
Mahesh Vs State of Haryana

Criminal Appeal No. 64-SB of 1999

Court: High Court Of Punjab And Haryana At Chandigarh

Date of Decision: April 22, 2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) â€” Section 313#Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) â€” Section 15, 51, 52, 55, 57

Hon'ble Judges: Sham Sunder, J

Bench: Single Bench

Advocate: Vinod Gupta, for the Appellant; A.K. Jindal, A.A.G., Haryana, for the Respondent

Final Decision: Allowed

Judgement

Sham Sunder, J.

1. This appeal is directed against the judgment of conviction and the order of sentence dated 18.12.1998, rendered by the Court of Additional

Sessions Judge, Hisar, vide which it convicted the accused/appellant Mukesh and sentenced him to undergo rigorous imprisonment for a period of

ten years, and to pay a fine of Rs. 1,00,000/-, and in default of payment of the same, to undergo rigorous imprisonment for another period of two

years for the offence punishable u/s 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter called as "the Act" only) for

having been found in possession of 20 kilograms of poppy husk, without any permit or licence.

2. The facts, in brief, are that on 26-03-1995, Inspector Murari Lal, (PW-9) while being posted as SHO of Police Station, Fatehabad received a

wireless message, from police control room Hisar, for holding a picket on Bhuna Fatehabad Road. In pursuance of this message, he along with

Head Constable, Dharampal, PW-8, Constable Rakesh Kumar, PW-5 and other police officials held the picket, on Bhuna Hisar Road. At about

4.15 p.m., Mukesh- accused, was seen coming on a scooter, without having number plate, from the side of Bhuna, carrying a bag tied on the

pillion. He was apprehended. On search of the bag, in accordance with the provisions of law, 20 kilograms of poppy husk, was recovered. A

sample was taken out, and the remaining poppy husk, was put into the same bag. The sample and the bag were converted into parcels, sealed, and

thereafter taken into possession vide memo Ex.PE, attested by the witnesses. Ruqa Ex.PG was sent to the Police Station, on the basis whereof,

FIR Ex.PH, was recorded. Site plan exhibit PJ of the place of recovery was prepared, with correct marginal notes. The accused was arrested.

The statements of the witnesses were recorded. After the completion of investigation, the accused was challaned.

3. On appearance, in the Court, the copies of documents, relied upon by the prosecution, were supplied to the accused. Charge u/s 15 of the Act,

was framed against the accused, to which he pleaded not guilty, and claimed judicial trial.

4. The prosecution, in support of its case, examined Nasib Singh, PW-1, Jaswant Kaur, PW-2, Ram Chander, ASI, PW-3, Mange Ram, D.S.P.,

PW-4, Rakesh Kumar, Constable, PW-5, Mam Chand, Inspector, PW-6, Mukesh Chand, Constable, PW-7, Dharampal, Head Constable,

PW-8 and Murari Lal, Inspector, PW-9. Thereafter, the Additional Public Prosecutor for the State, closed the prosecution evidence.

5. The statement of the accused u/s 313 Cr.P.C., was recorded, and he was put all the incriminating circumstances, appearing against him, in the

prosecution evidence. He pleaded false implication. It was stated by him that Niranjan Singh, Constable had raised a loan of Rs. 7500/-, from him,

and when he demanded the same, from him, he refused to pay the amount, and threatened, to involve him in a false case. It was further stated by

him, that some other accused, was arrested from the Dhani of Harnam Singh carrying 40 kilograms of Poppy Husk, out of which, 20 kilograms

poppy husk was planted against that accused and the remaining 20 kilograms was planted against him. The accused examined Virender Singh,

Naib Moharrir, DW 1, and Constable Indraj Singh, DW-2, in his defence.

6. After hearing the Additional Public Prosecutor for the State, the Counsel for the accused, and, on going through the evidence, on record, the

trial Court, convicted and sentenced the accused, as stated hereinbefore.

7. Feeling aggrieved, against the correctness and legality of the judgment of conviction, and the order of sentence, the instant appeal, was filed by

the accused/appellant.

8. I have heard the learned Counsel for the parties, and have gone through the evidence and record of the case, carefully.

