

CRA-D-544-DBA-2002 (O&M)

- : 1 :-

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

**CRA-D-544-DBA-2002 (O&M).
Date of Decision: 12.09.2023.**

State of Punjab

....Appellant.

VERSUS

Hem Raj and another

....Respondents.

**CORAM : HON'BLE MR. JUSTICE ANUPINDER SINGH GREWAL
HON'BLE MR. JUSTICE LALIT BATRA**

Present: Mr. Jashandeep Singh, Assistant Advocate General, Punjab,
for the appellant.

Mr. Sahil Khunger, Advocate for respondent No.1.

Mr. Atam Prakash Setia, Advocate for respondent No.2.

LALIT BATRA, J.

This criminal appeal has been preferred by appellant-State of Punjab, impugning the legality of judgment of acquittal dated 23.11.2001 rendered by learned Judge, Special Court, Ludhiana, in Sessions Case No.100 of 17.11.2000, in terms of which, respondents/accused-Hem Raj and Avtar Singh were acquitted of charge under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'NDPS Act'), in case FIR No.273 dated 19.08.2000 under Section 15 of NDPS Act, registered at Police Station Sadar, Ludhiana.

2. As per prosecution version, on 19.08.2000, a police party headed by ASI Manjit Singh (PW-6), Investigating Officer, comprising *inter alia* of ASI Kulwant Singh (PW-9) was present in village Dhandran, for search of bad elements and in connection with special search operation.

A secret information was received by ASI Manjit Singh to the effect that respondents/accused had brought poppy husk in heavy quantity from Rajasthan and were selling it by concealing the same in the bushes growing in the ditches near the railway line falling between Dhandran-Alamgir Road and in case raid is conducted, gunny bags of poppy husk can be recovered. Accordingly, police party proceeded to raid the disclosed place and in the outer side of village Dhandran, Achhru Singh son of Bachan Singh, resident of village Baddowal, Police Station Sadar, Ludhiana, met the Investigating Officer and he was joined in the raiding party. On encircling the disclosed place, respondent No.1/accused-Hem Raj was found sitting on certain gunny bags, whereas respondent No.2/accused-Avtar Singh was keeping a watch around. On seeing the police party, respondent No.2/accused-Avtar Singh managed to escape through the fields, however, his name was disclosed to the Investigating Officer by respondent No.1/accused-Hem Raj. Investigating Officer informed respondent No.1/accused-Hem Raj that ten (10) gunny bags on which he was sitting, were suspected to contain some contraband and he was given offer to get the search effected either before a Magistrate or a Gazetted Officer. Respondent No.1/accused-Hem Raj opted the search to be conducted in the presence of some Gazetted Officer. After recording statement (Ex.PJ) of respondent No.1/accused-Hem Raj, DSP Harmohan Singh (PW-3) was called by the Investigating Officer at the spot. Thereafter, on reaching DSP Harmohan Singh at the spot, respondent No.1/accused-Hem Raj was given an offer of search to be conducted before a Magistrate, however, respondent/accused-Hem Raj reposed confidence in DSP Harmohan Singh. After recording statement (Ex.PC) of respondent

No.1/accused-Hem Raj, search of ten (10) gunny bags in possession of respondent No.1/accused-Hem Raj was conducted and those bags were found containing poppy husk. From each bag, two samples of 250 grams each were taken and remaining contents in each bag were weighed and found to be 30 kilograms. Samples as well as residues were separately sealed with the seal of Investigating Officer bearing inscriptions "MS" and with the seal of DSP bearing inscriptions "HS". Thereafter, samples as well as residues alongwith the chits containing specimen impressions of seals including chit (Ex.P-1) were taken into police possession, vide memo (Ex.PD). Seal of Investigating Officer bearing inscriptions "MS" after its use was entrusted to ASI Kulwant Singh (PW-9), whereas DSP retained his seal bearing inscription "HS" with him. Nothing was recovered from the personal search of respondent No.1/accused-Hem Raj. Respondent No.1/accused could not produce any permit or licence with respect to possession of said contraband. On these allegations, ruqqa (Ex.PM) was sent to Police Station Sadar, Ludhiana, for registration of case and on the basis of which, FIR (Ex.PM/1) was recorded. Rough site-plan (Ex.PN) of the place of recovery was prepared. On reaching the Police Station, respondent No.1/accused-Hem Raj alongwith case property was produced before Inspector/SHO Mukhwinder Singh (PW-1), who checked the case property, verified the facts and interrogated respondent No.1/accused and put his seal bearing inscription "MS" on the parcels and the chits. Thereafter, on his directions, parcels and the chits were deposited with MHC Rajinder Singh (PW-2) on the same day with the seals intact. Thereafter, on the following day, in terms of application (Ex.PU), respondent No.1/accused as well as case property

were produced before Duty Magistrate, Ludhiana, on which learned Magistrate passed order (Ex.PU/1) and thereafter Investigating Officer again deposited the case property with MHC Rajinder Kumar on the same day with the seals intact.

