

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

**CRA-S-1328-SB-2004 (O&M)  
Reserved on: 05.12.2022  
Date of Pronouncement: 07.12.2022**

Surinder Kumar ...Appellant

vs.

State of Punjab ...Respondent

**Coram : Hon'ble Mr. Justice N.S.Shekhawat**

**Present :** Mr. Pratap Singh Gill, Advocate (Amicus Curiae),  
for the appellant.

Mr. M.S.Bajwa, DAG, PUnjab.

\*\*\*

**N.S.Shekhawat J.**

The present appeal is directed against the judgment of conviction and order of sentence dated 03.06.2004, passed by the learned Judge, Special Court, Patiala, whereby, the present appellant has been convicted under Sections 15(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as Act) and sentenced to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs. 1 Lac or in default of payment of fine to further undergo rigorous imprisonment for six months under Section 15 (c) of the NDPS Act.

The FIR in the instant case was got registered by Sub-Inspector Preetipal Singh, SHO, Police Station Kotwali, Nabha. On 17.11.2000, Preetipal Singh, SI/SHO along with other police officials were present on duty near

P.W.D. Rest House and he received a secret information that Surinder Kumar @ Tittu s/o Kasturi Lal, accused had hidden several bags of poppy husk for sale and was in possession of the same. He had stored the said bags in the room meant with storing fodder for the cattle in his house at Bhwanigarh Road Nabha. If a raid was conducted on the said room in the cattle shed of the house of Surinder Kumar @ Tittu, immediately, then the poppy husk could be recovered in heavy quantity from his house. On finding the information reliable, ruqa Ex.PB was sent to the Police Station through C. Labh Singh and on the basis of the same, the FIR Ex.PB/1 was registered by the police. Harminder Pal Singh, DSP was also informed through wireless message to reach at the spot and the complainant along with his fellow police officials conducted the raid at the spot. In the meantime, Harminder Pal Singh, DSP also reached at the spot and a public witness, namely, Harbhajan Singh was also associated by the police party. Both the DSP and Harbhajan Singh were informed about the secret information received against the accused.

The police party along with Harminder Pal Singh, DSP reached the place, which was disclosed in the secret information and the accused was found present there. Harminder Pal Singh, DSP shared his identity and expressed his intention to search the house of the accused and vide memo Ex.PC, the accused aggrieved to get the house searched and the memo was signed by him. During the course of his interrogation, the accused suffered a disclosure statement to the effect that seven bags of poppy husk had been concealed by him in the house in a room meant for cattle and he could get the same recovered. The memo Ex. PD was signed by the accused, Harminder Pal Singh, DSP, Harbhajan Singh and in pursuance of the same, he got recovered seven bags of

poppy husk from the room, in which, fodder for the cattle was stored. Two samples of 250 grams each were drawn from each bag and remaining poppy husk in each bag weighed to be 34.5 kgs each. The remaining quantity of poppy husk was again kept in the same bags. 14 samples and the bags containing the remaining poppy husk were sealed by Preetipal Singh, SI/SHO with his seal bearing impression 'PS' and Harminder Pal Singh, DSP had affixed his seal 'HPS' and the recovered contraband was taken in the possession by the police.

As per the case set up by the prosecution, Preetipal Singh SI/SHO gave his own seal to Tek Singh, ASI, whereas, Harminder Pal Singh, DSP retained his own seal with himself. The site plan of the place of recovery was prepared and the personal search of the accused were conducted, which led to recovery of Rs.40/- and the same were taken into possession by the police. After completing the formalities at the place of seizure, the team returned in the police station and the case property was deposited by Preetipal Singh, SI/SHO with Parshotam Kumar, MHC in an intact condition. Next day, again an application was moved by him to the MHC for taking the case property and producing the same before the learned Magistrate. After being produced before the learned Area Magistrate, the case property was re-deposited with Parshotam Kumar, MHC in an intact condition by the Investigating Officer. As per him, so long as the case property remained in his possession, there was no tampering with the case property. The sample parcels were sent to the FSL by the MHC and vide a report Ex. PL, the FSL declared the contents of the parcels to be poppy heads.

