

(2008) 11 P&H CK 0156

High Court Of Punjab And Haryana At Chandigarh

Case No: Criminal Appeal No. 996-SB of 2005

Balwinder Singh alias Billa

APPELLANT

Vs

State of Haryana

RESPONDENT

Date of Decision: Nov. 12, 2008

Acts Referred:

- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 15

Citation: (2008) 28 CriminalCC 666

Hon'ble Judges: Sham Sunder, J

Bench: Single Bench

Advocate: H.L. Bhatia, for the Appellant; A.K. Jindal, AAG, Haryana, for the Respondent

Final Decision: Allowed

Judgement

Sham Sunder, J.

This appeal is directed against the judgment of conviction dated 11.04.2005 and the order of sentence dated 15.04.2005, rendered by the Court of Additional Session Judge, Kurukshetra, vide which it convicted the accused (now appellant) 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 five years, and to pay a fine of Rs. 50,000/-, and in default of payment of fine, to undergo rigorous imprisonment for another period of one year, for having been found in possession of 46 kgs 200. grams poppy-hush, without any permit or licence, which falls within the ambit of non-commercial quantity.

2. The facts, in brief, are that on 18.09.2003, ASI Krishan Singh, Investigating Officer, posted in CIA Staff, Kurukshetra, alongwith other police officials, was present at G.T.Road, Pipli, in connection with patrol duty and detection of crime. In the meanwhile, Taranjit Singh, independent witness met the Police party. When ASI Krishan Singh reached bus stand, Pipli, he found a person sitting on two bags of

black colour and one plastic bag. He was apprehended, and on enquiry, he disclosed his name as Balwinder Singh alias Billa son of Sardara Singh. Thereafter, all the three bags were produced before DSP Anil Kumar Dhawan, at his residence. ASI Krishan Singh had apprised of him, the facts of the case. The search of bags was conducted. Each bag was found containing 15 kgs 400 grams poppy husk. Two samples of 200 grams each, were separated from each bag, and the remaining poppy husk, was put into the same bags. The samples, and the bags, containing the 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, formal FIR was registered. Rough site plan of the place of recovery, was prepared. The accused was arrested. 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 judicial trial.

4. The prosecution, in support of its case, examined ASI Om Parkash, PW1, HC Balvinder Singh, P W2, Constable Laxman Singh, P W3, EHC Jasmer Singh, PW4, Anil Kumar, DSP, PW5, Taranjit Singh, PW6, SI Avtar Singh, PW10 and Dharminder Kumar, Addl. Ahlmad, PW11. Thereafter, the 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. He, however, did not lead any evidence in his defence.

6. After hearing the 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 appellant, 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 outset, submitted that though Taranjit Singh, PW6, an independent witness was allegedly joined by the Investigating Officer, at the time of effecting the alleged recovery, yet he did not support the case of the prosecution. He further submitted that Taranjit Singh, in his statement, in clear-cut terms stated that nothing was recovered, in his presence, from accused Balwinder Singh. He further stated that his signatures were obtained on blank papers, by the Investigating Officer. He was put such questions, as are put, during the course of cross-examination by the Public Prosecutor, after seeking permission

of the Court but even during the course of such cross-examination, he did not improve the case of the prosecution. He also denied that after the alleged recovery of bags, containing poppy husk, the same were produced before the Deputy Superintendent of Police. Had Taranjit Singh, PW6, been with the police party, he would have certainly stated that the recovery was effected, from the accused, in his presence. There was no reason, on his part, not to speak the truth, had the recovery, in this case, been effected from the accused, in his presence. It is, no doubt true that the evidence of the official witness, cannot be disbelieved, and distrusted, in the absence of corroboration through and independent source, if the same is found to be cogent, convincing and reliable. In the instant case, the scrutiny of the evidence of the official witnesses, in the case is not reliable. In these circumstances, non-corroboration of the evidence of the official witnesses, through the statement of Taranjit Singh, independent witness, PW6, clearly caused a serious dent, in the prosecution case. This fact assumes greater importance, on account of the reason, that the alleged recovery of poppy husk effected from the accused falls within the ambit of non-commercial quantity, and could be planted against the accused. In [Mauria Udyog Ltd. Vs. Commissioner of Central Excise](#), a three Judge Bench of the Apex Court set aside the judgment of conviction, where the independent witnesses, denied that the search and seizure of opium took place, in their presence. The principle of law, laid down, in the aforesaid case, is fully applicable to the facts of the instant case. In these circumstances, a cloud of doubt, was cast on the prosecution story.

10. It was next submitted by the Counsel for the appellant, that though the alleged recovery was effected, in this case, on 18.09.2003, yet the sample parcels were sent to the office of the Forensic Science Laboratory on 24.09.2003 i.e. after a delay of 6 days, which remained unexplained. He further submitted that thus the possibility of tampering with the sample parcels, until the same reached the office of the Forensic Science Laboratory, could not be ruled out. The submission of the Counsel of the appellant, in this regard; appears to be correct, It is, no doubt, true that, if the other evidence, produced by the prosecution, to prove the completion of link evidence, is found to be cogent, convincing, reliable and trustworthy, then mere delay in sending the sample to the Office of Chemical Examiner, pales into insignificance. If, on the other hand, the other evidence produced, in this regard, is found to be un-reliable, then certainly the delay assumes importance. In the instant case, the other evidence, produced by the prosecution, to prove the completion of link evidence, besides being deficient, is neither reliable, nor creditworthy. In these circumstances, the un-explained delay, referred to above, in sending the sample to the laboratory, certainly proved fatal to the case of the prosecution. In *State of Rajasthan v. Gurmail Singh* 2005 ACJ 468 (S.C.) : 2005 (2) CCC 59 (S.C.) : 2005 (2) RCR 58 the contraband was kept in the Malkhana. The Malkhana register was not produced to prove that it was so kept, till the sample was handed over to the Constable for deposit in the laboratory. The other evidence produced was also

