

accused, and the recovery memos were not signed or thumb marked by the accused persons, therefore, these documents carry no evidentiary value in the eyes of law under Section 27 of the Evidence Act. Regarding recoveries of blood stained chappal and sweater alleged to be belonging to the accused/appellants, as the sweater could not be tracked and sniffed by the police dog and only one chappal, out of a pair, was found to be stained with human blood, that alone would not act as an incriminating material strong enough to sustain the findings of guilt against the accused. Moreover, both the accused did not leave the town and abscond, and they were arrested when they were just walking on a road in normal condition while going home.

(20) In view of the aforesaid analysis of the evidence, we are not inclined to uphold the impugned judgment. It is, thus, set aside and resultantly, the criminal appeal is allowed. The accused/appellants, who are in jail, are directed to be released forthwith, if not wanted in any other case.

R.N.R.

Before Harbans Lal, J.

GURDEEPSINGH ALIAS DEEP,—Appellant

versus

STATE OF PUNJAB,—Respondent

CrI. A. No. 2351/SB of 2004 &

CrI. A. No. 189/SB of 2005

8th April, 2008

Evidence Act, 1872-S. 114(g)—Narcotic Drugs and Psychotropic Substances Act, 1985—S. 15—Conviction of appellants u/s 15 of 1985 Act—Neither any specific question was framed nor it was put to accused that they were in conscious possession of poppy husk bags—Prosecution giving up independent witness to examine on pretext of his having been won over by accused—In absence of his examination, an adverse inference has to be drawn—Accused also depriving of their valuable right to cross-examine this

witness—Appeal accepted while acquitting accused of charged offence.

Held, that on going through the statement of both the accused recorded under Section 313 of the Code of Criminal Procedure, it transpires that no specific question was framed nor it was put to them that they were in conscious possession of the poppy husk bags. It cannot be said that both the accused had custody and control of bags.

(Para 13)

Further held, that it is in the evidence of Inspector Jasbir Singh (Investigator) that the seal after use was handed over to Kulwinder Singh, who, as emerges out from the record, has been given up on the pretext of his having been won over by the accused. In the absence of his examination, it is very difficult to presume that the seal was returned by him after dispatch of the sample parcels to the Chemical Examiner. As per chemical examiner's report, the sample parcels were received in his office on 5th September, 2000, whereas the recovery was effected on 2nd September, 2000. It implies that the samples were dispatched after three days but there is no vouch for the fact that the Investigator got back his seal after sending the sample parcels.

(Para 15)

Further held, that Kulwinder Singh having not been examined, an adverse inference has to be drawn under Section 114(g) of Evidence Act that if he had been examined, he would have nullified the prosecution story by stating their against. The accused have also been deprived of their valuable right to cross-examine this witness.

(Para 17)

S.S. Rana, Advocate *for the appellant* in Cr. A. No. 2351-SB of 2004.

J. S. Chahal, Advocate *for the appellant* in Cr. A. No. 189-SB of 2005.

Ms Manjari Nehru, Deputy Advocate General, Punjab, *for the respondent-State.*

JUDGMENT

HARBANS LAL, J.

(1) This judgment shall dispose of Criminal Appeal No. 2351-SB of 2004 preferred by Gurdeep Singh *alias* Deep as well as Criminal Appeal No. 189-SB of 2005 filed by Nachhatar Singh against the judgment/order of sentence dated 31st August, 2004 passed by the Court of learned Judge, Special Court, Ludhiana, whereby he convicted and sentenced the accused-appellant Gurdeep Singh *alias* Deep and Nachhatar Singh to undergo rigorous imprisonment for 10 years and to pay a fine, the defaulter to further undergo rigorous imprisonment for six months under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for brevity, 'the Act').

