

IN THE HIGH COURT OF PUNJAB & HARYANA, CHANDIGARH
Sr. No.: 307

Criminal Miscellaneous No.M-980-SB of 2012 (O & M)
Date of Decision: March 17, 2018

Chander Bhan & others

..... APPELLANTS

VERSUS

State of Punjab

..... RESPONDENT

. . .

CORAM: HON'BLE MR. JUSTICE JASPAL SINGH

. . .

PRESENT: - Mr. Sushil Sheoran, Advocate, for Mr. R.A. Sheoran,
Advocate, for appellant Nos.1, 2 and 4.

Mr. Harkeerat Singh, Advocate, for respondent No.3.

Mr. Sandeep Kumar, Deputy Advocate General, Punjab.

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Jaspal Singh, J

The instant criminal appeal has been preferred by accused – appellants against judgment of conviction & order of sentence dated November 04, 2011, whereby they have been held guilty and sentenced under Section 15 of Psychotropic Drugs & Substances Act, 1985 (for short, ‘NDPS Act’) to undergo RI for a period of 10 years each alongwith fine to the tune of ₹ 1 lac each and in default of payment of fine, to further undergo RI for 2 years, in case FIR No.25 dated March 16, 2010, Police Station, Ghagga.

The brief facts of the case are that on March 16, 2010, a

patrolling duty at Bus Stand, Badshahpur, to the effect that accused Chander Bhan son of Amar Chand alongwith his wife Roshni, Dinesh son of Karambir and Ram Mehar son of Mange Ram indulge in the business of selling poppy husk. Accordingly, a naka was held at Ghaggar Bridge, Badshahpur. One Kuldeep Singh son of Sardar Singh was associated with the police party. At about 11:00 AM one jeep bearing No.HR-24A-0404 was signaled to stop, in the rear portion of which, two gunny bags containing 64.200 kgs of poppy husk, were found. Driver of the jeep disclosed his name as Chander Bhan and woman sitting beside him disclosed her name as Roshni. Persons sitting on the rear seat disclosed their names as Dinesh son of Karambir and Ram Mehar son of Mange Ram. Option was given to them whether they wanted to be searched in the presence of a Gazetted Officer or a Magistrate. They reposed faith in ASI Kanwal Nain Singh, whereafter, their separate consent memo were recorded. On checking, poppy husk was found in both the gunny bags.

After completion of necessary formalities and on receipt of report of Chemical Examiner, final report under Section 173(2) Cr.P.C. was presented in the court. Copies of documents as required under Section 207 Cr.P.C. were supplied to them, free of costs. Finding a prima facie case, accused were charge-sheeted under Section 15 of the Act, to which, they pleaded not guilty and claimed trial.

In order to substantiate its case, prosecution examined as many as five witnesses besides adducing documentary evidence.

When incriminating circumstances appearing in prosecution evidence were put to accused for eliciting their explanation as required under Section 313 Cr.P.C., they denied all the allegations and pleaded false implication in the instant case. They did not lead any evidence in defence.

After hearing learned counsel for the parties and on appraisal of evidence, trial court vide judgment of conviction & order of sentence dated November 04, 2011 held the accused guilty, convicted and sentenced as detailed above.

Aggrieved by the aforesaid judgment/order of trial court, accused have approached this Court by way of instant appeal. The conviction and sentence of appellants have been challenged on the ground that prosecution has miserably failed to prove the conscious possession of the contraband; that conviction is wholly based on the statements of official witness(es) whereas admittedly, public witness was available. Kuldeep Singh was the only independent witness who was not examined. The occurrence took place at 11:00 AM whereas Police party reached police station at 7:30 PM i.e. after a delay of 8 ½ hours, which shows that a false case has been planted. There is 14 days' delay in sending the sample to Chemical Examiner, whereas, as per Government instructions, sample should reach FSL within 72 hours.

Learned counsel for the appellants has also argued that there are a number of material infirmities and illegalities in the impugned judgment of conviction and order of sentence, such as non-compliance of Sections 42 and 50 of the Act, non-examination of PW Kuldeep Singh and Lady Constable Usha Rani, who were allegedly present at the time of alleged recovery and were accompanying the Investigating Officer. Non reporting of the matter to the senior officer or DSP of the area despite the fact that naka was laid and secret information was received besides some other material facts which bely the case of the prosecution.

While concluding his arguments, learned counsel for the

sustainable in the eyes of law and liable to be set aside. Consequently, all the accused – appellants deserve acquittal.

On the other hand, learned counsel for the respondent – State has supported the impugned judgment of conviction and order of sentence. He has reiterated the version of prosecution story. He has argued that there is no discrepancy or infirmity in the testimonies of witnesses which would falsify the prosecution case. He has submitted that impugned judgment/order are absolutely in consonance with the evidence available on file and accordingly prayed for dismissal of the appeal.

This Court has weighed the rival contentions of learned counsel for the parties and minutely scanned the evidence and is of the considered view that prosecution has miserably failed to bring home the guilt of the accused beyond all reasonable doubts and the conviction & sentence ordered by the trial court vide the impugned judgment/order dated November 04, 2011 are not sustainable.

Here, it would be pertinent to mention that extent of burden to prove the case beyond reasonable doubt is on the prosecution. A heightened security test is necessary to be invoked because the object and intent of the Act is to provide maximum sentence and also to uphold the individual human rights and dignity. It is the fundamental duty of the prosecution to prove beyond a shadow of reasonable doubt that the investigation conducted in the case is absolutely flawless and the prosecution is obliged to prove from the stage of effecting recovery till the samples reach the Chemical Examiner to show that there was no chance of tempering with it. Once the presumption is stumbling, then benefit is to be extended to the accused.

