

**IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH.**

CRA-3147-SB-2009

Date of Decision: December 06, 2017

Devinder Singh @ Kaka

...Appellant

VERSUS

State of Punjab

....Respondent

CORAM : HON'BLE MR. JUSTICE SUDIP AHLUWALIA

Present:- Mr. L.S.Sidhu, Advocate for the Appellant.

Mr. Hittan Nehra, Addl. Advocate General, Punjab.

SUDIP AHLUWALIA, J.

This appeal is directed against the Judgment of conviction and order of sentence dated 30.3.2009 passed by the Ld. Judge, Special Court, Muktsar in SC No.125/21.11.2002 arising out of FIR No.29 dated 25.3.2002 of Police Station Gidderbaha, under Section 15 of the Narcotic Drugs & Psychotropic Substances Act (in short “NDPS Act”), 1985.

2. Vide the impugned Judgment, the Trial Judge had convicted the Appellant of the offence u/s 15 of the NDPS Act, and sentenced him to undergo imprisonment for a period of ten years and to pay a fine of Rs. One Lac, in default whereof he was directed to further undergo imprisonment for a period of six months.

3. The Appellant faced trial on the charge that he had

committed the aforesaid offence since he was found in possession of 180 Kg. of Poppy Husk on 25.3.2002 at about 7.30 P.M. in the area of village Bharu without any permit or licence.

4. Scrutiny of the Trial Court record goes to reveal that actual evidence from the prosecution side was recorded by way of deposition of PW-1 ASI Gurdev Singh on 12.4.2006. Prior to that on 16.2.2006 on submission of Ld. Addl. PP for the State, the evidence of one witness namely C. Harbans Singh, who was present in Court, was given up 'being unnecessary'. Thereafter, six more witnesses were examined from the prosecution side and the prosecution evidence was finally closed on 20.3.2009 after recording the statement of PW-7.

5. No independent witness was led from the defence side but in the examination of the Appellant by the Court u/s 313 Cr.PC, it was his consistent assertion that the statements and evidence led against him are all false and motivated; that he is innocent and that his Car was brought to the Police Station one day prior to the alleged recovery and on the next day, such false recovery was foisted upon him.

6. Having carefully perused the oral as well as documentary evidence led from the prosecution side and after hearing arguments and submissions raised on behalf of the Appellant, this Court now proceeds on to consider the merit in each of the contentions/points raised to assail the impugned Judgment.

7. The first ground on which the Judgment of conviction has been challenged is that identification of the accused/Appellant for the purpose of showing his involvement in the alleged offence was itself not established. It is seen on perusal of the impugned Judgment that the

same submission regarding identification of the accused/Appellant was also raised before the Ld. Trial Court, which however, found little merit in the same. Now to substantiate this contention before this Court, Ld. counsel for the Appellant has drawn attention to the FIR which was drawn up at the Police Station shortly after the alleged seizure of contraband from the Appellant's Car from which he otherwise managed to flee away. Perusal of the aforesaid FIR drawn up at 8 P.M. (Ex.P9) goes to show that the occurrence allegedly took place near village 'Bharu' about 3 K.M. north of the Police Station. Details of the incident have been mentioned in the said FIR in which it is also specifically noted that the fleeing accused was identified by C. 68 Harbans Singh as 'Devinder Singh @ Kaka son of Kashmir Singh, Jat, R/o Kandu Khera'. This noting would clearly go to show that identity of the accused was already known to the complainant/Police Party by the time the FIR was drawn up at 8 P.M. on 25.3.2002, and that such identity had been established by C. 68 Harbans Singh, who was a member of the Police Party. This is also clear from the statement of complainant/ASI Gurdev Singh as PW-1 to the effect that 'C. Harbans Singh No.68 identified by (Sic) as Devinder Singh accused'. PW-3 DSP Kulwinder Singh also stated in his deposition that S.I. Kirpal Singh and some other Police officials had chased the accused, but could not apprehend him. He was identified by C. Harbans Singh, who disclosed his name as 'Devinder Singh'. Subsequently, C. 68 Harbans Singh himself deposed as PW-6 in the case and stated in his examination-in-chief 'the entire Police Party ran after the accused, but he could not be apprehended. I identified the fleeing accused who is present today in Court.'

