

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

**CRA-S-2328-SB-2010 (O&M)
Date of decision : August 26, 2015**

Mukhtair Singh

..... Appellant

Versus

State of Punjab

..... Respondent

CORAM : HON'BLE MR.JUSTICE GURMIT RAM

1. To be referred to the Reporters or not? No / Yes
2. Whether the judgment should be reported in the Digest? No / Yes

Present : Mr. B.S. Aulakh, Advocate/Legal Aid counsel
for the appellant.

Ms. Shivali, Assistant Advocate General, Punjab.

GURMIT RAM, J.

1. This criminal appeal has been preferred by appellant-Mukhtair Singh (accused) against the judgment and order of sentence dated 10.02.2009 passed by Judge Special Court, Ludhiana in criminal case bearing FIR No.110 of 2002, under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short the Act), Police Station Sudhar, District Ludhiana vide which he was held guilty under Section 15 of the Act and sentenced thereunder.
2. The case of the prosecution in nut-shell before the learned trial Court was that on 23.10.2002, police party of ASI Amar Singh, In-charge

Police Post Jodhan was present in the area of drain-bridge, village Mansooran where accused-appellant came from the side of village Dolon Kalan on a Moped bearing registration No.PB10-AX-3644 make Panther, while carrying two filled gunny bags on it. He was intercepted by the police party on the basis of suspicion. In the meantime one Kala son of Surjit resident of Ahmedgarh also came there and he was associated in the police party. ASI Amar Singh told him (accused-Mukhtiar Singh) that search of his bags is to be conducted since he suspects some contraband in the same and offered him that if he so desires then some Gazetted Officer or Magistrate could be called at the spot. Thereupon the accused expressed his desire that his search be conducted by some Gazetted Officer. Accordingly his dissent statement was recorded. Then on the request of ASI Amar Singh, Sh. H.S. Brar, Deputy Superintendent of Police, *Halqa* Raikot, reached at the spot, who also disclosed his identity to the accused. He further told him that he wants to conduct search of his bags and that if he desires that the search of his bags is to be conducted through any other Gazetted Officer or Magistrate, then arrangement thereof could be made. But he reposed confidence in him (DSP, H.S. Brar) and accordingly his consent memo was prepared. Then as per direction of DSP, H.S. Brar; ASI Amar Singh conducted the search of bags of the accused, which were found containing poppy husk, regarding which the accused could not produce any license or permit. Then two samples measuring 250 grams each were separated from each of the said bags and the remaining contents of each of which on weighment were found to be 34 ½ kilograms. The abovesaid all the sample parcels and the gunny bags containing remaining poppy husk

were sealed by ASI Amar Singh and DSP H.S. Brar with their respective seals bearing impressions “AS” and “HS” and the same were taken into police possession vide a memo along with abovesaid Moped and rubber tube. Specimen seal was also prepared separately. ASI Amar Singh handed over his seal to Kala Singh, whereas DSP H.S. Brar kept his seal with him. Accordingly *ruqa* was sent to the Police Station, on the basis of which instant case was registered. Accused was formally arrested in this case after disclosing him grounds of his arrest. Site plan of the place of recovery was prepared. On returning to the Police Station, case property as well as accused were produced before the Station House Officer, who also checked the case property and verified the facts of the case. On the next date, case property was produced along with accused before the Illaqua Magistrate/Duty Magistrate. On the completion of investigation, challan against the accused was presented in the Court of Judge Special Court, Ludhiana.

3. Compliance of provisions of Section 207 of Cr.P.C. was made.
4. Finding a prima facie case under Section 15 of the Act against the accused, he was chargesheeted accordingly to which he pleaded not guilty and claimed trial.
5. During trial of the case, the prosecution examined as many as six witnesses in order to prove its case.
6. Then accused was also examined as required under Section 313 Cr.P.C., wherein he denied the entire prosecution version. Further he took the plea that no contraband was recovered from him on 23.10.2002. He was picked up from his house by the Police and the present case thereafter was

planted against him. Further he also pleaded his innocence. In his defence he also examined one Om Parkash as DW-1.