9. The Counsel for the appellant, at the very outset, submitted that no independent witness was joined by the Investigating Officer, despite

availability, at the time of effecting the alleged recovery, from the accused. He further contended that, even no effort was made, by the Investigating

Officer to join an independent witness, as a result whereof, the case of the prosecution became doubtful. The submission of the Counsel for the

appellant, in this regard, appears to be correct. Dharampal, Head Constable, PW-8, during the course of cross-examination, stated that the place

of the recovery was a busy public place. He further stated that the residence of DSP and SDM, Fatehabad, is situated at about 250 paces, from

the place of recovery. Murari Lal, Inspector, PW-9, during the course of cross-examination, stated that near the place of recovery, there are

shops and he saw machine of Nathu. He further stated that no shop opened upto 8.00 a.m. He further stated that he did not know, whether any

Tea-stall was open or not. He further stated that no person came to the spot, where they were doing the writing work. He further stated that spring

scale was brought by Constable Joginder Singh, from the nearby locality, and saw Mill. He further stated that he instructed Joginder Singh,

Constable, to bring an independent witness, but, he on return, told him that none was ready to join the police party. The names of the persons,

who refused to join the police party, were not recorded, either in the Ruqa, or in any other document, prepared at the time of the alleged recovery,

from the accused. Such a fact was also not recorded, in the case diary. Even, no action was initiated, against any of the persons, who refused to

join the police party, at the time of effecting the alleged recovery. It means that no genuine effort was made by the Investigating Officer, to join an

independent witness, at the time of effecting the alleged recovery. Had a genuine effort been made, by the Investigating Officer, to join an

independent witness, and no independent witness had come forward to join the police party, the matter would have been different. Since minimum

stringent punishment is provided, for the offences punishable under the Act, and according to the provisions of Section 51 of the Act, the

provisions of the Code of Criminal Procedure, relating to search, seizure and arrest shall apply to the extent the same are not inconsistent with the

provisions of the Act, it was imperative, on the part of the Investigating Officer, to join an independent witness, at the time of the alleged search

and seizure or at least to make a genuine, sincere and real effort to join such a witness. The search and seizure, before an independent witness,

would have imparted much more authenticity, and creditworthiness, to the proceedings, so conducted. It would have also verily strengthen the

prosecution case. The said safeguard was also intended to avoid criticism of arbitrary and high-handed action, against the authorized Officer. In

other words, the Legislature, in its wisdom, considered it necessary to provide such a statutory safeguard, to lend credibility to the procedure,

relating to search and seizure, keeping in view the severe punishment, prescribed under the Act. That being so, it was imperative for the authorized

Officer, to follow the reasonable, fair and just procedure, as envisaged by the Statute and failure to do so, must be viewed with suspicion. The

legitimacy of judicial procedure, may come under cloud, if the Court is seen to condone acts of violation of statutory safeguards, committed by the

authorized officer, during search and seizure operation, and may also undermine respect of law. That cannot be permitted. In the instant case, the

alleged recovery being minor, now falling within the ambit of non-commercial quantity, and chances of plantation of the same, against the accused,

could not be ruled out, it became the bounden duty of the Investigating Officer, to observe all the safeguards, provided under the Act, at the time

of search and seizure. 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. The evidence of the official witnesses, does not inspire confidence, in the mind of the

Court. In this view of the matter, non-corroboration of the evidence of official witnesses, through an independent source, certainly makes the case

of the prosecution suspect. In *State of Punjab v. Bhupinder Singh* 2001 (01) RCR (Cr.) 356, a Division Bench of this Court, held the case of the

prosecution, to be doubtful, on account of non-joining of an independent witness, though the recovery was effected from a busy locality. In *State*

of Punjab v. Ram Chand 2001 (1) RCR (Cr.) 817, a Division Bench of this Court, held that it was imperative to join an independent witness, to

vouchsafe the fair investigation. On account of non-joining of an independent witness, it was held that the accused was entitled to be given the

benefit of doubt. The principle of law, laid down, in the aforesaid authorities, is fully applicable, to the facts of the instant case. On account of non-

joining of an independent witness, at the time of the alleged search and seizure, the case of the prosecution, became highly doubtful. The trial Court

failed to take into consideration, this aspect of the matter, as a result whereof, miscarriage of justice occasioned.

10. It was next contended by the Counsel for the appellant, that the alleged recovery was effected on 26-03-1995, whereas, the sample was sent

to the Forensic Science Laboratory on 03-04-1995, i.e. after a delay of 9 days. He further contended that the seal, after use, was handed over by

the Investigating Officer to Dharampal, Head Constable. Dharampal, Head Constable, during the course of cross-examination stated that he

returned the seal to the Investigating Officer after 2/3 days. The Deputy Superintendent of Police retained the seal, after use, with him. The sample

in this case was sent after about 9 days. It means that the seal and the case property, including the sample remained in the custody of the police

officials, until the same (sample) was sent to the Forensic Science Laboratory. In these circumstances, tampering with the sample parcel and

