

(2008) 03 P&H CK 0200

High Court Of Punjab And Haryana At Chandigarh**Case No:** Criminal Appeal No. 646-SB of 1995

Karam Singh

APPELLANT

Vs

The State of Punjab

RESPONDENT

Date of Decision: March 28, 2008**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 52, 55, 57
- Negotiable Instruments Act, 1881 (NI) - Section 15

Hon'ble Judges: Sham Sunder, J**Bench:** Single Bench**Advocate:** Karambir Singh Kahlon, for the Appellant; S.S. Bhullar, DAG., Punjab, for the Respondent**Final Decision:** Allowed

Judgement

Sham Sunder, J.

This appeal is directed against the judgment of conviction dated 6.10.1995, and the order of sentence of the even date, rendered by the Court of Addl. Sessions Judge, Amritsar, vide which it convicted the accused/appellant Karam 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 3 years.

2. The facts, in brief are that on 25.2.1993, Shangara Singh, ASI, alongwith Didar Singh, ASI, Gurdas Singh, HC, Chatter Singh, HC, Gurvail Singh, Constable, and other police officials, was going from village Shaheed to Sarvala, on official vehicle, in connection with patrolling and detection of bad elements, and when the police party reached, in the area of village Shaheed, Baldev Singh, ASI, Balwinder Singh, ASI,

Raghubir Singh, HC, Amrik Singh, HC, Mangar Singh, HC, Pargat Singh, Constable, and Surinder Singh, Constable, were joined in the police party, who were already holding naka there. Thereafter, the police party held naka on the canal minor bridge, in the area of village Shaheed, and when the accused was seen coming from the side of fields. On seeing the police party, he tried to turn back, but was apprehended, on suspicion. The accused was carrying a gunny bag, on his person. The search of the bag, being carried by the accused, was conducted, in accordance with the provisions of law, which resulted into the recovery of 5 Kgs. poppy-husk, now falling within the ambit of non-commercial quantity. A sample of 250 grams, was separated therefrom, and the remaining poppy-husk was put into the same gunny bag. The sample, and the remaining poppy-husk, were converted into parcels, duly sealed with the seal, bearing impression 'SS', and thereafter, the same was taken into possession. Ruqa was sent to the Police Station, on the basis whereof, the formal FIR was registered. Rough site plan of the place of recovery, with correct marginal notes, was prepared. 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 him, to which he pleaded not guilty and claimed trial.

4. The prosecution, in support of its case, examined Shangara Singh, ASI (PW-1), Jagtar Singh, HC (PW-2), Shiv Karan Singh, Constable (PW-3), Govinder Singh, SI (PW-4), and Gurdas Singh, Constable (PW-5). Thereafter, the Addl. 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 he was arrested from bus adda and illegally detained in the Police Station. He, however, did not lead any evidence, in his defence.

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 hereinbefore.

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 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 out-set, contended that though the alleged recovery was effected, from the accused, from a public place, yet no independent witness, despite availability, was joined by the Investigating Officer, as

a result whereof, the case of the prosecution became suspicious. The submission of the Counsel for the appellant, in this regard, appears to be correct. Gurdas Singh, HC (PW-5), a witness to the recovery, during the course of his cross-examination, stated that there were behaks, near the place of recovery. He, however, did not state even a single word that any person, from those behaks, was summoned, at the time of effecting the alleged recovery. On the other hand, Shangara Singh, ASI (PW-1), the Investigating Officer, in this case, during the course of his cross-examination, stated that they did not try to join any independent person, either from village Patti or from village Shaheed, or from any other village. He further stated that there were fields, around the place of recovery. He further stated that there was no behak, near the place of recovery. It means, that no effort, whatsoever, was made by the Investigating Officer, to join an independent witness, despite availability. In similar circumstances, in *Hawa Singh v. State of Haryana* 2005 (4) RCR (Cri) 292, when an independent witness was not joined, despite availability, the accused was acquitted, in a case of recovery of 20 Kgs. of poppy-husk. In *State of Punjab v. Ram Chand* 2001(1) RCR (Cri) 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 nonjoining of an independent witness, it was held that the accused was entitled to be given the benefit of doubt. In these circumstances, it was held that the case of the prosecution became doubtful. In the instate case also, non-joining of an independent witness, despite availability, cast a cloud of doubt, on the prosecution story. This aspect of the matter, was not taken into consideration, by the trial Court, as a result whereof, miscarriage of justice occasioned.

