

A

AVTAR SINGH AND ORS

v

STATE OF PUNJAB

SEPTEMBER 18, 2002

B

[S. RAJENDRA BABU AND P. VENKATARAMA REDDI, JJ.]

C

Narcotic Drugs and Psychotropic Substances Act, 1985—Sections 15, 35 and 54—Accused found travelling at odd hour in a vehicle containing poppy husk—Conviction by courts below on presumption as to possession—Correctness of—Held, in the absence of proof presumption as to possession cannot be drawn, hence conviction and sentence set aside—Evidence Act, 1872, Section 114.

D

Words and Phrases :

'Possession'—Meaning of.

E

According to the prosecution appellant No.3 was driving a vehicle containing poppy husk bags at odd hour. Appellant Nos.1 and 2 were sitting at the back on the bags. Appellants were apprehended and bags of poppy husk were recovered. Trial Court convicted the appellants under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 invoking presumption under section 54. High Court resorted to presumption under section 35 and confirmed the order of trial court. Hence the present appeal.

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Appellants contended that the possession, much less conscious possession of the bags of poppy husk has not been established and also the accused were not questioned about it.

Allowing the appeal, the Court

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HELD: 1.1. It is difficult to reach the conclusion beyond reasonable doubt that the three appellants one of whom was driving the vehicle and the other two sitting on the back were having custody or control of the goods. 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

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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. 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 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 Evidence Act. [486-G, H; 487-A-E]

1.2. High Court resorted to presumption under Section 35 of the Narcotic Drugs and Psychotropic Substances Act, 1985 which relates to culpable state of mind, without considering the aspect of possession. Trial court invoked the presumption under S.54 of the Act without addressing itself to the question of possession. The approach of both the courts is erroneous in law. They rested their conclusion on the fact that the accused failed to give satisfactory explanation for travelling in the vehicle containing poppy husk at odd hour. But, the other relevant aspects as pointed out were neither adverted to nor taken into account by trial court and High Court. Thus non-application of mind to the material factors has vitiated the judgment under appeal. *Inder Sein v. State of Punjab*, [1973] 2 SCC 372, referred to. [487-E-G]

1.3. Third appellant would have been charged alternatively for transporting the offensive goods without permit or authorization as required by law; but, such a charge was not laid and there was not even reference to Section 8 of the Act. As a result third appellant goes scot-free. Thus the conviction and sentence of all the appellants is set aside. [487-H; 488-A]

2. 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

A custody or control over the goods. [486-E]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2082 of 1996.

From the Judgment and Order dated 26.3.1996 of the Punjab and Haryana

B High Court in Crl. A. No. 375 of 1995.

P.N. Lekhi and M.K. Garg, for the Appellants.

Bimal Roy jad and Ms. Sunita, for the Respondent.

C The Judgment of the Court was delivered by

P. VENKATARAMA REDDI, J. Five persons including the three appellants herein were charged under Section 15 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as 'Act') for having conscious possession of 640 Kgs. of poppy husk on 7.8.1989 without valid

D permit or licence. According to the prosecution case, they were all travelling in a truck belonging to accused No.5 in the small hours of 7.8.1989. The vehicle was checked at canal bridge near the village Dhange at about 1.30 A.M. by PW 2 ASI who was on the patrolling duty along with PW 4 (Head Constable) and two other constables. The vehicle was carrying 16 bags of**E poppy husk. Balbir Chand appellant No.3 herein was driving the vehicle. One person who was sitting in the front seat by the side of the driver and another person sitting on the back side of the truck ran away leaving the vehicle. These two persons are said to be Swarna Ram Accused No.3 and Swatantra Kumar (since deceased). The other two sitting at the back i.e., appellants 1 and 2 and the driver of the vehicle -Appellant No.3 were apprehended on the****F spot. 16 gunny bags of poppy husk were recovered. 250 gms was taken out as sample from each bag and sealed. The remaining bags were weighed after sealing and each bag was found to contain 39 Kgs and 750 gms. The sealed bags and sample were sent to the concerned Police Station. On the search of person of each of the accused, nothing incriminating was found. PW 5, who was SHO at Police Station Goraya, made further investigation. According****G to him, ASI Darbari Lal (PW 2) produced the three appellants herein along with the case property of 16 bags of poppy husk and 16 samples when he was at the bus stand Goraya for patrolling. He affixed the seals on the bags and sent the samples to the chemical examiner. The report of the chemical examiner is Ex. P X, according to which the contents are 'Poppy head'****H containing morphine. The sealed bags were produced in court.**