Further, it is the case prosecution that on 26.08.2000, respondent No.2/accused-Avtar Singh had surrendered in the Court of learned Judicial Magistrate Ist Class, Ludhiana. Investigating Officer formally arrested respondent No.2/accused on 30.08.2000 and after obtaining his production warrants, police remand was obtained. On 01.09.2000, respondent No.2/accused suffered disclosure statement (Ex.PO), which was signed by him and attested by ASI Kulwant Singh (PW-9) and independent witness Achhru Singh and in pursuant to his disclosure statement, he got recovered one gunny bag containing poppy husk. DSP Harmohan Singh (PW-3) was also called. Offer was given to respondent No.2/accused for search to be conducted before Magistrate, however, he reposed confidence in the DSP. After recording statement (Ex.PE) of respondent No.2/accused, search of gunny bag was conducted and it was found containing poppy husk. Out of said contraband, two samples of 250 grams each were taken and the remaining contraband was weighed to be 20 kilograms. Samples as well as residues were separately sealed with the seal of Investigating Officer bearing inscriptions "MS" and with the seal of DSP bearing inscriptions "HS". Thereafter, sample parcels as well as residues alongwith specimen impressions of seals including chit (Ex.P1/A) were taken into police possession, vide memo (Ex.PF).

Investigating Officer handed over his seal bearing inscriptions "MS" after

its use to ASI Kulwant Singh (PW-9), whereas DSP retained his seal bearing inscription “HS” with him. Nothing was recovered from the personal search of respondent No.2/ accused-Avtar Singh. Rough site-plan (Ex.PQ) of the place of recovery was prepared. On reaching the Police Station, respondent No.2/accused-Avtar Singh alongwith the case property were produced before Inspector/SHO Mukhwinder Singh (PW-1), who checked the case property, verified the facts and interrogated respondent No.2/accused and put his seal bearing inscription “MS” on the parcels and the chit. Thereafter, in terms of application (Ex.PR), respondent No.2/ accused as well as case property were produced before learned Judicial Magistrate Ist Class, Ludhiana, who passed order (Ex.PR/1) and thereafter Investigating Officer deposited the case property and the chits with MHC Rajinder Singh (PW-2) on the same day with the seals intact. Vide Chemical Examiner Reports (Ex.PS and Ex.PT), ten (10) samples of the poppy husk earlier recovered and one sample of poppy husk subsequently recovered from accused persons, on examination were found to be of “Chura Poppy Heads”. After completion of investigation, final report as envisaged under Section 173 Cr.P.C. (*Challan*) was presented against respondents/ accused in the Court.

3. Finding a *prima facie* case, respondents/accused were charge-sheeted to face trial for the commission of offence punishable under Section 15 of NDPS Act, to which they pleaded not guilty and claimed trial.

4. To substantiate its case, prosecution has examined PW-1 Inspector/SHO Mukhwinder Singh, who has deposed regarding production of case property before him by the Investigating Officer on 19.08.2000 and

01.09.2000. PW-2 Head Constable Rajinder Singh is a formal witness. PW-3 DSP Harmohan Singh deposed regarding his participation in the investigation on 19.08.2000 and 01.09.2000 and, thus, supported the prosecution version. PW-4 Constable Dimple and PW-5 Constable Gurbachan Singh are also formal witnesses. PW-6 ASI Manjit Singh (Investigating Officer) has reiterated the manner of investigations conducted by him pertaining to recovery of contraband from respondents on 19.08.2000 and 01.09.2000. PW-7 Constable Harminderpal Singh deposed regarding delivery of copy of FIR to Senior Superintendent of Police. PW-8 Head Constable Darshan Lal deposed regarding delivery of copy of FIR to the Area Magistrate. PW-9 ASI Kulwant Singh deposed regarding his participation in the investigation on 19.08.2000 and 01.09.2000 and further corroborated the testimony of Investigating Officer on material particulars. Chemical Examiner Reports (Ex.PS and Ex.PT) were tendered in evidence and after giving up prosecution witness Achhru Singh as having been won over by accused, prosecution evidence was closed by learned Additional Public Prosecutor for the State.

5. After closure of prosecution evidence, statements of respondents/accused as envisaged under Section 313 Cr.P.C. were recorded, wherein all the incriminating material/evidence were put to them, but they have denied all the allegations levelled against them and stated that nothing was recovered from them and they have been falsely implicated in the instant case.