7. The learned trial Court after hearing learned counsel for both the parties and going through the record as well held the accused guilty under Section 15 of the Act and sentenced him thereunder vide the impugned judgment and order of sentence.

8. The appellant (accused) being aggrieved from the impugned judgment and order of sentence has come up with the instant appeal, notice of which was given to the prosecution. Record of learned trial Court was also requisitioned.

9. Counsel for both the parties were heard. Record was also perused minutely.

10. The learned counsel for the appellant has contended that as per the case of the prosecution, one Kala Singh arrived at the spot at the relevant time and he was joined in the police party as an independent witness. It is his further contention that even it is also case of prosecution that ASI Amar Singh, Investigating Officer of this case had handed over his seal after sealing the entire case property to Kala Singh, but the prosecution did not examine him as a witness during trial of the case, which had caused a serious dent in the prosecution version as alleged. Then it is also his contention that as per the prosecution, the alleged recovery of contraband was effected on 23.10.2002 and whereas the sample parcels of this case were sent to the office of Chemical Examiner on 07.11.2002 i.e. after a gap of 14 days from the date of alleged recovery. The prosecution did not give any explanation with regard to causing of that delay and as such, the

possibility of tampering with the sample parcels etc. could not be ruled out. Then it is also his contention that as per the case of the prosecution, one Sukhdarshan Singh was posted as AMHC in Police Station, Sudhar with whom the entire case property after the alleged recovery was deposited. The prosecution had also failed to examine this material witness during the trial of the case and that for this reason, the entire link evidence of the prosecution case is missing. In support of his contention herein he has also referred to the cross-examination of PW-6 HC Kulwinder Singh. Then he has also contended that there was also violation of the provision of Section 57 of the Act since no information was sent to the Higher Police Officers after the alleged recovery. Even Form No.29 was not prepared at the spot. Then it is further his submission that the entire case of prosecution is based on surmises and conjectures and as such, the impugned judgment and order of sentence are not tenable in the eyes of law as well as on facts.

11. But on the other hand, learned State Counsel has strongly controverted the above entire contentions of learned counsel for the appellant. It is further his contention that impugned judgment and order of sentence are very much sustainable in the eyes of law being based on the credible evidence, both oral as well as documentary available on the file. Then she has further submitted that AMHC Sukhdarshan Singh could not be examined in this case since he expired during the trial of the case and in his place HC Kulwinder Singh who was posted as MHC in the concerned Police Station during trial of the case was examined by prosecution as PW-6. He had produced register No.19 of the concerned Police Station, besides, tendering affidavit Ex.PW6/A of said AMHC Sukhdarshan Singh, since

expired.

12. Now I deem it proper to discuss the evidence in brief of both the parties in order to evaluate their above rival contentions in the right perspective.

13. ASI Amar Singh, Investigating Officer of this case appeared as PW-2. His statement in brief was that his police party apprehended the accused (appellant) on 23.10.2002 in the area of canal bridge, Mansooran, where he came on a Moped bearing No.PB10-AX-3644 while carrying two loaded gunny bags. He was given an offer as per the law, with regard to search of his gunny bags. Search of his gunny bags was conducted in the presence of DSP H.S. Brar, after obtaining his consent vide memo Ex.PC. During search, these bags were found to be containing poppy husk and two samples measuring 250 grams each were separated from each of the bags and the remaining poppy husk in each of the bags was found to be 34 ½ kilograms. The said sample parcels and gunny bags containing residue poppy husk after sealing the same with the seal of “AS” and “HS” were taken into police possession vide memo Ex.PD alongwith said moped. Then further he proved the Ruqa Ex.PE, FIR Ex.PD/1 and rough site plan of the place of recovery Ex.PF. Ex.PG was the memo vide which grounds of arrest were disclosed to the accused and he was formally arrested in this case. On returning to Police Station, accused as well as the case property were produced before the SI/SHO Arvind Puri along with sample seal chit, who verified the facts of the case from the accused and affixed his seal of “AP” on the parcels of the case property after checking the same. He further deposited it with AMHC Sukhdarshan Singh. On the next day,

