

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

Reserved on: 24.07.2019

Date of decision: August 30, 2019

CRA-S-1930-SB of 2004

Joginder Singh

.....Appellant

Versus

State of Punjab

.....Respondent

CORAM: HON'BLE MR. JUSTICE MAHABIR SINGH SINDHU

Present: Mr. Amarjit Singh Virk, Advocate for the appellant.

Mr. V.G. Jauhar, Senior DAG Punjab.

MAHABIR SINGH SINDHU, J

Present appeal has been filed against the impugned judgment of conviction and order of sentence dated 13.09.2004 passed by learned Judge, Special Court, Patiala (hereinafter referred as 'Special Court'), whereby, the appellant was convicted under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'Act') and sentenced to undergo Rigorous Imprisonment for a period of 18 months and a fine of ₹2,000/-; with a default clause to further undergo Rigorous Imprisonment for a period of 2 months.

Brief facts of the case are that on 25.05.2002, ASI-Jaswinder Singh (PW5) along with police party including ASI Harpal Singh, were present at bus-stand of village Gheora, regarding case bearing FIR No.162/2002, under Section 382 of Indian Penal Code, 1860 (for short 'IPC'), being investigated by Inspector-Harbhajan Singh (PW3). At that

time, one Satnam Singh son of Sampuran Singh happened to be there and when PW5 was talking with him, then two persons were seen coming on Hero Honda motorcycle from village Gheora side. Upon noticing police party, both tried to escape while taking a u-turn, but pillion rider was apprehended by PW5; whereas, driver of the motorcycle was caught by ASI-Harpal Singh along with other police officials. The pillion rider, who was carrying a bag on his right shoulder, disclosed his name as Joginder Singh (appellant). PW5 asked him that he is suspecting some contraband in his possession, therefore, a search is to be conducted. Consequently, an option was given to the appellant for his search to be conducted either in the presence of some Gazetted Officer or a Magistrate. Appellant reposed confidence in PW5 vide his consent memo (Ex. PD) witnessed by Head Constable-Gurcharan Singh (PW4) and above Satnam Singh as an independent witness. Thereafter, his search was conducted and from the bag carried by him on the right shoulder, opium was recovered wrapped in a waxed paper of white colour. Entire contraband was weighed to be 750 grams and out of which two samples of 10 grams (each) were separately drawn. Both samples were put in small boxes while the residue was put in a separate box. All three separate parcels were sealed with seal bearing impression 'JS'. One sample seal (Ex. P1) was prepared separately. Seal bearing impression 'JS' after use, was handed over to Satnam Singh. Entire case property was taken into possession vide recovery memo (Ex. PE). Personal search of the appellant was also conducted and currency notes of ₹75 were recovered, which were taken into possession vide separate recovery

memo (Ex. PF). *Ruqa* (Ex. PH) was sent to the police station, on the basis of which formal FIR (Ex. PH/1) was registered by SI-Wirsa Singh. Rough site-plan (Ex. PJ) of the place of recovery was also prepared with marginal notes. Appellant was arrested after supplying grounds of arrest vide memo Ex. PG and entire case property alongwith the accused was produced before the SHO-Inspector Harbhajan Singh (PW3), who after verification, put his seal bearing impression 'HS'. Thereafter, case property was deposited with MHC-Udham Singh (PW2).

On next day, i.e. 26.05.2002, statement of HC-Jagtar Singh (PW6) was recorded under Section 161 of Code of Criminal Procedure, 1973 (for short 'Cr. P.C.'). He produced the case property along with accused before the Court of Judicial Magistrate Ist Class, Samana (for short 'JMIC') and the investigation of the case was completed in usual course. After receipt of chemical examiner report (Ex. PK), challan under Section 173 Cr. P.C. was submitted before the Court of competent jurisdiction. Learned Special Court, after taking into consideration the material available on record, charged the appellant under Section 18 of the Act, to which he pleaded not guilty and claimed trial. Prosecution, in order to prove its case, examined following six witnesses:-

PW1-HC Daljit Singh No.2191 along with his Affidavit Ex. PA;
PW2-MHC Udham Singh No.1787 along with his affidavit Ex. PB;
PW3-Inspector Harbhajan Singh;
PW4-HC Gurcharan Singh;
PW5-ASI Jaswinder Singh, and
PW6-HC Jagtar Singh.

In addition to above, prosecution, in order to prove the charge against the appellant, brought on record following documentary

evidence:-

Ex. PC-Application for production of case property before JMIC;
Ex. P1-Specimen seal;
Ex. P2-Second sample;
Ex. P3-Bulk contraband;
Ex. PD-Consent memo;
Ex. DA-Statement of HC-Gurcharan Singh;
Ex. PE-Seizure memo of case property;
Ex. PF-Recovery memo regarding ₹75/- from personal search of appellant;
Ex. PG-Arrest memo;
Ex. PH-*Ruqa*;
Ex. PH/1-FIR recorded by SI-Wirsa Singh;
Ex. PJ-Rough site plan of recovery;
Ex. PK- Report of chemical examiner.

