

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

CRA-S-1641-SB-2004

Date of decision: 03.11.2015

Kulwant Singh alias Gudu

..... 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. B.S. Saroha, Advocate for the appellant.

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

DARSHAN SINGH, J.

The present appeal has been preferred against the judgment of conviction dated 19.05.2004, passed by the learned Judge, Special Court, Sangrur, vide which accused-appellant Kulwant Singh alias Gudu has been held guilty and convicted for the offence punishable under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (here-in-after referred as to '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 three years and to pay a fine of ₹ 20,000/-, in default of payment of fine to further undergo

rigorous imprisonment for six months.

2- As per the prosecution case, on 02.07.1998 PW1 Inspector Tale Ram Singh (the Investigating Officer of the case) along with other police officials was returning in the government vehicle after patrolling from village Daulatpur to Dhuri through metalled road. One Dharam Singh son of Bhajan Singh, resident of Kakarwal met the police party. He was also joined in the police party. When the police party reached on the bridge of drain near village Daulatpur, they saw the accused-appellant coming on foot from the side of Dhuri town. The accused-appellant on seeing the police party got perplexed and turned on the bank of drain towards his right side. He was apprehended. The Investigating Officer asked the accused-appellant that he suspected some intoxicant with him. The accused was apprised of his right to get his search conducted in presence of a magistrate or a gazetted officer. Vide memo Ex.P2, the accused-appellant opted to get his search conducted in the presence of some gazetted officer. The Investigating Officer sent a wireless message to the Deputy Superintendent of Police, Dhuri, requesting him to reach at the spot. DSP Rajbachan Singh Sandhu reached at the spot. In his presence, search of the accused-appellant was conducted and from the right pocket of his pants, opium wrapped in a glazed paper was recovered. Two samples of 10 grams each were taken out of the same and put into two small boxes. On weighment, the residue was found to be 480 grams. The samples as well as the residue were converted into separate

parcels and were sealed with the seals of the Investigating Officer and the DSP bearing impressions 'TR' and 'RS', respectively. Separate sample seal chit Ex.P1 was prepared and the seals, after use, was handed over to ASI Satnam Singh. All the aforesaid parcels were taken into possession vide recovery memo Ex.P3, which was attested by the witnesses. Ruqqa Ex.P5 was sent to the police station and on the basis of which, formal FIR Ex.P6 was registered. Rough site plan Ex.P8 of the place of recovery was prepared. On return to the police station, the case property was deposited with the Mohrir Head Constable.

3- On 03.07.1998, while in police custody, the accused-appellant suffered disclosure statement Ex.P9 that he had concealed 1 ½ kilograms of opium underneath the earth on the left corner of the room in his residential house. Upon which, the police party took the accused-appellant at his residential house. Information was also sent to Shri Rajbachan Singh Sandhu DSP, Dhuri through wireless set and he also reached at the residential house of the accused-appellant. The accused-appellant got recovered 1½ kilograms of opium from his house as per his disclosure statement. Two samples of 10 grams each were taken out of the recovered opium and put into separate tin boxes. On weighment, the residue was found to be 01 kilogram 480 grams, which was put into a tin box. All the above said parcels were sealed with seals bearing impressions 'TR' and 'RS' of Inspector Tale Ram and DSP Rajbachan Singh, respectively. Sample seal chit Ex.P10 was prepared. Said parcels

were taken into possession vide separate recovery memo Ex.P11. Seals after use was handed over to ASI Satnam Singh. Rough site plan Ex.P12 was prepared. On return to the police station, the case property was deposited with the MHC. In due course, the sample parcels were sent to the Chemical Examiner for examination. On receipt of the report of the Chemical Examiner Ex.P13 and completion of formalities of the investigation, the report under Section 173 of the Code of Criminal Procedure, 1973 (here-in-after referred to as 'Cr.P.C.') was presented in the Court.

4- The accused-appellant was charge-sheeted for the offence punishable under Section 18 of the Act vide order dated 19.01.2004 by the learned trial Court, to which the accused-appellant pleaded not guilty and claimed trial.

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

6- When examined under Section 313 Cr.P.C., the accused-appellant pleaded innocence and false implication. He pleaded that nothing was recovered from him.

7- In the defence evidence, accused examined Amrik Singh as DW1 and HC Chand Singh as DW2.

