

Before Harbans Lal, J.

LAKHVIR SINGH AND ANOTHER,—Appellants

versus

STATE OF PUNJAB,—Respondents

CrI. A No. 827/SB of 2001

9th May, 2008

Narcotic Drugs and Psychotropic Substances Act, 1985-Ss. 15, 35 & 54—Conviction of appellants u/s 15 of 1985 Act—Neither any specific question regarding presumption was framed by trial Court nor it was put to accused that they were in possession of bags—Prosecution failing to establish conscious possession of bags of accused—Appeal accepted while acquitting accused of offence.

Held, that it was necessary for the trial Court to frame a specific question regarding presumption, which is sought to be drawn either under Section 35 or Section 54 of the Act when the accused were examined under Section 313 of Cr. P.C., so as to seek their explanation. A glance through their statutory statements would reveal that no such specific question has been framed by the learned trial Court. Sequelley, the presumptions arising under the aforementioned Sections are not available to the prosecution. It further emanates from their statutory statements that it has nowhere been put to them that they were in possession of the bags. Consequently, their conscious possession is not established *qua* the bags by the prosecution.

(Para 17)

Rajesh Gupta, Advocate *for the appellants*.

K.D.S. Sidhu, Deputy Advocate General Punjab, *for the respondent-State*.

HARBANS LAL, J.

(1) This appeal is directed against the judgment/order of sentence dated 10th July, 2001 passed by the Court of learned Judge, Special

Court, Sangrur, whereby he convicted and sentenced accused Lakhvir Singh, as well as Iqbal Singh to undergo rigorous imprisonment for 10 years and to pay a fine of Rs. 1,00,000 each and in default of payment of fine, the defaulter to further undergo rigorous imprisonment for two years under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for brevity, 'the Act').

(2) As set up by the prosecution, on 15th October, 1992, ASI Tarlochan Singh the then Incharge SHO of Police Station, Sangrur, among other police officials, happened to be present on the bridge of drain, in the area of Village Duggan. Meanwhile, PW Nahar Singh came there with whom the aforesaid ASI started chattering. In the meantime, a truck bearing registration No. AS-01/8649 came from the side of Qilla Bharian. The same was signalled to stop. It was driven by accused Lakhvir Singh, whereas accused Iqbal Singh was sitting by his side. The accused were apprised of their right to have the search of their truck in the presence of a Gazetted Officer or a Magistrate. They expressed their confidence in the aforesaid ASI, who carried out search of the truck, which yielded 18 bags containing poppy husk. Two samples of 250 grams each were drawn from each bag to serve as sample and the same were converted into parcels. The remainder of each bag when weighed came to 39.500 Kg. which was also made into parcels. Thereafter, all the parcels were sealed with the seal bearing impression TS and seized,—*vide* recovery memo., along with the aforesaid truck. In the meantime, Rupinder Singh DSP(R) also came at the spot who after satisfying himself, also affixed his seal on the case property. Certificate of registration of the truck was also taken into possession along with one rope recovered from the truck. On personal search of the accused Lakhvir Singh, driving license was recovered apart from currency notes worth Rs. 365. The same were taken into possession,—*vide* separate memo. On personal search of accused Iqbal Singh, currency notes of Rs. 116 were recovered. The same were also seized,—*vide* separate memo. Ruqa was sent to the Police Station. On its basis, formal FIR was registered. The above mentioned ASI prepared the visual site plan showing the place of recovery, recorded statements of witnesses, arrested the accused and on return to the Police Station, he deposited the case property with intact with MHC. On 16th October.

1992, he produced the accused as well as the case property before the Illaqa Magistrate, who made his endorsement. On receipt of chemical examiner's report and after completion of investigation, the charge sheet was laid in the Court of Illaqa Magistrate, who,—*vide* order dated 15th December, 1992, committed the case to the Court of Sessions for trial of the accused.

(3) On commitment, the accused was charged under Section 15 of the Act to which they did not plead guilty and claimed trial.

(4) In order to substantiate its allegations, the prosecution has examined PW-1 ASI Tarlochan Singh, PW-2 DSP Rupinder Singh, PW-3 H.C. Nirmal Singh, PW-4 ASI Joginder Singh, PW-5 Constable Gurmit Singh and closed its evidence.

(5) When examined under Section 313 of the Code of Criminal Procedure, the accused denied all the incriminating circumstances appearing in the prosecution evidence against them and pleaded innocence. Lakhvir Singh accused has put forth that "I was coming from Dhuri side and the Police party was holding Nakabandi where they held me up and a scuffle took place between me and the Police party, as a result thereafter, this false recovery was planted upon me." Accused Iqbal Singh has come up with the plea that "I am innocent. I was arrested by the Police of Police Station, Sangrur and illegally detained in the Police Station and my relatives sent the telegram to the higher authorities. The police planted this false case later on, on me and Lakhvir Singh. No incriminating article was recovered from my possession nor I am the owner or driver of the truck in question shown by the police in this case."

