

*Before Jitendra Chauhan, J.*

**PAPPU SINGH & OTHERS—Appellant**

*versus*

**STATE OF HARYANA—Respondent**

**CRA No.1133-SB of 2000**

July 16, 2013

*Narcotic Drugs and Psychotropic Substance Act, 1985 - Ss.15, 55 - Code of Criminal Procedure, 1973 - S.313 - "Conscious possession" - Appellant tried under NDPS Act - Convicted by trial Court - Held, specific question regarding "conscious possession" not put to appellants in statement recorded u/s 313 Cr.P.C. - Presumption cannot be drawn against them - Appellants not arrested from spot - Police officials did not know the accused earlier - Test Identification Parade not conducted - Seal after use was not handed over to independent witness - Form 29-M not filled at spot nor deposited in malkhana - Only one sample separated from each bag - Two samples should have been drawn as per S.55 of the Act - Accused escaped in presence of trained officials - Prosecution has not explained their escape - No gazetted officer was present at the time of recovery - Recovery highly doubtful and material on record not sufficient to convict the accused - Appeal allowed.*

*Held*, that in the present case, a huge recovery of poppy straw was effected from the brick kiln. Nobody was arrested from the spot. A close examination of the statements of the accused under Section 313 of the Code of Criminal Procedure would reveal that a specific question was not been put by the learned trial Court regarding the presumption which is sought to be raised either under Section 35 or 54 of the Act. Consequently, in view of the afore-extracted observations, such presumption to the effect that the accused were in conscious possession of the bags cannot be drawn against them.

(Para 14)

*Further held*, that none of the accused was arrested from the spot. There is no explanation on record as to how the police officials identified the accused. There is nothing on record to suggest that the members of the

police party knew the accused earlier, if so, the context as to how the police party knew them has not been cited. No test identification parade was got conducted by the prosecution. So, the identity of the accused, who ran away from the spot, could not be matched with the present accused, who were suspected to be the actual culprits. There are chances of mistaken identity in this case. The ASI who allegedly recognized the accused, was not having any friendship or thick relations with the present accused leaving no doubt about the identity of the ran away accused. There is possibility of framing the present accused merely on suspicion.

(Para 15)

*Further held*, that the seal after use remained with the Investigating Officer for a period of fifteen days. It was not handed over to any independent witness, who were part of the team.

(Para 16)

*Further held*, that Form No.29-M was also not filled at the spot nor deposited in the malkhana. The samples were sent to the chemical examiner after 14 days. It was held that tampering with the samples cannot be ruled out and it was a serious flaw in the link evidence.

(Para 17)

*Further held*, that as is evident from the evidence of PW11 ASI Hari Chand, Investigating Officer, only one sample of 100 grams was separated from each bag. Two samples should have been drawn in view of the provisions of Section 55 of the Act. Thus, the aforesaid provisions though merely directory in nature have also been given a go by.

(Para 18)

*Further held*, that there were large number of police officials in the raiding party in the jeeps. As per the version of the Investigating Officer, they were at a distance of some yards from the accused, when they ran away. All the police officials were armed with the dandas and other weapons. In the circumstances, much remains to be explained by the prosecution as to how all the accused escaped and trained police officials could not capture a single accused.

(Para 19)

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*Further held*, that no gazette officer was present at the spot at the time of recovery. When the truck number was verified, it was found to be issued to a scooter owner. In the circumstances, the recovery of the poppy straw is highly doubtful and the material on record is not sufficient to connect the accused.

