

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

CRA-S-1680-SB of 2005 (O&M)

Date of decision: 02.09.2015

Harjinder Singh

...Appellant

Versus

State of Punjab

...Respondent

CORAM: HON'BLE MR.JUSTICE JITENDRA CHAUHAN

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

Mr. Luvinder Sofat, AAG, Punjab
for the State.

Jitendra Chauhan, J.

The present appeal is directed against the judgment of conviction and order of sentence dated 23.08.2005, ordered by the learned Judge, Special Court, Ludhiana, thereby convicting the appellant under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short the 'Act') and sentencing him to undergo rigorous imprisonment for ten years and to pay a fine of ₹1,00,000/- and in default of payment thereof, to undergo further rigorous imprisonment for one year.

2. The case of the prosecution as per para No.2 of the judgment of the trial Court is as under:-

“On 11.08.2002, Inspector Malkit Singh and the other police officials on Govt., vehicle was present in connection with checking at Beeja chowk. Secret information was imparted to him that Harbhajan Singh son of Gurnam Singh was dealing in poppy husk. He sent ruqa to the police station. He requested DSP to reach the spot. He along with the other police officials reached at village Bhorala and apprehended the accused Harjinder Singh. In the presence of DSP Amrik Singh, statement of accused Harjinder Singh under Section 27 of Evidence Act was recorded. He disclosed that he had concealed five bags of poppy husk in the kotha meant for storing chaff and he only knew the same and he could get the same recovered from that place. As per the disclosure statement accused got recovered five bags of poppy husk from the disclosed place. On weighment each bag was found to be 30 kgs each of poppy husk. Samples of 250/250 grams were taken out from the each bags and the remaining poppy husk was taken into possession and made into parcels. All the samples and the parcels were sealed by Inspector Malkit Singh with his seal bearing impression MS and DSP also put his seal on all the parcels bearing impression ASB. Sample seal was prepared separately and seal after use was handed over to SI Gurcharan Singh. All the parcels along with the sample seal were taken into possession, vide separate recovery memo and on return to the police station the case property was deposited with the MHC. Samples were sent to the chemical examiner and report of the chemical examiner was received. After completion of necessary investigation and formalities, challan

against the accused was presented in Court.”

3. On presentation of challan, the trial Court finding prima facie evidence against accused-appellant, framed charge for the offence punishable under Section 15 of the Act to which he pleaded 'not guilty' and claimed trial.

4. In support of its case, the prosecution examined the following witnesses:-

PW-1, Inspector Malkit Singh, who was posted as Incharge CIA Staff on the alleged date of occurrence, had received a secret information that the appellant/accused was indulging in selling the poppy husk and on receipt of secret information, he sent ruqa Ex.PA to the police station on the basis of which formal FIR Ex.PA/1 was recorded. This witness had deposed regarding the whole investigation carried out by him;

PW-2 SI/SHO Gurcharan Singh had also corroborated the sequence of investigation and toe the lines as stated by PW-1, Inspector Malkit Singh;

PW-3 HC Karam Singh, tendered into evidence his sworn affidavit Ex.PG;

PW-4 HC Gian Singh, tendered into evidence his sworn affidavit Ex.PH;

PW-5 Gurmail Singh, who was posted as ASI at PS

Sadar, Khanna on 11.08.2002, received ruka from PW-1, Inspector Malkit Singh on the basis of which, he recorded FIR Ex.PA/1. He also testified the fact of recovery from the accused.

PW-6 Fateh Singh, tendered into evidence his sworn affidavit Ex.PW6/A;

PW-7, DSP Amrik Singh also testified the sequence of investigation being carried out by the investigating agency.

5. The statement of the accused under Section 313 Cr.P.C., was recorded. He pleaded innocence and alleged false implication. In defence, the accused had examined DW-1 Mahesh Kumar; DW-2 Kesar Singh, Lamberdar and thereafter, he closed his defence evidence.

6. After hearing the Public Prosecutor for the State, the Counsel for the accused, and after going through the evidence on record, the trial Court convicted and sentenced the accused/appellant, as stated hereinbefore.

7. Feeling aggrieved, against the judgment of conviction passed by the trial Court, the instant appeal was filed by the accused/appellant which was admitted on 08.11.2005. The sentence of the applicant/appellant was suspended on 23.02.2007.

8. The learned counsel for the appellant has submitted that the accused has been falsely implicated in the instant case. Although there was secret information with the police, the same was neither

reduced into writing nor was sent to the immediate superior officer and, therefore, there has been a total non-compliance of Section 42 of the Act, entitling the appellant to acquittal.