The investigation in the case was conducted by the Investigating Officer and finally report under Section 173 Cr.P.C. was presented in the Competent Court against the accused/appellant. The learned trial Court ordered framing of charge under Section 15 of the NDPS Act against the accused, to which he pleaded not guilty and claimed trial.

During the course of trial, the prosecution examined five witnesses to prove the charge against the appellant/accused. PW1 C. Maghar Singh tendered his affidavit Ex.PA and prayed that the same may be read as a part of the evidence. PW-2 Inspector Preetipal Singh, who was posted as SI/SHO, Police Station Kotwali on 17.11.2000 appeared as PW-2. He supported the case of the prosecution in totality. He alongwith other police officials conducted the raid, after joining Harminder Pal Singh, DSP and Harbhajan Singh, a private person. The interrogation was done and the recovery of seven bags of poppy husk was effected by him in the presence of the DSP and the private witness. He stated that 7 – 8 police officials were there in the police party including himself and they had gone on a private Sumo and an official gypsy. One of the relatives of one official of their police party had brought the Sumo. He further admitted that the accused had himself stated that he was the owner of the house. Neither he had seen any document which could prove the ownership of the accused regarding that house. He further stated that no gate was fixed at point B shown in the map Ex.PF. He admitted that there was no wall from the portion A to A-1 of the site plan Ex.PF. Two doors shown in the map, which were fixed to the animal shed, were not locked or bolted. He further stated that he had dispatched special report after reaching the police station to the higher officials. After completion of the writing work, the police party straight away went to the

residential house of the accused just to ascertain the antecedents of the accused. He was not aware as to whether the accused was not the owner of the house from which the recovery of poppy husk was effected. Still further, the prosecution examined Parshotam Kumar, MHC as PW-3. He admitted that the entry was made in register No.19 regarding the property deposited in the Malkhana. He produced register No.19 before the Court. He had made entry in the register No.19 regarding entrusting the case property to Preetipal Singh, IO for production of the same before the learned Illaqa Magistrate. However, he had not mentioned the time when the case property was handed over, in register No.19. He further admitted that there was no mention regarding handing over the case property to I.O. Preetipal Singh or regarding receipt of the case property back in the Malkhana. He produced the copy of the entry of register No.19 as Ex.DA.

The prosecution further examined PW-4 Harmindarpal Singh, DSP as PW-4. He had gone with the raiding party. He also admitted that after the samples were sealed, he kept the seal with himself. He also admitted that Preetipal Singh, entrusted his seal to ASI Tek Singh to after its use. The said witness also admitted that several independent witnesses were present, but they did not feel any necessity of joining the independent witnesses. No documents were collected to prove the ownership of the house of the accused. He admitted when the house is searched, two independent witnesses of the locality are to be joined as witnesses under Section 100(4) Cr.P.C. He further admitted that there is no boundary wall on the back and the left side of the courtyard. No person was called from the shops located in front of the courtyard. Even there was no gate or door on the front gate of the courtyard. There was no gate on the room

of wheat straw from which the recovery was effected. Even there was no gate where the accused was arrested. Still further, the prosecution examined PW-5 ASI Tek Singh, who had also joined the raiding party along with the other police officials. He admitted that after the raid, Preetipal Singh, SI handed over the seal to him. The said witness also admitted that he did not know whether the independent witnesses were joined by the Investigating Officer or not. The Investigating Officer had given a wireless message to the DSP to reach at the house of the accused and also told the name of the accused and disclosed all the contents of the secret information to the DSP. He further stated that the independent witness, Harbhajan Singh was relieved by the IO after reaching the police station.

After the prosecution had completed its evidence, the entire evidence led by the prosecution was put to the accused in his statement under Section 313 Cr.P.C. The appellant/accused stated that he had been falsely involved in the case as few young residents of Nabha had formed a private Anti Corruption Cell and they used to make complaints against the corrupt officials. He further stated that the house from where the recovery has been allegedly effected by the police neither belonged to him nor possessed by him at any point of time. He had no connection with the said house. The house allegedly belonged to one Kartar Singh S/o Kishan Singh and he was not present at the time of alleged recovery and the entire recovery had been planted against him as he had made complaints against various police officials.

