(2008) 07 P&H CK 0054

High Court Of Punjab And Haryana At Chandigarh

Case No: None

Malkiat Singh alias Kala	APPELLANT
Vs	
The State of Punjab	RESPONDENT

Date of Decision: July 31, 2008

Acts Referred:

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

Citation: (2008) 152 PLR 233 : (2009) 1 RCR(Criminal) 353

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 and the order of sentence dated 14.07.200S, rendered by the Judge, Special Court, Kapurthala, vide which she convicted the accused (now appellant), for the offence, punishable u/s 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to be as the ''Act'' only) and sentenced him to undergo RI for a period of 10 years and to pay a fine of Rs. 1 lac, in default of payment of fine to two years, for having been found in possession of 60 Kgs poppy husk, without any permit or licence.

2. The facts, in brief, are that on 3.7.1997 ASI Harjinder Singh along with H.C. Gian Singh and other police officials was going on the unmetalled passage, leading from Latianwala to Ahmadpur Channa, in connection with patrol duty, and when the police party reached near the motor of Ex-Sarpanch Kewal Singh, resident of village Ahmadpur, from the side of Ahmadpur Channa, a person was seen coming, carrying two bags on the carrier of his cycle. He was apprehended on suspicion. He disclosed his name as Malkiat Singh alias Kala son of Karnail Singh, r/o Village Latianwala,

Police Station Sultanpur Lodhi. The search of the carrier of the cycle was conducted, in the presence of the DSP, Sub Division, Sultanpur Lodhi, who was called to the spot, by sending a message, as a result whereof, two bags were recovered. Each bags contained 30 kgs poppy husk. A sample of 250 grams of poppy husk, was taken out, from each of the bags. The samples and the bags, containing remaining poppy husk, were converted into parcels, duly sealed, and taken into possession, vide a separate recovery memo. Ruqa was sent to the Police Station, on the basis whereof the FIR was recorded. The site plan was prepared. The accused was arrested. The statements of the witnesses, were recorded. After the completion of investigation, the accused was challaned.

On his appearance, in the Court, the accused was supplied the copies of documents, relied upon by the prosecution. Charge u/s 15 of the Act, was framed against the accused, to which he pleaded not guilty, and claimed judicial trial.

3. The prosecution, in support of its case, examined Malkiat Singh, Constable, (PW-1), Sakattar Singh, Head Constable, (PW-2), Surinder Singh, DSP, (PW-3), Balbir Singh, Inspector, (PW-4), and Gian Singh, Head Constable, (PW-5) and Harjinder Singh, ASI, (PW-6). Thereafter, the Addl. Public Prosecutor of the State, closed the prosecution evidence.

4. The statement of the accused, u/s 313 of the Code of Criminal Procedure, was recorded. He was put all the incriminating circumstances, appearing against him, in the prosecution evidence. He pleaded false implication. It was stated by him, that on 29.6.1997, the police officials raided his house, on the basis of suspicion, in some theft case. It was further stated by him that on 30.06.1997, the police officials, assured the Sarpanch and respectables of the village that they would leave him (accused), but later on, they did not release him, but on the other hand, planted this case against him.

In his defence, the accused examined Partap Singh, Head Constable, (DW-1), Harjit Singh, Constable (DW-2), Onkar Singh (DW-3) and Manjit Singh, Constable (DW-4). Thereafter, the defence evidence was closed.

5. 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.

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.

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

7. The Counsel for the appellant, at the very outset, submitted that no independent witness, was joined by the Investigating Officer, despite availability, 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. Harjinder Singh, ASI, (PW-6), during the course of cross-examination, stated that they did not take any independent witness, while starting from the Police Station. He further stated that the Constable, who was sent to bring an independent witness, on return, told him that nobody was ready to join the police party, from village Ahmadpur Chhana. He further stated that he did not mention this fact in the ruqa. Harjinder Singh, ASI (PW-6) also did not mention this fact in any other document, prepared at the spot. He also did not mention this fact in the case diary. It means that the statement of Harjinder Singh, ASI to the effect, that the Constable, was sent to bring an independent witnesses, and on return, he told that none was ready to join the Police Party, is not correct. Under these circumstances, it can be very well held that no effort was made to join an independent witness. 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 creditability 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. 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-foldely, 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 suspect. In State of Punjab v. Bhupinder Singh 2001(1) R.C.R. 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) R.C.R. 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.

8. It was next submitted by the Counsel for the appellant, that though the alleged recovery was effected on 3.7.1997, yet the samples were sent to the office of the Chemical Examiner on 8.7.1997 and, thus, the delay of 5 days, in sending the same to the office of the Chemical Examiner, remained unexplained and, as such, the possibility of tampering with the same, until the same reach the Laboratory, could not be ruled out. No explanation, whatsoever, was furnished as to why the samples were not sent to the office of the Chemical Examiner, for about OS days. Had any explanation been furnished, the matter would have been considered, in the light thereof, but in the absence of any explanation, having been furnished, in this regard, the Court cannot coin any of its own. In Gian Singh v. State of Punjab 2006(2) R.C.R.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 State of Rajasthan v. Gurmail Singh 2005(2) R.C.R. 58, (Supreme Court), the contraband remained in the Malkhana for 20 days. The malkhana register was not produced, to prove that it was so kept in the malkhana, till the sample was handed over to the Constable. In these circumstances, in the aforesaid case, the appellant was acquitted. 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 the 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. No doubt the prosecution could lead other independent evidence, to prove that none tampered with the sample, till it reached the office of the Forensic Science Laboratory. The other evidence, produced by the prosecution, in this case to prove the link evidence, is not only deficient, but also unreliable. In the instant case, the principle of law, laid down, in the aforesaid authorities, is fully applicable to the facts of the present case. The delay of 05 days, in sending the samples 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, as the possibility of tampering with the same, could not be ruled out. The submission of the Counsel for

the appellant, in this regard, being correct, is accepted.