There is an unexplained delay of 10 days in sending the sample to the chemical examiner, so the possibility of tampering with contraband cannot be ruled out.

9. Learned counsel has further submitted that as per the prosecution story, the alleged recovery was effected from the house of the accused, where other family members had been also residing in the same house, but there is no evidence regarding the ownership of the said house, therefore, the conscious possession of the contraband from the accused/appellant is not proved. A raid was conducted on the house of the accused/appellant but no public person or neighbourer from the nearby locality was called at the time of house search, so there is a serious non compliance of Section 100 of the Code of Criminal Procedure.

10. Further, the learned counsel for the appellant/accused has pointed out discrepancies in the statements of PW-1, Malkit Singh, the Investigating Officer and PW-2, SI Gurcharan Singh. He refers to the testimony of PW-1, Malkit Singh, where he specifically stated that the writing work was done by sitting on the cot which was lying in the courtyard. He had two spring weighing instruments, capacity of one was 4 kg and the other was one quintal whereas PW-2, SI

Gurcharan Singh had stated that the writing work was done by sitting on the chairs and table. Furthermore, PW-7, DSP Amrik Singh had stated that the investigating officer was having weighing machine, whereas, as per the version of IO, he was having two spring weighing instruments. PW-1, Malkit Singh has admitted in his cross examination that the place where he received the information was a thoroughfare, therefore, his version that no person met the police party from the place of the information to the house of accused, is highly improbable.

11. The learned counsel has further argued that it is not the case that accused made a disclosure statement while in police custody and since the accused was not in the custody of police, therefore, the disclosure statement of the accused is of no consequence which is totally contrary to Section 27 of the Evidence Act. The evidence led by the prosecution without the testimony of independent witness, solely rests on the official witness, who are, of course interested in the conviction of the appellant to get rewarded.

12. Lastly, the learned counsel for the appellant has contended that the appellant/accused has already undergone about 05 years and 09 months approx., out of substantive sentence of 10 years imposed upon him. Therefore, he may be acquitted of the charges leveled against him.

13. In support of his contentions, the learned counsel for the

appellant has cited **Nachhattar Singh** Vs. **State of Haryana**, 2014

(1) RCR (Criminal) 490, wherein it has been noticed as under:-

“Narcotic Drugs and Psychotropic Substances Act, 1985, Section -15-Contraband-Appeal against conviction-Acquittal-Delay in sending sample-the recovery was effected on 1st January, 1999-Sample parcel was sent to Fsl Laboratory on 13th January, 1999-According to the Narcotic Control Bureau Instructions, the sample parcel should have been deposited within 72 hours with the Chemical Examiner-Prosecution has not given any explanation for withholding the sample for such a long time-Seal after use not handed over to independent witness-Certain loop holes which have not been plugged-Conviction and sentence set aside.”

14. The reliance has also been placed upon **Pall** Vs. **State of Punjab**, 1996(1) RCR (Criminal) 802, wherein, it has been noticed as under:-

“Evidence Act, Section 27- Narcotic Drugs and Psychotropic Substances Act, 1985, Section 15- Police Officer first arresting the accused on suspicion and then effecting recovery of poppy husk on disclosure statement of accused-Discovery of poppy husk in the circumstances not admissible in evidence-Police officer was not entitled to arrest the accused prior to the recovery as by that time accused had committed no offence.”

15. Further, the learned counsel for the appellant has placed reliance upon the law laid down by Hon'ble Apex Court in **Rajender**

Singh Vs. **State of Haryana**, 2011(3) RCR (Criminal) 856, in which it has been held as under:-

“4 (d). While total non-compliance with requirements of sub- sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non- sending of a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior; then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001.”

16. On the other hand, the learned State counsel, has refuted the contentions and urged that the prosecution had established its case beyond a shadow of reasonable doubt. He contended that proper

procedure had been followed in the present case. Report of chemical examiner Ex.PX qua the contents of the narcotic substance stands proved. Although, all the witnesses were officials but they have supported the case of the prosecution. There was no previous enmity of any of the official witnesses against the accused before registration of the present FIR. He further argued that when the secret information was received, ruqa was sent to the police station, the Gazetted officer i.e. PW-7, DSP Amrik Singh was immediately called, therefore, strict compliance of the Act had been made. He refers to the testimony of PW-7, DSP Amrik Singh where he had specifically stated that one official was sent to bring sarpanch, member panchayat, lamberdar or other respectable of the village, however, none agreed to join the investigation, therefore, the learned counsel has contended that the police had made its best efforts to join the independent witness. The appellant/accused was found in possession of the contraband and had been rightly convicted by the trial Court. He supports the judgment of the Court below and prayed for dismissal of the appeal.

