

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

CRA-S-1336-SB of 2010

DATE OF DECISION :- September 29, 2015

Nirmal Singh

...Appellant

Versus

State of Punjab

...Respondent

CRR No. 1014 of 2013

Nirmal Singh

...Petitioner

Versus

State of Punjab

...Respondent

CORAM: HON'BLE MR.JUSTICE M.JEYAPPAUL

Present:- Mr. Atul Goel, Advocate for the appellant.

Mr. Premjit Singh Hundal, Additional Advocate General,
Punjab.

1. Whether Reporters of local papers may be allowed to see the judgment? Yes/No
2. To be referred to the Reporters or not? Yes/No
3. Whether the judgment should be reported in the digest? **Yes**

M.JEYAPPAUL, J.

1. Appellant Nirmal Singh was convicted under Section 18

(b) of the NDPS Act and sentenced to undergo 10 years' R.I. and to pay a fine of ₹1 lakh and in default of payment of fine to further undergo Rigorous Imprisonment for a further period of 6 months. Accused Nirmal Singh has challenged the above conviction and sentence passed by the trial Court in CRA-S-1336-SB of 2010. He has also filed CRR No. 1014 of 2013 challenging the dismissal of his plea for release of the truck which allegedly transported 5 Kgs of Opium.

2. The entire case of the prosecution is evident from the following testimony of PW3 SI/SHO Hardeep Singh, who intercepted and searched the truck owned by the accused, collected samples therefrom, investigated the case and filed the final report.

3. On 22.8.2007, PW3 Hardip Singh and other police officials proceeded along with SI Jagtar Singh in connection with patrolling duty. On the way, Partap Singh son of Teja Singh was also joined as a witness. Naka was held for checking the vehicles at Bhikiwind Harike at about 11 A.M. A truck bearing registration No. MP 09 KB-1641 came from the Harike side. The truck was stopped by the police party head by PW3. The truck driver tried to escape after alighting from the truck. He was apprehended by PW3 with the help of other police officials. On enquiry, he disclosed his name and address. PW3 having suspected some intoxicant substance in the truck gave an option to the accused for being searched either in the presence of a Gazetted Officer or a Magistrate. The accused opted

to be searched in the presence of a Gazetted Officer. Non-consent memo Ex. PW3/A was prepared. It was signed by the accused and attested by S.I. Jagtar Singh and independent witness Partap Singh. On information passed on through wireless PW1 DSP Kamaljit Singh reached the spot at 12.15 P.M. The accused reposed confidence in PW1 and consent memo Ex. PW1/A was prepared. The same was signed by the accused and attested by S.I. Jagtar Singh and independent witness, Partap Singh. As per instructions given by PW1, the cabin of the truck was searched by PW3. Opium found wrapped in a polethene paper was recovered from the backside box from the driver's seat. The above box was used for sleeping purposes by the co-driver. On weighing, the Opium weighed 5 Kg. 10 gms. was separated as a sample and put in a plastic bag while the remaining bulk quantity was put in plastic bags. Two separate parcels were prepared and sealed with seals of PW1 and PW3. Sample seals were separately prepared. Form 29 was also prepared at the spot. PW1 and PW3 put their signatures and affixed their seal on Form 29. PW3 handed over his seal to S.I. Jagtar Singh. PW1 retained his seal with him. The case property was taken in possession vide recovery memo PW1/C which was attested by PW1 and the above witnesses. The truck along with the registration certificate was taken into possession by the police vide recovery memo Ex.PW3/B. The Registration Certificate of the truck was exhibited as Ex.P2 which stood in the name of the accused. The

truck was loaded with 300 bags of husk of grams. Those bags were also taken into possession by the police under recovery memo Ex.PW3/C. Ruqa Ex.PW3/D was dispatched to the police station through Head Constable Jasbir Singh. On the basis of the above Ruqa, FIR was registered by ASI Harjinder Singh. Rough site plan was prepared. Accused was arrested. His personal search was also undertaken. Where upon a driving licence, a sum of ₹750/- and Nokia phone were recovered. The case property was kept in the safe custody of PW3. On the next day, PW3 produced the accused as well as the case property before the Illaqa Magistrate. The sample seals were entrusted to PW2 Head Constable Ashwani Kumar, who deposited the same with the Forensic Science Laboratory. The FSL report disclosed that the sample sent for examination was nothing but Opium.