9. It was next submitted by the Counsel for the appellant, that the provisions of Section 55 of the Act, were not complied with, as a result whereof, a prejudice was caused to the accused. Section 55 of the Act, lays down that an Officer Incharge of the Police Station, shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized, under this Act, within the local area of that Police Station, and which may be delivered to him, and shall allow any officer who may accompany such articles, to the Police Station, or who may be deputed for the purpose, to affix his seal to such articles, or to take samples of, and from them, and all samples, so taken, shall also be sealed with a seal of the Officer-in-charge of the Police Station. The perusal of the provisions of Section 55 of the Act, clearly reveals that the case property and the samples are required to be produced before the Magistrate, so as to ensure, that there was no false implication of the accused, and that actually a specific quantity of the contraband was recovered from the accused. No doubts 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 beached. 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, it 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) R.C.R. 702 SC 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 vitiate 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, since the Investigating Officer, intentionally and deliberately breached the provisions of Section 55, he could not say that the provisions of Section 55 being 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 provision 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 Courts condone acts of violation of statutory safeguards, committed by an authorized officer, during search and seizure operation. Such an attitude of the 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.

10. It was next submitted by the Counsel for the appellant that the provisions of Section 57 of the Act, were not complied with, as a result whereof, prejudice was caused to the accused. No doubt, the provisions of Section 57 of the Act, are directory in nature. That does not mean that the same, should not be complied with, by the Investigating Officer, deliberately and intentionally. Similar principle of law, was laid down, in Gurbax Singh''s case (supra). However, the Investigating Officer, cannot totally ignore these provisions, as such failure will have bearing on the appreciation of evidence, regarding search of the accused, and seizure. The object of the provisions of Section 57, is that the Superior Officer should be informed, immediately, after the alleged recovery of the contraband, so that he must be aware of the genuineness of the proceedings, conducted by his junior, to ensure that no innocent person is implicated, and the allegations of highhandedness, against the Police officials, are averted. Had any explanation been furnished by the Investigating Officer, as to what prevented him, from complying with the provisions of Section 57 of the Act, the matter would have been different. In the absence of any explanation, what to speak of plausible, the Court cannot coin any of its own, to fit in with the prosecution case. Since, the provisions of Section 57 of the Act, were observed, more in breach, than in compliance, by the Investigating Officer, intentionally and deliberately, prejudice was caused to the accused, and, the case of the prosecution became doubtful, on account of this reason. The trial Court failed to take into consideration, this aspect of the matter, as a result whereof, it committed an error, in recording conviction and awarding sentence.

11. It was next submitted by the Counsel for the appellant, that the sample impression of the seals was neither deposited with the MHC, nor the same was sent to the office of the Chemical Examiner, for deposit, as a result whereof, it could not be ascertained, as to whether, the seals on the samples were the same, as were affixed, at the time of alleged search and seizure. The submission of the Counsel for the appellant, in this regard, appears to be correct. Ex.PA is the affidavit of Malkiat Singh, Constable, who took the sample parcels, to the office of the Chemical Examiner. There is nothing, in his affidavit, that he was handed over the specimen impression of the seals and he deposited the same in the office of the Chemical Examiner, along with the sample parcels. Harjinder Singh, ASI (PW-6), stated that, in the ruqa, he did not mention that specimen seal was prepared at the spot. The other evidence, produced by the prosecution, in this case, to prove the link evidence, is not only deficient but also unreliable. Non-strict proof, by the prosecution, that the sample was not tampered with, until it was deposited in the office of the Chemical Examiner, must prove fatal to the case of the prosecution. In these circumstances, the possibility of tampering with the sample parcel could not be ruled out. In State of Rajasthan v. Gurmail Singh 2005(2) R.C.R. 58, (Supreme Court), the sample seal

was not sent to the Laboratory, at the time of sending the sample parcel. The Apex Court, held that the case of the prosecution was doubtful, on account of this reason. In this view of the matter, the case of the prosecution also became doubtful. The trial Court, did not take into consideration, this aspect of the matter, as a result whereof, miscarriage of justice occasioned.

No other point was urged, by the Counsel for the parties.

12. 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. Had the trial Court taken into consideration, the aforesaid infirmities, and lacunae, it would not have reached the conclusion, that the accused committed the offence, punishable u/s 15 of the Act. The judgment of conviction, and the order of sentence are, thus, liable to be set aside.

13. For the reasons recorded, herein before, the appeal is accepted. The judgment of conviction, and the order of sentence dated 14.07.2005, are set aside. The appellant shall stand acquitted of the charge, framed against him. If, he is on bail, he shall stand discharged of his bail bonds. If, he is in custody, he shall be set at liberty, at once, if not required in any other case.