17. This Court has heard the arguments of learned counsel for the parties and has carefully gone through the record of the case.

18. The recovery was effected on 11.08.2002 and the sample parcel was sent to FSL Laboratory on 21.08.2002. Thus, there was a delay of 10 days in sending the sample. As observed by the Division

Bench of this Court in **Parminder Singh vs. State of Haryana** 2006

(4) Recent Criminal Reports (Crl.), 495(DB), according to the Narcotic Control Bureau Instructions, the sample parcel should have been deposited within 72 hours with the Chemical Examiner. Herein, the prosecution has not given any explanation for withholding the sample for such a long time.

19. The next contention of learned counsel for the appellant is that the conviction of the appellant is solely based on the testimony of official witnesses. A careful perusal of the prosecution evidence shows that there are loop holes which have not been plugged. The trial Court has convicted the appellant on the testimony of police officials. It is true that the testimonies of police officials cannot be brushed aside being interested witnesses but while considering its probative value, the Court must also be cautious against false implication. There must be some independent corroboration also.

20. In the present case, the secret information was not reduced into writing and the copies of the same were not sent to the higher officer. PW-1, Malkit Singh admitted in his statement that he did not reduce the secret information into writing, which amounts to non compliance of Section 42 (a) of NDPS Act. Reliance can be placed upon **Rajender Singh Vs. State of Haryana**, 2011(3) RCR (Criminal) 856, wherein it has been held as under:-

“4. A reading of the above said provision pre-supposes that if an authorized officer has reason to believe from personal knowledge or information received by him that some person is dealing in a narcotic drug or a psychotropic substance, he should ordinarily take down the information in writing except in cases of urgency which are set out in the Section itself. Section 42(2), however, which calls for interpretation in the matter before us, is however categorical that the information if taken down in writing shall be sent to the superior officer forthwith.”

21. Furthermore, the recovery was allegedly effected from the house of the accused, where other family members had been also residing but the prosecution fails to prove as to who was the owner of the said house or the other family members residing in the house along with the appellant. There is no evidence on file that the accused/appellant was the exclusive owner in possession of the alleged house. No document was procured by the prosecution from the concerned authorities regarding the ownership of the house. No ration card was taken into possession. The prosecution has failed to prove the exclusive conscious possession of the case property. PW-1, Malkit Singh had specifically stated that the place where he received the secret information was a thoroughfare and the room from where the recovery was effected was not locked and the room was without doors. This version of PW-1 is unbelievable which causes a dent in

the prosecution story. It appears to be a case of discovery of poppy husk during search of the house instead of recovery in pursuance of disclosure statement of accused under Section 27 of the Evidence Act, which is discarded.

22. This is a case of house search as alleged by the prosecution surrounded by the houses in the locality, the house was raided on the secret information, but no public person or neighbourer was called at the time of house search, which is mandatory as per Section 100 (4) Cr.P.C. At the time of house search, two or more persons must be joined from the same locality, but in this case, non compliance of Section 100(4) Cr.P.C., is also fatal to the case of prosecution. The other family members of the accused had been residing in the same house, but they were not questioned regarding presence of contraband in the house. In the absence of any evidence that the house was in sole occupation of the appellant, the accused-appellant cannot be held solely responsible for the recovery of contraband from the house which is jointly occupied or in possession of so many other family members.

23. Otherwise also, there were material discrepancies in the statements of shadow witnesses of the prosecution i.e. PW-1, Malkit Singh, PW-2, SI Gurcharan Singh and PW-7, DSP Amrik Singh, which also create a doubt in the prosecution story. Thus, the prosecution has failed to prove its case beyond a reasonable shadow

of doubt.

24. In view of the foregoing discussion, the instant appeal is allowed. The judgment of conviction and order of sentence dated 23.08.2005, passed by the Special Court, Ludhiana are set aside. The appellant is acquitted of the charge levelled against him by giving him the benefit of doubt. He is stated to be on bail. His bail bonds stand discharged. He be set at liberty forthwith, if not required in any other case.

02.09.2015

sumit.k

(JITENDRA CHAUHAN)
JUDGE

Note:- Whether to be referred to reporter– Yes