A STATE OF PUNJAB

v.

LAKHWINDER SINGH & ANR.

(Criminal Appeal No. 32 of 2009)

APRIL 5, 2010

B

[DR. MUKUNDAKAM SHARMA AND A.K. PATNAIK, JJ.]

Narcotic Drugs and Psychotropic Substances Act, 1985 – s. 15 – Punishment for contravention in relation to poppy C *straw – Respondents found in possession of 35 bags of poppy husk – Conviction u/s. 15 by trial court – Set aside by High Court – On appeal, held: Evidence clearly established that respondents were in conscious possession of contraband goods – Failure of defence to prove that seizure and seal put* D *in the samples were ever tampered with before it was examined by Chemical Examiner – Delay of seven days in sending samples to the examiner not fatal since the seal was found intact at the time of examination – Thus, order of trial court restored.*

E

The question which arose for consideration in this appeal was whether the High Court was justified in acquitting the respondents of the charge u/s. 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 by setting aside the order of conviction and sentence F **passed by the trial court.**

Disposing of the appeal, the Court

HELD: 1. Section 15 of the Narcotic Drugs and G **Psychotropic Substances Act, 1985 makes possession of contraband articles an offence. Section 15 in Chapter IV of the Act relates to the offence of possession of poppy straw. [Para 11] [100-A-B]**

H

2.1. Evidence was led by the prosecution to establish that the respondents were found sitting on the said bags of poppy husk. It was also stated by the Sub-Inspector as also the Assistant Sub-Inspector that the presence of the accused respondents at such an early hour, i.e., 8.00 a.m. near a religious place with such large number of bags and their sitting on them and on seeing the police party their conduct of trying to hide themselves behind the bags prove and establish that they were in possession of the said bags. The very fact that they tried to hide themselves behind the bags made the police party suspicious about the contents of the bags which led to a search of the said bags and on search being carried out in accordance with law, the said suspicion that the bags contained contraband was confirmed. [Para 14] [100-F-H; 101-A]

2.2. The respondents, during the trial, could not give any satisfactory reply as to how and why they came from place H and were found sitting on bags of poppy husk. Their subsequent conduct of hiding behind the bags also shows their guilty mind. [Para 15] [101-B]

2.3. In the memos prepared by the Investigating Officer, it was clearly stated that the contraband was contained in the bags which were kept in the possession of the respondents. There were separate memos prepared and each one of them is signed by the two respondents respectively and separately. The said documents, therefore, clearly establish that the respondents were in possession of the said contraband. The evidence adduced by both the Sub-Inspectors as also by the Assistant Sub-Inspector examined as PW-3 and PW-4 also prove and establish that both the respondents were in conscious possession of the contraband goods. [Para 16] [101-C-E]

Inder Sain v. State of Punjab **(1973) 2 SCC 372;** *Madan*

A *Lal and Anr. v. State of H.P.* **(2003) 7 SCC 465;** *Gunwantlal v. State of M.P.* **(1972) 2 SCC 194, relied on.**

3. Regarding the seizure of the contraband goods, the discrepancies pointed out by the High Court are very minor and they are not very material. The prosecution B **has been able to establish and prove that the said bags which were 35 in number contained poppy husk and accordingly the same were seized after taking samples therefrom which were properly sealed. The defence has not been able to prove that the said seizure and seal put** C **in the samples were in any manner tampered with before it was examined by the Chemical Examiner, There was merely a delay of about seven days in sending the samples to the Forensic Examiner and it is not proved as to how the said delay of seven days has affected the said** D **examination when it could not be proved that the seal of the sample was in any manner tampered with. The seal having been found intact at the time of the examination by the Chemical Examiner and the said fact having been recorded in his report, a mere observation by the High** E **Court that the case property might have been tampered with, is based on surmises and conjectures and cannot take the place of proof. The case property was produced in the Court and there is no evidence to show that the same was ever tampered with. [Paras 16 and 18] [101-E-**F **H; 102-A-B-E]**

Hardip Singh v. State of Punjab **(2008) 8 SCC 557, relied on.**

4.1. The discrepancies referred to by the High Court G **as glaring discrepancies appear to be very minor discrepancies which do not in any manner affect the substratum of the case and the offence alleged against the respondents. [Para 9] [98-F]**

