

(2008) 02 P&H CK 0046

High Court Of Punjab And Haryana At Chandigarh

Case No: None

Dilbagh Singh

APPELLANT

Vs

State of Punjab

RESPONDENT

Date of Decision: Feb. 1, 2008**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 15

Citation: (2008) 2 PLR 130 : (2008) 2 RCR(Criminal) 724**Hon'ble Judges:** Sham Sunder, J**Bench:** Single Bench**Final Decision:** Allowed

Judgement

Sham Sunder, J.

This appeal is directed against the judgment of conviction dated 03.05.1995, and the order of sentence dated 04.05.1995, rendered by the Court of Additional sessions Judge, Ambala vide which it convicted the accused/appellant Dilbagh Singh, for the offence punishable u/s 15 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter called as "the Act" only) and sentenced him to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs. 1 lac, and in default of payment of the same, to undergo rigorous imprisonment for another period of two years.

2. The facts, in brief, are that on 06.12.1993, Deep Ram, Sub Inspector was present on the bridge of Narwana Branch Canal, along with other police officials. The accused was seen coming from the other side, on a cycle, with a gunny bag on the carrier thereof. On seeking the police party, he tried to slip away, but on suspicion, he was apprehended. The search of the gunny bag was conducted, in accordance with the provisions of law. It was found containing 10 Kgs of poppy husk. Two samples were separated from the recovered poppy husk, and the remaining poppy

husk, was kept, in the same bag. The samples and the bag were sealed with the seal, bearing impressions "KS" and "DR" and same were taken into police possession vide recovery memo Ex.PB. The accused was arrested. After the completion of investigation, the accused was challaned.

3. On his appearance, in the Court of the Committing Magistrate, the copies of documents, relied upon by the prosecution, were supplied to the accused. After the case was received by commitment, in the Court of Sessions, charge u/s 15 of the Act, was framed against him, to which he pleaded not guilty and claimed trial.

4. The prosecution, in support of its case, examined Ashok Kumar, HC (PW1), Karan Singh, DSP (PW2), Atma Ram, HC (PW3), and Deep Ram, SI/SHO (PW4), the Investigating Officer. The Addl. PP for the State, tendered into evidence affidavits Ex.PY and Ex.PZ respectively, report of the Chemical examiner Ex.PX, and, thereafter, closed the same.

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, and, did not lead any evidence in defence and closed the same.

6. After hearing the Addl. 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 herein before.

7. Feeling aggrieved, against the judgment of conviction and the order of sentence, rendered by the trial Court, the instant appeal, was filed by the accused/appellant.

8. I have heard the 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 contended that DSP Karan Singh retained the seal with him, after its use. He further contended that since the seal after its use, was retained by the same official, to whom, it belonged and who allegedly affixed the same on the bag of poppy husk and the samples, the possibility of tampering with the case property and the samples could not be ruled out. In *Rajesh Jagdamba Avasthi v. State of Goa* 2005(1) R.C.R. 406 charas was recovered from the possession of the accused and sealed in two packets. Packets and seal remained in the custody of the same person. In these circumstances, it was held that there was every possibility of the seized substance being tampered with. The conviction of the accused was set aside, inter-alia, on this ground. In the instant case, the possibility of tampering with the case property, could not be ruled out. A serious doubt, on account of this reason, was cast on the prosecution case.

10. It was next contended by the Counsel for the appellant that there was delay of 14 days, in sending the sample to the office of the Chemical Examiner, and since the seal remained with the same officer, who allegedly affixed the same, the possibility

of changing the material and tampering with the case property, could not be ruled out. However, no explanation was furnished, on behalf of the prosecution, as to why there was delay of 14 days, in sending the sample to the office of the Chemical Examiner. It is for the prosecution, to prove beyond a reasonable doubt that none tampered with the samples, till the same reached the office of the Chemical Examiner. Since the sample was allegedly sent to the office of Chemical examiner after about 14 days, it could not be safely held that the same remained un-tampered with. This fact cast a shadow of doubt, on the case of the prosecution. In *Ramji Singh v. State of Haryana* 2007(3) R.C.R. 452 the sample was sent to the office of the Chemical Examiner after 72 hours, the seal remained with a police official, and had not been handed over to any independent witness. Under these circumstances, it was held that this circumstance would prove fatal to the case of the prosecution. The principle of law, laid down, in the aforesaid authority, is fully applicable to the facts of the present case. Delay of 14 days, in sending the sample, to the office of the Chemical Examiner, and non-strict proof by the prosecution that the same was not tampered with, till it was deposited in that office, must prove fatal to the case of the prosecution. The submission of the Counsel for the appellant, in this regard, being correct, is accepted.

