
(2007) 02 P&H CK 0145

High Court Of Punjab And Haryana At Chandigarh

Case No: Criminal Appeal No. 151-SB of 1993

Kaur Singh

APPELLANT

Vs

State of Punjab

RESPONDENT

Date of Decision: Feb. 1, 2007

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 15, 42

Citation: (2007) 2 RCR(Criminal) 633

Hon'ble Judges: Nirmal Yadav, J

Bench: Single Bench

Advocate: B.S. Bhalla, for the Appellant; G.S. Bhandari, D.A.G., Punjab, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

Nirmal Yadav, J.

The present appeal arises out of judgment and order dated 4.5.1993 passed by learned Additional Sessions Judge, Faridkot, convicting the accused-Appellant u/s 15 of the NDPS Act and sentencing him to undergo rigorous imprisonment for a period of 10 years and imposing a fine of Rs. 1 lac and in default of payment of fine to further undergo rigorous imprisonment for 2 years, 6 months.

2. The case of the prosecution, in brief, is that on 6.5.1991, the then Sub- Inspector Anokh Singh, ASI-Arjan Singh and other police officials of Police Station Nihalsinghwala were present at the bus stand of Village Himatpura. Sub-Inspector Anokh Singh received a secret information that two persons namely, Kaur Singh and Ashok Kumar were dealing in the sale of poppy husk and in case fields of Kaur Singh in the area of village Himatpura were raided, they could be apprehended. Accordingly, Ruqa Exhibit-PA was sent to Police Station on the basis of which formal

FIR Exhibit PA-1 was recorded. The Investigating Officer constituted a raiding party in which Jagir Singh, PW, was joined as independent witness. When the fields of Kaur Singh were raided, he was found present in the tubewell kotha and apprehended at the spot while Ashok Kumar, accused managed to escape. Appellant Kaur Singh was informed by the Investigating Officer, whether he would like to be searched in the presence of a Gazetted Officer or a Magistrate. The accused, however, waived his right of being searched in the presence of a Gazetted Officer or a Magistrate and expressed confidence in the Investigating Officer vide Memo, Exhibit PB, which was thumb-marked by him. Thereafter, his personal search was conducted. On further search of the premises, 20 bags of poppy husk were found lying in the Kotha, which were taken into possession. Each bag was found containing 40 kgs. poppy husk. 250 grams of poppy husk was drawn from each bag as sample. The samples and remainder were sealed by Sub-Inspector Anokh Singh with the seal marked 'AS'. The poppy husk bags, Exhibits P-1 to P-20 and the samples were taken into possession vide recovery memo Exhibit PD attested by P Ws Gurcharan Singh, Arjan Singh and Jagir Singh. The Investigating Officer prepared the seal impression, Exhibit P-21 and formally arrested Kaur Singh after disclosing the grounds of arrest vide Memo Exhibit PE. Thereafter, rough site plan, Exhibit PF with regard to recovery was prepared by the Sub-Inspector and statements of P Ws were recorded. On return to Police Station, the case property was deposited with MHC Gurcharan Singh and accused Kaur Singh was lodged in police lock-up. Subsequently, accused Ashok Kumar was also apprehended. The samples were sent to Public Analyst, who vide his report Exhibit PG found the presence of maconic acid and morphine in the samples and declared the contents to be poppy heads.

3. To substantiate its charges against the accused-Appellant, prosecution examined Anokh Singh, Investigating Officer as PW-1, ASI-Arjan Singh as PW-2, and gave up Gurcharan Singh as unnecessary witness and tendered in evidence affidavits Exhibits PJ and PK of MHC-Gurcharan Singh and Karnail Singh, Constable respectively. The defence set up by the Appellant and Ashok Kumar, accused as emerged from their statements recorded u/s 313 Cr.P.C., was false implication at the behest of Gurcharan Singh, ASI. According to Kaur Singh, his brother had litigation with cousin of ASI-Gurcharan Singh in the Courts at Moga. He further stated that earlier his father was a police informer, but later on, he stopped helping the police and, therefore, the police officers were annoyed with his father and other family members. He further stated that Jagir Singh, Chowkidar of the village is a stock witness and has been joined by the police in 10-15 other cases. According to him, he was neither owner nor in possession of the land and tubewell kotha from where the contraband is alleged to have been recovered by the police. Kaur Singh produced copies of plaint and judgment as Exhibits D-1 and D-2 regarding litigation between Nazar Singh cousin of ASI-Gurcharan Singh and his brother Labh Singh. After taking into consideration the facts and circumstances of the case, the trial Court acquitted Ashok Kumar, accused observing that his case was distinct from the case of Kaur

Singh as he was not apprehended at the spot. No identification parade was conducted nor any of the police officials stated that they knew Ashok Kumar. The State of Punjab has not preferred any appeal against the acquittal of accused Ashok Kumar. Accordingly, Appellant- Kaur Singh has filed the present appeal.

