

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

CRA-S-1417-SB-2004

Date of decision: 11.09.2015

Balwinder Singh alias Kala

..... Appellant

Versus

State of Punjab

..... Respondent

CORAM : HON'BLE MR. JUSTICE DARSHAN SINGH

1. Whether Reporters of the local papers may be allowed to see the judgment ? Yes
2. To be referred to the Reporters or not ? Yes
3. Whether the judgment should be reported in the Digest ? Yes

Present: Mr. Gurpal Singh Sandhu, Advocate for
Mr. S.P.S. Sidhu, Advocate for the appellant.

Mr. Ajaib Singh, Additional Advocate General
for the State of Punjab.

DARSHAN SINGH, J.

The present appeal has been preferred against the judgment of conviction dated 13.07.2004, passed by the learned Judge, Special Court, Kapurthala, vide which accused-appellant Balwinder Singh alias Kala has been held guilty and convicted for the offence punishable under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (here-in-after called the 'Act') and the order on quantum of sentence of

the even dated, vide which the appellant has been sentenced to undergo rigorous imprisonment for a period of two years and to pay a fine of Rs.25,000/- and in default of payment of fine, to further undergo rigorous imprisonment for four months.

2- As per the prosecution case, on 30.06.2000 PW2 ASI Davinder Singh, (the Investigating Officer) along with Head Constable Dilbag Singh and other police officials was present at 'T' point of village Chak Dona while holding Nakabandi, in connection with crime detection. After some time, Kulwant Singh resident of village Chak Dona came there. He was joined in the police party. At about 8:00 P.M., one person was seen coming from the side of village Chak Dona while carrying something heavy on his head. With the help of torch, he was asked to stop. On enquiry, he disclosed his name as Balwinder Singh alias Kala, the present appellant. The plastic bag, carried by him, was checked and it was found containing poppy husk. 250 grams of poppy husk was taken out as sample and the residue came to be 11 kilograms and 750 grams. The sample as well as residue were sealed in separate parcels with seal bearing impression 'DS' and all these articles were taken into possession vide recovery memo Ex.PB. The seal after use was handed over to HC Dilbag Singh. The accused was arrested vide memo Ex.PE. Ruqqa Ex.PC was sent to the police station. On the basis of which, formal FIR Ex.PA was registered. The Investigating Officer prepared the site plan of the place of recovery Ex.PD.

3- On return to the Police Station, the case property was

produced before SI Hardeep Singh, the then SHO, Police Station Sadar, Kapurthala, who put his seal bearing impression 'HS' on the parcels of the case property. Case property was deposited with the Moharir Head Constable. On the next day, the Investigating Officer, took the case property from the MHC and produced the same along with the accused before the Illaqa Magistrate, who had checked the case property and signed on the sealed parcel. The sample was sent to the Chemical Examiner, Jalandhar for examination. On receipt of the report of the FSL Ex.PH and completion of formalities of the investigation, the report under Section 173 of Code of Criminal Procedure, 1973 (here-in-after called 'Cr.P.C.') was presented in the Court.

4- The accused appellant was charge sheeted for the offence punishable under Section 15 of the Act vide order dated 04.08.2000 by the learned trial Court, to which the appellant pleaded not guilty and claimed trial.

5- In order to substantiate its case, prosecution examined as many as seven witnesses.

6- When examined under Section 313 Cr.P.C., the accused-appellant pleaded innocence and false implication.

7- In the defence evidence, accused examined Deputy Singh as DW1, Charan Kaur as DW2, Pawanjit as DW3, Charan Singh as DW4, HC Ashwani Kumar as DW5 and Swaran Singh as DW6. Thereafter, the defence evidence was closed.

8- Appreciating the evidence on record and the contentions

raised by learned counsel for the parties, the accused appellant was held guilty and convicted for the offence punishable under Section 15 of the Act and was awarded the sentence as mentioned in the upper part of the judgment.

9- Aggrieved with the aforesaid judgment of conviction and order of sentence the present appeal has been preferred.

10- I have heard Mr. Gurpal Singh Sandhu, Advocate, learned counsel appearing for the appellant, Mr. Ajaib Singh, learned Additional Advocate General for the State of Punjab and have meticulously examined the record of the case.

11- Initiating the arguments, learned counsel for the appellant contended that the accused-appellant has been falsely implicated in this case by PW2 ASI Davinder Singh, the Investigating Officer of the case. He contended that one Kulwant Singh son of Swaran Singh is shown to have been associated as an independent witness in this case but he was not even present in India on the date of alleged occurrence and was living abroad, which is evident from the statement of his father DW6 Swaran Singh. He further contended that in fact the accused-appellant was forcibly taken away from his house and was thereafter falsely implicated in this case. In support of this plea, he has drawn my attention to the statement of DW1 Deputy Singh, Member Panchayat, DW2 Charan Kaur, the mother of the appellant and DW4 Charan Singh, the co-villager. He contended that the statements of the defence witness should be treated at par with the testimonies of the prosecution witnesses. He further

contended that on the application of the mother of the appellant, inquiry was conducted by the DSP, Sub Division, Shakot. His report is Ex.DC, from which the case of the prosecution stands falsified.