Entire incriminating material was put to the appellant under Section 313 Cr. P.C., but he denied the same and claimed innocence while raising the plea of false implication. In defence, appellant produced two witnesses, namely Dalip Singh son of Kartar Singh and Joginder Singh son of Gurbachan Singh as DW1 and DW2, respectively. After hearing both the sides and taking into consideration the material available on record, learned Special Court found the appellant guilty under Section 18 of the Act and sentenced him to undergo Rigorous Imprisonment for a period of 18 months and a fine of ₹2,000/-; with a default clause to further undergo Rigorous Imprisonment for a period of 2 months. Hence, the present appeal.

It is contended on behalf of the appellant that impugned judgment of conviction and order of sentence are not legally sustainable while raising the following points:-

- i) There are material contradictions in the testimony of the prosecution witnesses;
- ii) Independent witness, namely, Satnam Singh, to whom the

seal after use was handed over by Investigating Officer (PW5), has been given up by the prosecution, thus the recovery of the contraband becomes doubtful;

iii)ASI Harpal Singh, who apprehended the motorcycle as well as another Satnam Singh (driver of the motorcycle), has not been examined;

iv)Motorcycle upon which the appellant was stated to be a pillion rider, has not been recovered in this case;

v)Signatures of the Magistrate on the samples sent to FSL have not been proved;

On the other hand, learned State counsel submitted that recovery in this case is duly proved by the prosecution witnesses and thus, the present appeal deserves to be dismissed.

Heard both sides and perused the record.

ASI-Jaswinder Singh, who is the Investigating Officer of this case, while appearing as PW5, deposed that on 25.05.2002, when he was talking with Satnam Singh son of Sampuran Singh at bus-stand, village Gheora, then two persons came on a Hero Honda motorcycle of black colour from village Gheora side. Upon noticing the police party, they tried to fled away, but appellant, who was carrying a bag on his right shoulder, being pillion rider, was apprehended by him. Whereas, driver of the motorcycle was caught by ASI Harpal Singh with the help of his party. PW5 became suspicious of some contraband in his possession, therefore, a written offer (Ex. PG) was given to the appellant for seeking his option to be searched in the presence of a Gazetted Officer or Magistrate. Appellant reposed faith in PW5 by way of consent memo (Ex. PD) and his search was conducted leading to the recovery of 750 grams of opium from his possession. Two samples of 10 grams (each)

were separately drawn from the contraband and were put in small boxes while the residue was put in a separate box. All three parcels were sealed with his seal bearing impression 'JS' and sample seal was prepared as Ex. P1. This witness has further deposed that seal after use was handed over to independent witness Satnam Singh. He has further deposed that from personal search of the appellant, ₹75 were recovered vide memo Ex. PF. During cross-examination, this witness stated that FIR No.162 of 2002 was registered against unknown persons and investigation of the same was not with him. He also stated that investigation of that case was never entrusted to him or ASI-Harpal Singh; rather that occurrence had taken place at a petrol pump of Dharmeri. He further stated that ASI-Harpal Singh was posted at Police Station Nawangaun, whereas, he himself was posted at Police Station Samana. Also stated that there are *panches* and *sarpanches* in nearby villages, but none was called for the present case.

PW1-Daljit Singh, Head Constable deposited the case property with Forensic Science Laboratory (FSL), Chandigarh.

PW2-Udham Singh stated that he was posted as MHC *malkhana* and case property was deposited with him. During cross-examination, this witness stated that he has neither brought Register No.19 in the Court today; nor there is any entry regarding time of receipt, deposit as well as sending of case property.

PW3-Inspector Harbhajan Singh deposed that on 25.2.2002, he was posted as SHO Police Station Samana, and on that day, ASI-Jaswinder Singh produced the appellant before him along with case property and he affixed his seal bearing impression 'HS'. Thereafter, on

his direction, case property was deposited with MHC-Udham Singh (PW2). He further deposed that an application (Ex. PC) was prepared under his signatures for production of case property before JMIC. During cross-examination, this witness stated that independent witness Satnam Singh had accompanied the police party, but he did not record anywhere to show the presence of said Satnam Singh at police station by way of any DDR.