8- Appreciating the evidence on record and the contentions raised by learned counsel for the parties, the accused appellant was held guilty and convicted by the learned trial Court for the offence punishable

under Section 18 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. B.S. Saroha, Advocate, learned counsel for the appellant, Mr. Manjit Singh Naryal, 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 it is a case of chance recovery. One Dharam Singh is alleged to have been associated as an independent witness. It is alleged that he had witnessed both the recoveries as well as disclosure statement suffered by the appellant, but he has not been examined by the prosecution. So, there is no independent corroboration to the testimonies of the official witnesses. He further contended that said Dharam Singh was the stock witness of the police. He was also cited as a witness in two other police cases bearing FIR Nos. 104/99 and 119/99, copies thereof are Ex.D1 and Ex.D2, respectively.

12- He further contended that there are some material contradictions in the statements of the prosecution witnesses and even the presence of PW2 DSP Rajbachan Singh at the time of the recovery of the contraband is extremely doubtful.

13- He further contended that there is no evidence to

establish that the appellant was in conscious possession of the contraband. No question has been put to the appellant in his statement under Section 313 Cr.P.C. that he was in conscious possession of the contraband. So, it is not proved that the accused was found in conscious possession of the contraband. To support his contentions, he has relied upon case *State of Punjab Vs. Hari Singh and others 2009(2) RCR (Criminal) 143*. He further contended that in fact the appellant was called through some police official at Police Station Dhuri by the SHO of Police Station Dhuri on the pretext of some wooden work but he was falsely implicated in the present case. The appellant had never indulged in any illegal activity. This fact is proved from the statement of DW1 Amrik Singh, Municipal Commissioner, Dhuri. Thus, he pleaded that no recovery was effected from the possession of the appellant and he has been falsely implicated.

14- He further contended that the sentence awarded to the appellant is harsh. He is about 63 years of age. He has underwent open heart surgery. He has already undergone incarceration of 01 year and 4 months out of the sentence of three years. Thus, he pleaded that the appellant deserves reduction in the matter of sentence.

15- On the other hand, learned State counsel contended that Dharam Singh, the independent witness associated in the investigation of the case, was given up as having been won over by the accused. So, his non-examination cannot create any dent in the cogent, consistent and

reliable evidence of the police officials.

16- He further contended that from the testimonies of PW1 Inspector Tale Ram, the Investigating Officer of the case, PW3 ASI Satnam Singh, the witness of recovery, PW2 DSP Rajbachan Singh, the Gazetted Police Officer, it is established that 500 grams opium was recovered from the personal search of the accused-appellant and 1½ kilograms opium was recovered on the basis of his disclosure statement. He further contended that learned counsel for the appellant has not been able to point out any material contradiction in their statements. Thus, he pleaded that the conviction of the appellant has been rightly recorded by the learned trial Court and sentence awarded to him is also just and appropriate.

17- I have duly considered the aforesaid contentions.

18- Admittedly, the initial recovery in this case is a chance recovery. The Investigating Officer was not having any secret information against the present appellant. The accused-appellant was seen per chance while he was coming from the side of Dhuri and on seeing the police vehicle, he tried to slip away. On suspicion, he was apprehended, which resulted into the recovery of 500 grams opium from his possession. Prior to that, Dharam Singh son of Bhajan Singh was associated in the police party. No doubt this witness has not been examined by the prosecution and was given up by the learned Public Prosecutor vide his statement dated 31.03.2003, as having been won over

by the accused. In my opinion, no adverse inference can be drawn against the prosecution for non-examination of Dharam Singh as he has been given up by the learned Public Prosecutor as he was not going to support the prosecution case as a result of having been won over by the accused. The law is well settled that the prosecution is not bound to examine each and every witness, particularly the witness who has been won over by the accused and is not going to support its case. The Hon'ble Supreme Court in case ***Banti alias Guddu Vs. State of Madhya Pradesh 2003(4) RCR (Criminal) 911*** has laid down that there is no illegality if the Public Prosecutor has given up the witness who was not likely to support the prosecution case. In case ***Masalti Vs. State of Uttar Pradesh, AIR 1965 SC 202***, it was held that it is, undoubtedly, the duty of the prosecution to lay before the Court all material witnesses, available to it, whose evidence is necessary for unfolding the case, it would be unsound to lay down it as a general rule that every witness must be examined even though his evidence may not be material or even if it is known that he has been won over or terrorised. In ***Roop Singh Vs. State of Punjab 1996 (1) RCR (Criminal) 146***, the Division Bench of this Court held that no adverse inference can be drawn, when the only independent witness was given up by the prosecution, as won over by the accused. It was further laid down that the panch witnesses, being human beings, are quite exposed and vulnerable to human feelings of yielding, browbeating, threats and inducements and giving up of the public

witnesses as won over, is fully justified in the present day situation, prevailing in the society. The same rule of law has been reiterated by another Division Bench of this Court in case ***Karnail Singh Vs. State of Punjab 1983 Criminal Law Journal, 1218***. In view of the consistent rule of law laid down in the cases referred above, the non-examination of Dharam Singh as having been won over by the accused, is no ground to reject the prosecution version.