accused was produced before the Duty Magistrate along with case property vide request application Ex.PJ, on which, Court passed the order Ex.PJ/1. On returning to the Police Station, the case property was redeposited by this witness with seals intact with abovesaid AMHC. Further, he proved the case property, i.e. sample parcels Ex.P2 and Ex.P3 and bulk parcels Ex.P4 and Ex.P5.

14. PW-5 DSP H.S. Brar was the Gazetted Officer, in whom the accused reposed confidence for search of his bags and in whose presence as well as under his direction, ASI Amar Singh conducted search of the gunny bags of the accused, which led to the recovery of the contraband in question.

15. PW-3 HC Baldev Singh was one of the members of the police party headed by ASI Amar Singh on the date of alleged recovery and he was present at the spot at that time. Both PW-3 and PW-5 had fully corroborated with the above discussed statement of PW-2 ASI Amar Singh with regard to the recovery of two gunny bags containing poppy husk weighing 35 kgs. each from the unlawful possession of the accused.

16. PW-4 SI Arvind Puri was SHO of Police Station, Sudhar on the date of alleged recovery. It is in his statement that the accused along with case property (duly sealed) and one Moped bearing No.PB10-AX-3644 and a rubber tube was produced before him by ASI Amar Singh. He verified the facts of the case from the accused and affixed his seal of "AP" on the parcels of the case property after checking the same including seal impression chit Ex.P1.

17. PW-1 C.Manjit Singh and PW-6 HC Kulwinder Singh were the formal witnesses in this case. PW-1 had tendered his duly sworn affidavit

Ex.PA as a part of his statement. PW-6 HC Kulwinder Singh produced register No.19 and docket register along with affidavit Ex.PW6/A of HC Sukhdarshan Singh, the then AMHC (since expired).

18. In defence version DW-1 Om Parkash (Sarpanch) deposed to the effect that on 23.10.2002 In-charge Police Post, Jodhan namely ASI Amar Singh came to their village who conducted the search of the house of the accused in his presence, but nothing incriminating was found therein. The police took the accused-appellant to the Police Station for the purpose of investigation and subsequently foisted the instant case upon him.

19. In the case in hand there is nothing on the record to say that there is non-compliance of provisions of Sections 55 and 57 of the Act. It is case of the prosecution that after the alleged recovery all the formalities as required under the law were done at the spot and thereafter the entire case property along with the Moped was taken into police custody vide a memo. On returning to the Police Station, the entire case property duly sealed along with the accused and witnesses was produced before SI/SHO Arvind Puri, who got the same into his possession after verifying the facts of the case and checking the parcels of case property. Then it is also case of prosecution that when the accused was apprehended, then some suspicion arose that the gunny bags which he was carrying were containing some narcotic substance. Upon this immediately intimation in this regard was sent to DSP, Halqa Raikot, who was immediate superior of ASI Amar Singh, In-charge Police Post Jodhan and of SHO Police Station Sudhar. Then it is also on the record that after registration of the FIR, special reports were sent to all the concerned superior Officers including Illaqa Magistrate.

Statements made by PW-2, ASI Amar Singh; PW-4, SI Arvind Puri; and PW-5, DSP H.S. Brar in the Court had proved the above case of the prosecution upto the hilt leaving no stone unturned arousing any suspicion about this version of prosecution.