6. In their defence evidence, respondents/accused have examined DW-1 Constable Balwinder Singh, who had brought record of FIR No.98

dated 03.03.1999 under Sections 399 and 402 IPC, registered at Police Station Sadar, Ludhiana, has proved copy (Ex.DE) of said FIR. Above said witness had also brought summoned record of FIR No.395 of 2000 under Section 302 IPC read with Section 34 IPC, registered at Police Station Sadar, Ludhiana. Further, DW-2 Darshan Singh Grewal, Ahlmad in the Court of Additional District and Sessions Judge, Ludhiana, who had brought file of Sessions Case No.30 dated 09.06.2001 titled 'State vs. Abdul Madaan' arising out of FIR No.395 of 2000 under Section 302 IPC read with Section 34 IPC, registered at Police Station Sadar, Ludhiana, stated that Achhru Singh son of Bachna Ram, resident of village Baddowal, Police Station Sadar, Ludhiana, has been cited as a prosecution witness in that case. Thereafter, evidence of respondents/accused was closed by order of the Court.

7. On appreciation of evidence, learned Judge, Special Court, Ludhiana, acquitted the respondents/accused of charge under Section 15 of NDPS Act, vide judgment of acquittal dated 23.11.2001.

8. We have heard learned counsel for the appellant-State as well as learned counsel for respondents No.1 and 2 and critically examined the evidence available on the record.

9. Learned counsel for appellant/State *inter alia* contended that since learned trial Court did not appreciate the prosecution version in right perspective and, thus, findings of learned trial Court are against law and based upon conjectures and surmises. On the basis of secret information received by PW-6 ASI Manjit Singh (Investigating Officer), raid was conducted and respondent No.1/accused-Hem Raj was apprehended by the

police having conscious possession of ten (10) gunny bags of poppy husk, whereas respondent No.2/accused-Avtar Singh fled away from the spot. Offer to get the search effected in the presence of Gazetted Officer or Magistrate was given to respondent No.1/accused and accordingly Gazetted Officer (PW-3 DSP Harmohan Singh) was called at the spot. Recovery of contraband was effected while complying with mandatory provisions of NDPS Act. Learned trial Court has further failed to appreciate the fact that samples were drawn in accordance with law with proper seal. Subsequently, respondent No.2/accused-Avtar Singh on his surrender in the Court was formally arrested on 30.08.2000 and in pursuant to his disclosure statement, he got recovered one gunny bag containing poppy husk weighing 20½ kilograms. Learned trial Court has placed reliance on the discrepancies in the testimonies of prosecution witnesses, which with the passage of time are bound to occur as human memory is fallible. Learned counsel for appellant-State further argued that since respondents/accused had kept in their conscious possession huge quantity of poppy husk and that too without any permit or licence, prosecution has been able to prove its case beyond shadow of reasonable doubt and, thus, instant appeal may be allowed and judgment of acquittal be set aside and respondents/accused are liable to be convicted and sentenced for the commission of offence punishable under Section 15 of NDPS Act.

10. On the other hand, learned counsel for respondents No.1 and 2 have vehemently argued that the conscious possession of respondents No.1 and 2/accused qua the alleged poppy husk bags is not established. Though PW-3 DSP Harmohan Singh was called at the spot by PW-6 ASI Manjit

Singh (Investigating Officer), but presence of above said witness (PW-3) at the place of recovery appears to be doubtful as his statement under Section 161 Cr.P.C. was not recorded and in the absence of said statement, considerable prejudice has been caused to the respondents/ accused. Moreover, prosecution witness Achhru Singh stated to be stock witness of police, who was allegedly joined by the Investigating Officer at the time of recovery, was not even examined by the prosecution and as such adverse inference can be drawn in this regard towards the case of prosecution. As seal bearing inscriptions "MS" pertaining to Investigating Officer after its use was entrusted to PW-9 ASI Kulwant Singh, an official subordinate to PW-6 ASI Manjit Singh (Investigating Officer) and the fact that seal bearing inscriptions "HS" of PW-3 DSP Harmohan Singh after its use was retained by him, thus, as the seals remained with the police officials till the sample parcels were despatched to the office of Chemical Examiner, in this view of the matter tampering with the sample parcels could not be ruled out. Even otherwise, seals were required to be handed over to independent witness Achhru Singh. Though PW-6 ASI Manjit Singh (Investigating Officer) has categorically stated that in compliance of provisions of Section 55 of NDPS Act, Station House Officer (PW-1 Inspector Mukhwinder Singh) had affixed his own seal bearing inscriptions 'MS' on the sample parcels as well as residues, but no such averment has been made by said witness (PW-1) when he stepped into the witness-box and even otherwise Chemical Examination Reports speak about two seals bearing inscriptions 'MS' and 'HS' and there is no reference of third seal bearing inscription 'MS' and as such interpolation in the sample parcels could not be ruled out. There

were material contradictions/ discrepancies in the testimonies of prosecution witnesses. Moreso, respondent No.2-Avtar Singh was arrayed as accused only on the basis of disclosure statement of respondent No.1, therefore, identity of said respondent/accused could not be proved. Learned counsel for respondents submitted that since prosecution has utterly failed to prove its case beyond the shadow of reasonable doubt, respondents have been rightly acquitted of charge under Section 15 of NDPS Act, by the learned trial Court and, thus, instant appeal being devoid of merits be dismissed.