changing the contents thereof, until it reached the Office of the Forensic Science Laboratory, could not be ruled out. It is, no doubt, true that, if the

other evidence, produced by the prosecution, to prove the completion of link evidence, is found to be cogent, convincing, reliable and trustworthy,

then mere delay in sending the sample to the Office of Chemical Examiner, pales into insignificance. If, on the other hand, the other evidence

produced, in this regard, is found to be un-reliable, then certainly the delay assumes importance. In the instant case, the other evidence, produced

by the prosecution, to prove the completion of link evidence, besides being deficient, is neither reliable, nor creditworthy. In these circumstances,

the un-explained delay, referred to above, in sending the sample to the laboratory, certainly proved fatal to the case of the prosecution. In State of

Rajasthan v. Gurmail Singh 2005 (2) RCR (Cr.) 58 S.C. the contraband was kept in the Malkhana. The Malkhana register was not produced to

prove that it was so kept, till the sample was handed over to the Constable, for deposit in the laboratory. The other evidence produced was also

found to be un-reliable. In these circumstances, it was held that the prosecution miserably failed to prove that the sample was not tampered with,

until it reached the office of the Chemical Examiner. In Gian Singh v. State of Punjab 2006 (2) RCR (Cr.) 611, there was a delay of 14 days, in

sending the sample to the office of the Chemical Examiner. Under these circumstances, it was held that the possibility of tampering with the sample,

could not be ruled out, and the link evidence was incomplete. Ultimately, the appellant was acquitted in that case. In Rajesh Jagdamba v. State of

Goa, 2005 (1) RCR (Cr.) 406 (S.C.) the packets of contraband and the seal, remained in the custody of the same person. In these circumstances,

it was held that the possibility of the seized substance, being tampered with, could not be ruled out. The principle of law, laid down, in the aforesaid

authorities, is fully applicable to the facts of the instant case. On account of the aforesaid reason, a doubt was cast on the case of the prosecution.

The trial Court failed to take into consideration this aspect of the matter, in its proper perspective, as a result whereof, miscarriage of justice

occasioned. On account of this infirmity, the case of the prosecution became doubtful.

11. It was next contended by the Counsel for the appellant, that the sample seal was never deposited with the Forensic Science Laboratory, as a

result, whereof, it could not be ascertained, as to whether, the seals which were found on the sample, were the same, as were affixed immediately

after the alleged seizure. Exhibit PA, is the affidavit of Naib Singh, Constable. This affidavit does not speak of deposit of the sample seal in the

Office of the Forensic Science Laboratory. In para 3 of this affidavit, it was testified that the sample, duly sealed, was deposited with the Forensic

Science Laboratory. In State of Rajasthan v. Gurmail Singh's case (supra), the sample impression of the seal was not sent to the Office of the

Chemical Examiner. It was, thus, held that there was no evidence to prove satisfactorily that the seals affixed on the sample bottles were the same,

which were immediately affixed after seizure of the contraband. Ultimately, the accused was acquitted by the Apex Court. In State of Rajasthan v.

Daulat Ram 1980 SCC (Cr.) 683, it was held that the prosecution is required to prove beyond reasonable doubt, all the links in the evidence,

starting from the seizure, until the deposit of the sample parcel, in the office of the Chemical Examiner. In that case, the parcel changed many

hands, before it reached the office of the Chemical Examiner, and the prosecution miserably failed to prove the link evidence. In these

circumstances, it was held by the Apex Court, in the aforesaid case, that the possibility of tampering with the parcel, until it reached the office of

the Chemical Examiner, could not be ruled out. The principle of law, laid down, in the aforesaid authorities, is fully applicable to the facts of this

case. In the instant case also, the possibility of tampering with the sample, could not be ruled out, on account of the aforesaid reason, the benefit of

doubt whereof, must go the appellant-accused. The trial Court, however, failed to take into consideration, this aspect of the matter, as a result

whereof, miscarriage of justice occasioned.

12. It was next contended by the Counsel for the appellant, that there was violation of the Provisions of Section 55 of the Act, as the case

property and the sample were not produced before the Magistrate. The submission of the Counsel for the appellant, in this regard, appears to be

correct. No doubt, the provisions of Section 55 of the Act are directory, in nature, yet that does not mean that the same should be deliberately and

intentionally breached. Had any explanation been furnished, by the Investigating Officer, as to what prevented him, from producing the case

property, before the Illaqa Magistrate, immediately after the search and seizure, the matter would have been considered, in the light thereof, but in

the absence of any explanation, having been furnished, by the Investigating Officer, in this regard, the Court cannot coin any of its own, to fit in with

the prosecution case. Since, there was deliberate and intentional breach of the provisions of Section 55 of the Act, by the Investigating Officer, the

same cannot be condoned. In *Gurbax Singh v. State of Haryana* 2001 (1) RCR (Crl.) 702 (S.C.), it was held that non-compliance of the

provisions of Sections 52, 55 and 57, which are, no doubt, directory and violation thereof, would not ipso-facto violate the trial or conviction.

