

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

Crl. Appeal-S No. 2083 of 2013(O&M)

Date of Decision: March 11 , 2015.

Bhola Singh and another

..... APPELLANT (s)

Versus

State of Punjab

..... RESPONDENT (s)

CORAM:- HON'BLE MRS.JUSTICE LISA GILL

Present: Dr. Anmol Rattan Sidhu, Senior Advocate with
Mr. Suvir Sidhu, Advocate
for the appellants.

Mr. S.S.Chaudhary, DAG, Punjab.

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the reporters or not?
3. Whether the judgment should be reported in the digest?

LISA GILL, J.

Appellants have preferred this appeal impugning judgment and order dated 05.06.2013 passed by learned Judge, Special Court, Sri Muktsar Sahib whereby they have been convicted and sentenced to undergo rigorous imprisonment for two months each, besides, pay a fine of ₹2,000/- each for the offence punishable under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the 'NDPS Act').

As per the prosecution version, ASI Duli Chand alongwith other police officials was present at chowk Berian Wala in the area of village Mann on 27.07.2006 in connection with the Nakabandi. A car bearing registration No.PB-08-3326 being driven by appellant – Bhola Singh came from the side of village Badal. It stopped on signalled being given to do so. Appellant Karamjit Singh was sitting on the front passenger seat. On suspicion of their carrying contraband, they were apprised of their rights to be searched before a gazetted officer or a Magistrate. Both the appellants reposed faith in the Investigating Officer. An attempt was made to join independent witness but none was available. Both the appellants signed on the consent memos Ex.P3 and P4, respectively. Memos were attested by HC Sukhwinder Singh and HC Baldev Singh.

On search of the car, one plastic bag containing poppyhusk was recovered. On weighment, 5 Kg. poppyhusk was recovered from the boot of the car. 250 grams poppyhusk was taken as a sample. Separate parcels were prepared with seal bearing impression 'DC'. Specimen seal was also prepared and was handed over to HC Sukhwinder Singh. Case property was taken in possession vide memo Ex.P7. The car and its RC (Ex.P6) were also taken in possession. Ruqa (Ex.P8) was sent to the police station on the basis of which FIR No.191 dated 27.07.2006 (Ex.P9) was registered. Entire case property was produced before the SHO ASI Harjinder Singh (since deceased). He interrogated the appellants and sealed the parcels with his seal bearing impression 'HS' and case property was taken in possession vide memo Ex.P14. Appellant and case property was produced before the learned Illaqa Magistrate on 28.07.2006. On return to the police station, case property was deposited

with MHC Nirbhai Singh. Special Report (Ex.P23) was sent to DSP Manjit Inder Singh Bal. As per the Chemical Examiner's report (Ex.P15), material recovered from the appellants was detected to be poppyhusk.

Case property was disposed of by the Disposal Committee vide order, Ex.P16. The car in question stood in the name of one Balbir Singh son of Mukand Singh, who sold the same to appellant – Karamjit Singh (Ex.P18).

On completion of investigation, Challan/report under Section 173 Cr.P.C. was presented. Charge was framed against the appellants to which they pleaded not guilty and claimed trial.

Prosecution examined as many as eight witnesses to prove its case.

Appellants while recording their statement under Section 313 Cr.P.C. pleaded false implication. It is specifically averred that they were working with the Punjab State Electricity Board ('PSEB', for short) in village Bhagta Bhai. Both of them had conducted a raid at the residence of a relative of ASI Duli Chand (PW3) regarding theft of electricity. It is due to this reason, they have been falsely implicated in this case. DW1 Mahinder Singh, another employee of the PSEB was examined in defence who stated that the appellants were working with him at the relevant time and they had detected a Kundi connection at the residence of Rakesh Kumar at village Bhai Ka Bhagta. Rakesh Kumar is a relative of ASI Duli Chand (PW3).

Learned trial court on appreciation of evidence on record, convicted the appellants for the offence punishable under Section 15 of the NDPS Act vide impugned judgment dated 05.06.2013 and sentenced them as aforementioned.

Learned senior counsel for the appellants vehemently urges that

the false implication of the appellants is evident on the face of it. In the present case where there are specific allegations of mala fides against the officials witnesses therefore, non-joining of an independent witness is fatal to the prosecution case. He submits that it has been proved on record that ASI Duli Chand (PW3) nursed a grudge against the appellants on account of their reporting a Kundi (illegal) connection at the residence of Rakesh Kumar who is a relative of PW3 ASI Duli Chand.

Furthermore, there is no compliance of the mandatory provisions of Sections 50, 55 and 57 of the NDPS Act. Link evidence is not complete in this case. There is a delay of 11 days in sending the sample to the Chemical Examiner. It is further submitted that possibility of tampering with the sample, in this situation, is possible. Prosecution has thus failed to establish the conscious possession of the appellant over the alleged contraband.

Learned senior counsel for the appellants points out that link evidence in this case is missing. There is a delay of 18 days in sending the sample for chemical examination. Learned senior counsel for the appellants further points out that relevant documents allegedly prepared at the spot at the time of recovery bear the FIR number which in the normal course of events cannot be possible. Special report (Ex.P23) is undated.