8. It is in the backdrop of the above evidence that the Appellant's side has drawn attention of the Court to the statements given by PW-6 in his cross-examination, which are reproduced as follows -

“Village of accused is Kandukhera. I am resident of village Mallan. I was not member of any police party which might have appeared as witness against the accused earlier. My village is at a distance of 70 K.M. from Kandukhera. I have seen the accused after the date of recovery when he appeared in court in this case. Accused was sighted at about 5/5-30 p.m. We remained on the spot for about 2½ hours. Ruqa was sent at about 7-30 p.m. Through HC Jaswant Singh. We left the spot at 7-45 p.m. All members of the police party left the spot at the same time. Not shot was fired to apprehend the accused. I do not know about the business of the accused. I do not know about the family members of the accused. I am not having any relation t Kandukhera.”

9. From the above statements of PW-6, the Appellant's side has sought to emphasize before this Court that the witness had no previous acquaintance with the accused on account of which he could not have been in a position to identify him when allegedly fleeing away from the spot. Ld. counsel for the Appellant has taken great pain to press before this Court that as per the witness, village of the accused 'Kandukhera' is about 70 K.M. away from the village of the witness (Mallan); that the witness having never been a member of any Police Party which might have apprehended the accused on any occasion, and never having appeared as a witness against the accused earlier, and his lack of knowledge regarding the business and family members of the accused coupled with the fact that the witness admittedly has no relation in village Kandukhera, would go to suggest that he had no

acquaintance with the accused earlier, on account of which he could not have been in a position to identify him at the spot as alleged.

10. In the opinion of this Court, however, the contention in the ultimate analysis does not discredit the statements given by PW-6 in totality notwithstanding that the answers given by him in his cross-examination might suggest to some extent his lack of previous acquaintance with the accused. This is so because the settled law is that when a certain conclusion is sought to be drawn from the statements given by a witness in his cross-examination, then a categorical and specific suggestion to that effect must have to be given to the witness for him to admit or deny. But in his entire cross-examination, no suggestion whatsoever was directly given to PW-6 to the effect that he had no previous acquaintance with the accused. In fact, having put all the questions regarding touching upon the witness's lack of knowledge regarding the business, family members or village of the accused, no direct question was ever put to him in his cross-examination as to on what basis he had identified the accused, if there was no previous acquaintance with him. Otherwise, not even any question was put to the witness as to how he knew about the identity of the fleeing accused, in order to discredit his statement regarding identification of the accused. It may be noted that the witness had stated in the very beginning of his cross-examination that he had been in service for 14 years. As such, from the time of his cross-examination in 2007, he would appear to have been in service as a Police Constable since around the year 1993. From the custody certificate of the Appellant, which has been routinely placed before this Court, it has transpired that he had been implicated and

convicted in another FIR No.54 dated 24.1.2001 Police Station Samana also under the NDPS Act. In such circumstances, nominal acquaintance with the identity of a person who was allegedly involved in another case of a similar nature preceding the present one, would surely not appear to be altogether improbable for a Police Constable in actual service for a long time, notwithstanding that such Constable may not have been actually a member of the raiding party in the earlier case. For these reasons, this particular contention regarding identification of the accused at the instance of PW-6 is found to be un-satisfactory.

11. The next submission made in assailing the Judgment of conviction is that the Appellant/accused was denied of opportunity to lead any defence evidence from his side, which according to Ld. counsel substantially vitiates the proceedings of the Ld. Trial Court. In this regard, the attention of this Court has been drawn to the statement of the accused recorded u/s 313 of Cr.PC on 20.3.2009, in which seven questions were put to him by the Ld. Trial Judge, but there was no specific question as to whether he wanted to lead any evidence from his side. A closer scrutiny of the LCR however, again reveals the fallacy in this contention. It is verified from the record that the last question (No.7) put to the accused/Appellant in his examination u/s 313 Cr.PC was 'Anything else to say ?' This question in the opinion of the Court is wide enough to cover the ambit of granting an opportunity to the accused to lead evidence from his side. In any case, perusal of the Zimni Order passed by the Ld. Trial Court on the relevant date (20.3.2009) clearly shows that opportunity to lead defence evidence was specifically granted on that date, after examination of the accused u/s

313 Cr.PC was completed. The text of the aforesaid Zimni Order happens to be-

“20.3.09 Present: Add PP for the State.

Accused in custody.

C. Harbans Singh is present but his statement has already been recorded in this case. So, he is discharged. Ld. Addl. PP closed the evidence. Statement of accused u/s 313 Cr.PC recorded. Adjourned to 25.3.09 for defence evidence.”