PW4-Gurcharan Singh, Head Constable deposed that appellant was apprehended by ASI-Jaswinder Singh (PW5) with their help and the motorcycle was without number plate. He further deposed that 750 grams of opium was recovered from the bag carried by the appellant on his right shoulder and out of which, two samples of 10 grams (each) were separately drawn, whereas, remaining bulk was separated. All three parcels were prepared and duly sealed with the seal of ASI-Jaswinder Singh bearing impression 'JS'. Specimen seal was prepared as Ex. P1. Seal after use was handed over to independent witness Satnam Singh. He further deposed that from the personal search of the accused, ₹75 were recovered and the same was taken into possession vide recovery memo Ex. PF. During cross-examination, this witness stated that person who was driving the motorcycle was Satnam Singh, but he was not apprehended. Voluntarily stated that said Satnam Singh was apprehended by police party headed by ASI-Harpal Singh but neither any proceedings were recorded by ASI Jaswinder Singh (PW5) to the effect; nor any inquiry was made from said Satnam Singh. Further stated that above Satnam Singh was apprehended by police party headed

by ASI-Harpal Singh at bus-stand, Gheroa and appellant was also caught by the police at the same time i.e. at 10:15 A.M. This witness also stated that weights and scales were arranged through Constable-Narinder Singh from Village Gheora and the which were returned by him. He candidly stated that appellant signed in Hindi and he cannot tell whether the Investigating Officer (PW5) verified from the appellant as to whether he was conversant with Punjabi language or not?

PW6-Head Constable Jagtar Singh deposed that on 26.05.2002, he was posted at Police Station Samana, and on that day, MHC-Udham Singh handed over the case property to him. He produced the appellant as well as case property along with an application Ex. PC before JMIC, who verified the same by putting his signatures on the sample parcel. Thereafter, the case property was returned to him, which was re-deposited with the MHC, in the police station.

As per the case of the prosecution, the motorcycle was being driven by one Satnam Singh and from the testimonies of PW4 as well as PW5, it transpires that he was apprehended by ASI Harpal Singh, but neither any proceedings were recorded to that effect; nor any material is available on record. Even the case file is absolutely silent about the recovery of the motorcycle allegedly driven by said Satnam Singh and the appellant was stated to be a pillion rider. Even ASI Harpal Singh who apprehended said Satnam Singh has also not been produced as a witness by the prosecution to prove this aspect of the matter. Still further another Satnam Singh son of Sampuran Singh, who is stated to be a public witness to whom the seal of Investigating Officer (PW5) bearing

impression 'JS' after use was handed over, has also been given up. Although, prosecution is claiming that independent witness was won over by the appellant, but without recording his examination-in-chief, it is not discernible as to what was the basis before learned trial Court to accept the request of the prosecution to drop the independent witness. This lapse on the part of prosecution while giving up independent witness-Satnam Singh deprived the appellant of an opportunity for bringing on record the truth during cross-examination. Moreover, prosecution has acknowledged that this independent witness remained present throughout the entire proceedings of alleged recovery of contraband and as discussed above, even the seal of Investigating Officer PW5 after use was handed over to him. Thus, in the opinion of this Court, examination of this witness was of much significance. Putting of the seal impression upon the recovery of contraband and to prove the same within the four corners of law is to accord sanctity to the recovery proceedings to rule out any manipulation by the prosecution. But in the present case, there is total negation of this valuable exercise and that makes the recovery doubtful. Although, learned trial Court, in routine, permitted the prosecution to give up this material witness, but that is not sufficient for them to wriggle out of the material aspect of the matter resulting into deprivation of cross-examination at the instance of the appellant. This approach of learned Special Court is absolutely unacceptable and such a trend should be discouraged without any exception keeping in view the object of the criminal trial, i.e. to discover the truth and not just harping upon to record the conviction or acquittal

as the case may be. Hon'ble Supreme Court in the case of **The State of U.P. and another versus Jaggo alias Jagdish and others**, AIR 1971 SC, 1586 has held that witness, whose evidence is essential to unfold the narrative and elicit the correct facts, should be called for examination and reference, in this regard, can be made to Paragraphs-14, 15 and 16 thereof, which read as under:-

“14. The High Court was also correct in referring to two other features of the prosecution case. The first is that Ramesh who was mentioned in the first information report was not examined. The second was about the medical evidence.

*15. Ramesh is the person with whom Lalu was talking at the time of the alleged occurrence. Ramesh was mentioned in the first information report. It is true that all the witnesses of the prosecution need not be called but it is important to notice that the witness whose evidence is essential to the “unfolding of the narrative” should be called. This salutary principle in criminal trials has been stressed by this Court in the case of *Habeeb Mohammad v. The State of Hyderabad*, 1954 SCR 475 = (AIR 1954 SC 51), for eliciting the truth. The absence of Ramesh from the prosecution evidence seriously affects the truth of the prosecution case.*

*16. This Court in *Habeed Mohammad's case*, 1954 SCR 475 = (AIR 1954 SC 51) (supra) referred to the observations of Jenkins, C. J. in *Ram Ranjan Roy v. Emperor*, ILR 42 Cal 422 = (AIR 1915 Cal 545) that the purpose of a criminal trial is not to support at all costs a theory but to investigate the offence and to determine the guilt or innocence of the accused and the duty of a public prosecutor is to represent the administration of justice so that the testimony of all the available eye-witnesses should be before the Court. Lord*