It is argued that planting of 5 Kg poppyhusk to falsely implicate the appellants is not difficult task at all for the police officials. Learned senior counsel urges that the appellants have a clean service record. There is no other case registered against them either before or after the present one. Therefore, they are entitled to acquittal in this case.

Learned counsel for the State, however, refutes the said averments and submits that the present is a case of chance recovery. Therefore, there is no question of any prejudice being caused by non-joining of an independent witness. Delay in sending the sample cannot be fatal to the prosecution case. Link evidence is complete as it is proved on record that the sample was not tampered with at any stage. Prosecution has, thus, proved its case against the appellants beyond the shadow of doubt. Consequently, their conviction and sentence deserve to be upheld.

I have heard learned counsel for the parties and gone through the record.

As per the prosecution version, ASI Duli Chand (PW3) alongwith other police officials was present in the area of village Mann in connection with Nakabandi. Appellants were travelling in car bearing registration No. PB-08-3326. Their car was stopped on suspicion. It is averred that the appellants were apprised of their rights for being searched before a gazetted officer or a Magistrate but on their reposing faith in the Investigating Officer, search was carried out by ASI Duli Chand (PW3) himself. On search of the car, one plastic bag containing 5 Kg. poppyhusk was recovered. It is relevant to note that there is specific non-compliance of the provisions of Section 57 of the NDPS Act. Doubtlessly, the present is a case of chance recovery. Still it is incumbent upon the officer to have conveyed the information to the superior officer immediately. No such step has been taken. Even if it is accepted that the search was conducted by ASI Duli Chand (PW3) upon confidence being reposed on him, it was incumbent to have conveyed the information to a

superior officer as mandated by law.

Needless to say, non-joining of an independent witness by itself cannot render the prosecution version doubtful. However in the present case, it is relevant in view of the allegations of mala fides alleged by the appellants. A bald statement has been made by PW3 ASI Duli Chand that he tried to join independent witness but none was available. No detail whatsoever has been given in respect to the efforts allegedly made. None has been named and neither any action against anyone on that count is revealed. It is admitted by PW3 ASI Duli Chand that the alleged place of occurrence is a thorough fare. Village Mann is only one kilometer away. There is a Panchayat having its Sarpanch and other members in the village. In this situation, non-joining of an independent witness does become material and raises a doubt on the veracity of the prosecution version.

Another glaring fact which emerges on a perusal of the statements of the appellants recorded under Section 313 Cr.P.C. is that no question has been put to the accused in respect to their conscious possession of the contraband allegedly recovered. Hon'ble Supreme Court in **State of Punjab v. Hari Singh, 2009(2) RCR(CrL) 143** has reiterated that questioning of accused under Section 313 Cr.P.C. is not an empty formality. In the said case, no question with regard to the possession or conscious possession had been put to the accused from whom 16 bags of poppyhusk were allegedly recovered. It was held that a circumstance about which the accused was not asked to explain cannot be used against him. Accused in the said case were acquitted. Similar view was taken by the Hon'ble Supreme Court in **Avtar Singh v. State of**

Punjab, 2002(4) RCR(Crl.) 180 where 16 gunny bags of poppyhusk were recovered from a trunk in which the accused were travelling/driving. They were acquitted as they were not proved to be in conscious possession of the contraband. No question had been put to them in regard to their conscious possession when statements were recorded under Section 313 Cr.P.C. Thus, in the present case also the appellants' conscious possession of the contraband is not proved beyond reasonable doubt, no specific question having been put to them while recording their statements under Section 313 Cr.P.C.

Contention of learned senior counsel for the appellants in respect to violation of Section 50 of the NDPS Act is, however, untenable. Recovery of the alleged contraband has not been effected from the person of the accused. Therefore, Section 50 of the NDPS Act would not be attracted.

However, the link evidence in this case is not complete. It is noted that the alleged recovery was made on 27.07.2006. The sample was deposited with the FSL on 08.08.2006. Form M-29 (Ex.P5) has admittedly been filled up on 07.08.2006. There is no explanation whatsoever for the same. Delay per se may not be fatal in a given case but in the present fact scenario it constitutes another suspicious circumstance. Perusal of the record indicates that some of the documents allegedly prepared at the spot i.e., the Consent Memo Ex.P3 and Sample Seal Ex.P5 bear the FIR No. etc. thereby, indicating that either the documents were prepared later or insertions made later. It has been held by this Court in **Ajay Mallik and others v. State of U.T., 2009(3) RCR(Crl.) 649**, that both the above situations reflect on the integrity of prosecution version.

Looking into the entirety of the facts and circumstances of the case

as mentioned above, a serious doubt is cast on the prosecution version. Appellants are employees of PSEB having a clean service record and are not involved in any other case. They are undoubtedly entitled to the benefit of doubt as the prosecution has been unable to prove its case beyond reasonable doubt.

Consequently, this appeal is allowed.

Impugned judgment and order dated 05.06.2013 passed by learned Judge, Special Court, Sri Muktsar Sahib are set aside and the appellants are acquitted of the charges against them.

March 11, 2015.
'om'

(LISA GILL)
JUDGE