(6) In defence, accused Lakhvir Singh has examined his wife Lakhvir Kaur as DW-1, DW-2, Surinder Kumar and DW-3 Rattan Chand, Senior Section Supervisor, Central Telegraph Office, Amritsar.

(7) After hearing the learned Additional Public Prosecutor, the learned defence counsel and examining the evidence on record, the learned trial court convicted and sentenced the accused as noticed at the outset. Feeling aggrieved with their conviction/sentence, they have preferred this appeal.

(8) I have heard Mr. Rajesh Gupta, Advocate for the appellants, as well as Mr. K.D.S. Sidhu Deputy Advocate General, Punjab for the State, besides going through the record with due care and circumspection.

(9) Mr. Rajesh Gupta, Advocate appearing on the behalf of the appellants, making a short shrift of his arguments, urged with great vehemence that (a) the case property produced at the trial was in torn condition and, thus, prosecution could not connect the same with the accused ; (b) Nahar Singh, independent witness has not been examined and as its consequences, the accused have been deprived of their valuable right to cross-examine him ; (c) ownership of the truck has not been established ; (d) the documents, Exh. D1 and D2 pertaining to the issuance of telegrams with regard to plantation of the case upon the accused belie the prosecution story ; (e) the conscious possession of the accused *qua* the poppy husk is not demonstrated by the prosecution; and all these circumstances are fatal to the prosecution case.

(10) In response, Mr. K.D.S. Sidhu, Deputy Advocate General, Punjab, maintained that with the efflux of time, the case property could not remain in the same and the case property produced at the trial was the same which was recovered from the truck. He further pressed into service that Nahar Singh, PW had joined hands with the accused and for that reason he was not examined. The accused did not account for their possession *qua* the bags and that being so, they are presumed to be in their conscious possession in view of presumption arising under Sections 35 and 54 of the Act.

(11) On giving a deep and thoughtful consideration to the rival contentions, I am disposed to hold that the contentions raised on behalf of the State do not hold water and are liable to be rejected for the discussion to follow hereunder.

(12) On reading the entire evidence of ASI Tarlochan Singh, PW-1, the Investigator, it transpires that the seal was not handed over by him either to Nahar Singh, independent witness or to any other police official. This gives rise to the presumption that the seal was althrough retained in his own custody. It also follows from his testimony that the alleged recovery was effected by him before the arrival of Rupinder

Singh, DSP. This DSP has also stated in categoric terms that "I reached the spot. At the spot, both the accused were present along with the case property and the witnesses. I satisfied myself and after due verification, I put my own seal RS on the case property. The chit bearing the sample of the seal is Exh. P39 and thereafter, the case property was handed over to SHO Tarlochan Singh." He has nowhere stated that the recovery was effected within his view. Thus, on assessing the entire evidence, it emerges out that search and seizure of the alleged poppy husk bags was effected by ASI Tarlochan Singh, PW and the case was also investigated by him. He being the complainant could not be the investigator in view of the observations made in re : **Risala versus State of Haryana, (1) and Mohd. Salim versus State of Haryana, (2)**. One thing is crystal clear from the evidence of the aforementioned ASI that the seal throughout remained with him. That being so, the possibility of tampering with the contents of the sample parcels or the case property cannot be ruled out. The sample parcels were received in the office of the Chemical Examiner on 20th October, 1992, whereas recovery was effected on 15th October, 1992. The investigator has not assigned any reason worth mention for not handing over the seal after use to Nahar Singh, PW. Form No. 29 was also not prepared at the spot nor deposited in the Malkhana. As revealed by Exh. PK, the chemical examiner's report, such form was filled up on 19th October, 1992. All these circumstances, when put together, prove fatal to the prosecution case. It is in the cross-examination of Investigating Officer that "some of the bags are torn and some seals are broken." The CJM has not put the seal on the case property when the same was produced in his Court. This state of the case property by itself leads to the conclusion that the prosecution has not been able to connect the case property with the accused.

(13) It is in the cross-examination of the Investigating Officer that "the case property and the accused were produced before the Illaqa Magistrate on the next day but the Illaqa Magistrate had not put his signatures or seal on the case property." In such circumstances, it is very difficult to presume that the case property was produced before

(1) 1996(2) Recent Criminal Reports (Criminal) 707

(2) 2008(2) Recent Criminal Reports (Criminal) 128

him as there is no vouch for this fact. It is also in the cross-examination of the Investigator that "I had not supplied the written grounds of arrest to the accused at the spot. I had not produced the case property before the acting SHO." It clearly indicates the violations of the provisions of the Act.