12- He further contended that the tempering with of the case property is not ruled out as the specimen seal impression was not deposited with the Moharir Head Constable. There is serious contradiction in the case of the prosecution as to how the case property was handled and produced before the Magistrate. The Officer Incharge of the Police Station has violated Section 55 of the Act and has not taken the charge of the case property.

13- He further contended that the story of the prosecution is highly improbable. The village of the accused was situated at a distance of 20-25 kilometers from the place of occurrence. It is not believable that he will be roaming on foot at such a distance from his house having a bag on his head. The Ruqqa is alleged to have been sent to the Police station at 10:00 P.M. at night. It is alleged that police party stayed at the spot upto 01:45 A.M. It is not explained as to for what reason the police party remained at the spot thereafter when almost the entire proceedings were already complete. He further contended that when the specific allegations were levelled of the false implication, the testimonies of two junior police officials without any independent corroboration, should not be relied upon. Thus, he pleaded that the prosecution has failed to establish its case.

14- On the other hand, learned State counsel pleaded that 12

kilograms poppy husk has been recovered from the possession of the appellant, which is established from the statement of PW2 ASI Davinder Singh, the Investigating Officer of the case and PW4 Head Constable Dilbag Singh, the witness of recovery. Their testimonies have been further corroborated from PW7 SI Hardeep Singh. The chain of link evidence is also complete. The case property was produced before the Magistrate, which was found intact. Thus, he pleaded that there is no infirmity in the conviction of the appellant recorded by the learned trial Court.

15- I have duly considered the aforesaid contentions.

16- As per the prosecution version, the Investigating Officer along with the fellow police officials was holding the Nakabandi near 'T' point Chak Dona. It is alleged that one Kulwant Singh, resident of Chak Dona came there and was associated in the police party. The accused was alleged to have been apprehended in his presence. He also witnessed the search, seizure and recovery of contraband from the possession of the appellant but this witness has not been examined by the prosecution and was given up by the learned Public Prosecutor as having been won over by the accused vide statement dated 26.04.2002. There is no dispute with the proposition of law that mere non-examination of an independent witness itself is not a ground to discard or reject the testimonies of the official witnesses but in the instant case, the circumstances are peculiar. The Investigating Officer has admitted in the cross-examination that on the application of the accused, an inquiry was held. PW4 HC Dilbag

Singh, the witness of the recovery, has also admitted that on the complaint of the father of the accused, the inquiry was conducted by the Deputy Superintendent of Police and he appeared before the Inquiry Officer but he cannot tell about the result of the inquiry. So, the accused-appellant was setting up the specific case of the false implication by the Investigating Officer and even an inquiry was held by the Deputy Superintendent of Police. In those circumstances, due to non-examination of Kulwant Singh, the independent witness, the testimonies of the official witnesses have to stand the test of close scrutiny and even the minor circumstances will assume significance.

17- DW6 Swaran Singh is the father of Kulwant Singh, the alleged independent witness. He has categorically deposed that Kulwant Singh is his son. He has left for abroad on 30.07.1999 and he came back to India for the first time on 01.08.2003 and again went to Italy on 01.09.2003. He further categorically stated that his son is illiterate. The documents Ex.PB, PE and PF do not bear his signatures. The police has wrongly written his name. On 30.06.2000, he was not in India. Even in the inquiry report Ex.DC, the Deputy Superintendent of Police, Shapur has mentioned that public witness Kulwant Singh, resident of village Chak Dona could not be associated in the inquiry as he had gone abroad. ASI Davinder Singh, the Investigating Officer of the case, has stated in the cross-examination that he was summoned by the Inquiry Officer. His statement was recorded by the Inquiry Officer. Kulwant Singh witness was also summoned and his statement was also recorded. Whereas, in the

inquiry report Ex.DC, it has been categorically mentioned that Kulwant Singh could not be associated as he had gone abroad. In view of these circumstances, the testimonies of the official witnesses needed the independent corroboration.

