

IN THE HIGH COURT OF PUNJAB & HARYANA, CHANDIGARH

Criminal Appeal No.S-9-SB of 2009 (O & M)

Date of Decision: *August 13, 2015*

Sukhdev Singh & another

..... APPELLANTS

VERSUS

State of Punjab

..... RESPONDENT

. . .

CORAM: HON'BLE MR. JUSTICE JASPAL SINGH

. . .

PRESENT: - Mr. N.S. Swaitch, Advocate, for the appellant No.1.

Mr. Vivek Goel, Advocate, for appellant No.2.

Mr. Y.K. Gupta, Assistant Advocate General, Punjab.

. . .

Jaspal Singh, J

1. The instant appeal has been directed by the appellants against judgment of conviction and order of sentence dated November 03, 2008 passed by the Judge, Special Court, Faridkot in case bearing FIR No.149 dated July 19, 2007 under Section 15 of the Narcotics Drugs & Psychotropic Substances Act, 1985 (for short, 'Act'), Police Station, Jaitu, whereby they have been convicted and sentenced to undergo RI for a period of ten years besides fine to the tune of ₹ 1 lac and in default of payment of fine, the defaulter to further undergo imprisonment for one year.

2. Briefly stated, the case of the prosecution is that on July 19, 2007, SI Gursher Singh, SHO, Police Station, Jaitu alongwith CII Darshan

Singh and some other officials as well as police party headed by ASI Amarjit Singh, Incharge, Police Post, Bajakhana was present on the bridge of Kassi (water course) located at Romana Ajit Singh – Ghania road in connection with patrolling and checking of vehicles. Labh Singh, Member, Panchayat, village Romana Ajit Singh came there who was associated with the police party. At about 6.00 AM, truck bearing No.RJ-13G-1741 came from the side of village Romana Ajit Singh which was signaled to stop. Accused Sukhdev Singh. driver, was was apprehended at the spot. However, co-accused Rajbir Singh succeeded in fleeing away from the cabin of the truck. One Deep Kumar (since deceased), a juvenile, was also apprehended while sitting on the bags in the truck. Sukhdev Singh as well as Deep Kumar were made aware by SI Gursher Singh that there is some intoxicant in the bags loaded in the truck and they were to be subjected to search. They were further informed that they had a legal right to get their search conducted in the presence of a Magistrate or a gazetted officer, in response to which, they intended to get their search conducted by a gazetted officer. Accordingly, memo Ex.PB was reduced into black & white which was signed by both the aforesaid accused and was attested by PW Labh Singh and ASI Amarjit Singh. Meanwhile, DSP Balwinder Singh Bajwa also arrived at the spot after receiving information. He disclosed his identity to both the accused present at the spot and also apprised them that they could get the search conducted by a Magistrate or some gazetted officer. However, they reposed confidence in him. Consequently, Memo Ex.PC was jotted down which was signed by both the accused and attested by PW Labh Singh and SI Gursher Singh. It was only thereafter on the directions of DSP, SI Gursher Singh conducted search of the truck and recovered 12 bags of poppy husk lying in the body of truck. Two samples weighing 250 grams each were taken out from each of

the bag and the same were converted into parcels. On weighing, each bag was found containing 29.5 KGs of poppy husk. The bags were numbered. All the parcels alongwith samples as well as bags were sealed by SI Gursher Singh with seal impression 'GS' as well as with seal of DSP bearing impression 'BS'. Sample impressions of the seals were prepared separately. SI Gursher Singh handed over the seal to ASI Amarjit Singh. All the aforesaid articles alongwith truck were taken into possession vide seizure memo Ex.PD which was witnessed by ASI Amarjit Singh and PW Labh Singh. It was also verified by DSP Balwinder Singh Bajwa. Ruqa Ex.PF was sent to the police station which formed the basis of FIR Ex.PF/1. Investigating Officer also prepared rough site plan Ex.PG of the place of recovery; recorded statements of witnesses under Section 161 Cr.P.C.; completed other formalities at the spot and on return to police station, case property was retained by SI Gursher Singh. Accused were put behind the bars. On July 20, 2007 i.e. next day, both accused with inventory Ex.P1 were produced before the Additional Chief Judicial Magistrate, Faridkot. In compliance of order of ACJM, all the 12 samples and 12 parcels of the bulk were deposited by SI Gursher Singh in the judicial Malkhana whereas remaining 12 sample parcels were retained by him. He also prepared and sent report Ex.PK under Section 57 of the Act to the higher authorities.