4.2. Considering the facts and circumstances of the H **case, the view taken by the High Court is palpably wrong**

and the findings recorded are also perverse. The reasons stated are sufficient and cogent grounds to disturb the acquittal. The judgment and order passed by the High Court is set aside and the order of the trial court is restored. [Para 19] [102-E-F]

Case Law Reference:

(1973) 2 SCC 372	**Relied on.**	**Para 10**
(2003) 7 SCC 465	**Relied on.**	**Para12**
(1972) 2 SCC 194	**Relied on.**	**Para 13**
(2008) 8 SCC 557	**Relied on.**	**Para 17**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 32 of 2009.

From the Judgment & Order dated 20.8.2007 of the High Court of Punjab & Haryana at Chandigarh in Crl. Appeal No. 607-DB of 2005.

Kuldip Singh for the Appellant.

Manoj Mittal, Dr. Kailash Chand for the Respondents.

The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA 1. The present appeal is an appeal filed by the State of Punjab challenging the judgment and order dated 20.08.2007 passed by the High Court of Punjab & Haryana whereby the High Court acquitted the respondents herein of the charge under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 [for short "NDPS Act"], thereby reversing the judgment and order of conviction and sentence passed by the trial Court, i.e., the Special Court, Patiala. The trial Court convicted the respondents herein under the aforesaid section and sentenced each of them to suffer rigorous imprisonment for a period of 12 years and to pay a fine of Rs. 1 lakh each, and in default of

payment of fine, to further undergo rigorous imprisonment for two years.

2. The prosecution case, in brief, is that on 23.04.2002 Sub-Inspector, Tejinder Singh [PW-4], who was the then Station House Officer [for short "SHO"] of the Police Station, Ghagga accompanied by Sub-Inspector Ajaib Singh, Assistant Sub-Inspector Surinderpaljit Singh [PW-3] and constables, viz., Faqir Chand, Kulwant Singh and other police officials were present at village Shahpur and were going around in the course of their routine duty of checking of the religious places in the said village. It was during the course of patrolling that they also visited a temple of Udasi Community on Shahpur Tilla and saw that on the nearby passage a man and woman were sitting on some plastic bags. As soon as the respondents saw the police party, they tried to hide themselves behind the said bags. On seeing the aforesaid conduct of the respondents, the police party became suspicious and therefore approached them to enquire from them their identity. Respondent no. 1 gave his name as Lakhwinder Singh @ Lakha whereas the woman [respondent no. 2] disclosed her name as Balwinder Kaur.

3. The SHO [PW-4] then informed the respondents about his suspicion of the said bags containing contraband and also of his intention to conduct a search of the bags. Accordingly, PW-4 offered them as to whether they wanted to be searched by him or by a Gazetted Officer or a Magistrate. At this, respondents refused to be searched by PW-4 and consequently, the Sub-Inspector sent a wireless message to send a Gazetted Officer or a Magistrate. Upon this Jaspreet Singh Sindhu, DSP, Samana arrived at the said place and disclosed his identity to the accused persons and separately asked the respondents as to whether they wanted their search to be conducted by a Gazetted Officer or a Magistrate. Lady Constable Harjit Kaur was also called at the spot. On being so asked, both the respondents gave their consent to be searched before the DSP. In the meantime, Gurnam Singh, Lamberdar

of village Kakrala also joined the police party and he also thumb marked the consent memo. Thereafter, a search of the bags on which the respondents were sitting, numbering 35, was conducted and poppy husk was found in all the 35 bags. A

4. On recovery of the aforesaid poppy husk from the said bags, two samples of 250 grams each were separated from each bag and separate parcels were prepared. The bags were numbered from Nos. 1 to 35. The bags as well as the sample parcels were separately sealed by PW-4 with his seal TS, and the sample seal was separately prepared. The seal after use was handed over to Gurnam Singh, Lamberdar of village Kakrala. The case property was taken into possession through recovery memo. Intimation for grounds of arrest was given to the respondents and they were accordingly arrested and on return to the police station, case property was deposited with the MHC. The case property and the sample parcels were produced before the learned Sub-Divisional Judicial Magistrate, Samana on 24.04.2002. On the analysis of the samples, the Chemical Examiner submitted a report whereby he confirmed the contents of the samples seized and sealed to be poppy husk. Ruqa was prepared and sent to the Police Station Ghagga, on the basis of which a formal First Information Report was drawn and registered. After completing the investigation, the challan was presented in the Court. B C D E