In defence the accused Ex.DW-1 Sukhwinder Kumar, Patwari, who brought the summoned record. As per the *Jamabandi*, the owner of the said Khasra numbers was Kartar Singh S/o Kishan Singh and the land was not

owned by Surinder Kumar @ Tittu, the appellant. Neither he owned the land nor cultivated it nor he was in possession of the land as per the record. He produced the Akash Latha. The relevant portion was shown from Bouran Gate to Bhawanigarh Road and the khata number and Khatauni numbers in questions fell on the said road as shown in the Akash Latha brought by him and the relevant portion of Akash Latha was exhibited as Ex.D3. There was no house or land possessed and owned by Surinder Kumar @ Tittu, the appellant, as per record brought by him. Upinder Singh, draftsman was examined as DW-2, who exhibited the map Ex.D1, after consulting the revenue record. He stated that the site in question was part of Khasra No.45/24/1 and 24/2. As per his enquiry from Rajinder Singh and Sadhu Singh, neighbours, the place was in the name of Kartar Singh and he was not residing there for the last 5-6 years and nobody was residing there. He further stated that there was no wall between Mark A to A-1 and no wall between mark A to B. Apart from that there was also no wall from point B to C and it was an accessible place and every person could come and go without any hindrance. There was no door fixed before the cattle shed, which was shown as mark Y. Again in Mark D to E, there was no wall and it was in open space. He had given the marginal notes after consulting the revenue record. Everything was visible from outside, if it was lying in the cattle shed. The defence further examined Rajinder Singh as DW-3. He stated that at about 3.30 pm on 17.11.2000, he along with other persons of the locality were sitting in front of the house and a police party came there in a gypsy. One constable enquired from them about the house of Surinder Kuamr @ Tittu. After getting the information, he knocked at the door of Surinder Kumar @ Tittu and the police party took him away with them. The police party disclosed

them that they needed Surinder Kumar @ Tittu to get the identity of a person fixed, who was sitting in the police station. They were assured that Surinder Kumar @ Tittu would be let off after getting the said identification conducted. He was not released till next morning and were informed that the police party had taken him to judicial Courts. In fact, the persons of their locality and surrounding locality had formed an Anti Corruption Cell and they had raised voice against the corruption of police and Revenue Department. The appellant was annoyed with them and they had intentionally and falsely implicated Surinder Kumar @ Tittu in the said offence.

After both these sides led with their respective evidence, the learned trial Court vide the impugned judgment and order dated 03.06.2004 convicted and sentenced the appellant as mentioned above.

Assailing the findings recorded by the learned trial Court, the appellant had preferred the instant appeal.

I have heard learned counsel for the parties and have carefully perused the record with their assistance.

Learned counsel for the appellant vehemently contended that the prosecution had falsely alleged that the appellant was in conscious possession of the contraband. The evidence led by the prosecution itself shows that he was not the owner in possession of the cattle shed, from where the recovery was allegedly made. Even the witnesses of the prosecution had admitted that they had not verified the ownership of the cattle shed and he has been falsely implicated only on presumption. In fact, the cattle shed was owned by Kartar Singh S/o Kishan Singh, who had not been examined by the prosecution to prove the possession of the appellant. Further, the defence had examined DW-1

Sukhwinder Kumar, Patwari, who was the competent witness to depose with regard to the ownership and possession of the property in question and he had clearly stated on the strength of the official record that the place in question was owned by Kartar Singh and not by the present appellant. Learned counsel further submitted that the place of recovery was open to the public as there were no walls surrounding the compound and the cattle shed was visible from outside. Even from the site plan Ex.PF, it was apparent that there were no walls on several points and anybody could enter the premises without any hindrance or hurdle. Consequently, the prosecution had failed to prove the conscious possession of the contraband and the appellant was liable to be acquitted by this Court. The submissions raised by learned counsel for the appellant has been opposed by the learned State counsel by submitting that the appellant was found in possession of the contraband, which stood established from the testimonies of the official witnesses. Still further, under Section 35 of the Act, there was presumption of culpable mental state. Furthermore, under Section 54 of the Act, there is a presumption regarding the possession of illicit articles. In any trial held under the provisions of the Act, it has to be presumed, unless and until the contrary is proved that the accused had committed an offence under this Act in respect of the contraband for the possession of which, he fails to account satisfactorily. In view of the said statutory presumptions, it can be safely concluded that the appellant was in conscious possession of the contraband.