11. While having due regard to the contentions of learned counsel for the parties, it is observed that vide impugned judgment dated 23.11.2001, respondents-accused have been acquitted of charge levelled against them as prosecution has miserably failed to substantiate its allegations against the accused persons. It is obvious that appeal against acquittal is considered on slightly different parameters compared to an ordinary appeal. That apart, the scope of the Appellate Court, while dealing with the appeals against acquittal, is settled. Though there is no embargo on the Appellate Court to reverse the decision based on the evidence upon which the acquittal is based, generally the order of acquittal based on presumption of innocence of the accused, is further strengthened by acquittal. The Appellate Court, while considering an appeal against acquittal, has to consider whether there are compelling and substantial reasons for reversing the order of acquittal. The Appellate Court can reverse the order of acquittal if the view taken by the learned trial Court is palpably erroneous and it could not have been taken by the Court of competent jurisdiction and is taken against well settled canons of criminal

jurisprudence. Merely because the Appellate Court, on re-appreciation and re-evaluation of the evidence, is inclined to take a different view, interference with the judgment of acquittal is not justified. If the view taken by the learned trial Court is a possible view, even if two views are equally balanced, it need not result in interference by the Appellate Court in the judgment of the learned trial Court of acquittal. The Appellate Court will have to see whether there is perversity in the decision, if the conclusions are contrary to the evidence on record, or the Court's entire approach is patently illegal or it is based on erroneous understanding. If the order of acquittal is to be reversed, the Appellate Court must examine and discuss the grounds given by the learned trial Court to acquit the accused and must give cogent reasons to overturn the findings. Thus, while considering the order against acquittal, generally the Appellate Court should not interfere where view taken by the learned trial Court is not unreasonable or perverse. To this effect reliance can be placed on rulings **Lalit Kumar Sharma and others** vs. **Superintendent and Remembrancer**, AIR 1989 SC 2134 and **Munishamappa and others** vs. **State of Karnataka**, 2019 (3) KantLJ 466 (Supreme Court).

12. Keeping in view above said settled proposition of law and while applying the said ratio to the instant matter, it can be conveniently held that prosecution has utterly failed to discharge its onus beyond the shadow of reasonable doubt against respondents-accused. With this legal position in mind, we have considered the view taken by the learned trial Court is a possible view and it does not require any interference by this Court and, thus, learned trial Court has rightly acquitted respondents-

accused of the charges levelled against them and to arrive at said conclusion, reasons are enumerated as under:-

(i) Prosecution has failed to prove the alleged recovery of the poppy husk from the conscious possession of the respondents/ accused. It is well settled, as held by the Hon'ble Supreme Court in Syed Mohd. Syed Umer Syed and others vs. State of Gujarat JT 1995(3) SC 489, that unlawful possession of the contraband is the sine qua non for conviction under the NDPS Act and that fact has to be established by the prosecution beyond reasonable doubt. Though possession has not been defined in the NDPS Act but has been judicially construed to be conscious and intelligent possession and not merely the physical presence of the accused in proximity or even in close proximity of the object. There are two essential elements of possession; firstly the corpus- the element of physical control and secondly, the animus or intent with which such control is exercised. It is conscious and intelligent possession of any contraband which attracts penal provisions of the NDPS Act and it is for the prosecution to establish that the accused was found in conscious and intelligent possession of the contraband. To that effect reliance can also be placed on rulings Baldev Singh vs. State of Punjab, 2005(1) RCR (Criminal) 823; Sukhdev Singh @ Sukha vs. State of Punjab, 2006(1) RCR (Criminal) 4, and Buta Singh vs. State of Punjab 2006(1) RCR (Criminal) 835.