20. Then the learned State counsel has further contended that provisions of abovesaid Sections 55 and 57 of the Act are not mandatory in nature and even non-compliance of provisions of these Sections, if any, does not vitiate the trial in any manner. Then there are some case laws on this point as laid down by this Court as well as by the Hon'ble Apex Court, which are detailed as under:-

- I. ***Rangi Ram vs. State of Haryana, 2002(2) R.C.R. (Criminal) 811***, wherein it has been held that Provisions of Section 57 of the Act are not mandatory. Its non-compliance by itself cannot vitiate the conviction.
- II. ***Babubhai Odhavji Patel, etc. etc. vs. State of Gujarat, 2005(4) R.C.R. (Criminal) 858***, wherein also it has been laid down that provisions of Sections 55 and 57 of the Act are not mandatory, rather they are only directory.
- III. ***Bahadur Singh vs. State of Haryana, 2010 (2) R.C.R. (Criminal) 586***. In this case also it was laid down that provisions of Section 57 of the Act are not mandatory. The information regarding arrest of the accused and seizure of contraband was duly reported to the local Police Station, on the basis of which the FIR had been drawn up, conviction was held to be valid.

In the case in hand also as abovesaid, the intimation regarding the arrest of present appellant as well as of the contraband seized from him

was duly sent to DSP, Halqa Raikot as well as to the Police Station concerned through *ruqa* on the basis of which FIR was registered.

IV. ***Jagiro @ Jagir Kaur vs. State of Punjab, 2014 (3) R.C.R. (Criminal) 717.*** In this authority, ratio of the case law ***Babubhai Odhavji Patel, etc. etc. vs. State of Gujarat (supra)*** was followed and held that it is well settled law that requirement of Sections 52, 55 and 57 of the Act are directory and not mandatory in nature.

Facts of the case in hand are found to be almost identical with the case laws cited supra i.e. ***Babubhai Odhavji Patel, etc. etc. vs. State of Gujarat*** and ***Jagiro @ Jagir Kaur vs. State of Punjab***. So in the light of the facts of case in hand and the principle laid down in the case laws cited supra, the above contention of learned counsel for the appellant is not held to be correct and same is declined.

21. Further contention of learned counsel for the appellant (accused) is that as per case of prosecution one Kala Singh was joined in the police party as an independent witness and even seal was also handed over to him by the Investigating Officer after necessary formalities. This witness was the essential witness to prove the case of prosecution, but prosecution did not examine him on the plea being won over by the accused, which fact is suffice to smell a rat about the genuineness of the prosecution version. But on the other hand, learned State Counsel has contended that no prejudice has been caused to the appellant (accused) due to non-examination of said Kala Singh, since the prosecution version stands established on the record in the statements of other witnesses examined by prosecution during trial of the case. Then there are some case laws also on

this point which are detailed as under:-

I. ***Piara Singh vs. The State of Punjab, 1982 Cr.L.J. 1176 (FB).***

Para No.26 of this authority is found to be relevant for the purpose of above issue in question, which reads as under:-

“to conclude, it must be held that there is neither a statutory requirement nor a precedential mandate for handing over the seal used by the police officer in the course of an investigation to a third person forthwith. It necessarily follow therefrom that even where it has been so done, the non-production of such a witness cannot by itself affect the merits of the trial.”

II. ***Mohd. Iqbal vs. The State of Punjab, 2003(1) R.C.R.***

(Criminal) 316. In this case two independent witnesses were joined by the Police Party during investigation who were won over by the accused and given up by prosecution. It was held that *“such witnesses were given up having won over which is not uncommon in actual practice. Hon'ble Supreme Court in Ambika prasad and another vs. State (Delhi Admn., Delhi), 2000(1) RCR (Crl.) 643 (SC): AIR 2000 Supreme Court 718 has held that if independent persons are not willing to carry with the investigation, the prosecution cannot be blamed and it cannot be a ground for rejecting the evidence of eye witnesses.”*

Then it is also a settled law that statement of any official witness is as good as that of a private witness. Prosecution case cannot be disbelieved on the simple plea that its case is based merely on the testimonies of the official witnesses.

