

(2008) 01 P&H CK 0263

High Court Of Punjab And Haryana At Chandigarh**Case No:** Criminal Appeal No. 427-SB of 1996

Ishwar Singh

APPELLANT

Vs

State of Punjab

RESPONDENT

Date of Decision: Jan. 11, 2008**Acts Referred:**

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

Citation: (2008) 2 RCR(Criminal) 417**Hon'ble Judges:** Harbans Lal, J**Bench:** Single Bench**Advocate:** Vinod Ghai, for the Appellant; Shilesh Gupta, D.A.G., Punjab, for the Respondent

Judgement

Harbans Lal, J.

This appeal has been directed against the judgment/order of sentence dated 6th July, 1995 whereby the Court of learned Additional Sessions Judge, Sangrur convicted and sentenced the accused to undergo rigorous imprisonment for ten years and to pay a fine of Rs. 1lac and in default thereof, he will further undergo rigorous imprisonment for two years u/s 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter to be referred as "the Act").

2. Succinctly put, the facts of the prosecution case are that on 2nd March, 1991 Sub Inspector Joginder Paul Singh among other police officials including Assistant Sub Inspector Amar Singh was going on patrolling in a Government Jeep bearing registration No. PIS-2105 being driven by Constable Gurtej Singh from village Ladda to village Kanjhla by metalled road. When the police party neared the government tubewell, the accused was spotted sitting on a gunny bag in front of the tubewell. On suspicion, he was apprehended by the aforesaid SI. Meanwhile, Sultan Singh came at the spot. He was also joined in the police party. Then aforesaid SI asked the

accused that his search is to be conducted, and if he so desired, his search could be conducted before a Gazetted Officer or a Magistrate. He reposed confidence in the said SI. The mouth of the gunny bag was already open. A tin dabba was lying near the gunny bag. On search, poppy husk was found in the gunny bag. When weighed, the poppy husk came to 35 kgs., out of which two samples each weighing 200 grams were drawn and converted in to different parcels. The remainder was sealed in the same gunny bag and made into a parcel. The samples and the gunny bag were sealed with the seal bearing impression 'JPS'. The specimen seal impression was prepared. The seal after use was handed over to ASI Amar Singh. The parcels were seized vide memo, which was attested by ASI Amar Singh as well as PW Sultan Singh. On further personal search of the accused, currency notes worth Rs. 80/- were recovered. The same were also taken into possession vide memo Ex.PB. Ruqa Ex.PD was sent to the police station, where on its basis formal FIR Ex.PD/1 was recorded. A rough site plan Ex.PE showing the place of occurrence was prepared. On return to the police station, the case property was deposited with the MHC Budh Singh with seals intact. On receipt of Chemical Examiner Report Ex.PF and after completion of the investigation, the charge-sheet was laid in the Court for trial of the accused.

3. The accused was charged u/s 15 ibid, to which he did not plead guilty and claimed trial.

4. To bring home guilt against the accused, the prosecution has examined Inspector Joginder Paul Singh, Investigator, PW1, SI Amar Singh PW2 and closed its evidence by tendering the Chemical Examiner Report Ex.PF, affidavits Ex.PG and Ex.PH of MHC Budh Singh and Constable Sukhvinder Singh respectively. PW Sultan Singh was given up as having been won by the accused.

5. When examined u/s 313 Cr.P.C., the accused denied all the incriminating circumstances appearing in the prosecution evidence against him and pleaded innocence. He has put-forth that he was brought from his village in the presence of Tara Singh son of Uttam Singh and Banta Singh Numberdar and later on, he was falsely implicated in this case. In his defence, he has examined Banta Singh DW1, PHG Amrik Singh DW2 and closed his defence evidence.

6. After hearing the learned Additional Public Prosecutor for the State, learned defence counsel and examining the evidence on record, the learned trial Court convicted and sentenced the accused as noticed at the outset. Feeling dissatisfied with the same, he preferred the instant appeal.

7. I have heard the learned counsel for the parties and have gone through the record with due care and circumspection.

8. Mr. Vinod Ghai, Advocate appearing on behalf of the appellant maintained with a good deal of force that as emerges out of the evidence of PHG Amrik Singh DW2, who has deposed from register no. 19, no tin dibba was deposited with the MHC

and furthermore, as per his further evidence PW Sultan Singh was also cited as a prosecution witness in case FIR Nos. 24 and 22 and thus, obviously he is a stooge of the police.

9. To tide over these submissions, Mr. Shilesh Gupta, Deputy Advocate General, Punjab pressed into service that by way of inadvertence, tin dibba would have not been entered in the aforesaid register and as regards Sultan Singh PW, he cannot be branded as such for his merely having been cited as a prosecution witness in the abovementioned FIRs. This contention does not find favour with me. Tin dibba being a part of the case property might have also been deposited with the MHC. The prosecution might be apprehensive that if Sultan Singh PW is produced at the trial, it may be elicited from him as to in how many more cases he has been cited as a prosecution witness. For his withholding from the witness box, an adverse inference has to be drawn to the effect that the recovery has not been effected in the manner as has been propounded by the prosecution. Besides this, the accused has also been deprived of his valuable right to cross-examine him.

10. As per affidavit Ex.PG, the case property was deposited with Budh Singh MHC. Vide affidavit Ex.PH, the sample was carried by Constable Sukhwinder Singh to the office of Chemical Examiner for chemical analysis. They have not been tendered for their cross-examination. Thus, the accused has been deprived of his right to cross-examine them.

11. In re: Gian Singh v. State of Punjab, 2006 (2) RCR(Crl.) 611 (P&H), in an identical situation, this Court has held that link evidence is missing, which is material infirmity.

12. It is in the evidence of Inspector Joginder Paul Singh, Investigator, that the seal after use was handed over to ASI Amar Singh. The prosecution has not apportioned any reason for handing over the seal to this official witness in the presence of independent witness Sultan Singh PW. The Investigator as well as this witness being posted in the same police station, it was not difficult for the former to get back the seal from the latter before the despatch of the sample to tamper with the contents of the sample.

Section 55 of the Act reads as under:-

"55. Police to take charge of articles seized and delivered. - An officer-in-charge of a 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."

13. From the bare reading of the above language, it is manifestly clear that the Inspector Joginder Paul Singh PW being the SHO should have been kept the case property in his safe custody pending the orders of the Magistrate, whereas he has stated that on return to the police station, the case property was deposited with MHC Budh Singh. However, this provision is merely directory in nature as so observed in *T. Paul Kuki v. State of West Bengal*, (1993) 3 Crimes 660 (Cal) (DB) but its non-observance, inter alia, caused prejudice to the accused. It is apt to be borne in mind that as per prosecution story, the accused/appellant was sitting on the bag and that too near a Government tube- well. There is nothing on the record to show that the Investigator had conducted inquiry and found the appellant to be the owner of the poppy husk bag. Further, the record is quite barren to show that this bag was transported by the appellant. In these premises, the only conclusion, which can be possibly drawn is that the prosecution has dismally failed to establish the conscious possession of the appellant.

14. In view of the forgoing discussion, it is held that the prosecution has not been able to bring home guilt against the accused. Sequently, this appeal succeeds and is accepted, setting aside the impugned judgment/order of sentence. The appellant is hereby acquitted of the charge framed against him. His bail bonds shall stand discharged.