(2) As set up by the prosecution, on 2nd September, 2000 Inspector Jasbir Singh, SHO Police Station Dehlon, in the company of other police officials, was proceeding from village Qila Raipur towards village Phalewal being on patrol duty. ASI Mohan Dass was joined in the police party. Naka was set up at the crossing of village Phalewal. Kulwinder Singh, PW came there. He was also co-opted in the police party. At about 7.00 A.M. a truck bearing registration No. PB-03E-3531 came from the side of village Pakhowal. The same was signalled to stop by the above mentioned inspector. The truck driver as well as the occupant made an attempt to make good their escape, but they were intercepted. The truck Driver disclosed his name as Gurdip Singh *alias* Deepa, whereas the occupant told his name to be Nachhatar Singh *alias* Billu. On receipt of wireless message, DSP Vijay Sharma came at the spot. He disclosed his identity to the accused. On search of the truck, 13 bags of poppy husk along with Sarson cake bags were recovered. When weighed, the contents of each poppy husk bag came to 30 Kg. Two samples of 250 grams each were drawn from each bag and the same were converted into parcels. The remainder of each bag was also made into parcels. Thereafter, all the parcels were sealed with the seal JS. The seal after use was handed over to Kulwinder Singh. All the parcels along with the truck were seized,—*vide* recovery memo. On receipt of Chemical Examiner's report and after completion of investigation, the charge-sheet was laid in the Court for trial of the accused.

(3) The accused were charged under Section 15 of the Act to which they did not plead guilty and claimed trial.

(4) To bring home guilt against the accused, the prosecution examined PW-1 Inspector Jasbir Singh, PW-2 Constable Kabal Singh, PW-3 HC Joginder Singh, PW-4 ASI Sukhdev Singh, PW-5 SP(D) Vijay Sharma, PW-6 ASI Mohinder Singh, PW-7 SI Jasbir Singh and closed its evidence.

(5) When examined under Section 313 of the Code of Criminal Procedure, both the accused denied all the incriminating circumstances appearing in the prosecution evidence against them and pleaded false implication. Accused Nachhatar Singh put forth that :—

“I am innocent. No recovery was effected from me. I did not know co-accused Gurdip Singh. I am not the owner of truck No. PB-03E-3531, nor the Driver of the same. In fact I had filed a writ petition for Habeas Corpus bearing No. 1145 to 1999, titled as **Nachhatar Singh versus State of Punjab**, before Hon’ble High Court of Punjab and Haryana for the release of his maternal uncle Mohinder Singh and his cousin Sukhdev Singh against the police officials of Jagraon and in the said writ, a Warrant Officer was appointed who recovered the detenu Mohinder Singh and Sukhdev Singh from the illegal custody of the police officials, Jagraon and submitted his report before Hon’ble High Court of Punjab and Haryana and due to this reason, I was picked up by the police officer of Police Station Dehlon falling within the jurisdiction of Police Distt. Jagraon prior to the present case and thereafter I was taken to Police Station Dehlon, where I was involved in this case falsely. I am permanent employee of P.S.E.B. I had been involved in this case falsely due to the enmity with the accused. I was also not the Conductor of the said truck.”

Accused Gurdeep Singh has put forth as under :—

“I am innocent. No recovery was effected from me. I was neither the owner, nor the Driver or Conductor of the vehicle

in question. In fact I was picked up from my house prior to the present case and was taken to Police Station, where I was involved in this case falsely. Co-accused Nachhatar Singh is not known to me. Case is false.”

(6) In defence, they examined Constable-2 Daljit Singh as DW-1 and tenderd certain documents in their defence.

(7) After hearing the learned Additional Public Prosecutor for the State, the learned defence counsel and examining the evidence on record, the learned trial Court convicted and sentenced both the accused as noticed at the outset. Feeling aggrieved with their conviction/sentence, they have preferred the above mentioned appeals.

(8) I have heard Mr. S.S. Rana, Mr. J. S. Chahal, the learned counsel for the appellants as well as Ms. Manjari Nehru, Deputy Advocate General, Punjab besides going through the record with due care and circumspection.

(9) The learned counsel for the appellants, making a short shrift of their arguments, strenuously urged that (a) as is borne out from the record, the accused Nachhatar Singh had filed a Writ of Habeas Corpus against the police officials and to wreak that vengeance, he has been falsely implicated in this case; (b) Nachhatar Singh accused was neither the owner nor driver of the alleged vehicle ; (c) Kulwinder Singh, independent witness has not been examined ; (d) conscious possession of the accused *qua* the alleged bags is neither established by the prosecution nor put to the accused when examined under Section 313 of the Code of Criminal Procedure, though in view of the observations made by the Division Bench of this Court in re: **Raj Kumar versus State of Punjab (1)**, a specific question should have been framed regarding conscious possession and put to the accused when their statutory statements were recorded and all these circumstances are cumulatively fatal to the prosecution case.