The learned Additional Sessions Judge, Jalandhar, acquitted Swarna Ram for the reason that his identity was not established and also acquitted Amrik Singh the owner of the vehicle on the ground that there was no proof that he knowingly allowed the vehicle to carry the offensive stuff. Each of the appellants was convicted under Section 15 and sentenced to undergo RI for a period of 10 years and to pay a fine of Rs.1 lakh and in default to undergo RI for a further period of two years. On appeal, the High Court confirmed the verdict of the trial court. The contention that Section 50 (1) of the Act has not been complied with was rightly negatived by both the courts on the facts of the case and no contention has been advanced before us in this regard. The contention that independent witnesses were not examined was also negatived holding that at that hour and place, it was difficult to expect any independent witness to be present there.

The more important contention raised before the High Court was that from the mere fact that the appellants were sitting in the truck, it cannot be held that they were in possession of poppy husk. The High Court observed that the appellants did not come forward with the case that they were merely passengers and that they were unaware of what was contained in the bags. The reason for travelling at that odd hour with the offending goods was not stated by any of the accused. Therefore, the High Court concluded that "their close connection of being in possession of the poppy husk must be held to have been established". The High Court also pressed into service the presumption under S. 35 of the Act.

In this appeal, the learned senior counsel, apart from commenting on the artificiality of the prosecution case and the discrepancies in the evidence regarding the police officer to whom the seized bags were handed over, mainly concentrated on the point that the possession, much less conscious possession, of the bags of poppy husk, has not been established and the accused were not even questioned about it. We find force in the contention of the learned counsel.

Section 15 provides for punishment if any person in contravention of any provision of the Act or any rule or order made or condition of a licence granted thereunder, produces, possesses, transports, imports inter-State, exports inter-State sells, purchases, uses or omits to warehouse poppy straw or removes or does any act in respect of warehoused poppy straw. Section 8 enacts a prohibition against production, manufacture, possession, sale,

- A purchase, transport, warehousing, use, consumption, import and export or transshipment of any narcotic drug or psychotropic substance except for medical or scientific purposes and to the extent and in the manner permitted by the provision of the Act or Rules or Orders made thereunder or in accordance with the term of licence or permit, if any. We are here concerned with possession and transportation. However, the charge is confined to possession in the instant case.

- Possession is the core ingredient to be established before the accused in the instant case are subjected to the punishment under Section 15. If the accused are found to be in possession of poppy straw which is a narcotic drug within the meaning of Clause (xiv) of S. 2, it is for them to account for such possession satisfactorily; if not, the presumption under Section 54 comes into play. We need not go into the aspect whether the possession must be conscious possession. Perhaps taking clue from the decision of this Court in *Inder Sain v. State of Punjab*, [1973] 2 SCC 372 arising under the Opium Act, the learned trial Judge charged the accused of having conscious possession of poppy husk. Assuming that poppy husk comes within the expression poppy straw, the question, however, remains whether the prosecution satisfactorily proved the fact that the accused were in possession of poppy husk. Accepting the evidence of PW 4 the Head constable, it is seen that appellant No.3 (Accused No.4) was driving the vehicle loaded with bags of poppy husk. Appellants 1 and 2 (Accused Nos. 1 and 2) were sitting on the bags placed in the truck. As soon as the vehicle was stopped by ASI (PW 2), one person sitting in the cabin by the side of the driver and another person sitting in the back of the truck fled. No investigation has been directed to ascertain the role played by each of the accused and the nexus between the accused and the offending goods. 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 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 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 traveling 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 S.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 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 S.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. Non-application of mind to the material factors has thus vitiated the judgment under appeal.

Coming to the case of the third appellant who was driving the vehicle, there is one more infirmity in the prosecution case. He would have been charged alternatively for transporting the offensive goods without permit or authorization as required by law; but, such a charge was not laid. There was

A not even reference to Section 8 of the Act. The result is, he too goes scot free.

For the above reasons, we set aside the conviction and sentence of the appellants and allow the appeal. The appellants shall be set at liberty forthwith, if they are in jail.

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N.J.

Appeal allowed.