(Para 20)

Ashwani Verma, Advocate for the appellants in CRA No.1133-SB of 2000

Rahul Vats, Advocate for the appellants in CRA No.1167-SB of 2000 and CRA No.273 SB of 2001

Deepak Jindal, Deputy Advocate General, Haryana

**JITENDRA CHAUHAN, J.**

(1) This judgment shall dispose of three appeals i.e. CRA No.1133 SB of 2000, filed by Pappu Singh, Dhola alias Banta, Babu alias Tunda and Koshala alias Kushal Chand; CRA No.1167-SB of 2000, filed by Lakha Singh and CRA No.273 SB 2001, filed by Jarnail Singh @Russi, against the judgment and order dated 18/21.10.2000, whereby all the appellants were convicted and sentenced to undergo rigorous imprisonment for ten years each and to pay a fine of Rs.One lac each; in default of payment of fine, the defaulter to further undergo RI for one year under Sections 15 of the Narcotic Drugs and Psychotropic Substances Act, whereas Sanwar Mal, Om Parkash, Ranbir and Pawan Singh were acquitted by the trial Court as the prosecution has failed to prove charge against the said persons.

(2) The facts necessary for adjudication of the matter as narrated in para no.2 of the impugned judgement are as under:-

“Inspector Dharambir Singh (PW14) was posted as S110 in Police Station Ratia on 9.8.1996. On that day he was present at bridge of Bhakhra Canal in the area of village Baliaia in a jeep accompanied by Head Constable Sher Singh, Constables Rameshwar Dass, Krishan Kumar, Nihal Singh, Ishwar Singh and Sumer Singh. Head Constable Ram Phal was driver of the jeep. Inspector Sh.Dharambir Singh received secret information that truck No.2829 RSN in which bags containing poppy straw and khal were loaded had gone from

Ratia towards village Baliala via village Ratangarh and Lakha Singh, Russi alias Jamail Singh, residents of village Baliala, Khoshala alias Kushal Chand, Dhalla alias Banta Singh, Pappi and Tunda alias Babu residents of Mehmadi were accompanied poppy straw in the truck. The secret information was reduced by Inspector Dharambir Singh in writing (Ex.PG) and sent to the police station for registration of the case, on the basis of which, formal FIR (Ex.PG/1) was registered by ASI Jai Singh (PW6). Inspector Dharambir Singh transmitted message to police post Mehmra, Police Post Khai and Police Post, Madh on wireless system directing the police officers and men posted in these police posts to meet him at Ratangarh and another message to police station Ratia for bringing either Tehsildar Ratia or DSP Fatchabad to Ratangarh if they were available. After transmitting this message, Dharambir Inspector went to Ratangarh turning from where a road leads to village Baliala. ASI Hari Chand, Incharge Police Post Madh and ASI Katar Singh, Incharge Police Post Mehmra met him at Ratangarh turning as they had reached there on receiving the message on wireless system. ASI Katar Singh and ASI Hari Chand were accompanied by the constables posted in police Posts Mehmra and Madh. Inspector Dharambir Singh then proceeded to village Baliala accompanied by ASI Katar Singh, ASI Hari Chand and Constables. At village Baliala, he received information that the gunny bags had been unloaded on the site of abandoned brick kiln of Pardeep Kumar in the area of village Baliala and Lakha Singh, Russi alias Jamail Singh, Koshala, Dhalla alias Banta Singh and Tunda alias Babu were selling poppy straw at the site of abandoned brick kiln. Kesar Singh Sarpanch of village Baliala and Swaran Singh another resident of village Baliala were associated by Dharambir Singh Inspector in the raiding party. In the meantime, message was received on wireless system that neither Tehsildar Ratia nor BDO Ratia, nor DSP Fatchabad were available at the Headquarter. Dharambir Inspector then proceeded to brick kiln of Pardeep Kumar with the raiding party. When the jeep turned towards site of abandoned brick kiln, Jamail Singh alias Russi, Lakha Singh, Banta Singh alias Dhalla, Tunda alias Babu Ram, Koshala and Pappu who were seen sitting on the gunny bags fled away on noticing the police party coming in a jeep. Police Personnel persued them to some