4. In addition to PW3 the star witness in this case, the prosecution examined PW1 Karamjit Singh, DSP in whose presence the contraband was recovered from the Truck and PW2 HC Ashwani Kumar who was engaged for depositing the sample with the FSL.

5. The accused took up a plea in his statement under Section 313 Cr.P.C. that he was the owner of the truck bearing No. MP 09KB1641 which was registered at Indore in Madhya Pradesh. He is running a transport business at Indore where he was also residing. The above truck was driven by drivers of the accused, who belong to UP. The local police at Indore contacted the accused and

informed him that the truck had met with an accident in the area of Patti. Accused proceeded to Patti Police Station in that connection. On 22.8.2007, when the accused reached Police Station Patti, he found his truck parked over there. The police informed him that some contraband had been recovered from his truck and directed him to produce before them the persons who drove the said truck. Accused could not trace and produce the drivers as they had already fled away from the spot. As the accused expressed his inability to produce the drivers, the Station House Officer after consultation with his superiors falsely implicated him in this case by planting 5 Kgs of Opium. It is his contention that he was totally innocent.

6. The trial Court having adverted to the entire evidence on record returned a finding as stated supra

7. The evidence of PW3 S.I./S.H.O. Hardip Singh, the investigating officer in this case, goes to establish that it was only the accused who drove the vehicle at the time when it was intercepted by PW3 and other police officials. PW3 gave an opportunity to the accused to exercise his option for being searched either before a Gazetted Officer or a Magistrate. The non consent memo establishes that such an opportunity was afforded by PW3 to the accused.

8. The testimony of PW1 and PW3 would go to establish that PW1 was called to the spot. He also disclosed his identity to the accused who reposed confidence in him. The consent memo signed

by the accused establishes the consent voluntarily given by the accused for the search to be undertaken by PW1. During the course of search, PW3 found 5 Kgs of Opium in a polythene wrapper hidden in the box kept on the backside of the driver's seat. PW3 had drawn sample and properly parceled and sealed the sample as well as the remaining bulk quantity. Form 29 had been prepared at the spot. The accused was arrested and the truck was taken in police possession by PW3. They were produced before the Judicial Magistrate. The sample had been dispatched to the FSL through PW2. The opinion found in the FSL report discloses that the sample was nothing but Opium.

9. It was submitted by learned counsel appearing for the appellant that non examination of the independent witness creates a doubt in the case of the prosecution. The learned counsel appearing for the State vehemently contended that the independent witness was not examined as he was won over by the accused.

10. The accused has categorically admitted that the truck recovered in this case belonged to him. The R.C. book stood in his name. He in fact filed a petition for return of the vehicle on the basis that he was the owner of the vehicle but the same was dismissed by the trial Court. The contraband had been recovered from the bags kept behind the driver seat. PW3 had seen the accused making an attempt to escape after alighting from the truck. No other person was found in the truck. PW3 has given cogent details of the sequence of

events. Therefore, his testimony cannot be doubted just because the independent witness was not examined. Further, it is a common knowledge that independent witnesses are mortally afraid to associate themselves in investigation and give evidence against the accused involved in Narcotic cases. As the independent witness was reportedly won over, he was not examined. Under such circumstances, in my considered view, the trustworthy evidence of PW3 cannot be thrown over-board just because the independent witness was not examined.

11. Learned counsel appearing for the appellant submitted that the non-consent memo, consent memo and the recovery memo did contain the FIR number and the penal provision under the NDPS Act. It is his submission that those particulars could not have been introduced in the non-consent memo, consent memo and the recovery memo even before the FIR was registered. Such a serious lapse on the part of the investigating Agency goes to the root of the case, it was submitted. Counsel appearing for the State contended that the Police Station is located within about three miles and, therefore, there is every possibility for securing the FIR number to be furnished in those documents.