It would be also be not out of place to mention that as per the case of prosecution, police party laid a naka and while ASI Kanwal Nain Singh alongwith some other police officials was present at naka where he is alleged to have received the secret information but to the utter surprise, said secret information was not immediately reduced into writing and sent to his senior officers which is the mandate of Section 42 of the Act. Section 42(2) of the Act requires that where an officer takes down any information in writing under subsection (1) or records grounds for his belief under the proviso thereto, he shall send a copy thereof to his immediate official superior.

In the case in hand, ASI Kanwal Nain Singh, who conducted the investigation of this case and received the alleged secret information, did not opt to get it recorded in writing and send to the immediate senior officer, rather, he initiated the proceedings after the alleged apprehension of the accused and the alleged option under Section 50 of the Act, as to whether they wanted to get their personal search as well as search of the jeep conducted from a Magistrate or a Gazetted Officer but they reposed confidence in him. Exs.PA, PA/1, PA/2 and Ex.PA/3, are consent memos of accused Chander Bhan, Roshni, Ram Mehar and Dinesh were got prepared and subsequent thereto, he allegedly conducted the search of the jeep and got recovered the contraband i.e. gunny bags containing poppy husk. A glance at the aforesaid consent memos is suggestive of the fact that there is not even a slightest difference of words for all the persons and it cannot be expected that all the four persons had stated in similar words and lines that they repose confidence in him and do/does not want to conduct the search to be conducted in the presence of any Magistrate or Gazetted Officer. However,

separately. Otherwise also, such consent memos cannot be termed to be an outcome of the free will and volition of the accused, especially in view of the fact that Investigating Officer did not opt to record the secret information into writing and sending the same to his immediate senior officer. Moreover, Section 50 of the Act provides a safeguard to the accused, which cannot be said to have been complied with in the instant case because all the four consent memos, Exa.PA, PA/1, PA/2, PA/3 are absolutely identical and same except the name of person making it. So, violation of Section 42 coupled with Section 50 of the Act make the case of prosecution highly doubtful and suspicious.

Now, as regards the next limb of arguments put-forth by learned counsel for the appellants with regard to non-examination of PW Kuldeep Singh and lady Constable Usha Rani. As per the case of prosecution, PW Kuldeep Singh son of Sardar Singh was associated in the police party prior to conducting search of the accused persons. Even as per the case of prosecution, seal after use was also handed over to him by the Investigating Officer but to the utter surprise, he has not been examined during trial just by making a simple statement that he has been won over by the accused. Non-examination of the person who was entrusted with the seal after its use by the Investigating Officer puts a serious dent in its case. Even if he has been won over by accused, he could have been subjected to cross examination by the prosecution after getting him declared hostile. There is nothing on record to suggest as to when and how he returned the seal to the Investigating Officer. He could be termed to be the most material independent witness and must have thrown light on the case of the prosecution and the manner, in which, accused – appellants were arrested by

prosecution also miserably failed to examine lady Constable Usha Rani for the reasons known to it. She was allegedly present at the spot yet the prosecution chose not to examine her to corroborate the version unfolded by the Investigating Officer. The examination of the aforesaid witness was necessary to fortify the version of the Investigating Officer who is otherwise interested in the success of the case. Thus, non-examination of the said witnesses, without any plausible explanation goes to the root of the case and shatters the prosecution case.

As far as delay in sending the samples to the Chemical Examiner of 14 days is concerned, it also creates the case of the prosecution highly doubtful and suspicious. As per the case of prosecution, seal after use was handed over to PW Kuldeep Singh who has not been examined by the prosecution and in the absence of examination of aforesaid Kuldeep Singh, it can be safely inferred that Investigating Officer retained the seal with him and in such a situation, when there is no explanation for such an inordinate delay of 14 days, there is every possibility or likelihood of tampering with not only the case property but also the samples. There is no explanation what to say of any plausible explanation furnished by the Investigating Officer in this regard. Even Form No.29 which is mandatory to be filled at the spot, was not completed at the spot and it was done subsequently. So, inordinate delay in sending the samples coupled with non preparation of Form No.29 at the spot are the glaring circumstances which bely the prosecution story. In this context, reliance can be placed on the judgments of Hon'ble Apex Court in **Avtar Singh vs. State of Punjab, 2002(4) RCR (Criminal) 180** and **Asraf Ali vs. State of Assam, 2008(3) RCR (Criminal) 835** as well as judgments of this Court in cases **Sukhdev Singh and another vs. State of**

Punjab, 2004(4) RCR (Criminal) 260 which were subsequently relied upon by this Court in Criminal Appeal No.308-SB of 2005 titled 'Nazar Singh vs. State of Punjab' decided on January 09, 2014.

Taking into consideration the aforesaid aspects and lapses or omissions on the part of the prosecution, this Court is of the considered view that conviction & sentence awarded by the learned trial court vide impugned judgment of conviction and order of sentence are not sustainable in the eyes of law, particularly when the case of prosecution suffers from not only material irregularities but also illegalities.

As a net result of the afore narrated facts, circumstances, evidence and the settled principles of law, instant appeal is allowed. Consequently, impugned judgment and order of sentence dated November 04, 2011 are set aside and appellants – accused are acquitted of charge framed against them.

March 17, 2018
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(Jaspal Singh)
Judge

Whether Speaking/ Reasoned:
Whether Reportable:

Yes/ No
Yes/ No