS Act reads as under :-

[54. Presumption from possession of illicit articles. -- In 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.]

18. It is evident from the bare reading of the provision that presumption under Section 54 of the NDPS Act derives its evolution from 'possession of illicit article'. Section 54 of the NDPS Act takes over only after prosecution has proved possession of illicit article with the accused. Once such possession is proved only then it can be presumed that the accused had committed an offence under the Act. Thus, the burden to prove possession of illicit article with the accused lays heavily upon the prosecution. This burden cannot be shrugged off. The scheme of the act further makes it clear that the legislature was conscious of a situation

wherein the premises may be owned by someone and occupied by the other as in the present case. Section 25 of the NDPS Act puts owner or occupier or any other person having the control or use of any house, room, enclosure, space, place, animal or conveyance at par. In the present case, no doubt ownership vests upon the appellant but he cannot be said to be in possession of the same as it has been proved from the record of the State itself that a third person was holding statutory licence *qua* the same premises. The same having been proved on record, the appellant cannot be said to be in possession of the contraband as alleged. He cannot be convicted under Section 25 of the NDPS Act in the absence of tenant which is not the case.

19. The other thing that needs to be noticed is that as per the contents of FIR No.90, contraband was recovered from the Shop No.108 on the disclosure made by the appellant while in custody in FIR No.89. As per the case of the prosecution, the appellant suffered another disclosure statement while in custody in FIR No.90 and on the basis thereof, *opium* was recovered from the bathroom of Shop No.108 which lead to the registration of FIR No.91. Surprisingly, Site Plans of the same shop i.e. Ex.P-12 in FIR No.90 and Ex.P-14 in FIR No.91 are at variance. The said fact was admitted by the Investigating Officer Insp. Davinder Singh while appearing as PW-4. When confronted with the fact of there being marked variance between two Site Plans i.e. Ex.P-12 in FIR No.90 and Ex.P-14 in

FIR No.91 (Ex.P-14 in FIR No.91= Ex.D-1 in FIR No.90), he stated that -

“...It is correct that in site plan Ex.P12 bath room has been shown inside the room which has been marked A. It is correct that Ex.D1 is the correct copy of the site plan prepared in case FIR no.91 dated 25.9.2004 registered against the accused under NDPS Act and that case is also fixed for today. In this site plan Ex.D1 bath room has been shown outside the room/store, which was shown as Mark A in Ex.P12. Volunteered the bath room shown in Ex.D1 has not been shown in Ex.P12. There are actually two bath rooms, one is inside the store as shown in Ex.P12 and another is outside the store which is shown in Ex.D1. The door of the bath room opens outside the store. It has also got another door in this store but the same has been closed by the bricks. It is incorrect that false case is planted against the accused. It is further incorrect that to coop with both the site plans Ex.P12 and Ex.D1 I have given this explanation today only.”

Not only this, PW-4 (the Investigating Officer) and PW-5 (the witness of recovery) have given different descriptions of the shop. All this goes to the root of the case and raises serious doubts on the version of the prosecution. Benefit of this doubt must go to the appellant.

20. In view of the aforesaid discussion, both the appeals are allowed. The appellant is held to be not guilty of the offences punishable under Sections 15 and/or 18 of the NDPS Act.

21. Since, the main appeal(s) have been allowed we need not delve into arguments w.r.t. reduction of sentence and running of concurrent

sentences as prayed for. Accordingly, misc. application bearing CRM No.27561 of 2017 also stands disposed off.

22. Ordered accordingly.

(TEJINDER SINGH DHINDSA)
JUDGE

(PANKAJ JAIN)
JUDGE

April 20, 2022
Dpr

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