10. It was next contended by the Counsel for the appellant, that though the alleged recovery, in the instant case, was effected on 25.2.1993, whereas, the sample was sent to the office of the Chemical Examiner, on 6.4.1993 i.e. after a delay of 40 days, and since the seal remained with Gurdas Singh, HC, a junior official, the possibility of changing the material and tampering with the case property, could not be ruled out. He further contended that no explanation was furnished by the prosecution witnesses, as to why a delay of 40 days was caused, in sending the sample, and whether the sample remained untampered with, until it reached the office of the Chemical Examiner. The submission of the Counsel for the Appellant, appears to be correct. No explanation, whatsoever, has been furnished, by the prosecution witnesses, with regard to the, delay of 40 days, in sending the sample to the office of the Chemical Examiner. It is the duty of the prosecution, to prove beyond a reasonable doubt, that none tampered with the sample, till the same reached the office of the Chemical Examiner. Since, the sample was allegedly sent to the office of the Chemical Examiner, after about 40 days, it could not be safely held that the same remained un-tampered with. This fact casts a shadow of doubt, on the case of the prosecution. In *Gian Singh v. State of Punjab* RCR (Cri) 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 *Ramji Singh v. State of Haryana* 2007 (3) RCR (Cri) 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 Chemical Examiner. As stated above, the other evidence produced by the prosecution, in this case, is not only deficient, but also unreliable, to prove this factum. In these circumstances, the principle of law, laid down, in the aforesaid authorities, is fully applicable to the facts of the present case. The delay of 40 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, as the possibility of tampering with the sample, could not be ruled out. 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 the link evidence, in the instant case is incomplete, as a result whereof, the case of the prosecution, became doubtful. Govinder Singh, SI/SHO (PW-4), stated that the sample parcel, and the case property, were handed over to Shangara Singh, ASI, the Investigating Officer, for being deposited with the MHC. Shangara Singh, ASI, stated that he deposited the case property with the MHC, with seals intact. Both these witnesses did not state that sample impression of the seal, was also deposited with the MHC. No doubt, Jagtar Singh HC, (PW-2), stated that he handed over the sample parcel, and the sample seal, to Shivkaran Singh, Constable, for deposit the same, in the office of the Chemical Examiner. During the course of cross-examination, it was admitted by him, that Ex.DA, affidavit bore his signatures, and it was sworn by him. According to para 3 of Ex.DA, his affidavit, he only handed over the sample parcel, duly sealed to Shivkaran Singh, Constable, for deposit in the office of the Chemical Examiner, Amritsar, who after depositing the same, on 6.4.1993, handed over the receipt, to him. Shivkaran Singh, Constable (PW-3), stated that he was handed over the sample parcel, duly sealed, by Jagtar Singh, MHC, and he deposited the same, in the office of the Chemical Examiner. He also admitted that Ex.DB, affidavit, was sworn by him, and bears his signatures. Even according to para 2 of Ex.DB, affidavit of Shivkaran Singh, Constable, he was only handed over the sample parcel, duly sealed, and he deposited the same, in the office of the Chemical Examiner. Ex.DA, affidavit aforesaid, falsified the statement of Jagtar Singh, MHC, that sample impression of the seal, was also handed over to Shivkaran Singh, Constable. Since, sample impression of the seal, was not handed over to Shivkaran Singh, Constable, the question of deposit thereof, with the Chemical Examiner, did not at all arise. In *State of Rajasthan v. Gurmail Singh* 2005 (2) RCR (Cri) 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 instant case, also became doubtful. The trial Court, did not take into consideration, this aspect of the matter, as a result whereof, miscarriage of justice occasioned.

12. The provisions of Section 57 of the Act, were not complied with. No report was sent by the Investigating Officer, to his superior officer, with regard to the alleged apprehension of the accused, and alleged recovery of contraband, from him. 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. Shangara Singh, ASI (PW-1), the Investigating Officer, during the course of his cross- examination, in clear cut terms stated that he did not sent any special report to the D.S.P. It means that the provisions of Section 57 of the Act, were not complied with by the Investigating Officer, deliberately and intentionally. In *Gurbax Singh v. State of Haryana* 2001 (1) RCR (Cri) 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 vitiate the trial or conviction. However, the Investigating Officer, cannot totally ignore these provisions, and 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 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 high handedness 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 to 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, 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.

13. In view of the above discussion, it is held that the judgment of conviction and the order of sentence, rendered by the Court below, are not based on the correct appreciation of evidence, and law, on the point. The trial Court did not take into consideration, the infirmities and lacunae, enumerated, in the aforesaid paragraphs. Had these infirmities and lacunae, been taken into consideration, by the trial Court, the result would have been different. The judgment of conviction, and the order of sentence, warrant interference, and are liable to be set aside.

14. For the reasons recorded, hereinbefore, the appeal is accepted. The judgment of conviction, and the order of sentence dated 6.10.1995, 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.