(10) To controvert these submissions, Ms Manjari Nehru appearing on behalf of the State, argued that a close examination of the Chemical Examiner’s report would reveal that the sample seals on all

(1) 2005 (1) Recent Criminal Reports (Crl.) 70

the parcels tallied with the sample seal at the time of their receipt in the office of the Chemical Examiner and this rules out the possibility of tampering with the contents of the sample parcels. She further pressed into service that in view the provisions as enshrined in Section 35 and 54 of the Act, presumption uses against the accused that they were in conscious possession of the bags of poppy husk.

(11) In re: **Avtar Singh versus State of Punjab (2)**, the five accused were intercepted in the middle of the night travelling in a truck which was being driven by one of them. The truck was carrying 16 bags of poppy husk. One of the accused was sitting in the driver's cabin in the truck and three were sitting on the bags of poppy husk in the back of the truck. The Apex Court 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 person 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 answers 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.”

(12) In re: **Raj Kumar versus State of Punjab (3)**, the bag containing 8.250 Kgs. of opium was lying on the seat between the two

(3) 2005(1) R.C.R. (Crl.) 70

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.

(13) Coming to the facts of the present case, on going through the statements of both the accused recorded under Section 313 of the Code of Criminal Procedure, it transpires that no specific question was framed nor it was put to them that they were in conscious possession of the poppy husk bags. In view of the observations made in re: Avtar Singh (*supra*), it cannot be said that both the accused had custody and control of bags. Further, in the light of the above extracted observation from the case of **Raj Kumar** (*supra*), neither presumption under Section 35 nor under Section 54 of the Act would be attracted.

(14) As alleged by the prosecution, the accused Gurdip Singh was driving the truck, whereas Nachhatar Singh was sitting by his side. The prosecution has not produced any evidence to the effect that Gurdip Singh accused was holding driving license or that he or Nachhatar Singh was the owner of the truck. It was obligatory upon the Investigating Officer to have collected evidence as to who was the owner of the truck and from where the bags of poppy husk were being transported.

(15) It is in the evidence of Inspector Jasbir Singh, PW (Investigator) that the seal after use was handed over to Kulwinder Singh, who, as emerges out from the record, has been given up on the pretext of his having been won over by the accused. In the absence of his examination, it is very difficult to presume that the seal was returned by him after despatch of the sample parcels to the Chemical Examiner. As per chemical examiner's report, the sample parcels were received in his office on 5th September, 2000, whereas the recovery was effected on 2nd September, 2000. It implies that the samples were despatched after three days but there is no vouch for the fact that the Investigator got back his seal after sending the sample parcels.

(16) A glance through Exh. D/1 would reveal that Criminal Writ Petition No. 1145 of 1999 was filed by the accused Nachhatar Singh against Ashok Puri, DSP Jagraon, Incharge CIA Staff Jagraon, SHO PS City, Jagraon and SHO Police Station Sadar, Jagraon with a prayer for issuance of a Writ of Habeas Corpus for production and release of the two detenués Sukhdev Singh son of Mohinder Singh and Mohinder Singh son of Munshi Singh, resident of Village Chhajewal, Tehsil Jagraon, District Ludhiana, with a further prayer that a Warrant Officer may be appointed Ex. D/2 is the report of the Warrant Officer. In this report, it has been mentioned that within second of their raising a loud voice, both the alleged detenués responded to the calls from inside the room adjacent to the reporting room. At the fag end of his report, the Warrant Officer has mentioned that the alleged detenués were found out to be not required in connection with any case registered against them. Thus, it is inferable from these documents that the police of Police Station, Jagraon was inimically disposed towards the accused Nachhatar Singh. They would have been looking out for an opportunity to implicate him in some case as a measure of retaliation or reprisal.

(17) Kulwinder Singh, PW (as noted supra) has been withheld by the prosecution. As held by the Division Bench of this Court in re: **State of Punjab versus Surjit Singh, (4)** “when the prosecution alleges that a material witness has been won over by the accused, it is still necessary that such witness must be produced and examined at the trial to reveal the truth.” Reverting back to the facts of the present case, Kulwinder Singh having not been examined, an adverse inference has to be drawn under Section 114 (g) of Evidence Act that if he had been examined, he would have nullified the prosecution story by stating thereagainst. The accused have been deprived of their valuable right to cross-examine this witness.

(18) In view of the preceding discussion, this appeal is accepted, setting aside the impugned judgment/order of sentence. The appellants are hereby acquitted of the charged offence.

R.N.R.