I have considered the rival submissions made by the learned counsel for the parties and perused the relevant record in this regard.

To prove the charge, the prosecution had examined its star witness PW-2 Sub-Inspector Preetipal Singh, who was heading the police team along with DSP Harminderpal Singh. He clearly stated that he did not take any document in his possession regarding the ownership of the house from where the poppy bags were recovered. The accused had himself stated that he was the owner of the house. He further admitted that he had not seen any document, which could prove the ownership of the accused regarding that house. He further admitted that no gate was fixed at point B shown in the map Ex.PF. There was no wall in the portion of A to A-1. The two doors shown in the map which were fixed to the animal shed were not locked or bolted. He feigned ignorance if the accused was the owner of the house from where the recovery of poppy husk was effected. He was not aware as to whether the house was owned by one Kartar Singh S/o Kishan Singh. He had not even seen the jamabandi pertaining to the house, from where the poppy husk was recovered. Similarly, PW-4 Harminderpal Singh, DSP also admitted that no documents were collected to prove the ownership of the house of the accused. Even there was no boundary walls on the back and also on the left side of the courtyard. There was no gate or door on the front gate of the courtyard. There was no gate on the Kotha of the wheat straw from where the recovery was effected. Even there was no gate where the accused was arrested, whereas on the other hand the defence examined DW-1 Sukhwinder Singh, Patwari, who produced the revenue record to show that the accused neither owned this land, nor cultivated it nor was in possession of the said land as per the revenue record and also produced the Akash latha, which was exhibited as Ex.D3. Similarly Upinder Singh, draftsman was examined as DW-2, who prepared the map Ex.D1, giving

the marginal notes after consulting the revenue record. He clearly stated that he also made inquiries from the neighbours of the said place and during the said inquiry also, it was revealed that the place in question belonged to Kartar Singh S/o Kishan Singh. It was a place lying open and vacant for the last 5-6 years and it was without a door. Everything was visible from outside, if it was lying in the cattle shed. Thus, it is apparent that the recovery was allegedly made from a place, which was neither owned nor possessed by the present appellant. Even the police officials did not make any effort at all to verify the fact regarding ownership and possession of the place in question. Even the place, where the recovery was allegedly made had no gates and no walls on two sides and the place was visible from outside itself. Apart from that, the police neither made inquiries from the neighbours nor made efforts to get the official records verified. The revenue records are public documents and could be the best possible evidence to prove the ownership and possession of the house. Despite the best evidence available with the officials, the prosecution chose not to examine it for inexplicable reasons. However, the said evidence was placed on record by producing the defence witness DW-1 Sukhwinder Singh, Patwari, which clearly showed that the place belonged to one Kartar Singh S/o Kishan Singh. Apart from that, the prosecution miserably failed to establish that the appellant was in conscious possession of the house as well as the contraband. Consequently, it is highly unsafe to base the judgment of conviction on such a investigation.

In similarly circumstances, the Hon'ble Supreme Court held in the matter of ***Gangadhar @ Ganga Ram Vs. State of Madhya Pradesh, (2020) 9***

***SCC 202*** as follows:-

“8. The presumption against the accused of culpability under Section 35, and under Section 54 of the Act to explain possession satisfactorily, are rebuttable. It does not dispense with the obligation of the prosecution to prove the charge beyond all reasonable doubt. The presumptive provision with reverse burden of proof, does not sanction conviction on basis of preponderance of probability. Section 35(2) provides that a fact can be said to have been proved if it is established beyond reasonable doubt and not on preponderance of probability.