5. The trial Court after receipt of the chargesheet filed under Section 15 of the NDPS Act charged the respondents under the said Section. The respondents herein pleaded not guilty to the charge and claimed trial. Consequently, a trial was conducted, during the course of which, the prosecution examined four witnesses whereas the defence examined none. The respondents were examined under Section 313 CrPC. F G

6. Upon completion of the trial, the learned Judge, Special Court, Patiala passed a judgment and order dated 07.07.2005 whereby the trial Court convicted the respondents herein under Section 15 of the NDPS Act and sentenced them as aforesaid. H

A 7. Being aggrieved by the aforesaid judgment and order of conviction and sentence, the respondents herein filed an appeal before the High Court of Punjab and Haryana. The High Court after hearing the parties passed a judgment and order dated 20.08.2007 allowing the appeal filed by the respondents B herein. The Division Bench of the High Court set aside the order of conviction and sentence passed by the trial Court and acquitted the respondents of all the charges. Being aggrieved by the aforesaid order of acquittal, the present appeal was filed by the State of Punjab on which we have heard the learned C counsel appearing for the parties.

8. The counsel appearing for the State submitted before us that the order of acquittal is palpably wrong and perverse. It was also submitted that the findings recorded by the High Court that there were glaring discrepancies in the prosecution case D is based on irrelevant materials and that the order of acquittal was passed on frivolous grounds. It was also submitted by the counsel appearing for the appellant that conscious possession of the illegal substance by the respondents was established and the said finding having not been discredited, the High Court E was not justified in interfering with the order of conviction recorded by the trial Court.

9. In order to appreciate the aforesaid contention, we have gone through the records. The discrepancies which are referred F to by the High Court as glaring discrepancies appear to us to be very minor discrepancies which do not in any manner affect the sub-stratum of the case and the offence alleged against the respondents. The High Court has held that both the respondents were required to be acquitted because G Surinderpaljit Singh [PW-3] had stated that the seal was handed over to Gurnam Singh, Lamberdar of village Kakrala whereas the Investigating Officer had stated that the seal was handed over to Sub-Inspector Ajaib Singh. The other ground which was considered and relied upon by the High Court for acquitting the respondents was that the DSP, who had been H

called at the option of the respondents who wanted to be searched in front of the gazetted officer was not brought into the witness box and was given up by the prosecution as being unnecessary. Other grounds which have been recorded by the High Court for acquitting the respondents were that the police officials were travelling in a private jeep but the number of that jeep was not given by the prosecution and that the Sub-Inspector Tejinder Singh [PW-4], the Investigation Officer did not categorically say as to who was driving the jeep and who was the owner of the jeep. The High Court has also held that the delay of about seven days in sending the samples of the case property to the Forensic Science Laboratory was fatal, inasmuch as in the intervening period tampering of the case property could have been easily done. For the aforesaid reasons, the High Court passed the order of acquittal.

10. Counsel appearing for the respondents disputed the fact of conscious possession by the respondents and submitted that merely because the respondents were sitting on the bags it could not be said that they were in conscious possession of the bags. The expression "possession" came to be analysed by this Court in several decisions. The first case in point of time to which our attention was drawn is the decision in the case of *Inder Sain v. State of Punjab* reported in (1973) 2 SCC 372. In the said decision also this Court was called upon to answer the question as to whether the appellant was in possession of opium. In the said decision, this Court held that the word "possess" connotes some sort of knowledge about the thing possessed. It was also held that the prosecution must prove that accused was in control of something in the circumstances which showed that he was assenting to being in control of it. This Court further held that once it is proved by the prosecution that the accused was in physical custody of opium, it is for the accused to prove statutorily that he has not committed an offence by showing that he was not knowingly in possession of opium. Thus, the burden of proving the fact that the accused was not knowingly in possession of the contraband

A would lie on the shoulders of the accused person.

11. Section 15 of the NDPS Act makes possession of contraband articles an offence. Section 15 appears in Chapter IV of the Act which relates to the offence of possession of
B poppy straw.