Further, in case Avtar Singh vs. State of Punjab, 2002 (4) Recent Criminal Reports (Criminal) 180, Hon'ble Supreme Court observed as under :-

“The word 'possession' no doubt has different shades of meaning and it is quite elastic in its connotation. Possession and ownership need not always go together by the minimum requisite element which has to be satisfied in custody or control over the goods. Can it be said, on the basis of the evidence available on

record, that the three appellants—one of whom was driving the vehicle and other two sitting on the bags, were having such custody or control ? It is difficult to reach such conclusion beyond reasonable doubt. It transpires from evidence that the appellants were not the only occupants of the vehicle. One of the persons who was sitting in the cabin and another person sitting at the back of the truck made themselves scarce after seeing the police and the prosecution could not establish their identity. It is quite probable that one of them could be custodian of goods whether or not he as the proprietor. The persons who were merely sitting on the bags, in the absence of proof of any thing more, cannot be presumed to be in possession of the goods. For instance, if they are labourers engaged merely for loading and unloading purposes and there is nothing to show that the goods were at least in their temporary custody, conviction under Section 15 may not be warranted. At best, they may be abettors, but there is no such charge here. True, their silence and failure to explain circumstances in which they were travelling in the vehicle at the odd hours, is one strong circumstance that can be put against them.”

In case State of Punjab vs. Balkar Singh and another, 2004 SCC (Criminal) 838, accused were alleged to have been found present at the place where about hundred bags of poppy husk were recovered, sitting on such bags and failing to give any satisfactory explanation for being present at that place. The question arose whether it was proof enough of “conscious possession” of the prohibited substance. It was held by the Hon'ble Supreme Court that merely by being found to be present at the place where the poppy husk bags were found and the failure to give any satisfactory explanation for being so present did not prove that the accused persons were in possession of the said poppy husk bags. In all fairness, the police should have conducted further investigation as to the transportation of the poppy husk bags to the place of incident, ownership of poppy husk etc., to prove that the accused were really in possession of said articles.

Keeping in view *ratio decidendi* of above said rulings and in a given set of facts and from the testimonies of PW-3

DSP Harmohan Singh, PW-6 ASI Manjit Singh (Investigating Officer) and PW-9 ASI Kulwant Singh, it is quite evident that respondent/accused Hem Raj was found sitting on certain gunny bags in the ditches near the railway line in the area of village Alamgir. Allegedly, co-accused Avtar Singh was wandering around but on seeing the police party, he managed to escape. This is not suffice to prove conscious possession. Merely by sitting on the bags, in absence of proof of anything more, does not infer that they were in conscious possession of those bags. The Investigating Agency had not tried to ascertain whether the bags containing poppy husk were belonging to accused or not? In a way, it had not adduced any evidence to show the ownership of poppy husk. There was no investigation as to how those bags of poppy husk were transported to the place of recovery. Moreover, no efforts had been made to trace the ownership of land where ten bags of poppy husk were kept nor to trace the origin of contraband. Apart from above, it is quite evident that above said place of recovery was open and accessible to anyone. It is pertinent to mention here that later on one bag weighing 20½ kilograms of poppy husk was allegedly recovered at the instance of respondent/ accused-Avtar Singh from the room meant for storing fodder. Above said witnesses have also categorically testified that there was no residential house of respondent/accused-Avtar Singh adjoining to said room meant for storing fodder and even otherwise there was no door affixed to the said room and as such it can be easily concluded that above said place was open and accessible to all. For attracting the provisions of Section 54 of the NDPS Act, it is essential for the prosecution to establish the element of possession of contraband by the accused for the burden to shift to the accused to prove his innocence. This aspect of possession of contraband has to be proved by the prosecution beyond reasonable doubt. Prosecution has failed to prove beyond

shadow of doubt that the alleged contraband was recovered from the conscious and intelligent possession of the accused. Consequently, the provisions of Section 54 of NDPS Act can not be invoked to raise a presumption of guilt against the accused.

(ii) Alleged independent witness Achhru Singh was not examined and he was given up by Prosecuting Agency on the pretext having been won over by accused. Non-examination of independent witness Achhru Singh creates dent in the veracity of prosecution version. Even otherwise, joining of independent witness Achhru Singh in the investigation appears to be doubtful as in case he was present on the spot and joined in the investigation, then in the ordinary course it was incumbent upon the Investigating Officer to entrust the seal after its use to him so as to avoid any influence to make any interpolation in sample parcels and residues.

It is own case of prosecution that Achhru Singh, an independent witness was joined in the investigation, but to its utter dismay, the seal after use was made over to PW-9 ASI Kulwant Singh. The prosecution has not apportioned any reason for preferentially handing over the seal to the official witness in the presence of an independent witness. The seal could be taken from PW-9 ASI Kulwant Singh at any moment for the purpose of tampering with the contents of the sample parcels. Achhru Singh, has not been examined by the prosecution. It has been authoritatively held that when the prosecution apprehends that the independent witness will not support its version, if produced at the trial, still it is necessary for the prosecution to examine him to reveal the truth. For his non-examination, an adverse inference has to be drawn under Section 114(g) of the Indian Evidence Act, that had he been examined, he would have nullified the prosecution story by shedding light on the reality.