11. It was next contended by the Counsel for the appellant, that on account of non-joining of an independent witness, in this case, despite availability, a doubt was cast on the prosecution case. PW-3 Atma Ram, Head Constable, stated that one or two persons crossed the spot, but did not stop there. He further stated that they asked one or two persons, to stop till the search of the accused, but they did not stop. This witness admitted, during the course of cross-examination, that some persons were working, in the nearby fields, at the time of alleged recovery. There was nothing, on record, that any action was taken against those persons, who refused to join the investigation. This clearly goes to prove that actually the independent witnesses were available, but none was asked to join the party, at the time of search and seizure. It is, no doubt, true that in the absence of joining an independent witness, the evidence of the official witnesses, cannot be disbelieved. However, when the independent witnesses were present, but not joined, a doubt is cast on the prosecution story, especially when serious discrepancies and contradictions, occur, in the statements of the official witnesses, which would be discussed hereinafter. In similar circumstances in *Hawa Singh v. State of Haryana* 2005(4) R.C.R. 292 when independent witness was not joined, despite availability, the accused was acquitted, in a case of recovery of 20 Kgs. of poppy husk. On account of this reason, the case of the prosecution also becomes doubtful.

12. It was next contended by the Counsel for the appellant, that serious discrepancies, and contradictions occurred in the statements of the official witnesses, which cast a shadow of doubt, on the genuineness of the prosecution story. DSP Karan Singh, PW2, during the course of cross-examination, stated that poppy husk was weighed twice i.e. 5 Kgs each time, whereas, PW3, Atma Ram, HC

during the course of cross-examination, stated that poppy husk was weighed only once. DSP Karan Singh, PW2, during the course of cross-examination, stated that no person was working, in the fields, at the time of recovery, whereas, PW3, Atma Ram, HC during the course of cross-examination, stated that some persons were working, in the nearby fields, at the time of recovery. PW2 Karan Singh, DSP, during the course of cross-examination, stated that there was no metaled road, at the place of recovery, whereas, PW3 Atma Ram, Head Constable, during the course of cross-examination, stated that the place of recovery was situated, on the metaled road, whereas, sub Inspector Deep Ram, PW4, admitted in his cross-examination, that the road from the place of recovery, goes to village Segat. These discrepancies remained un-explained, on the record. No doubt these discrepancies, are not major, yet the same when taken cumulatively assume added significance, especially when the -evidence of the official witnesses is not corroborated, through the evidence of any other independent witness. These discrepancies, when considered cumulatively, go to show that either one of the prosecution witnesses, was not present, at the time of the alleged recovery, or no recovery was effected, in the manner, deposed to by the prosecution witnesses. This fact also casts a doubt, on the prosecution story.

13. Not only this, the link evidence, in this case, was also incomplete. Vide statement dated 24.5.1994, the affidavits Ex.PY of Zile Singh and Ex.PZ of Sikander Lal, were tendered into evidence. However, there is nothing, on record, that these witnesses were offered for cross-examination, by the accused. The accused has got a valuable and indefeasible right to cross-examine the witnesses produced by the prosecution, so as to shatter their veracity. It is the duty of the prosecution, to produce the witnesses, for cross-examination of the accused. There is no evidence, on record that these witnesses, were produced, in the Court, at any point of time, and offered for cross-examination, by the accused. Since no opportunity to the accused, was afforded, to cross-examine these witnesses, the affidavits of Zile Singh, Constable, to the office of the Chemical Examiner. The trial Court, however, did not take into consideration, this fact, in its proper perspective, and relied upon these two affidavits, which were, otherwise, legally in-admissible into evidence. Since the link evidence was incomplete, the case of the prosecution, became highly doubtful, and the accused was entitled to acquittal.

14. In view of the above discussion, it is held that the judgment of conviction and the order of sentence, rendered by the trial Court, are not based on the correct appreciation of evidence, and law, on the point. The trial Court, did not take into consideration the factors that no independent witness was joined despite availability; that the seal after use, remained with the same official, who allegedly affixed the same, on the case property and, thus, tampering with the property, could not be ruled out; that there were discrepancies and contradictions, in the evidence of the witnesses, which remained un-explained, thereby making the case of the prosecution, doubtful, and that no opportunity was afforded to the accused to cross-examine the formal witnesses, whose affidavits were tendered into evidence

by the Additional Public Prosecutor for the State, which could not be read into evidence. Had these factors been taken into consideration, by the trial Court, the result would have been different. The judgment of conviction and the order of sentence, are, therefore, liable to be set aside.

For the reasons recorded, herein before, the appeal is accepted. The judgment of conviction dated 3.5.1995 and the order of sentence dated 04.05.1995, are set aside. The appellant shall stand acquitted of the charge framed against him. He is discharged of the bail bonds.