9. That the right of the accused to a fair trial could not be whittled down under the Act was considered in **Noor Aga v. State of Punjab, (2008) 16 SCC 417** observing:

"58. ... An initial burden exists upon the prosecution and only when it stands satisfied, would the legal burden shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of the accused on the prosecution is "beyond all reasonable doubt" but it is "preponderance of probability" on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established.

59. With a view to bring within its purview the requirements of Section 54 of the Act, element of possession of the contraband was essential so as to shift the burden on the accused. The provisions being exceptions to the general rule, the generality thereof would continue to be operative,

namely, the element of possession will have to be proved beyond reasonable doubt."

10. The stringent provisions of the NDPS Act, such as Section 37, the minimum sentence of 10 years, absence of any provision for remission do not dispense with the requirements of prosecution to establish a prima facie case beyond reasonable doubt after investigation, only where after which the burden of proof shall shift to the accused. The gravity of the sentence and the stringency of the provisions will therefore call for a heightened scrutiny of the evidence for establishment of foundational facts by the prosecution.

11. It is apparent that the police being in a quandary with regard to the ownership and possession of the house in question due to a flawed, defective and incomplete investigation found it convenient to implicate the appellant also, sanguine that at least one of the two would be convicted. Sri Jain is right in the submission that according to normal human prudence, it stands to reason why the appellant who was residing in his new house for the last 15 years would identify his own erstwhile house as that of the accused Gokul Dangi, be a witness to the breaking of the lock and recovery to implicate himself.

12. The appellant had produced the sale agreement, Exhibit P.28 with promptness the very next day. It was never investigated for its genuineness by the police and neither were the panchayat records verified. The panchayat records are public documents and would have been the best evidence to establish the ownership and possession of the house. Despite the best evidence being available the police considered it sufficient to obtain a certificate Exhibit P37 signed by P.W. 14 who acknowledged her signature but denied knowledge of the contents of the certificate. The voters list entry of 2008 being prior to the sale is of no consequence. It is not without reason that the co-accused had absconded."

The learned counsel for the appellant further contended that the police investigation was extremely casual and perfunctory in nature and was aimed at ensuring the false implication of the appellant due to the fact that he was a part of Anti Corruption Cell against the police officials. He further submitted that from the record, it is apparent that after the recovery, no special report was sent by PW-2 Preetipal Singh SI/SHO to his senior officers. Still further, even PW-2 Preetipal Singh and PW-4 Harmindarpal Singh, DSP had colluded to falsely involve in a crime case without effecting any recovery of the contraband from him. PW-2 admitted that he had sealed the samples as well as the bags containing the entire recovery of poppy husk with the seal impression 'PS' and Harmindarpal Singh, DSP had put his seal bearing impression 'HPS'. PW-2 Preetipal Singh gave his seal to ASI Tek Singh and Harmindarpal Singh, DSP retained his seal with himself. Similarly, PW-4 Harmindarpal Singh, DSP also admitted that after sealing the samples, he retained the seal himself and Preetipal Singh, SI/SHO entrusted his seal to ASI Tek Singh after use. Still further, the case property was never deposited in the Malkhana by the police officials. Learned counsel submitted that the prosecution examined Parshotam Kumar, MHC as PW-3, with whom the case property / recovered contraband was deposited on 17.11.2000 by the police team. PW-3 Parshotam Kumar, admitted that the entry was made in register No.19 regarding depositing the property in Malkhana, which was given back to the Investigating Officer for production of the same before the Illaqa Magistrate. However, there was no mention regarding handing over the case property to Investigating Officer, Preetipal Singh or regarding the receipt of the case property back in the

Malkhana. Thus, it is apparent that from 18.11.2000 to 23.11.2000, the case property was lying at some undisclosed place and was not deposited in the Malkhana by the Investigating Officer. The said submissions raised by the learned counsel for the appellant have been refuted by the learned State counsel and he submitted that the case property was deposited in the Malkhana and the recovery stood proved against the present appellant.