(iii) Apart from above, independent witness Achhru Singh is proved to be convenient and stock witness of the police. DW-1 Constable Balwinder Singh deposed that in case FIR No.98 dated 03.03.1999 under Sections 399 and 402 IPC, registered at Police Station Sadar, Ludhiana (Ex.DE), Achhru Singh son of Bachan Singh was cited as a prosecution witness. Further, from the testimony of DW-2 Darshan Singh Grewal, Ahlmad, it is quite evident that in Sessions Case No.30 of 09.06.2001 titled 'State vs. Abdul Madaan', arising out of FIR No.395 of 2000 under Section 302 IPC read with Section 34 IPC, registered at Police Station Sadar, Ludhiana, Achhru Singh has been cited as a prosecution witness. In case any stock witness has been shown as independent witness at the time of investigation and that too at the crucial time of alleged recovery of contraband, in this scenario, prosecution version comes under the clouds of doubt as very presence of stock witness at the spot was doubtful especially when prosecution has chosen not to examine the said witness. To this effect, reliance can also be placed on ruling **Rajesh Jagdamba Avasthi vs. State of Goa, 2005(1) R.C.R. (Criminal) 406 (Supreme Court).**

(iv) Besides above convenience of Investigating Officer to join independent witness Achhru Singh can be seen from another angle of vision. Independent witness Achhru Singh was not only joined at the time of alleged recovery of contraband from respondent No.1/accused-Hem Raj, but also at the time of alleged recovery of contraband from respondent No.2/accused-Avtar Singh and that too which took place after interval of eleven (11) days of first incident. Admittedly, independent witness Achhru Singh was running a Tea Shop in the premises of Police Station Sadar, Ludhiana and the instant case pertains to same Police Station then it was quite convenient for the Investigating Officer to associate him in the so called investigation when a person is totally dependent upon any

establishment for his livelihood.

(v) Sealing process of sample parcels and residues thereof appears to be doubtful as it is categorical stand of Investigating Officer that as on both occasions when the sample parcels and residues were produced before Inspector/SHO Mukhwinder Singh (PW-1), latter had put/affixed his own seal bearing inscription 'MS' on said parcels, whereas Station House Officer (PW-1) has not uttered even a single word in that regard when stepped into the witness-box. At this juncture, it is relevant to point out here that despite availability of alleged independent witness Achhru Singh, seal bearing inscriptions 'MS' after its use by Investigating Officer was handed over ASI Kulwant Singh (PW-9). A bare perusal of Chemical Examiner Reports (Ex.PS and Ex.PT) reveals that third seal of 'MS' of Inspector Mukhwinder Singh (PW-1) was not there on the sample parcels when those were despatched to and received by the Chemical Examiner. In view of above contradictions in the testimonies of PW-6 ASI Manjit Singh (Investigating Officer) and Inspector Mukhwinder Singh (PW-1), there is a clear dent in the link evidence and further omission on the part of Inspector/SHO (PW-1) to affix his own seal when the case property was produced before him by the Investigating Officer violates the mandatory provisions of Section 55 of NDPS Act. Reliance in this regard was placed by learned trial Court on the law laid down by this Court in **Chhabil Dass vs. State of Haryana, 1998(1) Recent Criminal Reports 133** and **Bhura Singh vs. State of Punjab, 1996(3) Recent Criminal Reports 336**.

(vi) It is well settled that till the case property has not been dispatched to the office of Chemical Examiner/Forensic Science Laboratory, the seal should not be available to the Investigating Agency and in absence of such safeguard, the possibility of seal being tampered with, substance being changed and the containers being resealed cannot be ruled out.

This is a safeguard, which is to be maintained for sanctity of the search. However, in the instant case, though as per the case of prosecution, an independent witness Achhru Singh had been joined during the investigation, but despite that seal was handed over to PW-9 ASI Kulwant Singh, an official and subordinate to Investigating Officer. Thus, where the seals remained with the police officials after their use, it creates doubt in the mind of the Court of tampering with the samples. To this effect, reliance can also be placed on rulings **Gurmukh Singh Vs. State of Punjab, 2008(2) RCR (Criminal) 442; Hoshiar Singh Vs. State of Haryana, 2008(3) RCR (Criminal) 683 and State of Punjab Vs. Nachhhattar Singh alias Bania, 2007(3) RCR (Criminal) 1040.**