12. In *Madan Lal and another v. State of H.P.* reported in (2003) 7 SCC 465 this Court held that once possession is established, the person who claims that it was not a conscious possession has to establish it because how he came to be in
C possession of the same is within his special knowledge. It was also held in that case that Section 35 of the Act gives a statutory recognition to this position by making it a statutory presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn
D from possession of illicit articles.

13. In *Gunwantlal v. State of M.P.* reported in (1972) 2 SCC 194 it was held by this Court that possession in a given case need not be physical possession but can be constructive, having power and control over the article in the case in question,
E while the person to whom physical possession is given also is subject to such power or control.

14. In the backdrop of the aforesaid settled position of law we have to examine the facts of the present case in order to
F hold as to whether or not the respondents could be said to have been in conscious possession of the contraband goods. Evidence was led by the prosecution to establish that the respondents were found sitting on the aforesaid bags of poppy husk. It was also stated by the Sub-Inspector as also the
G Assistant Sub-Inspector that the presence of the accused respondents at such an early hour, i.e., 8.00 a.m. near a religious place with such large number of bags and their sitting on them and on seeing the police party their conduct of trying to hide themselves behind the bags prove and establish that
H they were in possession of the aforesaid bags. The very fact

that they tried to hide themselves behind the bags made the police party suspicious about the contents of the bags which led to a search of the said bags and on search being carried out in accordance with law, the aforesaid suspicion that the bags contained contraband was confirmed.

15. The respondents, during the trial, could not give any satisfactory reply as to how and why they came from Haryana and were found sitting on bags of poppy husk. Their subsequent conduct of hiding behind the bags also shows their guilty mind.

16. Reference could also be made to Exhibits PC and PD which are memos prepared by the Investigating Officer. In the said memos, it was clearly stated that the contraband was contained in the bags which were kept in the possession of the respondents. There were separate memos prepared and each one of them is signed by the two respondents respectively and separately. The aforesaid documents, therefore, clearly establish that the respondents were in possession of the said contraband. The evidence adduced by both the Sub-Inspectors as also by the Assistant Sub-Inspector examined as PW-3 and PW-4 also prove and establish that both the respondents were in conscious possession of the contraband goods. So far as the seizure of the contraband goods is concerned, the discrepancies pointed out by the High Court in our opinion are very minor and they are not very material. The prosecution has been able to establish and prove that the aforesaid bags which were 35 in number contained poppy husk and accordingly the same were seized after taking samples therefrom which were properly sealed. The defence has not been able to prove that the aforesaid seizure and seal put in the samples were in any manner tampered with before it was examined by the Chemical Examiner. There was merely a delay of about seven days in sending the samples to the Forensic Examiner and it is not proved as to how the aforesaid delay of seven days has affected the said examination when it could not be proved that the seal of the sample was in any manner tampered with. The

A seal having been found intact at the time of the examination by the Chemical Examiner and the said fact having been recorded in his report, a mere observation by the High Court that the case property might have been tampered with, in our opinion is based on surmises and conjectures and cannot take
B the place of proof.

17. We may at this stage refer to a decision of this Court in *Hardip Singh v. State of Punjab* reported in (2008) 8 SCC 557 in which there was a delay of about 40 days in sending
C the sample to laboratory after the same was seized. In the said decision, it was held that in view of cogent and reliable evidence that the opium was seized and sealed and that the samples were intact till they were handed over to the Chemical Examiner, the delay itself was held to be not fatal to the
D prosecution case. In our considered opinion, the ratio of the aforesaid decision squarely applies to the facts of the present case in this regard.

18. The case property was produced in the Court and there is no evidence to show that the same was ever tampered
E with.

19. Considering the facts and circumstances of the case, we are of the considered opinion that the view taken by the High Court is palpably wrong and the findings recorded are also
F perverse. In our considered opinion, the aforesaid reasons which are stated hereinabove are sufficient and cogent grounds to disturb the acquittal. Accordingly, the judgment and order passed by the High Court is set aside and the order of the trial Court is restored.

G 20. The respondents, if at liberty, are hereby directed to surrender forthwith and undergo the remaining term of imprisonment as directed by the trial Court. The appeal stands disposed of in terms of the aforesaid order.

H N.J. Appeal disposed of.