found to be un-reliable. In these circumstances, it was held that the prosecution miserably failed to prove that the sample was not tampered with, until it reached the office of the Chemical Examiner. In *Chan Singh v. State of Punjab*, 2006 (3) CCC 480 (P&H) : 2006 (2) RCR 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. The principle of law, laid down, in the aforesaid cases, is fully applicable to the facts of the instant case. The trial Court failed to take into consideration this aspect of the matter, in its proper perspective, as a result whereof, a dent was caused in the case of the prosecution became doubtful.

11. It was next submitted by the Counsel for the appellant, that the production of the case property before SI Baljit Singh, SHO, Police Station, Radaur was highly doubtful, in as much as, he did not prepare any document, for taking the said property into possession, nor did he make a mention of the factum that the case property was produced before him, in the case diary or any other document. The submission of the Counsel for the appellant, appears to be correct. SI Baljit Singh, PW10, during the course of cross-examination stated that he had not taken into possession the case property. He, however, stated that rather he returned the same to the Investigating Officer, after affixing his seals. He further stated that he had not recorded supplementary statements of any of the witnesses, in this case. Had the case property been produced before him, he would have certainly taken the same into possession, vide a separate memo, and would have made a mention of the same, in the case diary, or any other document. Had he mentioned this fact, in the case diary, or any other document, or had he prepared a memo for taking into possession, the case property, when the same was allegedly produced before him, his statement in the Court, would have been cross-checked. Since, it was not proved, beyond doubt, that the case property and the sample parcels were produced by the Investigating Officer, before the SHO, the provision of Section 55 of the Act were violated. No doubt, 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 breached. Had any explanation been furnished, by the Investigating Officer, as to what prevented him, from producing the case property, immediately after the search and seizure before the SHO, 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, to 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) RCR 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 violate 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 of the Act, he could not say that since the provisions of Section 55 of the Act are 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 provisions, 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 Court seems to 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 provision 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, it fell into error, in recording conviction.

12. It was next submitted by the Counsel for the appellant that the statements of HC Balvinder Singh, PW2, Constable Laxman Singh, PW3, who are material witnesses, were not recorded u/s 161 Cr.P.C. by the Investigating Officer. The submission of the Counsel for the appellant, in this regard, appears to be correct. No explanation, whatsoever, was furnished by the Investigating Officer, as to what prevented him, from recording the statements of the aforesaid witnesses u/s 161 Cr.P.C. In the absence of recording the statements of these witnesses u/s 161 Cr.P.C, the accused was deprived of confronting them with their previous statements, so as to shatter their veracity. In *Padam Singh v. State of Haryana*, 1997(4) RCR 172 (DB) (P&H), the statement of the DSP, who allegedly reached the spot, at the time of search and seizure, u/s 161 Cr.P.C. was not recorded. The Division Bench, in the aforesaid authority, under these circumstances, held that non-recording of the statement of such an important witness, was a serious irregularity, which considerably prejudiced the accused and may make his testimony tainted. Ultimately, on this ground, and, on other grounds, the conviction was set aside. The principle of law, laid down, in the aforesaid authority, is applicable to the facts of the present case. Non-recording of the statements of HC Balvinder Singh, PW2, and Constable Laxman Singh, PW3, u/s 161 Cr.P.C. by the Investigating Officer, caused a dent in the prosecution story. The case of the prosecution, therefore, became highly doubtful, on account of this reason.

13. It was next submitted by the counsel for the appellant, that the prosecution failed to prove that the accused was in conscious possession of the contraband. According to the prosecution, the accused was found sitting on the bags, containing

poppy husk, at the bus stand. Bus stand is a public place, accessible to all and sundry. The passengers in large numbers, do board and alight from the buses. The accused might have sat on the bags containing poppy husk, while waiting for the bus. No body saw him placing the bags, containing poppy husk, at the bus stand. Some other passenger might have placed these bags, at the bus stand. No investigation, in this regard, was made by the Investigating Officer. Thus, it was not proved, beyond doubt, that the accused was aware of the contents of the bags, lying at the bus stand. He was, thus, not in conscious possession of the contraband. In *Sukhdev Singh v. State of Punjab*, 2006 (1) CCC 934 (P&H) (DB) : (2006) 1 RCR 4 (P&H), a Division Bench of this Court acquitted the appellant holding that he was not in conscious possession of the contraband, when he was found sitting on six bags containing poppy husk, at an open and accessible place. The facts of the aforesaid case, are identical to the facts of this case. Since, the accused was not found in conscious possession of the contraband, he did not commit any offence, punishable u/s 15 of the Act. The trial Court, fell into an error, in convicting the accused.

14. No point was urged by the Counsel for the parties.

15. 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 liable to be set aside.

16. For the reasons recorded, hereinbefore, the appeal is accepted. The judgment of conviction dated 11.04.2005, and the order of sentence dated 15.04.2005, 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, is in custody, he shall be set at liberty, at once, if not required in any other case.