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distance, but they could not be apprehended. When the gunny bags were checked 60 bags were found containing poppy straw and 15 bags containing khal of binola. When the gunny bags with poppy straw were weighed, each gunny bag was found 40 kilograms in weight. 100 grams poppy straw was separated from each gunny bag as sample. 60 parcels containing 100 grams poppy straw were prepared and sealed with the seal of 'DR' by Inspector Dharambir Singh. Remainder gunny bags containing 39 kilograms 900 grams poppy straw in each bag were also sealed with the seal of 'DR'. After retraining specimen impression of seal, the seal was handed over by Inspector to ASI Hari Chand. Seizure memo (Ex.PB) was prepared and sealed parcels containing poppy straw were taken by Inspector Dharambir Singh in his possession. Seizure memo was attested by Kesar Singh Sarpanch, Swaran Singh and ASI Hari Chand. Site plan (Ex.PJ) was also prepared with correct marginal notes. Special report (Ex.PK) was sent to the police station with the message that a copy of this report be sent to the higher officers. Sealed parcels containing poppy straw as case property and specimen seal impression were deposited with MHC. Report under Section 57 was prepared and handed over by Inspector Dharambir Singh to MHC Ram Niwas (PW4) for despatching to the higher officers. Bir Singh, Pawan, Om Parkash and Ranbir accused came in a car No.DL-2C-5785 driven by Sanwar Mal accused to a crossing in the area of village Ratangarh on 13.8.1996. The car was stopped and they were arrested by Inspector Dharambir Singh because they piloted the truck carrying 60 bags of poppy straw on 9.8.1996. Car No.DL- 2C-5785, driving licence of Sanwar Mal accused and registration certificate and insurance policy were also taken by Inspector Dharambir Singh in his possession through seizure memo (Ex.PII). It is further case of the prosecution that poppy straw belonged to Sanwar Mal, Pawan, Om Parkash and Ranbir and these were entrusted by them to Koshala, Banta alias Dhalla, Jarnail alias Russi, Pappu, Lakha Singh and Babu Ram alias Tunda for retail sale and on 13.8.1996 Sanwar Mal etc. were going to village Baliala for collecting sale proceed of the poppy straw. ASI Ishwar Singh (PW10) arrested Dhalla alias Banta on 17.9.1997 and Jarnail Singh on 12.11.1996. Kaushal Chand was arrested on 17.2.1997 by ASI by

ASI Jagbir Singh (PW8) and Lakha Singh surrendered in the Court of learned Judicial Magistrate, Fatchabad on 2.2.1998 and he was arrested by ASI Anup Singh (PW7). MHC Ram Niwas delivered 60 sealed parcels containing 100 grams poppy straw bearing seal of 'DR' to Constable Mahabir Singh No.233 on 12.8.1996 along with specimen seal impression for depositing with Director, Forensic Science Laboratory, Madhuban. Constable Mahabir Singh PW3 deposited the sealed parcels containing poppy straw for sample with Director, Forensic Science Laboratory, Madhuban with seals intact. Senior Scientific Officer, Forensic Science Laboratory, Madhuban identified the samples delivered by Constable Mahabir Singh as poppy straw in his report dated 7.11.1996 (Ex.P1).

(3) After completion of the investigation, the challan was presented in the Court. The accused were charged under Section 15 of the Act, to which, they did not plead guilty and claimed trial.

(4) In order to substantiate the charges, the prosecution has examined the following witnesses:

PW1, Kesar Singh, was joined as independent witnesses in the raiding party, later on he was declared hostile. In his cross-examination, he deposed that no recovery was effected in his presence and he did not know the accused present in the Court. His signatures were taken on blank paper by the police.

PW2, Swaran Singh, was another independent witness joined, who was also declared hostile. In his deposition, he stated that he did not see any person unloading the bags from the truck.

PW3 Constable Mahabir Singh, tendered his affidavit Ex.P1D, wherein he has stated that he deposited the parcels in the DFSL, Madhuban.

PW4 MHC Ramniwas, tendered his affidavit Ex.P1E, wherein he deposed that he received the recovery and sample parcels. He handed over the parcels to Constable Mahabir Singh, who after depositing the same with the Chemical Examiner, handed over the receipt to him.

PW5, Constable Om Parkash, who identified the signature of DSP Charanject Singh on Ex.PF/1.