However, the Investigating Officer cannot totally ignore these provisions, and, as such, failure will have bearing, on the appreciation of evidence,

regarding search and seizure of the accused. The principle of law, laid down, in the aforesaid authority, is fully applicable to the facts of the instant

case. As stated above, the Investigating Officer intentionally and deliberately breached the provisions of Section 55. He could not say that since the

provisions of Section 55 are directory, in nature, he was not bound to comply with the same. If such a stand of the Investigating Officer is taken, as

correct, then the provisions of the Act, which are directory, in nature, would be flouted with impunity, by him. Compliance of the said provisions, is

an indicator, towards the reasonable, fair and just procedure, adopted by the Investigating Officer, during the course of search and seizure. Non-

compliance of such a provision, deliberately and intentionally, must be viewed with suspicion. Legitimacy of the judicial procedure, may come

under cloud, if the Court seems to condone acts of violation of statutory safeguards, committed by an authorized officer, during search and seizure

operation. Such an attitude of investigating agency, cannot be permitted. Intentional and deliberate breach of the provisions of Section 55 certainly

caused prejudice to the accused, and cast a doubt on the prosecution story. The trial Court did not take into consideration, this aspect of the

matter, as a result whereof, miscarriage of justice occasioned.

13. Learned counsel for the appellant further submitted that the appellant/accused was falsely implicated, in the instant case. He further contended

that Niranjn Singh, Constable, had taken money, on loan, from the accused and when he asked him to return, he refused to pay, and, on the other

hand, threatened him that he would involve him, in some false case. He, however, contended that, accordingly, the accused was falsely implicated

in the instant case, at the instance of Niranjn Singh, Constable, who was posted as Naib Court, in the Court of SDM, Fatehabad, at the relevant

time. The submission of the Counsel for the appellant, in this regard, appears to be correct. It may be stated here, that in his statement u/s 313

Cr.P.C., the accused set up the aforesaid plea. It is a settled principle of law, that the accused, is not required to prove his defence version,

beyond a reasonable doubt. The preponderance of probability, can be said to be sufficient, to prove such a plea, by the accused. Dharampal,

Head Constable, PW8, a witness to the alleged recovery, during cross-examination, stated that Niranjn Singh, Constable, had taken money as

loan from Mukesh-accused. He also admitted that the accused asked him to return the money. Rakesh Kumar, Constable, PW-5, during the

course of cross-examination stated that Niranjn Singh, Constable was posted as Naib Court, in the Court of SDM, at the relevant time. From the

joint reading of the statements of Constable Rakesh Kumar, and Head Constable, Dharampal, it becomes clear that actually Mukesh Kumar,

accused, had lent money to Niranjn Singh, Constable, who was posted as Naib Court, in the Court of SDM, Fatehabad, at the relevant time. It

also becomes clear that he asked Niranjn Singh to return the money. Under these circumstances, it could be well imagined, that Niranjn Singh

must have refused to return the money and also threatened Mukesh Kumar, by misusing his position, as Naib Court, being posted in the Court of

SDM, Fatehabad, at the relevant time, to involve him in a false case. Under these circumstances, the possibility of false implication of the accused,

in the instant case, could not be ruled out. The defence version, set up by the accused, appears to be more probable, than the prosecution version.

The trial Court failed to take into consideration the defence version, set up by the accused, and proved from the cross examination of the aforesaid

prosecution witnesses, as a result whereof, it committed an error in recording conviction and awarding sentence.

14. In view of the above discussion, it is held that the judgment of the trial Court is not based on the correct appreciation of evidence, and law, on

the point. The trial Court also failed to take into consideration the aforesaid infirmities and lacunae, in the prosecution case, as a result whereof, it

fell into an error, in recording the conviction and awarding sentence. The judgment of the trial Court, warrants interference, and is liable to be set

aside.

15. For the reasons recorded, hereinbefore, the appeal is accepted. The judgment of conviction, and the order of sentence dated 18-12-1998, are

set aside. The appellant, if, on bail, he shall stand discharged of the bail bonds. If he is in custody, he shall be set at liberty, at once, if not required,

in any other case.