(vii) Presence of PW-3 DSP Harmohan Singh at the time of recoveries and his joining in the investigation appears to be doubtful. It is important to note that according to the prosecution, he (PW-3) was summoned to the spot by flashing a wireless message to witness the search of respondents/accused and the gunny bags being kept by them and that the search of the gunny bags was conducted in the presence of this witness and poppy husk was recovered therefrom. In other words, according to the prosecution, this witness who is a Police Officer, was an eye-witness to the recoveries. Statement of above said witness under Section 161 Cr.P.C. could not be located either on the judicial file or the police file. It leads to clear inference that although PW-3 DSP Harmohan Singh was such a material witness of the prosecution, but his statement under Section 161 Cr.P.C. was not recorded. In case **Padam Singh vs. State of Haryana, 1997(4) Recent Criminal Reports 172**, it has been held by this Court as under:-

“Although it is not mandatory for an Investigating Officer to record the statement of a witness under Section 161 Cr.P.C., yet omission on the part of the Investigating Officer to do so in respect of a material prosecution

witness can give rise to an inference that such a witness had not seen the occurrence and has been introduced to support the story of the prosecution at a later stage. Such an omission would further result that the earlier statement of a witness not being made available to the accused and the Court not being in a position to test the veracity of that witness. The failure to record the statement of such an important eye-witness is a serious irregularity which considerably prejudices the accused and may in itself make the testimony of such a witness tainted.”

At this juncture, it is relevant to point out here that once prosecution has failed to examine PW-Achhru Singh, independent witness, and the testimony of DSP Harmohan Singh (PW-3) appears to be tainted one, in this scenario, testimonies of PW-6 ASI Manjit Singh (Investigating Officer) and ASI Kulwant Singh (PW-9), do not come to the rescue of prosecution. It is very well known that “the fouler the crime, the greater the evidence”. The word 'greater' does not mean in 'quantity' but it signifies in 'quality'. In the case in hand, we are not ready to accept the testimonies of PW-6 ASI Manjit Singh (Investigating Officer) and PW-9 ASI Kulwant Singh in the face of the fact that PW-Achhru Singh was not examined by the prosecution and the analysis of the credibility of the testimony of DSP Harmohan Singh (PW-3). Therefore, the case of the prosecution becomes suspect. Learned trial Court has rightly observed that in a given scenario, if the testimony of DSP Harmohan Singh (PW-3) is ignored, the whole prosecution story stands demolished.

(viii) There are material contradictions/discrepancies in the testimonies of official witnesses which make the prosecution version highly doubtful and the said contradictions/discrepancies are enumerated as under:-

(a) PW-3 DSP Harmohan Singh stated that distance between his office and the place of recovery is about 12 kilometers, whereas PW-6 ASI Manjit Singh (Investigating Officer) stated that said distance is 16

kilometers. However, PW-9 ASI Kulwant Singh stated said distance is 17/18 kilometers.

(b) PW-3 DSP Harmohan Singh deposed that message to reach the spot was received by him through a wireless set through the Control Room at about 6 PM, whereas PW-6 ASI Manjit Singh (Investigating Officer) testified that wireless message was sent to Police Station Sadar, Ludhiana, which in turn informed PW-3 DSP Harmohan Singh. However, PW-9 ASI Kulwant Singh stated that wireless message was flashed from the spot to the office of DSP.

(c) Investigating Officer (PW-6) stated that on 19.08.2000 he proceeded to raid the disclosed place alongwith secret informer, whereas PW-9 ASI Kulwant Singh stated that secret informer did not accompany them to the place of recovery.

(d) Investigating Officer (PW-6) stated that distance between Police Station and village Dhandran is approximately 11 kilometers, whereas according to PW-9 ASI Kulwant Singh, said distance is 18/19 kilometers.

(e) Investigating Officer (PW-6) stated that prior to receiving secret information, he had checked 10-12 persons, whereas PW-9 ASI Kulwant Singh stated that not even a single person was checked prior to receipt of secret information.

(f) Investigating Officer (PW-6) stated that distance between villages Baddowal and Dhandran is 18-19 kilometers, however, through short cut said distance is 10 kilometers, whereas PW-9 ASI Kulwant Singh has stated that said distance is 7-8 kilometers.

(g) Investigating Officer (PW-6) stated that he had tried to join 2-4 persons before raiding the disclosed

place, whereas PW-9 ASI Kulwant Singh did not say so.

(h) Investigating Officer (PW-6) stated that half of the gunny bags were covered with grass, whereas PW-9 ASI Kulwant Singh stated that all the bags were covered with dried grass.

(i) Investigating Officer (PW-6) stated that accused was apprehended at 6:15 PM and wireless message was flashed for DSP to the Police Station at 6:45 PM i.e. from the place of recovery effected on 19.08.2000. PW-9 ASI Kulwant Singh stated that said message was sent to DSP from the place of receiving secret information and not from the place of recovery.