4. Learned Counsel for the Appellant argued that judgment of conviction is based only on the statement of official witnesses. Though police had joined Jagir Singh, but he has not supported the prosecution case and, therefore, the alleged seizure, search and recovery do not inspire confidence. It is further argued that link evidence in the present case is totally missing. The Investigating Officer Anokh Singh who appeared as PW-1 did not state that he had prepared the sample seal or handed over the same to any of the witnesses present at the spot, meaning thereby, the seal remained with the Investigating Officer, therefore, there were ample chances of tampering with the samples as well as the remaining case property. There is no evidence to prove that the case property or the samples remained untampered till these were deposited with the MHC. The learned Counsel further argued that Appellant has categorically denied the ownership of the fields as well as Kotha from where the alleged recovery has been made. The prosecution has miserably failed to prove that the land and the Kotha from where the contraband is alleged to have been recovered, belong to Appellant. Learned Counsel for the Appellant further argued that testimonies of police officials suffer from material contradictions and the prosecution has miserably failed to bring home the guilt of the accused beyond reasonable shadow of doubt. It is argued that after search, seizure and recovery of contraband, the Investigating Officer did not inform the gazetted officer with regard to alleged recovery and as such, no compliance of Section 42 of the Act was made. Even after the alleged recovery, no gazetted officer or Magistrate was informed. Moharrir Head Constable Gurcharan Singh, who was handed over the case property to be placed in the malkhana, has not been produced in the witness box to depose as to whether the seal affixed on the samples or the case property was intact while it was being deposited in the malkhana and also when it was handed over to Constable Karnail Singh for depositing the same in the forensic science laboratory. The Appellant has placed on record plaint and judgment as Exhibits D-1 and D-2 relating to a litigation between his brother Labh Singh and Nazar Singh, cousin of ASI-Gurcharan Singh.

5. On the other hand, Learned State counsel submitted that there is nothing on record to disbelieve the cogent and trustworthy testimonies of the police officials. Both PW-1 and PW-2 have fully corroborated the prosecution case and if there are any discrepancies the same are very minor and do not affect the prosecution case in any manner. Learned State counsel further contended that though the Investigating Officer had joined independent witness but he did not support the prosecution case having been won over by the accused. Learned State counsel further argued that there is no cogent evidence to prove that the case has been foisted upon the Appellant on account of any litigation between his brother Labh Singh and Nazar

Singh, cousin of the Investigating Officer. It was further argued on behalf of the State that there is no evidence on record to prove that said Nazar Singh was in any manner related to Gurcharan Singh.

6. The main plank of argument of the learned defence counsel is that the alleged independent witness Jagir Singh has not been examined. It is submitted that prosecution has intentionally not produced Jagir Singh as he would not have supported the prosecution case. It is, therefore, argued that, in the absence of any independent corroboration, from the statements of two official prosecution witnesses, the possession of alleged contraband by the Appellant has not been established. Keeping in view that there is no independent witness, the testimonies of both the witnesses and other evidence have to be scrutinised with grave (great ?) care.

7. The substantial infirmity pointed out by learned defence counsel is with regard to the link evidence. It is submitted that sample seal was handed over to ASI-Gurcharan Singh. However, Gurcharan Singh has not been examined. There is no evidence that sample seal remained with ASI-Gurcharan Singh till the samples were sent to the forensic science laboratory. Even the Investigating Officer has not stated that the sample seal was returned to him after the samples were sent to the forensic science laboratory. It is further argued that the sample seal was available with prosecuting agency and in the absence of such a safeguard, the possibility of the substance alleged to be contraband being changed and the container being resealed cannot be ruled out. It is well established that till the case property has not been dispatched to the forensic science laboratory, the seal should not be available to the prosecuting agency. The learned Counsel further argued that as per the prosecution, the alleged recovery was made on 6.5.1991 and it was received by the forensic science laboratory on 14.5.1991. The samples were handed over to Constable Karnail Singh by MHC-Gurcharan Singh on 13.5.1991. MHC-Gurcharan Singh did not state that these samples remained intact till they were handed over to Constable Karnail Singh for onward transmission to the forensic science laboratory. As per the standing instructions issued by the Narcotics Control Bureau, the sample must be dispatched to the laboratory within 72 hours of its seizure to avoid any legal objection. However, in the present case, the samples were forwarded to the Chemical Examiner after 7 days of their seizure. It is well established by number of judicial pronouncements that where the seal remains with the police after use and the sample has been sent after a delay of 72 hours, this circumstance would be fatal to the prosecution case.

8. Learned Counsel for the Appellant further pointed out that the prosecution has miserably failed to prove that the place from where the alleged recovery was made, belongs to Appellant. The Appellant has categorically stated in his statement made u/s 313 Code of Criminal Procedure that he is neither owner nor in possession of the land or Kotha from where the case property is alleged to have been recovered. The

prosecution has failed to bring any evidence on record to prove that the Kotha from where the contraband was alleged to have been recovered or the land on which it is situated, was/were owned by or in possession of the Appellant and as such, conscious possession of the contraband alleged to have been recovered from Appellant is not at all proved.

9. Another circumstance which appears to be quite fatal to the prosecution case is that prosecution failed to prove that Form No. 29 was prepared on 6.5.1991 on which date the specimen of the seal was affixed. The said form was supposed to be deposited with the alleged contraband in the malkhana. But as per the affidavit of MHC-Gurcharan Singh, Exhibit PJ, it is not clear that the said form was deposited in the Malkhana on the same date along with the recovered contraband. The specimen seal impression used at the time of recovery is to be affixed on it so that it is deposited with the case property in the Malkhana and forwarded to the CFSL along with the sample parcels so that seal impression affixed on the sample parcels are duly compared with the seal impression on CFSL form. The idea behind taking such precaution is to eliminate the possibility of sample being tampered with. It is well known that harsher the punishment stricter is the onus on the prosecution to prove its case.

10. From the above discussion, it can be safely inferred that no doubt the alleged recovery effected in the present case is on the higher side, but in view of the material flaws in the prosecution case, I am of the view that prosecution case is not beyond reasonable shadow of doubt so as to prove the charge of possession of contraband by the Appellant. The prosecution case is not free from doubt for upholding the conviction and sentence as recorded by the learned trial Court.

11. Therefore, extending the benefit of doubt, Appellant is acquitted of the charge and appeal is allowed. The impugned judgment of conviction and order of sentence are set aside. The bail/surety bonds, if any furnished in case Appellant was on bail, shall stand discharged.