12. PW3 was the Station House Officer of Police Station, Patti, who registered the case. The truck was intercepted and seized at a place located three miles away from the Police Station. Given the vast communication facility available for the police sleuths, it is

possible to secure the FIR number from the Police Station for incorporating in consent memo, non consent memo and the recovery memo. Even otherwise, the question that arises for consideration is whether such a lapse on the part of the investigating Agency would lead to acquittal of the accused.

13. Learned counsel appearing for the appellant cited three decisions to support his contention that such a lapse would culminate in doubting the very integrity of the prosecution version. In

Ajay Malik and Ors. Versus State of U.T., Chandigarh 2009(3)

R.C.R. (Criminal) 649 it has been held as follows :-

“Admittedly, several spot documents such as the search memo, recovery memos and the rough site plan prepared at the spot (Ex. PG, PH and PO) surprisingly contain reference to FIR No. 235 dated 14.12.2003 and it is inconceivable as to how memos prepared at the spot could bear a reference to FIR No. which came to be registered later at 5.30 A.M. Two inferences could settle it: either the FIR was registered prior to the alleged recovery of contraband or the number of FIR was inserted in these documents after its registration. In both the situations it seriously reflects upon the integrity of the prosecution version.”

14. The above decision was cited with approval by the Division Bench of this Court in ***Didar Singh @ Dara versus The State of Punjab 2010(3) R.C.R. (Criminal) 337*** as follows :-

“There is another infirmity on the record which further creates a doubt about the entire prosecution case. As per

the prosecution, at the time of the recovery, various documents were prepared. Those documents are Ex. PA, Ex. PB, Ex. PC, Ex. PD, Ex. PE and Ex. PF. All these memos bear the FIR number of the case. It is admitted case of the prosecution that when these documents were prepared, the FIR was not registered and FIR No. was not available as the same was registered later on, on the ruqa sent by the police. It has not been explained how all these memos contained the FIR number which was not existing at the time when these memos were prepared. In *Ajay Malik & Ors. v. State of U.T., Chandigarh*, 2009(3) RCR (Cri.) 649, this Court while dealing with similar situation has observed that two inferences could be drawn from such situation, i.e., either the FIR was registered prior to the alleged recovery of the contraband or number of FIR was inserted in the document after its registration. But in both situations, it seriously reflects upon the integrity of the prosecution version. While relying upon several other decisions, it was held that such serious lapses in the prosecution case create a doubt to the prosecution theory.”

15. Ajay Malik was followed by this Court in the later judgment in ***Bhola Singh and another v. State of Punjab CRA-S No. 2083 of 2013(O&M)*** decided on March 11, 2015.

16. On a careful perusal of the above decisions of this Court, it is found that this Court took note of the integrity of the prosecution version as one of the grounds for recording acquittal. But it is to be noted that the case launched as against the accused would not end in acquittal on the sole ground that such a lapse had been committed

by the investigating Agency. In other words, if the case projected by the prosecution has been established otherwise, the question of recording acquittal on the mere ground that the FIR number before its registration was found in the consent memo, non consent memo and recovery memo does not arise. In my view, the case of the prosecution cannot be thrown over board just because there was such a lapse on the part of the investigating agency. If the Court starts recording acquittal on the basis of such a lapse on the part of the investigating agency, there is every danger for the investigating agency to wantonly commit such a lapse to lend a helping hand to the accused. Under such circumstances, the Court also will be a party to such an unholy design.

17. Coming to the facts of this case, the accused was found driving the truck owned by him. The contraband had been recovered not in the midst of the other bags but in the box kept behind the seat of the driver. Though it was contended by the accused that he was owner of fleet of trucks and he used to engage only drivers to drive the trucks, no evidence was adduced by the accused to substantiate such a plea. To top it all, the accused who contended that it was only his driver who drove the vehicle caused an accident and fled away from the scene did not choose to divulge the name of the drivers till the termination of trial. If at all, he had engaged some drivers who chose to betray him, he would have definitely divulge the name of the drivers. Further, if the driver had driven the vehicle, the

investigating agency would have booked the case not only against the drivers but also against the owner of the vehicle under the scheme of the NDPS Act. Therefore, the story of the accused that he was not on the wheels and it was only his driver who drove the vehicle, did not find favour with this Court.

