

IN THE HIGH COURT OF PUNJAB & HARYANA AT  
CHANDIGARH.

Date of decision :June 05, 2006.

**Raj Kumar Vs. State of Punjab**

**CORAM: Hon'ble Mr. Justice Virender Singh**

Present: Mr. Gur Rattan Pal Singh, Advocate, for  
the appellant.  
Mr. Ashutosh Hoshiarpuri, AAG, Punjab.

Virender Singh, J.

Appellant Raj Kumar stands convicted under Section 18 of the Narcotic Drugs and Psychotropic Substances Act ( for short the `Act') vide impugned judgment of learned sessions Judge, Ferozepur dated February 2, 2000 and has been sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs. one lac, in default of payment of fine to suffer further RI for one year. Aggrieved by the aforesaid judgment of conviction and sentence, he has preferred the instant appeal.

Briefly, the case of the prosecution is that on January 29, 2000, inspector Harcharan Singh (PW-2) along with ASI Darshan Singh (PW-1) and other police officials was on patrol duty and was going from

village Bahmniwala towards village Bandiwala in a government jeep and Gipsy. When they reached on the seepage bridge in the area of village Totianwali, they spotted a Maruti car bearing registration No. PCE-3700 of biscuit colour coming from the opposite direction. SI Harcharan Singh gave a signal to stop the car. The driver of the car after stopping it opened the door and made an attempt to run away. He was apprehended at the spot. Another person, who was sitting on the rear seat of the car, ran away after alighting from the car. He was apprehended by ASI Iqbal Singh with the help of his companions. The person, who was on the steering of the car and was apprehended by SI Harcharan Singh, disclosed his name as Raj Kumar (appellant-herein), son of Devi Lal, resident of village Dodewala, police station Sadar Abohar. SI Harcharan Singh gave him offer that his car was to be searched and the same could be done in the presence of a gazetted officer or a Magistrate. However, the appellant reposed his faith in him (SI Harcharan Singh). In this regard, consent memo. (Ex.P1) was prepared, which was signed by the appellant and attested by ASI Darshan Singh and Constable Satinder Singh. Before conducting search of the car, the SI offered the appellant to take his search, but the latter showed his satisfaction. In this regard a memo. (Ex.P2) was prepared, which was signed by the appellant and attested by ASI Darshan Singh and

Constable Satinder Singh. Thereafter the car was searched by SI Harcharan Singh as per rules. On search from beneath the driver's seat and below his feet, a bag of fertilizer containing opium wrapped in the glazed paper was recovered. On weighing, it was found to be six kilograms. 100 grams of opium was separated as sample. It was put into dabbi tin and its separate parcel was prepared. The remainder opium was put in the Pipa tin along with glazed paper and bag of the fertilizer. In this regard also a separate parcel was prepared. Both the parcels were sealed with the seal bearing inscription 'HS' ( for Harcharan Singh). The sample seal was also prepared separately. Both the parcels and the Maruti car were taken into possession vide recovery memo. Ex.P3, attested by ASI Darshan Singh and Constable Satinder Singh. Rough site plan ( Ex.PC) of the place of recovery was prepared with correct marginal notes. On personal search of the appellant, a sum of Rs.8,000/- were recovered from the pocket of his pant. Registration book of the car was also recovered from the pocket of his shirt. These documents were also taken into possession vide recovery memo. Ex.P4, attested by the aforesaid witnesses. Ruqqa (Exhibit P5) was sent to the police station on the basis of which formal FIR (Ex.P5/A) was recorded. Separate proceedings against Naresh Kumar, who was apprehended by ASI Iqbal Singh were conducted. On return, SI Harcharan Singh kept

the case property with him. On the next day, he produced the appellant and the case property before the learned Illaqa Magistrate vide request Ex.P7 & P8. After completion of investigation and receipt of the report of Chemical Examiner ( Exhibit P9), the appellant was challaned. He was charged under Section 18 of the Act, for which he now stands convicted.

In order to strengthen its case, the prosecution has examined PW1 ASI Darshan Singh, who is a witness to recovery; PW2 Inspector Harcharan Singh is the Investigating Officer, who is also a witness to recovery and PW3 Constable Suba Singh, who took the sample to the Chemical Examiner Bathinda and deposited the same in the said office. This witness has also tendered his affidavit ( Ex.P10) in this regard. Constable Satidner Singh, who was another witness to recovery, was given up as unnecessary.

The defence taken up by the appellant as emerges from his statement under Section 313 of the Code of Criminal Procedure is of false implication. He has tendered into evidence a copy of the judgment ( Exhibit D1) vide which Naresh Kumar, who was also apprehended at the spot, stands acquitted.