19- It is further the well settled principle of law by this time that the testimonies of the official witnesses are at par with the other witnesses. Their statements cannot be discarded simply on account of their official designation. There is no statutory or absolute rule that their depositions should be treated with suspicion. The police witnesses cannot be viewed with distrust every time. To support this view, reference can be made to cases ***Ram Swaroop Vs. State (Government of NCT of Delhi) (2013) 14, Supreme Court Cases 235*** and ***Kashmiri Lal Vs. State of Haryana 2013 (6) Supreme Court Cases 595***. Thus, the testimonies of the official witnesses examined by the prosecution cannot be discarded simply on the ground that Dharam Singh, the independent witness associated in the investigation of the case, has not been examined.

20- In the defence evidence the appellant has placed on file the copy of the FIRs Ex.D1 and Ex.D2 to show that said Dharam Singh son of Bhajan Singh was also cited as a witness in both these cases. But mere this fact he has been cited as a witness in two other police cases, is

no ground to conclude that he was the stock witness to the police. The accused-appellant has not produced the further evidence as to whether he has actually appeared in those two cases to support the prosecution version. So, the plea raised by learned counsel for the appellant that Dharam Singh was a stock witness of the police has no substance.

21- There is also no material available on record to show that PW1 Inspector Tale Ram the Investigating Officer of the case, PW2 DSP Rajbachan Singh a Gazetted Police Officer and PW3 ASI Satnam Singh, the witness of recovery had any animosity towards the accused. As per the suggestions put to the Investigating Officer, he was arrested from his house in the presence of Amrik Singh and Nirmal Singh. In his statement under Section 313 Cr.P.C., the appellant has simply pleaded false implication. Even in his statement under Section 313 Cr.P.C., the accused-appellant has not alleged any ill will or motive for the false implication on the part of the Investigating Officer. The statement of DW1 Amrik Singh is contrary to the suggestions put to PW1 Tale Ram the Investigating Officer and PW3 ASI Satnam Singh the witness of recovery, as they have been suggested that the appellant was arrested from his house in the presence of Nirmal Singh and Amrik Singh, whereas DW1 Amrik Singh has stated that the appellant was called to the police station and the police told them that accused was called by the SHO Police Station - Dhuri for some wooden work. But he did not return from the police station then he along with 4/5 persons went to the police

station and came to know that a false case has been planted against the appellant. So, this version of DW1 Amrik Singh contradicts the version put to the prosecution witnesses in their cross-examination that appellant was arrested from his house. Thus, the defence plea raised by the appellant does not inspire any confidence, rather it appears to be an afterthought version. As already mentioned, there is no material on record to show that the Investigating Officer or the other prosecution witnesses had any ill will or motive for the false implication of the appellant. Thus, their statements cannot be ignored.

22- Learned counsel for the appellant has raised the general plea that there are some contradictions in the statement of the prosecution witnesses but he has not pointed out any material contradiction, which can go to the root of the case, rather the statement of PW1 Inspector Tale Ram, PW2 DSP Rajbachan Singh and PW3 ASI Satnam Singh are consistent on the points of the apprehension of the appellant, the search and seizure of the contraband from his possession at the spot, the disclosure statement suffered by the appellant and the resultant recovery of more contraband from his house. The statements of these prosecution witnesses appear to be natural, consistent and reliable. Learned counsel for the appellant has also not pointed out any circumstance to show the presence of PW2 DSP Rajbachan Singh doubtful at the spot. PW2 DSP Rajbachan Singh has arrived at the spot on receiving wireless message from the Investigating Officer. He had also affixed his seals on the

parcels of the contraband. He also attested the relevant documents i.e. the consent memo Ex.P1, recovery memo Ex.P3 with respect to the recovery of 500 grams opium from the personal search of the appellant, memo regarding personal search and the recovery memo Ex.P11 with respect to the recovery of 1½ kilograms opium from the house of the appellant in pursuance of his disclosure statement. PW2 DSP Rajbachan Singh has also faced a lengthy cross-examination and his testimony could not be shattered in the cross-examination. If he would not have actually come present at the spot, he would not have been able to face such a lengthy and pointed cross-examination. So, there is nothing to doubt the presence of PW2 DSP Rajbachan Singh at the place of recovery.