(j) Investigating Officer stated that when DSP reached at the spot, accused-Hem Raj was standing with the police party, whereas PW-9 ASI Kulwant Singh stated that accused was still sitting on the gunny bags.

(k) Investigating Officer (PW-6) stated that DSP reached at the spot between 7:15 to 7:30 PM and remained there for 30 minutes i.e. upto 8 PM, whereas PW-9 ASI Kulwant Singh stated that DSP stayed at the spot till 11:15 PM.

(l) PW-9 ASI Kulwant Singh stated that weights and scale were brought by Constable Darshan Singh after arrival of DSP, whereas Investigating Officer (PW-6) stated that said Constable was sent for above said purpose before arrival of DSP. However, PW-3 DSP Harmohan Singh stated that weights and scale were already with the Investigating Officer (PW-6) when he reached the spot.

(m) Investigating Officer (PW-6) stated that Constable Darshan Singh weighed the contraband under his supervision. On the other hand, PW-9 ASI Kulwant Singh stated that weighing work was carried out under

his supervision by the members of police party.

(n) Investigating Officer (PW-6) stated weighing process was completed within 15-20 minutes, whereas PW-9 ASI Kulwant Singh stated that said process was completed by 11 PM.

(o) Investigating Officer (PW-6) stated that cloth for preparing parcels was stitched at the spot, whereas PW-9 ASI Kulwant Singh stated that stitched cloth bags were arranged by Constable Darshan Singh.

(p) Investigating Officer (PW-6) stated that writing work was not completed in the presence of DSP and it took an hour to complete the writing work, whereas PW-9 ASI Kulwant Singh stated that writing work was carried out in its entirety in the presence of DSP and it took five hours and even PW-3 DSP Harmohan Singh stated that entire writing work was carried out in his presence.

(q) Investigating Officer (PW-6) stated that police party stayed at the spot for 30 minutes after departure of DSP i.e. upto 8:30 PM, whereas PW-9 ASI Kulwant Singh stated that DSP stayed at the spot till 11:15 PM.

(r) PW-3 DSP Harmohan Singh stated that ruqqa was sent from the place of recovery at about 8:30/9:00 PM, whereas PW-6 ASI Manjit Singh (Investigating Officer) stated that ruqqa was dispatched from the place where secret information was received.

Thus, it was rightly held by learned trial Court that number of said contradictions/discrepancies are sufficient to hold that testimonies of official prosecution witnesses which are not corroborated by any independent witness, cannot be said to be unimpeachable and do not provide impregnable evidence.

(ix) It is, no doubt, true that in the absence of corroboration through an independent source, the evidence of the official witnesses, cannot be disbelieved, and distrusted, blind-foldedly, if the same is found to be creditworthy. However, when the evidence of the official witnesses, is found to be not cogent, convincing, reliable and trustworthy, then on account of non-corroboration thereof, through an independent source, certainly a doubt is cast on the prosecution story. In the instant case, the evidence of the prosecution witnesses does not inspire confidence in the mind of the Court. In this view of the matter, non-corroboration of the evidence of the official witnesses through an independent source, certainly makes the case of the prosecution doubtful. To this effect, reliance can be placed on rulings of this Court in **State of Punjab vs. Bhupinder Singh 2001(1) RCR(Criminal) 356**; **State of Punjab vs Ram Chand 2001(1) RCR (Criminal) 817** and **Partap Singh vs. State of Haryana 2009(2) RCR(Criminal) 355**.

(x) Respondent No.2/accused-Avtar Singh was not apprehended at the spot and none of the prosecution witnesses deposed that they knew him earlier and his name was disclosed by respondent No.1/accused-Hem Raj. No Test Identification Parade of accused-Avtar Singh was got conducted. He surrendered in the Court after one week of the registration of instant FIR, thus, it was rightly held by learned trial Court that it is highly improbable that accused Avtar Singh would leave evidence of commission of crime by concealing the poppy husk in the room meant for storing wheat-chaff. Thus, story of prosecution appears to be concocted one to rope in accused-Avtar Singh in the instant case.

13. As a sequel to above said findings, we are of the opinion that the learned trial Court while appreciating the entire evidence in its right

perspective, has rightly held that prosecution has failed to prove its case against respondents/accused. Thus, no case for any interference in the impugned judgment is made out. The view of the learned trial Court is hereby affirmed and is maintained.

14. In view of the above, the present appeal, being bereft of merit, is dismissed.

(Anupinder Singh Grewal)
Judge

(Lalit Batra)
Judge

12.09.2023

jitender

Whether speaking/ reasoned	:	Yes/ No
Whether Reportable	:	Yes/ No