18. It is the version of the accused that the truck met with an accident and on information, he rushed to Patti Police Station in connection therewith. Such a story is totally unbelievable as a driver who caused the accident carrying 5 Kgs. of contraband would have taken away the contraband as well and informed his owner as regards the accident of the truck. Therefore, it is not at all convincing that the driver who drove the vehicle had fled away and, therefore, the owner of the vehicle could not furnish any information about the driver. In my considered view, the accused has come out with a totally incredible story just to escape from the clutches of criminal law.

19. Learned counsel appearing for the appellant referring to Form 29 submitted that the same was not prepared at the place where the contraband was recovered. Further, PW1 and PW3 could not have affixed their seal on Form 29 on the date referred therein.

20. PW1 and PW3 have categorically deposed that Form 29 was prepared at the spot. Their oral testimony is fortified by the fact that the seals affixed by them was found on Form 29. At the bottom portion of Form 29, it appears that the date of dispatching of the

sample had been mentioned. Under such circumstances it cannot be construed that Form 29 was prepared only on the date when the sample was dispatched from the Malkhana.

21. It was submitted by the learned counsel appearing for the appellant that no question was put to the accused during the proceedings under Section 313 Cr.P.C. that he was in conscious possession of the contraband. He cited a decision of the Hon'ble Supreme Court in ***State of Punjab v. Hari Singh and others 2009 (2) R.C.R. (Criminal) 143*** wherein it has been held as follows :-

“When the accused was examined under Section 313 Criminal Procedure code, the essence of accusation was not brought to his notice, more particularly, that possession aspect, as was observed by this court in *Avtar Singh and Ors. vs. State of Punjab, 2002(4) RCR (Criminal) 180 : (2002(7) SCC 419)*. The effect of such omission vitally affects the prosecution case.”

22. In the above case, it appears that the accused who were sitting on the bags lying between the sugarcane fields and the heap of earth, had been apprehended by the police. Under such circumstances, the Hon'ble Supreme Court found that a question under Section 313 Cr.P.C. should have been put to the accused as regards the conscious possession of the bags during the examination under Section 313 Cr.P.C. A circumstance which was not brought to the notice of the accused facilitating him to come out with an excuse cannot be adversely used as against him. But it is to be noted that if no witness has spoken about the conscious

possession of the accused, the trial Court cannot formulate a question independent of the evidence adduced and put to the accused under Section 313 Cr.P.C.

23. In the instant case, the accused was found driving his own truck from which the contraband was recovered. In other words, the contraband was recovered from the place which was exclusively to the knowledge of the accused. Conscious possession in the instant case will have to be drawn from the circumstances which have been properly put to the notice of the accused to explain. Under such circumstances, in my view, the above decision will not apply to the facts of this case.

24. I find that the trial Court has rightly come to the conclusion based on the trustworthy testimony adduced by the prosecution that the accused was found in conscious possession of 5 kgs of Opium. Proportionate punishment has also been recorded by the trial Court. Therefore, there is no merit in the appeal. The judgment of the trial Court stands confirmed and the appeal stands dismissed. Accused Nirmal Singh is on bail. The bail bond executed by accused Nirmal singh stands cancelled. He shall surrender within one month from the date of this order before learned Chief Judicial Magistrate, Tarn Taran, failing which the learned Chief Judicial Magistrate, Tarn Taran shall issue warrant of arrest and send him to jail to undergo the unexpired portion of sentence.

25. In view of the above decision in the Criminal appeal, the

Criminal Revision Petition No. 1014 of 2013 stands dismissed as the truck which was involved in transportation of the contraband is liable to be confiscated by the State.

**(M. JEYAPPAUL)
JUDGE**

September 29, 2015
p.singh