22. Herein also there is an authority on this point of this Court as laid down in ***Jaswant Singh alias Jassa vs. State of Haryana, 2005(1) R.C.R. (Criminal) 802***. In this case law it was laid down that by now it is well settled law that where the recovery is supported by the official witnesses only, that per se is no ground to discard their testimonies. The only rule of caution is that their statements should be examined with extra care in order to find out whether they inspire confidence and are worthy of reliance.

23. So far as the non-recording of statement of DSP under Section 161 Cr.P.C. is concerned, that also does not have much effect on the merits of the case. As above discussed in this case, DSP reached at the spot of alleged recovery on the request of Amar Singh, ASI, after the apprehension of the accused carrying two gunny bags containing some suspicious substance on his Moped. He is one of the attesting witnesses of the memo Ex.PC with regard to the consent of the accused as well as of recovery memo Ex.PD vide which the entire case property was taken into police possession. While appearing as PW-5 in the Court, he supported the case of prosecution on the same lines. So, in the light of these facts the non-recording of his (DSP, H.S. Brar) statement under Section 161 of Cr.P.C. is merely an irregularity and as such, statement made by him in the Court cannot be held to be inadmissible in evidence. On this point also there is an authority of Hon'ble Apex Court titled as ***Dayal Singh vs. State of Maharashtra, 2007(2) R.C.R. (Criminal) 909***, wherein it was laid down that the failure to comply with the requirement of Section 161 (3) of Cr.P.C. might affect the weight to be attached to the evidence of witness whose

statement is not recorded under Section 161 Cr.P.C., but it does not render it inadmissible.

24. Learned defence counsel referred to cross-examination of PW-6 HC Kulwinder Singh in order to substantiate the point that as per register No.19 produced by this witness in the Court, it does not contain any entry with regard to withdrawal of the case property from *Malkhana* regarding its production in the Court and its re-deposit. Further, there is no mention in this register as to when sample parcels were taken out from the *Malkhana* for sending the same to the office of FSL. In the case in hand, HC Sukhdarshan Singh was posted as AMHC in Police Station Sudhar and case property was deposited with him as per the case of prosecution after the alleged recovery. He died during trial of the case and on his behalf PW-6 HC Kulwinder Singh was examined, who tendered in his statement affidavit of said HC Sukhdarshan Singh Ex.PW6/A and produced register No.19. The deponent of this affidavit got it attested from Judicial Magistrate Ist Class, Jagraon on 14.01.2003 which contains the entire particulars and details with regard to deposit of the case property, and also its withdrawal from Malkhana for producing the same in the Court and its re-deposit and also when the samples were taken out from *Malkhana* for sending the same to the office of Chemical Examiner. Further the contents of this affidavit are also corroborated by PW-4 SI/SHO Arvind Puri and PW-5 C. Manjit Singh. In my opinion, such like affidavit can be taken into consideration as per the provisions of Section 32 of the Indian Evidence Act. Then there is report Ex.PK received from the office of CFSL, Punjab at Chandigarh, which also confirmed the fact that all the seals of the sample parcels received in its

office were intact at the time of receiving the same and in consonance with the specimen seal sent. So, in these circumstances, it is difficult to rely upon the cross-examination of PW-6 HC Kulwinder Singh, when there is sufficient evidence on record contrary to it oral as well as documentary to prove the link evidence of the prosecution.

25. Then mere delay of 14 days in sending the sample parcels to the office of the Chemical Examiner as well as non-preparing of Form No.29 at the spot are not held to be upto the mark to discard the version of prosecution. Moreover matter regarding link evidence has already been discussed above in para No.24 of this judgment.

26. In the light of above, this appeal is held to be merit-less, consequently, it stands dismissed and disposed of accordingly.

August 26, 2015
Gaurav Sorot

(GURMIT RAM)
JUDGE