3. On July 23, 2007, aforesaid sample parcels alongwith sample seal were sent by SI Gursher Singh to the office of Chemical Examiner through C Kahan Singh, who after depositing the same on July 24, 2007 in the said office, produced the receipt before SI Gursher Singh. On the same day, accused Rajbir Singh was arrested. He was subjected to personal search regarding which memo Ex.PH was prepared. On receipt of the report

were found to be that of poppy head, and completion of the other necessary formalities, report under Section 173(2) Cr.P.C. was presented against accused.

4. Both the accused were supplied copies of report under Section 173(2) Cr.P.C. and documents annexed with it, free of cost as required under Section 207 Cr.P.C. There being a prima facie evidence appearing in report under Section 173 Cr.P.C. as well as documents annexed with it, both the accused were chargesheeted to face trial under Section 15 of the Act to which they did not plead guilty and claimed trial.

5. In order to establish the charge framed against the accused, prosecution examined as many as 5 witnesses, besides placing on record certain documents. They examined PW-1 CII Darshan Singh, PW-2 C Angrej Singh, PW-3 C Kahan Singh, PW-4 SI Gursher Singh, PW-5 ASI Amarjit Singh and after tendering into evidence the report of Assistant Chemical Examiner, Ex.PL, prosecution closed its evidence. When incriminating circumstances appearing in the prosecution evidence were put to the accused for eliciting their explanation as required under Section 313 Cr.P.C., they denied all the allegations and pleaded innocence. The specific defence plea taken by accused Sukhdev Singh reads as under:-

“I am innocent and falsely implicated in this case. Nothing was recovered from my possession. Infact my brother Boota Singh was illegally taken away from his house on 26.5.2005 by Sh. Jagdish Lal ASI who was posted at P.P. Bajakhana alongwith 203 other police officials in a jeep in the presence of Gurdev Singh and caused injuries to him and his wife Mohinder Kaur and also searched the house but nothing was recovered. Boota Singh filed a criminal complaint against Jagdish Lal and others in the court of JMIC, Bathinda and even Jagdish Lal ASI remained posted as SHO Incharge Jaitu/Bajakhana and the police of Jaitu and Bajakhana was inimical towards our family and this present case was planted against me in connivance with Jagdish Lal. Truck No.RJ7G-1741 belongs to my brother Gurdev

Singh was also implicated in this case who has nothing to do with the recovery.”

The defence plea taken by accused Rajbir Singh is to the following effect:-

“I am innocent. Nothing was recovered from me. I was brought from my house in the presence of Chowkidar Misri Singh, Nachhatar Singh and other respectables of the village. I have been falsely implicated.”

6. Both the accused adduced evidence in defence and examined DW-1 Hartej Singh, Malkhana Nazir; DW-2 Misri Singh; DW-3 Gulshan Singh; DW-4 Gurdev Singh; DW-5 Gopal Krishan, Record Keeper, Record Room Judicial, Bathinda; DW-6 Boota Singh; and DW-7 Jasbir Singh.

7. After hearing learned counsel for the parties and appraisal of evidence, both the accused were convicted and sentenced under Section 15 of the Act as fully reflected in Para 1 of this judgment. Dis-heartened with their conviction and sentence vide impugned judgment of conviction & order of sentence, they preferred the instant appeal which was admitted for hearing by this Court vide order dated January 07, 2009.