PW6 ASI Jai Narain, was posted in Police Station Ratia. On receiving ruqa Ex.PG, he recorded the formal FIR Ex.PG/1.

PW7 ASI Anoop Singh, arrested accused Lakha Singh. He went to RTA Office at Jodhpur. He verified that registration No.RSN 2794 and RSN 2829 were issued to one Trailer and scooter owners respectively.

PW8 ASI Jagbir Singh, arrested accused Kaushal Chand at Bus Stand Madh.

PW9 ASI Ram Kumar, proved Ex.PII, whereby RC, driving licence of Sanwar Mal and Car were taken into possession.

PW10 ASI Ishwar Singh, arrested accused Dhalla @ Banta and Jarnail Singh and recorded the evidence of formal PWs.

PW11 Hari Chand, was posted as ASI in the police post Madh. He deposed that on 9.8.1996, he received a VT Message and he alongwith other police official went to abandoned brick kiln. From where, they recovered 60 bags containing poppy straw. He identified the accused in the court.

PW 12 ASI Subh Ram, posted at Police Post Khai, arrested Sanwar Mal, Om Parkash and Ranbir.

PW13 SI Raj Kumar after completion of investigation prepared the challan.

PW14 Inspector Dharambir Singh deposed that he received the secret information with regard to transporting the alleged contraband and reduced the same in to writing and sent to the police station for registration of the case. He alongwith other police official carried out the raid and recovered the alleged contrabands from the accused persons.

(5) When examined under Section 313 of the Code of Criminal Procedure, the accused-appellants denied all the incriminating circumstances appearing in the prosecution evidence against them and pleaded false implication. In defence, they examined Ajay Kumar as DW1 and closed the evidence.

(6) The learned trial Court held that the accused Pappu Singh, Dhola alias Banta, Jamail alias Rusi, Babu alias Funda, Koshala alias Kushal Chand and Lakha Singh were found in possession of the alleged contraband and convicted and sentenced them as stated above by believing the versions given by Inspector Dharamir Singh and ASI Hari Chand, whereas Sanwar Mal, Om Parkash, Ranbir and Pawan Singh stand acquitted, as the prosecution had failed to prove charge against.

(7) Feeling dissatisfied with the same, the accused- appellants preferred appeals indicated in para No.1.

(8) Learned counsel for the appellants contended that the learned trial court has committed a grave error while convicting the appellants as the link evidence in this case is missing. It is further submitted that the appellants were not arrested from the spot. The recovery was effected from an abandoned place. The independent witnesses joined by the police party were declared hostile. The appellants were not arrested from the place of recovery. The appellants are labourer at the brick kiln. The statement of the brick owner, from which the recovery was effected was not recorded. As per the version given by the prosecution, at the time of raiding, a truck bearing No.RSN 2829 containing poppy straw and khal were being unloaded by the accused, but on verification from the RTA, Jodhpur, this registration number was found to be allotted to one scooter. The appellants were not found in conscious possession of the alleged contrabands. They further submit that no test identification parade was held after the arrest of the accused persons. There is no evidence that Form No.29 was filled at the spot by the Investigating officer and the same was deposited with the MHC in the Malkhana alongwith the case property. It is further submitted that no question was put to the accused with regard to the conscious possession of the contraband while recording the statement under Section 313 Cr.P.C. While recovering the alleged contraband, the provisions of Sections 50 and 42 of the Act were not complied with, as the search was not conducted in the presence of any gazetted officer.

(9) On the other hand, the learned State counsel submits that the prosecution case is fully established. He further submits that a huge quantity of contraband were recovered from the appellant, which cannot be planted upon them. Therefore, the learned trial Court has rightly convicted and sentenced the accused.



(10) I have heard the learned counsel for the parties and perused the record carefully.

(11) Pappu Singh accused died during the pendency of appeal. Therefore, the appeal filed by Pappu Singh stands abated.