I have heard Mr. Gur Rattan Pal Singh, learned counsel for the appellant and Mr. Ashutosh Hoshiarpuri, Assistant Advocate

General, Punjab. With their assistance I have gone through the entire record.

The first argument advanced by Mr. Gur Rattan Pal Singh is that acquittal of Naresh Kumar vide judgment ( Exhibit D1) demolishes the very case of the prosecution set up against the appellant as the witnesses in both the cases are same. Once the official witnesses in Naresh Kumar's case are disbelieved by the Court, they should not be believed in the case in hand. Mr. Singh has drawn the attention of this Court to the judgement ( Exhibit D1) in this regard.

I do not agree with the argument advanced by the learned counsel. A perusal of the aforesaid judgment ( Exhibit D1) reflects that Naresh Kumar has been acquitted mainly on account of non-compliance of the provisions of Section 50 of the Act, as per law prevailing at that time, whereas the appellant cannot derive any benefit on that aspect in view of the latest judgement rendered by Full Bench of Hon'ble the Apex Court in **State of Himachal Pradesh vs. Pawan Kumar, 2005(2) RCR (Criminal) 621 ( refers)**. Moreover in the case of Naresh Kumar, ASI Iqbal Singh and Constable Milkha Singh were witnesses, whereas the witnesses to recovery in the present case are entirely different. The appellant cannot build his case for acquittal on the basis of the aforesaid judgment ( Ex.D1), vide which Naresh Kumar, who also was

apprehended at the spot along with him, stands acquitted. The argument advanced by the learned counsel is, thus, repelled.

Mr. Singh then submits that the prosecution has not been able to prove conscious possession of the appellant qua the contraband as no question was put to him in this regard when his statement under section 313 of the Code of Criminal Procedure was recorded. Dwelling upon his argument, the learned counsel then contends that two persons were travelling in the Maruti car, one was sitting on the steering, whereas the other was on the rear seat. The prosecution has failed to prove as to who was in conscious possession of the contraband. In support of his contention, the learned counsel relies upon a judgment rendered by a Division Bench of this Court in **Raj Kumar Vs. State of Punjab, 2005(1) RCR ( Criminal) 70**. In the said case, the Hon'ble Bench has taken into consideration two decisions of Hon'ble the Apex Court rendered in **Avtar Singh and others v. State of Punjab, 2002(4) RCR ( CrL) 180 (SC)** and **Narcotics Control Bureau v. Murlidhar Soni and others, 2004(2) RCR ( CrL) 900 (SC)**.

I am not convinced with the aforesaid argument advanced by Mr. Singh. In Raj Kumar's case (supra), the jeep from which the contraband was recovered was driven by Raj Kumar accused and Hawa Singh was sitting by side on the front seat. There was a bag lying

between both of them. In that case, the learned counsel besides pointing out other infirmities mainly argued that the prosecution had failed to establish that the appellant was in conscious possession of opium as the possession was basic ingredient of the offence. Charge against both the accused was that they were found in possession of 8.250 Kgs. of opium. In that eventuality, the Hon'ble Bench took a serious note of the fact that they were not asked in their respective statements recorded under Section 313 of the Code of Criminal Procedure to the effect that there was evidence against them that they were in conscious possession of opium. The Hon'ble Bench held that the accused were not given a chance to explain their position.

However, the factual position in the instant case is entirely different. The recovery effected in this case is from below the driver's seat in his feet. Admittedly, the appellant was on the steering of that car. No doubt, Naresh Kumar stands acquitted (vide judgment Exhibit D1) may be, primarily on account of non-compliance of Section 50 of the Act and the said plea is now not available to the present appellant in view of the latest view of Hon'ble the Apex Court in **Pawan Kumar's case (supra)**, the fact remains that he was sitting on the rear seat of the car. Thus the facts in hand are entirely distinguishable.

The matter does not rest here. The Maruti car bearing

registration No. PCE-3700 from which the contraband was recovered, belongs to the appellant. Record reveals that the said car was got released by his father Devi Lal on furnishing spurdaginama. Counsel for the appellant could not deny this fact. In Avtar Singh's case (supra), their Lordships have held that possession and ownership need not always go together but the minimum requisite element which has to be established is the custody and control over the goods. In the case in hand, I find no difficulty in observing that the custody and control over the goods (contraband) was that of the appellant only. In my view, even if a specific question was not put to the appellant with regard to conscious possession of the contraband (6 Kgs of opium), it would not cause any prejudice to him for the reason that he was given full opportunity to explain the case against him and the evidence adduced by the prosecution. In a latest judgement rendered by Hon'ble the Apex Court in State of Punjab Vs. Sawarn Singh, JT 2005(6) SC 456, their Lordships while dealing with the aspect of Section 313 of the Code of Criminal Procedure have observed in para 10 as under:

“10. The questioning of the accused is done to enable him to give an opportunity to explain any circumstances which have come out in the evidence against him. It may be noticed that the entire evidence is recorded in his presence and he is given full opportunity to cross examine each and every witness examined on



the prosecution side. He is given copies of all documents, which are sought to be relied on by the prosecution. Apart from all these, as part of fair trial the accused is given opportunity to give his explanation regarding the evidence adduced by the prosecution. However, it is not necessary that the entire prosecution evidence need be put to him and answers elicited from the accused. If there were circumstances in the evidence which are adverse to the accused and his explanation would help the court evaluating the evidence properly, the court should bring the same to the notice of the accused to enable him to give any explanation or answers for such adverse circumstance in the evidence. Generally composite questions shall not be asked to accused bundling so many facts together. Questions must be such that any reasonable person in the position of the accused may be in a position to give rational explanation to the questions as had been asked. There shall not be failure of justice on account of an unfair trial.”

In the aforesaid case, the appellant was acquitted by the High Court on the ground that the evidence of the prosecution witnesses was not put to him in the statement recorded under Section 313 of the Code of Criminal Procedure with regard to taking out and sealing of samples and sending the same to Chemical Analyst. Hon'ble the Apex Court while observing that no prejudice was caused to the appellant, set aside the judgment of acquittal.

The learned counsel lastly contends that the link evidence is

missing in this case as statement of Constable Sube Singh ( PW3) is discrepant from his affidavit ( Ex.P10). He then contends that from the aforesaid fact, it appears that at one stage the case property was handed over to the Moharrir Head Constable by the Investigating Officer. The said MHC has not stepped into the witness box. The learned counsel in order to strengthen his argument, states that in the impugned judgment the learned trial Judge has also observed that there is discrepancy in this regard, but he has not given any weightage to it.

I am not one with the learned counsel for the appellant on this aspect as well. I have very carefully perused the affidavit ( Ex.P10) which is in vernacular ( Panjabi). No doubt when Sube Singh constable stepped into the witness-box as PW-3, in cross-examination he states that MHC Surender Pal had given him the sample for taking it to the Chemical Examiner. But in my view, it turns out to be a stray statement if read in the light of substantive statement of Harcharan Singh (PW2), the Investigating Officer, who has categorically deposed as under:

*“On return to the police station, I kept the case property in my possession and on the next day, I produced the case property along with the accused in the Court vide my request Exhibits P7 & P8. The police remand was given of the accused. Ex.P7/A is the order of the learned Magistrate. Exhibit P8/A is carbon copy of the order passed by the Magistrate on 30-1-1991. I sent the sample through Constable Sube Singh for deposit with*

*the Assistant Chemical Examiner, who deposited the same on 31.1.1991 and handed over the receipt to me.”*

From the aforesaid facts, it is clear that for the purposes of complying with the provisions of Section 55 of the Act, Inspector Harcharan Singh being Station House Officer of police station Jalalabad had kept the case property in his possession and on the next day when the appellant and the case property were produced in the Court, he had handed over the sample to Sube Singh for depositing the same with the Chemical Analyst. This shows that the sample had never been handed over to the Moharrir Head Constable for depositing the same in the Malkhana before it was handed over to Constable Sube Singh. The order ( Exhibit P8/A) passed by the learned Magistrate on 30-1-1991 on an application ( Ex.P8) moved by the Investigating Officer indicates that the case property was produced before him and on his direction the same was deposited in the treasury in safe custody, which also indicates that the entire case property including the sample remained in safe custody of the Investigating Officer and was never deposited with the Moharrir Head Constable on 29-1-1991.

No other point has been urged before me.

On the basis of the aforesaid discussion, it emerges that the prosecution has been able to prove conscious possession of the

contraband qua the appellant beyond any shadow of reasonable doubt and, therefore, I uphold the conviction and sentence of the appellant as recorded by the learned trial Court for the charge framed against him.

Faced with this situation, the learned counsel for the appellant prays that a lenient view may be taken with regard to the sentence ( of one year's RI ) awarded to him in default of non-payment of fine ( Rs. one lac).

Keeping in view the totality of facts and circumstances, I hereby reduce the sentence of one year awarded to the appellant on account of default clause with regard to sentence of fine to six months.

The net result is that the instant appeal stands dismissed except with the modification in the sentence, as indicated hereinabove.

**[Virender Singh]**  
**Judge**

**June 05, 2006**  
**`ask'**