8. First of all, taking the case of appellant No.2 Rajbir Singh, it has been argued by learned counsel for the appellants that neither his identity has been established at the spot nor he can be said to be in conscious possession of the bags allegedly containing poppy heads. In FIR Ex.PF/1, it finds mention that when accused Rajbir Singh fled away from the truck, he was known to CII Darshan Singh and HC Kulwant Singh. HC Kulwant Singh has not been examined by the prosecution whereas CII Darshan Singh, who has been examined as PW-1, has stated in his examination in chief that Rajbir Singh was apprehended by him at the spot. If his statement is taken to be correct, the question of fleeing away from the spot does not

arise at all. But, at the same time, it is the admitted case of prosecution that Rajbir Singh had succeeded in running away from the spot.

9. Learned counsel for the appellants further contends that at the time of arrest of Rajbir Singh, on July 23, 2007, he was not got subjected to any identification parade in order to established his identity. The mere fact that CII Dashan Singh has stated in examination in chief that Rajbir Singh was known to him but fled away from the spot is not suffice, especially when HC Kulwant Singh has not been examined. Rajbir Singh was not known to other members of the raiding police party.

10. While referring to statements of DWs, it has been submitted by learned counsel for the appellants that DWs have categorically deposed on oath that Rajbir Singh has been falsely implicated in the instant case. their statements have been ignored and disbelieved by the trial court simply on the ground that either they are related to accused Rajbir Singh or their residential house is situated at a distance of 1-2 kms from the place of recovery. For these reasons, their sworn testimonies cannot be discarded or disbelieved, especially when they have been subjected to thorough cross examination by learned Public Prosecutor but their testimonies could not be shattered.

11. Another limb of arguments put-forth by learned counsel for the appellants qua appellant – Rajbir Singh is that if for the sake of arguments, it is taken to be correct that Rajbir Singh was sitting on the bags, allegedly, of poppy husk or poppy heads but the mere fact that he was sitting on those bags does not prove that he was in conscious possession thereof.

12. Apart from the aforesaid submissions, it has further been argued by learned counsel for the appellants that prosecution has also

either of the accused. There is no independent corroboration to the testimony of official witnesses. Though Labh Singh was allegedly associated in the police party prior to conducting search and seizure of poppy husk but for the reasons best known to prosecution, he has not been examined. He has been given up as having been won over by the accused. In a case under the provisions of the Act, recovery of contraband in the presence of an independent person assumes importance. Since, in the instant case, Labh Singh has not been examined, much reliance cannot be placed upon the testimony of official witnesses who are otherwise interested in successfulness of the case against the accused.

13. The next submission made by learned counsel for the appellants is that link evidence is missing in the instant case. Thus, possibility of tampering with sample seals; substance of case property being changed; and bags been re-sealed cannot be ruled out. In the case in hand, SI Gursher Singh (Investigating Officer), after affixing the seal on the sample parcels as well as bags containing remaining poppy husk, was handed over to ASI Amarjit Singh, whereas DSP Balwinder Singh Bajwa retained his own seal. ASI Amarjit Singh, while subjected to cross examination, stated that seal was returned by him to SI Gursher Singh on the same day after the deposit of case property in Malkhana, whereas sample parcels as well as seal were sent to the office of Chemical Examiner for their analysis on July 23, 2007 i.e. after four days of the alleged recovery. On this score alone, whole case of prosecution falls to the ground.

14. It has been argued by learned counsel for the appellants that there are material contradictions and discrepancies in the statements of recovery witnesses PW-4 and PW-5. SI Gursher Singh has stated in his cross examination that seal was returned to him on the next day; that the bags

were not unloaded to take out the samples and to weigh them and that the sample parcels were prepared in cloth bags whereas PW5 ASI Amarjit Singh stated that the seal was returned by him on the same day after the return of the police party to the police station; that the bags were unloaded from the truck and then proceedings were conducted and that the sample parcels were prepared in pieces of cloth.

15. While concluding arguments, learned counsel for the appellants has submitted that since prosecution has miserably failed to establish the ingredients which constitute offence under Section 15 of the Act and case of the prosecution suffers from material infirmities, illegalities as well as contradictions, impugned judgment of conviction and order of sentence are not sustainable in the eyes of law and are liable to be set aside. Consequently, appellants deserve to be acquitted by way of acceptance of instant appeal.