Roche in Stephen Seneviratne v. The King, AIR 1936 PC 289, referred to the observations of Jenkins, C.J. and said that the witnesses essential to the unfolding of the narrative on which the prosecution is based must be called by the prosecution whether the effect of their testimony is for or against the case for the prosecution. That is why this Court in Habeed Mohammad's case, 1954 SCR 475 = (AIR 1954 SC 51) (supra) said that the absence of an eye-witness in the circumstances of the case might affect a fair trial. On behalf of the appellant it was said that Ramesh Chand was won over and therefore the prosecution could not call Ramesh. The High Court rightly said that the mere presentation of an application to the effect that a witness had been won over was not conclusive of the question that the witness has been won over. In such a case Ramesh could have been produced for cross-examination by the accused. That would have elicited the correct facts. If Ramesh was an eye-witness the accused were entitled to test his evidence particularly when Lalu was alleged to be talking with Ramesh at the time of the occurrence."

Still further, as per the testimonies of PW4 and PW5, weighing machine was arranged by Constable Narinder Singh from Village Gheora, but again he has not been examined by the prosecution; rather given up. Therefore, this is another lacuna which makes the prosecution case doubtful regarding the quantity of the contraband recovered from the appellant.

Also relevant to record that case property along with both samples were produced before JMIC, on 26.05.2002 and which were duly signed by him, but FSL report (Exhibit PK) nowhere reveals about the signature of the Magistrate; rather it find mention only the

impression of 'HS'/'JS', i.e. PW3 and PW5 respectively and order dated 26.05.2002 passed by learned JMIC being relevant reads as under:-

“Case property, i.e. two sample parcels allegedly containing 10/10 gms and one parcel allegedly containing 730 gms of opium sealed with the seals 'JS'/'HS' intact produced. The sample parcels have been signed by me. Case property seen and returned to the concerned as it is to be deposited in the Malkhana.”

Attention of this Court was drawn towards the statement of the appellant recorded under Section 313 Cr.P.C., wherein, there is no mention of the weighing machine brought by Constable Narinder Singh at the time of alleged recovery from the appellant. Thus, there is negation of full opportunity to the appellant by learned trial Court while not putting the entire incriminating material under Section 313 of Cr. P.C.

It is also noteworthy that appellant in order to prove his innocence, produced two defence witnesses, namely DW1-Dalip Singh and DW2-Joginder Singh. DW1-Dalip Singh deposed that appellant is having about 3 acres of land in the village and he has never been found indulged in any narcotics case; rather bears a good moral character. This witness also deposed that appellant has been falsely implicated in the present case while going to meet his sister at Village Rajla along with one Satnam Singh as well as one Joginder Singh, other than DW2-Joginder Singh. Since the motorcycle on which they were travelling was not having the registration number, thus, they failed to produce the papers on the asking of the police and due to some altercation, a false case has been planted against them.

DW2-Joginder Singh son of Gurbachan Singh also deposed

on the similar lines as of DW1 regarding the false implication of the appellant.

Concededly, appellant is the resident of Village Kheri Sheshgiran, Tehsil Pehowa, District Kurukshetra, Haryana and has signed in Hindi language at the time of entire police proceedings including recovery, whereas, the writing work was done by the Investigating Officer in Punjabi language without seeking his explanation as to whether he was aware about the contents of the documents upon which he has put his signature, but the learned trial Court has not even discussed the prejudice caused to the appellant on that count.

In view of the facts and circumstances discussed hereinabove, this Court has come to the conclusion that prosecution has failed to prove its case beyond reasonable doubt regarding the recovery of alleged contraband from the appellant, due to the following reasons:-

- i) Non-examination of the independent witness, namely Satnam Singh;
- ii) Giving up Constable Narinder Singh;
- iii) Remaining silent about the driver of the motorcycle as well as the recovery thereof and non-association of ASI Harpal Singh by the prosecution;
- iv) Absence of the signature of the JMIC appended on the sample sent to FSL for examination;
- v) Non-consideration of the testimonies of defence evidence, i.e. DW1 and DW2, in its true perspective.

Resultantly, the appeal is allowed, impugned judgment of conviction and order of sentence dated 13.09.2004 passed by learned Judge, Special Court, Patiala is set aside and appellant-Joginder Singh is

acquitted of the charge(s) framed against him. Bail bonds/surety bonds are discharged. Fine, if paid, be returned to him.

(MAHABIR SINGH SINDHU)
JUDGE

August 30, 2019
mahavir

Whether speaking/ reasoned: **Yes**

Whether Reportable: **Yes**