12. Thereafter when the matter came up on 25.3.09 it was noted that no DW was present and proceedings were therefore, adjourned to 30.3.09 for defence evidence and arguments. On the subsequent date '30.3.09' the defence evidence was closed and arguments were heard after which the Judgment was pronounced. These proceedings of 20.3.2009, 25.3.2009 and finally of 30.3.2009 unambiguously go to show that opportunity to lead evidence from defence side was specifically granted on not less than on two occasions and only after no defence witness could not be tendered, the defence evidence was closed. Consequently, the second contention raised on behalf of the Appellant to assail the impugned Judgment is also found to be without substance.

13. Ld. counsel for the Appellant has also urged that the prosecution story of recovery as alleged becomes unreliable as a whole on account of various irregularities which are listed as below -

- (i) *That according to the FIR, the recovery was made on 25.3.2002, which was notified to the SHO of the Police Station the same evening but the contraband was presented in the Court only on the next day;*
- (ii) *That the contraband was brought before the Court in a sealed condition after sealing had been done by the I.O. and SHO together;*

- (iii) *That there was an inordinate delay in sending the sealed samples for examination by Chemical Experts inasmuch as while seizure and sealing was effected on 25.3.2002, yet the samples were despatched only on 1.4.2002;*
- (iv) *That from the statements/cross-examinations of PW-7 and PW-2 it becomes clear that the requisite Form-29 for sending the samples for analysis was not filled up at the spot itself; and*
- (v) *That while according to the prosecution side, the samples were taken from each of six boxes allegedly seized from the accused/Appellant's Car at the time of recovery, but the same was not done in the presence of the local Magistrate, in compliance of the provisions of Section 52-A of the NDPS Act,*

14. The rationale behind the aforesaid submissions made on behalf of the Appellant largely follows from the alleged non-compliance of the directions of the Apex Court in the case of '**Union of India Vs. Mohanlal & Anr.**' 2016 (1) RCR (Criminal) 858. Ld. Counsel for the Appellant has thus contended that the directions of the Supreme Court as laid down in this particular citation were not followed in the present case on account of which, the final verdict gets vitiated. The relevant observations of the Apex Court which have been relied upon in this citation, are first set out as below -

“ 20. To sum up we direct as under :

(1) No sooner the seizure of any Narcotic Drugs and Psychotropic and controlled Substances and Conveyances is effected, the same shall be forwarded to the officer in-charge of the nearest police station or to the officer empowered under Section 53 of the Act. The officer concerned shall then approach the Magistrate with an application under Section 52A(ii) of the Act, which shall be allowed by the Magistrate as soon as may be required under Sub-Section 3 of Section 52A, as discussed by us in the body of this judgment under the

heading 'seizure and sampling'. The sampling shall be done under the supervision of the magistrate as discussed in paras 13 and 14 of this order.

(2) The Central Government and its agencies and so also the State Governments shall within six months from today take appropriate steps to set up storage facilities for the exclusive storage of seized Narcotic Drugs and Psychotropic and controlled Substances and Conveyances duly equipped with vaults and double locking system to prevent theft, pilferage or replacement of the seized drugs. The Central Government and the State Governments shall also designate an officer each for their respective storage facility and provide for other steps, measures as stipulated in Standing Order No. 1/89 to ensure proper security against theft, pilferage or replacement of the seized drugs.

(3) The Central Government and the State Governments shall be free to set up a storage facility for each district in the States and depending upon the extent of seizure and store required, one storage facility for more than one districts.

(4) Disposal of the seized drugs currently lying in the police maalkhans and other places used for storage shall be carried out by the DDCs concerned in terms of the directions issued by us in the body of this judgment under the heading 'disposal of drugs'.

15. After going through the impugned Judgment, this Court has observed that many of these contentions raised in Para 13 earlier were also substantially raised before the Ld. Trial Court which however, was not convinced about this effectiveness. In fact, the Ld. Trial Court has not found substance in some of these contentions by recording its detailed reasonings individually and separately qua the same. At any

rate, this Court proceeds on now to consider the relative merit and substance in the aforesaid contentions vis-a-vis the facts and circumstances of the case as well as the applicable judicial precedents in the succeeding paragraph.