I find the sufficient force in the argument raised by the learned counsel for the appellant. At the time of conducting of the raid, the police party had joined a private witness Harbhajan Singh, who remained associated with the police party through out the raid. PW-2 Inspector Preetipal Singh and PW-4 Harminder Pal Singh, DSP, both the witnesses had admitted that after affixing the seals on the samples and the bag containing remaining the poppy husk, the seal was handed over by SI/SHO Preetipal Singh, PW-2 to ASI Tek Singh, PW-5, whereas Harminder Pal Singh, DSP, PW-4 retained the seal himself. None of the witness handed over the seal to the independent witness Harbhajan Singh, who was accompanying them. Still further, even ASI Tek Singh was subordinate of both the said witnesses and it is apparent that the accused has been denied the right to fair investigation. Further dent has been caused to the case of the prosecution by the testimonies of PW-3 Parshotam Kumar, MHC. The relevant extract of his testimony has been reproduced below:-

*“It is correct that entry is made in register No.19 regarding the property deposited in the Malkhana. I have brought the register No.19 today in the Court. I made an entry in register No.19 regarding the entrusting the case property to Preetipal Singh, Investigating Officer, for production of the same before Illaqa Magistrate. However, at what time, the case property was*

*handed over is not mentioned in register No.19. The above said entry is regarding the production of the case property before Illaqa Magistrate. But there is no mention regarding handing over the case property to I.O. Preetipal Singh or regarding the receipt of the case property back in the Malkhana. Photostat copy of entry of register No.19 is Ex.DA which is correct and is attested by me. It is incorrect to suggest that I have filed a false affidavit.”*

From a perusal of the above testimony, it is apparent that the said witness had exhibited the register of Malkhana. The said register has been exhibited as Ex.DA. As per the record, the recovered contraband was deposited with Parshotam Kumar, MHC on 17.11.2000. On 18.11.2000, the case property was handed over to PW-2 Preetipal Singh SI/SHO for being produced before the learned Illaqa Magistrate. However, at what time the case property was handed over to him was not mentioned in register No.19. Still further, after production of the case property before the learned Magistrate on 18.11.2000, the Investigating Officer was bound to deposit the case property with the Incharge of the Malkhana i.e. PW-3 Parshotam Kumar, MHC. But surprisingly, the case property was not deposited back with the Incharge of Malkhana and apparently, the case property remained with the Investigating Officer till 23.11.2000, when the samples were sent to the FSL for further examination. Consequently, it is apparent that serious prejudice has been caused to the present appellant and a serious question mark has been raised on the manner, in which the investigation was conducted by the police. Even PW-4 Harminder Pal Singh kept the seal with himself, whereas, PW-2 Preetipal Singh, SI/SHO handed over the same to ASI Tek Singh, who was a subordinate.

Learned counsel for the appellant submitted that in the instant case, the recovery was allegedly effected by PW-2 Preetipal Singh, SI/SHO of the Police Station and he kept the case property with himself. Even the investigation was conducted by him and the accused was denied his right to fair investigation, which is the foundation by a fair trial. The investigation was conducted in the most unfair and partisan manner and the samples were sent after a long and unexplained delay to the FSL and the appellant had been denied his right of fair investigation and was entitled to get an order of acquittal. The submissions made by learned counsel for the appellant have been opposed by learned State counsel by submitting that the investigation was conducted in a fair and impartial manner and no short comings have been pointed out by the learned counsel for the appellant.

I find the submissions made by learned counsel for the appellant to be tenable and valid in law. In the instant case, the role of PW-2 Preetipal Singh SI/SHO was suspicious from the beginning. He himself was the complainant, SHO of the Police Station as well as the Investigator of the case. This clearly violates the principles of fair and impartial investigation and had caused miscarriage of justice to the accused.

Learned counsel for the appellant further submitted that the mandatory provisions of Section 57 of the NDPS Act had not been complied with by the Investigating Officer and non-compliance of the said provision of law would vitiate the proceedings of the trial and the appellant was liable to be convicted by this Court.

Learned State counsel submitted that the said provisions of law were directory in nature and not mandatory and the appellant, who is charged with a serious offence cannot be acquitted on the ground of any said irregularity.

I have heard learned counsel for the parties and considered their submissions in the light of the settled law. Section 57 of the NDPS has been reproduced below:-

**“57 Report of arrest and seizure.-** whenever any person makes any arrest or seizure, under this Act, he shall, within forty-eight hours next after such arrest or seizure, make a full report of all the particulars of such arrest or seizure to his immediate official superior.”