(14) There is another infirmity in this case that the DSP Rupinder Singh PW-2 in his cross-examination has stated "I handed over the seal after use to Tarlochan Singh SHO. It is correct that the bags are torn and the poppy husk is coming out from some bags. It is correct that the seals are broken but the seal impressions are of mine. It is correct that the poppy husk is less now in some bags." This evidence leaves no room for doubt that both the seals remained in the custody of the Investigator. So there could be every possibility of the contents of the sample parcel being tampered with. ASI Joginder Singh PW-4 went on to say that the seal after use was handed over to him, whereas ASI Tarlochan Singh, Investigator, as noted *supra*, is absolutely silent on this aspect. If it is assumed that the seal after use was handed over to this witness, despite that the possibility of the contents of the sample parcels being tampered with, cannot be ruled out. This witness ASI Joginder Singh PW-4 went on to say that the DSP kept the seal with him after use, whereas the above mentioned DSP has solemnly affirmed that after use he handed over his seal to ASI Tarlochan Singh. Thus, all these PWs are in sharp contradiction on this point. ASI Joginder Singh, PW-4 has stated that "I do not know if the telegrams were being sent already to the Senior Officers that the accused were in illegal detention of the Police. I do not know if there was any land dispute between Nahar Singh and the accused." Thus, obviously this witness has not categorically denied the fact with regard to issuance of telegrams. Rattan Chand DW-3, an official witness has deposed that "Today I had seen the receipts of telegrams, Exh. D1 and D2 on the file. Lakhvir Kaur wife of Lakhvir Singh filed an application for summoning the original record of Exh. D1 and D2 and as per our record, the record has been destroyed by the department after a lapse of one year. Exh. D1 and D2 are issued by our office." Lakhvir Kaur DW-1 has deposed that "on 6th October, 1992 my husband along with Iqbal Singh were detained in Police Station Sangrur. I came to the Police

Station on 7th October, 1992. The then Thanedar told me that my husband had relations with terrorists and demanded illegal gratification of Rs. 1,00,000 otherwise he could be involved in some other case. My husband was not let off by the Police Station Sangrur. I told the then Thanedar that I was not in a position to pay illegal gratification of Rs. 1,00,000. On 9th October, 1992 I sent telegrams to the DIG and IG Police. On 15th October, 1992, he (my husband) was falsely implicated in NDPS case. The receipts of the telegrams which were sent to the DIG and IG Police are Exh. D1 and D2.” This evidence further renders the story of prosecution suspect.

(15) In **Avtar Singh and others versus State of Punjab**, (3) Apex Court observed as under :—

“...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 person 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 travelling 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 Section 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 the 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 Section 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.”

(16) In re : **Raj Kumar versus State of Punjab, (4)** the jeep was being driven by Raj Kumar while Hawa Singh was seated by his side on the front seat. There was a bag lying between Raj Kumar and Hawa Singh. On search of the bag 8,250 kgs. poppy was recovered. The Division Bench of this Court held as under :—

“In the present case the bag containing 8.250 Kgs. of opium was lying on the seat between the two appellants. Both the appellants had been charged for possession of opium put neither of them had been asked any question in their statements under Section 313 Cr P.C. that they were in conscious possession of opium. Therefore, neither the presumption under Section 35 nor the presumption under Section 54 of the Act would be attracted.

Section 35 provides that in any prosecution for an offence under the Act which requires a culpable mental state of the accused (conscious possession), 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 has no such mental state with respect to the act charged as an offence in that prosecution. There is an explanatory clause which states that “culpable mental state” includes “intention, motive, knowledge of a fact and belief in or reasons to believe, a fact.”

Section 54 states that in trials under the 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.....
- (b)
- (c)
- (d)

for the possession of which he fails to account satisfactorily.

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 Cr. P.C. 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.”

(17) On the analogy of the above extracted observations, it was necessary for the trial Court to frame a specific question regarding presumption, which is sought to be drawn either under Section 35 or section 54 of the Act when the accused were examined under Section 313 of Cr. P.C., so as to seek their explanation. A glance through their statutory statements would reveal that no such specific question has been framed by the learned trial Court. Sequelley, in the instant case, the presumptions arising under the aforementioned Sections are not available to the prosecution. It further emanates from their statutory statements that it has nowhere been put to them that they were in possession of the bags. Consequently, their conscious possession is not established qua the bags by the prosecution.

(18) In view of the infirmities enumerated hereinbefore, this appeal is accepted, setting aside the impugned judgment/order of sentence. The accused-appellants are hereby acquitted of the charged offence.