16. On the other hand, learned State counsel has supported the prosecution case. He has argued that there is no discrepancy or infirmity in the testimonies of witnesses which would falsify the prosecution case. Statements of all the official witnesses are consistent from which it stands amply proved that accused Sukhdev Singh was arrested at the spot, who was driving the truck in which contraband i.e. 26 bags of poppy husk were transported whereas accused – appellant Rajbir Singh was identified by CII Darshan Singh (PW-1) and HC Kulwant Singh at the time he fled away from the cabin of the truck on seeing the police. The identity of Rajbir Singh has also been fully established. Moreover, contentions which have been raised by learned counsel for the appellants, have already been dealt with elaborately by the Judge, Special Court, while holding both the accused

guilty under Section 15 of the Act and imposition of sentence. The instant appeal being devoid of merits is liable to be dismissed.

17. This Court has weighed the rival submissions made by learned counsel for the parties and gone through the evidence besides scrutinizing the impugned judgment of conviction and order of sentence.

18. As far as appellant No.2 Rajbir Singh concerned, it is the case of prosecution that when truck bearing No.RJ-13G-1741 was signaled to stop, he jumped from the truck and succeeded in running away from the spot. Though, it has been alleged that he was identified by CII Darshan Singh as well as HC Kulwant Singh but for reasons best known to prosecution, HC Kulwant Singh has not been examined. Only CII Darshan Singh has been examined as PW-1 whose statement does not inspire confidence and is not worthy of credence so far as the case of Rajbir Singh is concerned. No doubt, in FIR, it finds mention that he was identified by CII Darshan Singh and HC Kulwant Singh but when Darshan Singh was subjected to cross examination, he has stated that Rajbir Singh was apprehended by him at the spot which is not the case of prosecution. Had he been intercepted or apprehended at the spot, the question of running away from the spot by him does not arise at all. Moreover, accused Rajbir Singh was allegedly arrested on July 23, 2007 i.e. after four days of the alleged recovery of poppy husk but he was not got subjected to identification parade before nominating as accused. The mere fact that name of Rajbir Singh figures in the FIR, does not *ipso facto* mean that accused facing trial is the same person, especially in view of statement of CII Darshan Singh (PW-1). Thus, it can be safely concluded that identity of accused Rajbir Singh is not established at the spot.

19. As far as conscious possession of poppy husk is concerned, even if for the sake of arguments, it is admitted that it was Rajbir Singh who fled away from the spot, his conscious possession is not established at all.

20. In case **Bhola Singh vs. State of Punjab, 2005(2) RCR (Crl.) 520 (P &H)**, accused was driving a tractor trolley and at the time when 14 bags of poppy husk were recovered from the trolley, four persons, allegedly sitting in the trolley, jumped away. It was held that it cannot be said that accused-driver was in conscious possession. It was further observed that mere fact that accused was driving the tractor cannot be held that he was in conscious possession of the contraband. Conviction was set aside. To the similar effect is the judgment rendered by the Hon'ble Supreme Court in case **Ritesh Chakarvarti vs. State of Madhya Pradesh, 2006(4) RCR (Criminal) 480**. In another judgment rendered by the Division Bench of this Court in case **Tarsem Singh Vs. State of Punjab, 2005 (4) RCR (Crl.) 300**, recovery of 20 gunny bags containing 40 kilograms of poppy husk was effected from a tractor trolley in which the accused was sitting. He was not the owner of the tractor trolley. There was also no evidence that he was actually owner of poppy husk. He was not even the driver. Thus, it was observed that it cannot be inferred that accused was exercising the possessory right over the contraband. Conviction was set aside. Similar views have been taken in the judgment rendered by the Hon'ble Apex Court in case **State of Punjab vs. Balkar Singh & another, 2004 SCC (Crl.) 838** which has been subsequently relied upon by the Division of this Court in case **Sukhdev Singh @ Sukha vs. State of Punjab, 2006(1) R.C.R. (Criminal)**