In the instant case also, PW-2 Preetipal Singh, Inspector, no where stated that any such report in compliance of Section 57 of the Act was submitted to his immediate Superior official. There has no evidence even on the record to show the submission of any such report by PW-2 Preetipal Singh, SI/SHO and there was non-compliance of Section 57 of the Act.

Apart from that, in the instant case, Harbhajan Singh was joined as an independent witness. Even PW-2 Preetipal Singh stated that he tried joining more independent witnesses during the raid, but no one agreed and this fact was not recorded in his zimni. On the other hand, DSP, Harminder Pal Singh, PW-4 stated that no independent witness was joined in the raid except Harbhajan Singh, who was already at the spot and they felt no necessity of it. Still further, PW-5, ASI Tek Singh stated that the Investigating Officer did not call any independent witness. Even Harbhajan Singh was not examined by the prosecution for the reasons known to it and the entire case is based on the

testimonies of the official witnesses. The prosecution could not have avoided examining Harbhajan Singh as a prosecution witness by simply submitted that he had won over by the accused. Had he being won over by the accused, the accused would have definitely produced him as a defence witness. Thus, the absence of any independent witness creates doubt about the story forwarded by the prosecution. Apart from that, in the memos, which were prepared prior to the registration of the FIR, the number in details of the FIR have been mentioned. In fact, it was shown that the raid was allegedly conducted and a memo under Section 27 of the Evidence Act was prepared at the spot whereby the accused confessed that he had concealed the poppy husk at the place in question and the memo was exhibited as Ex.PD. A perusal of the same, clearly shows that the details of the FIR have been mentioned on the same, whereas, the FIR was yet to be received by the Investigating Officer at the spot, after registration. It has been held by the Hon'ble Supreme Court in the matter of **Kamaljit Singh @ Pappu Vs. State of Punjab, 2020 (14) SCC 9** as follows:-

“5. The sole ground on which we are inclined to allow this appeal is that the prosecution has miserably failed to explain why the sole independent witness, Gurdev Singh Mann, who was present on the spot and in whose presence the search and seizure was carried out and being one of the witnesses for drawing the panchanamas, has not been examined by the prosecution.

6. Indeed, the Trial Court has noted that the prosecution could not have examined Gurdev Singh Mann as he was won over by the accused. The basis on which such finding has been recorded by the Trial Court, however, is not forthcoming. Neither the Investigating Officer nor any other police official has offered an explanation on that factual position. In addition, we find force in the argument of

the appellant that witness PW-2, who claimed to have received the information telephonically and had passed it on to his contemporary who, in turn, promptly recorded the FIR concerning the offence, eventually was entrusted with the investigation of the case. This Court, in the recent decision in the case of **Mohan Lal v. The State of Punjab - AIR 2018 Supreme Court 3853**, has frowned upon the same police official being the informant and the investigating officer. The court has observed thus:

"25. In view of the conflicting opinions expressed by different two Judges Benches of this Court, the importance of a fair investigation from the point of view of an accused as a guaranteed constitutional right under Article 21 of the Constitution of India, it is considered necessary that the law in this regard be laid down with certainty. To leave the matter for being determined on the individual facts of a case, may not only lead to a possible abuse of powers, but more importantly will leave the police, the accused, the lawyer and the courts in a state of uncertainty and confusion which has to be avoided. It is therefore held that a fair investigation, which is but the very foundation of fair trial, necessarily postulates that the informant and the investigator must not be the same person. Justice must not only be done, but must appear to be done also. Any possibility of bias or a predetermined conclusion has to be excluded. This requirement is all the more imperative in laws carrying a reverse burden of proof."

7. Indeed, Manjit Singh (PW 2) had received information telephonically and had passed on the same to his contemporary who recorded the FIR but the fact remains that he himself investigated the case. The unfairness in investigation becomes more glaring when we peruse the search and seizure panchanamas. It is seen that the FIR number has been noted at the top of these

panchanamas. It is unfathomable as to how the FIR number could be noted on the search and seizure panchanamas when the same were drawn up obviously at an earlier point in time and preceded the registration of the FIR. Even this discrepancy has not been explained by the prosecution at all. Furthermore, we find that the FIR has been registered by Nirmaljit Singh but he has not been examined by the prosecution and no explanation is offered in this regard as well.

