

(2008) 05 P&H CK 0185

High Court Of Punjab And Haryana At Chandigarh**Case No:** Criminal Appeal No. 1484-SB of 2001

Basir Mohammad

APPELLANT

Vs

State of Haryana

RESPONDENT

Date of Decision: May 2, 2008**Acts Referred:**

- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 20

Hon'ble Judges: Harbans Lal, J**Bench:** Single Bench**Advocate:** Robin Dutt, for the Appellant; Tarunveer Vashist, AAG, for the Respondent**Final Decision:** Allowed

Judgement

Harbans Lal, J.

This appeal is directed against the judgment dated 25.09.2001 order of sentence dated 28.09.2001 rendered by the Court of learned Additional Sessions Judge (Special Judge), Panchkula, whereby he convicted and sentenced the accused/ appellant Basir Mohammad to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs. 1 lakh and in default of payment of fine, to further undergo rigorous imprisonment for a period of one year u/s 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for brevity "the Act").

2. Shortly put, the facts of the prosecution case are that on 19.06.1999, ASI Karan Singh among other police officials happened to be present in the area of Nada Sahib in connection with crime checking and patrolling. After a short-while, Jagdish Sarpanch came there. He started chattering with the aforesaid ASI. In the meantime, the accused Basir Mohammad came at the spot. On catching sight of the police party, he made an endeavour to beat a retreat, which aroused suspicion in the mind of the aforesaid ASI, who intercepted the accused and apprised him of his right that if he requires, his search can be carried out in the presence of a Gazetted Officer or a Magistrate. He opted to be searched before a Gazetted Officer. On receipt of the

message. DSP Jagparvesh Dahiya arrived at the spot. On his directions, the aforementioned ASI carried out the search of the bag, which yielded charas. When weighed, it came to 600 grams, out of which two samples each weighing 25 grams were drawn and converted into parcels. The remainder was also made into parcel. All the parcels were sealed with seal "KS" and "JD" and seized vide recovery memo alongwith the bag. Ruqa was sent to the police station. On its basis formal FIR was registered. The aforesaid ASI prepared the rough site plan showing the place of recovery, arrested the accused alongwith the case property and the witnesses and produced the accused alongwith the case property and the witnesses before Mukesh Kumar SI/SHO, who after verification affixed his own seal "MK" on the said parcels. On receipt of the report from Forensic Science Laboratory and after completion of investigation, the charge-sheet was laid in the Court for trial of the accused.

3. The accused was charged u/s 20 of the Act, to which he did not plead guilty and claimed trial.

4. To bring home guilt against the accused, the prosecution has examined PW1 HC Partap Singh, PW2 ASI Hari Ram, PVV3 DSP Jag Parvesh, PW4 SI/SHO Mukesh Kumar, PW5 ASI Karan Singh, Investigating Officer, PW6 UGC Ram Chander and closed its evidence by tendering the Forensic Science Laboratory's report F.x.PJ.

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 did not lead evidence in defence. After hearing the learned Public Prosecutor for the State, learned defence counsel and examining the evidence on the record, the learned trial Court convicted and sentenced the accused as noticed at the outset. Feeling aggrieved therewith, he has preferred this appeal. I have heard the Learned Counsel for the parties and perused the record with due care and circumspection.

6. Mr. Robin Dutt, Advocate appearing on behalf of the appellant making a short shrift of his arguments canvassed at the bar that (a) there is delay of 15 days in sending the sample parcels to the Forensic Science Laboratory for chemical analysis; (b) Form M 29 was not prepared at the spot nor deposited in the malkhana; (c) the so-called independent witness Jagdish Sarpanch, to whom the seal was allegedly entrusted after use, has not been produced at the trial, with the result, primarily the accused has been deprived of his valuable right to cross-examine him, secondly, in the absence of his cross-examination, how it can be ascertained that the seal was returned by him after deposit of the sample parcels for chemical analysis; (d) ASI Hari Ram PW2 was declared hostile and he has admitted in categorical terms in his cross-examination by the accused that the recovery memo Ex. PD does not bear his signatures, though, his name as ASI Hari Ram written on the same, is suggestive of the fact that the recovery was not effected in his presence and these circumstances, when put together, demolishes the prosecution case like a house of cards. To drive

home, his arguments, he has relied upon the observations made in re: Gian Singh v. State of Punjab, 2006 (3) CCC 480 (P&H) : 2006 (2) RCR (Cri.) 611 (P&H), Mohamed Salim v. State of Haryana, 2008 (2) RCR (Cri.) 128 (P&H), Ramesh v. State of Haryana, 1998 (1) RCR (Cri.) 146 (P&H), Narain v. State of Haryana, 1997 (1) RCR (Cri.) 414 (P&H), Emma Charlotte Eve v. Narcotic Control Bureau, 2000 (4) RCR(Cri.) 386 (Delhi) and Bhola Singh v. State of Punjab, 2005 (2) CCC 865 (P&H) : 2005(2) RCR (Cri.) 520 (P&H).

7. To overcome these submissions, Mr. Tarunveer Vashist, Additional Advocate General, Haryana on behalf of the State argued that as revealed by Ex. PJ, the report of FSL, the sample seals tallied with the seals affixed on the sample parcels, when these were received in the laboratory and thus, the possibility of tampering with the contents of the sample parcels stands ruled out. He further argued that the witness, who has joined hands with the accused, cannot be expected of the prosecution to examine him. These contentions merit rejection for the discussion to follow hereunder:

8. The standing instruction No. 1/88 dated 15.03.1988 issued by the Narcotic Control Bureau, New Delhi reads in the following terms:

1.13 Mode and Time limit for dispatch of sample to Laboratory:

❖ The samples should be sent either by insured post or through special messenger duly authorised for the purpose. Dispatch of samples by registered post or ordinary mail should not be resorted to. Samples must be dispatched to the Laboratory within 72 hours of seizure to avoid any legal objection.