16. It is a matter of record that the alleged occurrence according to the prosecution side had taken place in the late evening hours of 25.3.2002. Consequently, in any case there would have been no scope for the Police Personnel to have produced or sealed the contraband before the Ld. Magistrate as the Court would have opened only on the following morning. Now it is seen from *Ex.P12* that the contraband with seal was actually produced before the Ld. Judicial Magistrate Ist Class on the following date itself i.e. on 26.3.2002, and the Ld. Magistrate had recorded in his relevant Order (vide *Ex.P-12*) of the said date -

“Present: APP for the State along with SI Kirpal Singh.

Heard.

*Case property sealed with seal of KS+KS, produced.
Seen/signed and returned to I/O for depositing the same with
MHC under rules.*

*Sd/-
JMJC
26/3/2002”*

17. As such by no stretch of imagination, it can be held that there was any delay on the part of the Police Officials in producing the contraband before the Ld. Magistrate. Similarly, as can be seen from the aforesaid noting of the Ld. Magistrate, he had found no impropriety in the seals appended to the samples/contraband produced before him on account of which, there would not appear to be any material irregularity in the matter of production of contraband before the Ld. Magistrate.

18. The Appellant's side has contended that there was an inordinate delay of sending the sealed samples for Chemical Examination, by a time gap of seven days since the samples were despatched only on 1.4.2002, which therefore, indicates a possibility of tampering on the part of the Police Officials in the meantime. In this regard, the State has cited the judgment of Supreme Court in '**Jarnail Singh Vs. State of Punjab' 2011 (1) R.C.R. (Criminal) 925** as also that of Coordinate Bench of this Court in '**Avtar Singh Vs. State of Punjab' 2016 (2) R.C.R. (Criminal) 938**. In these cases relying upon the previous decision of Apex Court in '**Hardip Singh Vs. State of Punjab' 2008(4) R.C.R. (Criminal) 97** in which case, there had been a delay of as many as 40 days in sending the samples to the office of Chemical Examiner, it was held that such delay did not and could not have caused any prejudice to the Appellant. This Court also finds no reason to hold that the ratio of the aforesaid decision is not applicable in the present case where the apparent delay is limited to just about a week, since in any case in the Chemical Examiner's Report (Ex.P-13), there is a clear noting that the seals on the samples (Ex.P-1) were found intact and in order.

19. Regarding applicability of the directions of Supreme Court in '**Mohanlal & Anr.' case (Supra)**, it can be observed at the outset that these directions are essentially in relation to the provisions of Section 52-A of the NDPS Act which pertain to disposal of the bulk of the seized contraband with the underlying objective that the same need not be retained for obvious reasons throughout pendency of the trial. But the Judgment in question containing the directions was pronounced as late

as in 2016. Clearly no such express directions of the Apex Court were in operation at the relevant time when the seizure was effected in the present case almost 14 years before the aforesaid judgment in '**Mohanlal & Anr.**' case (*Supra*) was passed. To that extent, it can be safely observed that omission of sampling being done in presence of the Magistrate at the spot, particularly when the time was late in the evening hours, was neither irregular nor in violation of any established rules or norms since as already noted the subsequent directions in '**Mohanlal & Anr.**' case (*Supra*) have essentially been passed in the context of the requirement of Section 52 -A of the NDPS Act the purpose of which is "Disposal of seized Narcotic Drugs and Psychotropic Substance."

20. Ld. Counsel for the Appellant has also sought to impeach the credibility of the prosecution case by contending that sealing and sampling has not been done in accordance with the relevant Rules 22.16 and 25.23 of the Punjab Police Rules, which prescribe specific formats regarding the seizure/recovery. This Court has gone through the concerned Recovery Memos in the present case. The same have been manually prepared in vernacular. Admittedly, those are not in strictly tabulated form with neatly drawn columns as given in the individual specimen forms under the relevant Police Rules. It is however, seen that by and large the information sought to be recorded under the given tabulation has been sufficiently narrated in the Recovery Memo. This Court finds no material infirmity in the seizure memo thus drawn upon as to hold the alleged seizure itself untenable.

21. Another contention raised on behalf of the Appellant is that he has been falsely framed since the Investigating Officer SI Kirpal

Singh in his cross-examination as PW7 had admitted that the bags of the samples produced in Court were 'in torn condition, and seals on it are not decipherable and are broken.' In this regard, the Appellant's side has relied upon the decision of the Supreme Court in '**State of Punjab Vs. Paramjit Singh' 2015(2) DC (Narcotics) 284**, in which it was observed *inter-alia* -

“5. The facts which were considered by the High Court further reveal that the seals were also broken and impressions of the same were not legible. Further, no special report was sent and the High Court also noted that no copy of ground of arrest was supplied to the accused in terms of Section 57 of Act. Further, no explanation was also furnished by the I.O. as to why the provisions of Section 57 of the Act were not complied with.