8. All these deficiencies, in our opinion, create serious doubts and are fatal to the prosecution case, for which reason the appellant deserves to be acquitted of the stated offence by giving him the benefit of doubt. We order accordingly. The bail bond stands discharged. The appeal is allowed.

It has been held by this Hon'ble Court in the matter of **Jawinder Singh and another Vs. State of Punjab 2013(1) R.C.R. (Criminal) 257** as follows:-

*“12. The next point argued by the learned counsel for the accused-appellants is that seal after use was not handed over by DSP Ajaib Singh to Kimati Lal, an independent witness available with the Police. In **Resham Singh v. State of Punjab, 1996(3) RCR (Criminal) 629**, his Court has held as under :-*

*"6. Assailing the said evidence, it was argued that no public witness had been joined and learned trial court was in error in passing the order of conviction on the testimonies of official witnesses. One has to weigh and scan the evidence in individual cases. Though, it is not mandatory that public witnesses should be joined, an attempt must be made to join the same. If no public witness is joined, even the reason should be forthcoming as to why it was not so done. In the present case, the village is only about 2-3 kms. away. Seemingly no attempt was made to get a witness from the nearby village. It was not known as to who were the*

*other persons who refused to join the police party and witnessed the said raid. In this process the explanation that attempt was made but no public witness was willing to join appears to be unsatisfactory. In these circumstances, it is difficult to act on the testimonies of official witnesses.*

*7. In addition to that, in the present case, chances of property being tampered cannot be ruled out. As a matter of fair play, it has always been insisted that the property and sample after being sealed should be handed over to a third person. This is to ensure that no tampering is to be done to the said property. In the present case, the evidence shows that seal after use was given to ASI Basant Singh. He was even handed over the said recovered articles and the sample by the Investigating Officer. The very sanctity of handing over the seal to third person in this process was put an end to. The chances of property, thus being tampered, could not be ruled out. In this process the appellant was entitled to the benefit of doubt."*

Still further, the accused had examined 3 witnesses to prove his defence. The prosecution examined DW-3 Rajinder Singh, who clearly stated that he knew the present appellant being the resident of the same colony. On 17.11.2000 at about 3.30 pm, when he was sitting in front of his house with other residents of the locality, the police party came there in a gypsy. On getting the information about the house of the appellant, he was taken away by the police and the appellant did not return in the night. Next day, they came to know about the arrest of the present appellant. In fact, the persons of their locality and of adjoining locality had formed an Anti Corruption Cell and had raised the voice against the corruption of the police and the revenue department.

Due to this, police persons were annoyed with their activities and had intentionally and knowingly planted the case on the present appellant. Even though, not much evidence has been led by the defence in this regard, yet the statement of the said defence witnesses could not be brushed aside completely as the defence witnesses are also to be treated at par with the prosecution witnesses. The manner in which the raid is conducted and the investigation has been conducted by the police, impels this Court to believe the story of the defence. In the instant case, the police conducted the investigation in the most unfair and shoddy manner. Even the mandatory provisions of NDPS Act and all the settled principles governing a fair and impartial investigation were completely overlooked by the police officials.

In view of the above discussion, it can be safely held that the findings recorded by the learned trial Court are contrary to the evidence on record and the settled principles of law. Consequently, the appeal succeeds and the impugned judgement and order dated 03.06.2004 are hereby set aside.

Pending application, if any, is also disposed off, accordingly.

Case property, if any, be dealt with, and destroyed after the expiry of period of limitation. The trial court record be sent back.

In the end, I record my appreciation for Mr. Pratap Singh Gill, learned Amicus Curiae, who had rendered able assistance to this Court.

07.12.2022  
hemlata

(N.S.SHEKHAWAT)  
JUDGE

Whether speaking/reasoned : Yes  
Whether reportable : Yes