4. In case **Lakhvinder Singh vs. State of Haryana, 1996(2) Recent**

husk from the fields, concealed under heap of Parali but there was no evidence that the land, from where bags were recovered, belonged to the accused or that he was in possession of that land or he was dealing/holding or was concerned in any manner with the same. The mere fact that accused hid himself behind the heap of Parali is not sufficient to prove possession of accused and it was held that the prosecution has failed to prove its case. In another case ***Baldev Singh vs. State of Punjab, 2005(1) RCR (Crl.) 823***, while relying upon the judgment delivered by the Hon'ble Apex Court in ***Syed Mohd. Syed Umer Syed & others vs. State of Gujarat, JT 1995(3) SC 489***, similar observation was made. In the case of ***Balkar Singh (supra)***, two bags of poppy husk were recovered. It was alleged that two accused persons were sitting over the bags. It was not established that bags belonged to the accused. It was held that merely because when police saw the accused, they were sitting on the bags, does not infer that they were in conscious possession of those bags. So, conviction recorded under Section 15 of the Act was set aside.

21. The judgments referred to above are fully applicable in the facts & circumstances of this case and clearly covers the case of Rajbir Singh accused. Thus, he is entitled to benefit of doubt in the above established facts & circumstances.

22. As far as contention of learned counsel for the appellants that non-examination of PW Labh Singh, who was allegedly associated in the raiding party, is concerned, entire case of prosecution cannot be thrown away. The non-examination of independent witness casts an obligation upon the court to scrutinize the statements of official witnesses with more caution and care. If their statements suffer from material

then, the benefit of non-examination of independent witness can be given. In the case in hand, when the statements of official witnesses namely CII Dashan Singh, C Angrej Singh, C Kahan Singh, SI Gursheer Singh and ASI Amarjit Singh are scrutinized, there are no material contradictions in their statements, so as to discard their testimonies as far as recovery of 26 bags of poppy husk from the cabin of truck are concerned.

23. Accused Sukhdev Singh is proved to have been intercepted/apprehended at the spot. He was apprised of his right to get his search conducted in the presence of a Magistrate or gazetted officer. It was only in response to the said option, he intended to get his search conducted in presence of gazetted officer. Meanwhile, DSP Balwinder Singh Bajwa arrived at the spot. He, after unfolding his identity, also made him aware of his right to get search conducted in the presence of Magistrate or gazetted officer. At that time, accused Sukhdev Singh reposed faith and confidence in him. It was only thereafter search of truck was carried out which led to recovery of 26 bags of poppy husk. Accused Sukhdev Singh was driving the truck at the time it was signaled to stop and the truck was subjected to search. No doubt after the recovery of truck as well as poppy husk, no one has claimed Superdari of the truck but that does not mean that accused Sukhdev Singh was not driving the truck. Thus, in the given circumstances, non-examination of PW Labh Singh, an independent witness, is not fatal to the case of the prosecution.

24. As far as contention of learned counsel for the appellant with regard to missing of link evidence is concerned, case property was taken to police station on July 19, 2007 which was retained by SI Gursheer

sealed bags of poppy husk were produced before the ACJM, Faridkot who found the seals intact and appended a note to this effect. It was only thereafter case property was deposited in the judicial Malkhana. The mere fact that sample parcels were sent on July 23, 2007 i.e. after four days of recovery, does not *ipso facto* mean that the same have been tampered with, especially in the circumstances that samples as well as gunny bags bore the seals of not only SI Gursheer Singh but that of DSP Balwinder Singh Bajwa. Not only this, sample parcels were received in the office of Chemical Examination with seals intact as is evident from the Chemical Examiner report Ex.PL as well as the affidavit and testimony of C Kahan Singh who was entrusted with samples for handing over the same to the Assistant Chemical Examiner for analysis. As regards minor contradictions, it is well settled principle that contradictions which do not go to the root of the case and shatter the basic version of prosecution, cannot assume much importance.

25. In the light of what has been discussed above, so far as accused – appellant No.2 Rajbir Singh is concerned, he is acquitted of the charge and impugned judgment of conviction & order of sentence is set aside qua him. As far as accused – appellant No.1 Sukhdev Singh is concerned, judgment of conviction and order of sentence dated November 03, 2008 is upheld.

26. Disposed of accordingly.

August 13, 2015
avin

(Jaspal Singh)
Judge