9. It has been manifested in plain words by the Narcotic Control Bureau that the sample parcels must be dispatched to the laboratory within 72 hours of the seizure to avoid any legal objection, whereas undeniably there is delay of ! 5 days in sending the sample to the FSL for chemical analysis in this case. The seal after use was allegedly handed over to Jagdish Sarpanch the alleged independent witness, who has been kept off the witness box. Only his examination would have been revealed that as to whether before or after the dispatch of the sample parcels, the seal was returned to him. Thus, in the absence of his examination, it is very difficult to presume that the seal was returned by him to the Investigator after sending the sample for chemical analysis. In this manner, he was also a cog in the wheel of link evidence. The Division Bench of this Court held in re: State of Punjab v. Surjit Singh, 2008 (1) RCR (Cri.) 266, (P&H) that when the prosecution alleged that a material witness has been won over by the accused, it is still necessary that such witness must be examined to reveal the truth. In re : Emma Charlotte Eve (supra), the prosecution failed to rule out the possibility of sample being changed or tampered with. It was held that it is a fact which has to be proved affirmatively by the prosecution. In re: Bhola Singh (supra). 14 bags of poppy husk were recovered from trolley. It was held that CFSL form should be prepared at the spot and deposited in

Malkhana. Filing of such form at the spot is a very valuable safeguard to ensure that the seal sample is not tampered with till its analysis by the FSL. Here in this case, as is borne out from the prosecution evidence, CFSL form was not prepared at the spot, nor deposited in the malkhana. In re: Narain (supra), the sample was deposited with the FSL with unexplained delay of 10 days. It was held that it causes dent in the prosecution version. In re : Mohd. Salim (supra), the samples were sent to the laboratory after 12 days. This delay was held fatal to the prosecution case. In re : Gian Singh (supra), the sample was sent to the Chemical Examiner after 14 days. It was held that the possibility of seal being tampered with, substance being changed and the container/packet being resealed cannot be ruled out. In the present case, firstly, there is a delay of 15 days in sending the sample for chemical examination. Secondly, CFSL form was neither prepared at the spot nor deposited in the malkhana. Thirdly, Jagdish Sarpanch, to whom the seal was allegedly entrusted, has been withheld by the prosecution. He was a material link to prove that the seal was taken back by the Investigating Officer after the deposit of the sample. It is quite axiomatic that the sample was sent for chemical examination beyond the period prescribed by the afore-referred Standing Instruction of the Narcotic Control Bureau. Startlingly enough that ASI Hari Ram PW2, an official witness, was declared hostile. His cross-examination directed by the accused tells upon the prosecution story. As alleged by the prosecution the recovery was effected in his presence, whereas he has testified that ""this recovery memo does not bear my signature. Though, my name ASI Hari Ram has been written on the same. I do not know as to who has written my name as a witness, in recovery memo Ex. PD." This evidence shakes the credibility of the prosecution story. It is also in his cross-examination that "Ex. P2 containing the residue have five seals. Ex. P I bears six seals. One of the seals is not readable". It is in his further evidence that "no bag is present in the court, which was taken into possession by the police". This evidence is not in conformity or is incompatible with the evidence of other recovery witnesses with regards to the number of seals affixed on the case property and the sample parcels. It is in his cross- examination that "I have stated in the Court and to the police officer in my statement that the documents Ex. PB and Ex. PC were read over and explained to the accused by Karan Singh. After hearing the contents thereof, and after admitting the same to be correct, the accused put his thumb impression on the same." When he was confronted with his statement Ex. PWI/A, it was not found so recorded therein. It is in his further cross-examination by the accused that "I have made the statement before the Investigating Officer that accused alongwith case property was produced before Mukesh Kumar SHO, who has put his seal on the case property." When he was confronted with his statement Ex. PWI/A, it was not found so recorded therein. Thus, palpably he has introduced material improvements in his testimony. In his cross-examination, PW3 Jag Parvesh, DSP went on to say that "nothing was sealed by me or by the Investigating Officer. We have not put any seal on the bag". Whereas in his examination-in-chief, he has testified that the separate samples were prepared and sealed . by me with my seal bearing impression "JP" and

thereafter, Investigating Officer had also put his seal bearing impression "KS" on all the three samples. This evidence further renders the prosecution story highly doubtful. Obviously his examination-in-chief is not in unison with his cross-examination. PW5 Karan Singh, Investigating Officer under the stress of cross-examination has stated that "It is correct that the recovery memo Ex. PD does not bear the signature of ASI Hari Ram." This admission read in conjunction with the above discussed evidence of ASI Hari Ram, leads to an illation that in fact Hari Ram was not in attendance at the spot. May be that his name was added in the recovery memo to show his presence at the spot. The absence of his signatures on the recovery memo further cast a cloak of suspicion on the prosecution version.

10. It can be culled out from the preceding discussion that the evidence of ASI Hari Ram PW2 is at variance with that of other witnesses. In a criminal case, the accused has no other way to show that a false case has been foisted on him except to show that the witnesses examined by the prosecution are not telling the truth when they are making discrepant statements on material aspects of the case. Thus, it would be quite risky to rely upon the evidence adduced by the prosecution to maintain conviction.

In view of the infirmities referred to hereinbefore, this appeal is accepted. The impugned judgment of conviction/order of sentence is hereby set aside and the appellant is hereby acquitted of the charged offence.