(12) With regard to conscious possession, the Hon'ble Apex Court *Avtar Singh versus State of Punjab (1)*, held 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 by the minimum requisite element which has to be satisfied in 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 custodian of goods whether or not he as the proprietor. The persons who were merely sitting on the bags, in the absence of proof of any thing 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 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 the Evidence Act nor is it after to conclude that the prosecution established beyond 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 nor taken into account by the trial Court and the High Court.”

(13) In re: *Raj Kumar versus State of Punjab (2)*, 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, but neither of them had been asked any question in their statements under Section 313 of Code of Criminal Procedure that they were in conscious possession of opium. It was held by the Division Bench of this Court that neither the presumption under Section 35 nor under Section 54 of the Act would be attracted. Further held that 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.

(14) In the present case, a huge recovery of poppy straw was effected from the brick kiln. Nobody was arrested from the spot. A close examination of the statements of the accused under Section 313 of the Code of Criminal Procedure would reveal that a specific question was not been put by the learned trial Court regarding the presumption which is sought to be raised either under Section 35 or 54 of the Act. Consequently, in view of the afore-extracted observations, such presumption to the effect that the accused were in conscious possession of the bags cannot be drawn against them.

(15) In this case, none of the accused was arrested from the spot. There is no explanation on record as to how the police officials identified the accused. There is nothing on record to suggest that the members of the police party knew the accused earlier, if so, the context as to how the police party knew them has not been cited. No test identification parade was got conducted by the prosecution. So, the identity of the accused, who ran away from the spot, could not be matched with the present accused, who were suspected to be the actual culprits. There are chances of mistaken identity in this case. The ASI who allegedly recognised the accused, was not having any friendship or thick relations with the present accused leaving no doubt about the identity of the ran away accused. There is possibility of framing the present accused merely on suspicion.

(16) From the perusal of the record, it reveals that the raiding party joined two independent witnesses namely, Kesar Singh Sarpanch and Swaran Singh. The seal after use remained with the Investigating Officer for a period of fifteen days. It was not handed over to any independent witness, who were part of the team. In his cross-examination, PW1 Kesar Singh has stated that when Ex.PB, recovery memo was signed by him, it was blank and no recovery was effected in his presence. He did not know the accused present in the court. Swaran Singh PW2 deposed that he did not see any person unloading the bags from the truck. As emanates from the statements of PW1 and PW2, the seal after use was not handed over to them.

(17) In re: *Gurjant Singh versus State of Punjab (3)*, the seal after use was not handed over to independent witness. Form No.29-M was

also not filled at the spot nor deposited in the malkhana. The samples were sent to the chemical examiner after 14 days. It was held that tampering with the samples cannot be ruled out and it was a serious flaw in the link evidence. Thus, in the instant case, the above lacunae are fatal to the prosecution case.

(18) As is evident from the evidence of PW11 ASI Hari Chand, Investigating Officer, only one sample of 100 grams was separated from each bag. According to the observations made in re: *Hawa Singh* versus *State of Haryana* (4), two samples should have been drawn in view of the provisions of Section 55 of the Act. Thus, the aforesaid provisions though merely directory in nature have also been given a go bye.

(19) There were large number of police officials in the raiding party in the jeeps. As per the version of the Investigating Officer, they were at a distance of some yards from the accused, when they ran away. All the police officials were armed with the dandas and other weapons. In the circumstances, much remains to be explained by the prosecution as to how all the accused escaped and trained police officials could not capture a single accused.

(20) Moreover, the owner of the brick kiln from which the recovery of the contraband was made was not examined. No gazetted officer was present at the spot at the time of recovery. When the truck number was verified, it was found to be issued to a scooter owner. In the circumstances, the recovery of the poppy straw is highly doubtful and the material on record is not sufficient to connect the accused.

(21) Keeping in view all the circumstances, this Court comes to the conclusion that the prosecution has failed to prove its case against the accused beyond reasonable doubt.

(22) In view of the above discussion, all the appeals are allowed; setting aside the impugned judgment/order of conviction and sentence. The accused-appellants are hereby acquitted of the charged offence.

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*J.S. Mehndiratta*