6. In these circumstances, the High Court held that it is not acceptable that where the place of occurrence was a public place and a thoroughfare still no efforts were made by the prosecution to find out an independent witness. Furthermore, the seal was found to be tampered without any investigation from the I.O. In view of that, the High Court held that there was violation of the mandatory provisions of Sections 42 and 50 of the Act and on that ground the High Court acquitted the accused of such charge. The High Court further held that no efforts were taken by the officer concerned following the provisions of Sections 52 and 57 of the Act.”

22. It may however, be observed from the very first line of the aforesaid citation that the decision was passed by the Apex Court in absence of any hearing from the side of the State. It is however, to be considered that the aforesaid date of making statement in court was 17.11.2008 which was more than 6½ years after seizure and sealing of

the contraband/samples, which were thereafter ostensibly retained in Police Mal Khana. Over this long period of time a natural wear and tear of the bags kept inside in a closed space with little ventilation and possibly in contact with various other articles of contraband seized in connection with the several other cases, cannot be ruled out. At any rate as already discussed earlier, the seals on the samples sent for chemical analysis were noted as having been found in order in the relevant report, which was very shortly after actual seizure on 25.3.2002. At any rate, as noticed from Para 5 of the aforesaid Judgment set out above, it is seen that the 'seals were also broken and impressions of the same were not legible', was not the only ground on which the respondent's conviction by the Trial Court was set aside.

23. It has also been argued on behalf of the Appellant that conscious possession or recovery from him has not been proved and that in his examination u/s 313 Cr.PC incorrect questions were put to him on account of which, he was denied the opportunity to explain that nothing was recovered from his conscious possession. To counter this argument, Ld. Counsel for the State relied upon the decision of the Supreme Court in '**Dharampal Singh Vs. State of Punjab**' 2010 (4) **R.C.R. (Criminal) 504** wherein it was held -

“As part of fair trial, Section 313 of the Code of Criminal Procedure requires giving opportunity to the accused to give his explanation regarding the circumstance appearing against him in the evidence adduced by the prosecution. The purpose behind it is to enable the accused to explain those circumstances. It is not necessary to put entire prosecution evidence and elicit answer but only those circumstances which are adverse to the accused and his explanation would help the court in evaluating the evidence properly. The

circumstances are to be put and not the conclusion. It is not an idle formality and questioning must be fair and couched in a form intelligible to the accused. But it does not follow that omission will necessarily vitiate the trial. The trial would be vitiated on this score only when on fact it is found that it had occasioned a failure of justice.”

24. It is seen in the present case that the quantity of the contraband recovered is huge being 180 Kgs. in all in six bags of 30 Kgs. each. According to the prosecution evidence, the Appellant had run away from the spot after leaving those bags behind. His case therefore is similar to that in '**Kulwinder Singh & Anr. Vs. State of Punjab**' 2015 (2) R.C.R (Criminal) 918 wherein it was held that after the accused had managed to escape on the contraband being found in the truck in which they were sitting, it was shown that they were in conscious possession of bags or else they would not have run away from the spot. Since, once possession was found the accused is presumed to be in conscious possession, and it is the settled law that if the accused takes a stand that he was not in conscious possession, then he himself has to establish the same.

25. In '**Baldev Singh Vs. State of Haryana**' 2015(4) R.C.R. (Criminal) 1014, also where 33 bags of Poppy Husk were allegedly recovered from the Appellant, the Apex Court had observed that it was not possible to accept his contention that he was falsely implicated when admittedly the Police Officials have no previous enmity with him and it was therefore, also highly improbable that such a huge quantity had been arranged by the Police Officials in order to falsely implicate him. In the present case also, there is no material to indicate nor any

suggestion to the effect that the Police had any previous enmity with the Appellant on account of which, they had any reason to falsely implicate him.

26. For the detailed reasons and observations put on record in the preceding paragraphs, this Court finds no ground to interfere with the Judgment of conviction passed by the Ld. Trial Court. Dismissed.

(Sudip Ahluwalia)
Judge

December 06, 2017
AS

Whether speaking/reasoned : *Yes/No*

Whether Reportable : *Yes/No*