23- No doubt, in the statement of appellant under Section 313 Cr.P.C., no specific question has been put to the appellant with respect to his conscious possession but that omission in the statement under Section 313 Cr.P.C. is also no ground to vitiate the conviction. In the instant case 500 grams opium has been recovered from the personal search of the accused-appellant and 1½ kilograms opium has been recovered in pursuance of his disclosure statement from his residential house. Every error or omission in the statement under Section 313 Cr.P.C. does not necessarily vitiate the conviction/trial. The accused has to show that some prejudice has been caused to him due to that omission. The Hon'ble Supreme Court in case ***Paramjeet Singh @ Pamma Vs. State of Uttarakhand 2010(4) RCR (Criminal) 548*** after considering large

number of cases on this issue authoritatively laid down as under:-

“Thus, it is evident from the above that the provisions of Section 313 Cr. P.C make it obligatory for the court to question the accused on the evidence and circumstances against him so as to offer the accused an opportunity to explain the same. But, it would not be enough for the accused to show that he has not been questioned or examined on a particular circumstance, instead he must show that such non-examination has actually and materially prejudiced him and has resulted in the failure of justice. In other words, in the event of an inadvertent omission on the part of the court to question the accused on any incriminating circumstance cannot ipso facto vitiate the trial unless it is shown that some material prejudice was caused to the accused by the omission of the court”

24- Similarly, in case *Gian Chand and others Vs. State of Haryana 2013(3) RCR (Criminal) 916*, the Hon'ble Apex Court has reiterated the same legal position and laid down as under:-

“So far as Section 313 Cr.P.C. is concerned, undoubtedly, the attention of the accused must specifically be brought to inculpable pieces of evidence to give him an opportunity to offer an explanation if he chooses to do so. A three-Judge Bench of this Court in *Wasim Khan v. The State of Uttar Pradesh, AIR 1956 SC 400*; and *Bhoor Singh & Anr. v. State of Punjab, AIR 1974 SC 1256* held that every error or omission in compliance of the provisions of Section 342 of the old Cr.P.C. does not necessarily vitiate trial. The accused must show that some prejudice has been caused or was likely to have been caused to him.”

25- In view of the aforesaid consistent rule of law, it would not be enough for the accused to show that the specific question regarding conscious possession has not been put to him but he has to further show what prejudice has been caused to him due to such non-

examination and how it had resulted in failure of justice. All these aspects are totally lacking in this case. The appellant has not been able to point out as to what prejudice has been caused to him due to omission of the specific question with respect to his conscious possession and how it had caused failure of justice. In case *Gian Chand and others Vs. State of Haryana* (supra), the Hon'ble Apex Court has also taken the note of case *State of Punjab Vs. Hari Singh and others* (supra) relied upon by learned counsel for the appellant. Hence it cannot advance the case of the appellant in view of the aforesaid circumstances.

26- I also do not find any substance in the plea of learned counsel for the appellant for reduction of sentence. Learned counsel for the appellant has sought the reduction of sentence on two grounds. Firstly, the appellant is 63 years of age and secondly, he has underwent open heart surgery. The appellant has not placed on record any material to show that he was suffering from any heart ailment and has underwent the open heart surgery. The age of the appellant is mentioned as 47 years in the charge-sheet dated 07.10.1998. So, on the date of recovery, he was about 47 years of age. If his age has increased with the pendency of the case and the present appeal, he does not become entitled for reduction of sentence. Two kilograms opium has been recovered from the possession of the appellant. He has been sentenced to undergo rigorous imprisonment for three years and to pay fine of ₹ 20,000/-, in default of payment of fine he has been ordered to further undergo rigorous

imprisonment for a period of six months. The sentence awarded by the learned trial Court is just and appropriate keeping in view the quantity of the opium recovered from the appellant, which does not call for any further reduction in the matter of sentence.

27- Thus, keeping in view my aforesaid discussion, it is established beyond shadow of reasonable doubt that 2 kilograms opium was recovered from the possession of the appellant. So, there is no legal infirmity or impropriety in the conviction of the appellant as recorded by learned trial Court and the sentence awarded to him which are hereby maintained and affirmed.

28- Resultantly, the present appeal has no merits and the same is hereby dismissed. The accused-appellant is on bail. His bail stand cancelled. He shall surrender within 15 days from the date of this judgment before the learned Chief Judicial Magistrate, Sangrur, who shall send him to jail to undergo the remaining part of his sentence. If, he fails to surrender, the learned Chief Judicial Magistrate, Sangrur, shall take coercive steps to secure his presence and send him to jail to undergo the remaining part of the sentence.

Dated: 03.11.2015.
sunil yadav

(DARSHAN SINGH)
JUDGE