18- It was the bounden duty of the prosecution to establish that the case property has remained intact and was not tampered with at any stage. The seal after use in this case has been handed over by the Investigating Officer to PW4 Head Constable Dilbag Singh, his junior police officials and not to the public witness Kulwant Singh. In order to complete the chain of the link evidence, the prosecution was required to examine all the persons who has handled the case property. PW2 ASI Davinder Singh has stated that he has produced the case property before SHO Hardeep Singh, who affixed his own seals bearing impression 'HS' on the parcels and on the direction of the SHO, he deposited the case property with MHC but PW7 SI Hardeep Singh, the then SHO Police Station Sadar Kapurthala stated that he had returned the case property to ASI Hardeep Singh. Said ASI Hardeep Singh has not been produced in the witness box. In the affidavit of PW3 HC Ram Lal Ex.PJ, it is mentioned that the case property was deposited with him by ASI Davinder Singh, Incharge Police Post Kalasagghia. The case of the prosecution is further contradictory as to who has produced the case property before the Magistrate on the next day. ASI Davinder Singh has stated that on the next day he produced the case property along with the accused in the Court. The case property was checked by the Magistrate

and had signed the parcels. He further deposed that on return to the Police Station, he deposited the case property with the MHC. PW3 MHC Ram Lal has stated that on 01.07.2000 the case property was withdrawn from Malkhana for production in the Court. He has not mentioned to as to who had withdrawn the case property. There is the application dated 01.07.2000 available on record. On the back of this application, the Magistrate has passed the order with respect to the case property. This application is signed by ASI Balkar Singh for SHO Police Station Sadar Kapurthala. The order dated 01.07.2000, passed by the Magistrate shows that the case property was produced before him by HC Manjit Singh No.275 and after checking the seals etc., the case property was received back by HC Manjit Singh No.275. It shows that the case property in the Court was produced by HC Manjit Singh and he has received back the case property from the Court. Said HC Manjit Singh has not been examined as witness. So, the important witness, who has handled the case property and produced the same before the Magistrate, has not been produced in the witness box. Therefore, there is no evidence on record to show that after the case property was withdrawn from the Malkhana for production in the Court and till it was again deposited in the Malkhana, the same remained intact.

19- There is a serious omission in the affidavit Ex.PJ of PW3 HC Ram Lal, Moharir Head Constable, as in his affidavit it is nowhere mentioned that the case property was withdrawn from the Malkhana on 01.07.2000 for production in the Court. In the cross-examination, he has

stated that no entry was made in the Register No.19 of the Police Station with respect to withdrawal of the case property. It is also not mentioned in his affidavit as to when the case property was again deposited with him after it was produced before the Court and by whom.

20- Thus, in these circumstances two police officials namely ASI Hardeep and Head Constable Manjit Singh No.275 who have handled the case property have not been examined. In the absence of their testimonies, there is a serious omission in the chain of the link evidence and the tampering with of the case property is not ruled out.

21- DW5 Head Constable Ashwani Kumar has appeared in the witness box along with Register No.19 and the Daily Diary Register dated 30.06.2000. He stated that in the Register No.19 and in the Rojnamcha, there is no entry regarding deposit of the specimen seal along with the case property. He proved the copy of the relevant entry Ex.DD wherein there is no reference that the specimen seal impression was deposited in the Malkhana. So, even the specimen seal impression has not been deposited by the Investigating Officer with the Moharir Head Constable for sending to the Chemical Examiner along with the case property, which is again a serious lacuna and the tampering with of the case property cannot be ruled out.

22- The story of the prosecution is also not plausible. PW4 Head Constable Davinder Singh has stated that village of the accused was at a distance of 20/25 kilometers from the place of recovery. It is alleged that the accused was carrying the bag containing 12 kilograms poppy

husk on his head. It is not believable that the accused would have come at such a distance from his house on foot carrying a bag on his head. So, even the manner of apprehension of the appellant as alleged by the prosecution does not inspire confidence.

23- The Ruqqa Ex.PC has been sent to the Police Station at 10:00 P.M. The Ruqqa Ex.PC shows that it was prepared after practically completion of the substantial proceedings regarding search and seizure and preparing the necessary documents. After that only the site plan was to be prepared and the statements of the witnesses were to be recorded. But PW4 HC Dilbag Singh states that they remained at the spot upto 01:45 AM. So, even thereafter they remained at the spot for 03 hours and 45 minutes. There is no explanation as to for what purpose, the police party stayed at the spot for such a long period after sending the Ruqqa Ex.PC to the Police Station, which further renders the case of the prosecution doubtful with respect to the genuineness of the proceedings and the time of recovery.

24- Thus, keeping in view my aforesaid discussion and totality of the circumstances discussed above, the prosecution has not been able to establish its case beyond shadow of reasonable doubt. So, the accused appellant deserves the benefit of doubt and his conviction and sentence as recorded by the learned trial Court is not sustainable in the eyes of law.

25- Consequently, the present appeal is hereby allowed. The conviction and sentence of the appellant as recorded by the learned trial

Court is hereby set aside. By giving the benefit of doubt, the accused-appellant is hereby acquitted of the charges. The amount of the fine deposited by him with the learned trial Court be refunded to him in accordance with rules.

Dated: 11.09.2015
sunil yadav

(DARSHAN SINGH)
JUDGE