

(2014) 04 P&H CK 0269

High Court Of Punjab And Haryana At Chandigarh**Case No:** C.R.A.-S. No. 853-SB of 2000

Kulwant Singh

APPELLANT

Vs

State of Punjab

RESPONDENT

Date of Decision: April 9, 2014**Acts Referred:**

- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 15, 41, 42, 43, 44

Citation: (2015) 1 Crimes 192 : (2014) 4 RCR(Criminal) 316**Hon'ble Judges:** R.P. Nagrath, J**Bench:** Single Bench**Advocate:** Paramjit Singh Brar, Baltej Singh Sidhu and Jaswant Singh, Advocate for the Appellant; B.S. Cheema, Advocate for the Respondent

Judgement

R.P. Nagrath, J.

This is an appeal against the conviction of appellants recorded by the Judge, Special Court under Section 15 of Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "the Act"). Being commercial quantity, appellants were sentenced to undergo rigorous imprisonment for ten years and to pay fine of Rs. 1 lac, in default of payment of fine to further undergo rigorous imprisonment for six months each. The version of prosecution is that on 04.05.1994, police party headed by Inspector Teja Singh, SHO of Police Station Kotwali, Bathinda was present at Naruana road in connection with Jitender Kumar checking of vehicles. Chand Singh son of Kala Singh a private witness was also present with the police party. Major Singh DSP City Bathinda came there and was issuing instructions with regard to checking of the vehicles. In the meanwhile, the police party saw Truck No. PB-03-2808 coming from Naruana side at a fast speed. Inspector Teja Singh stopped the vehicle with the help of other officials. The driver and other occupant of the truck sitting in cabin, tried to run away. Kulwant Singh-appellant No. 1, the driver was apprehended at the spot but his accomplice managed to escape.

2. Search of the truck was conducted by Inspector Teja Singh in the presence of DSP Major Singh. The truck was found loaded with four bags containing 32 kgs. of poppy-husk each. 100 gms. of poppy-husk from each of these bags were separated as samples. The samples and remaining gunny bags each containing 30 kgs. 900 gms. of poppy-husk were prepared into parcels sealed with seal bearing impression "TS" of the Inspector. Seal after use was handed over to ASI Dinesh Kumar.
3. The case property was taken into possession vide memo Ex. PA attested by other police officials, the DSP and also Chand Singh P.W. The truck was also taken into possession vide separate memo Ex. PB. Ruqa Ex. PD was sent to the Police Station and formal F.I.R. Ex. PD/1 was registered. Rough sketch Ex. PE of the place of recovery was also prepared.
4. All the four sample parcels were sent for analysis to the office of Chemical Examiner and the contents were found to be poppy Head vide report Ex. PK.
5. Bhura Singh-appellant No. 2 was arrested on 18.05.1994 by P.W.-2 Manohar Lal Inspector, then posted as Additional SHO of Police Station Kotwali, Bathinda. After the challan was presented a charge was framed against both the appellants for offence under Section 15 of the Act.
6. The prosecution examined four witnesses in support of its case.
7. The appellants denied all the incriminating circumstances appearing in the prosecution evidence against them and pleaded false implication. Kulwant Singh-appellant No. 1 pleaded that the recovery was in fact made from Naresh Kumar and Rikhi Ram, owners of the truck but the appellant was falsely implicated by arresting him from his house. Bhura Singh-appellant No. 2 pleaded that he was not accompanying Kulwant Singh-appellant No. 1 nor anything was recovered from him. He was apprehended from his house in the presence of Piara Singh, ex-member panchayat and Amar Singh son of Arjan Singh and illegally detained in the police station. In defence Bhura Singh-appellant No. 2 examined Amar Singh as DW-1.
8. Learned trial Court convicted and sentenced the appellants as aforesaid.
9. I have heard learned counsel for the appellants, the State counsel and carefully perused the trial Court record.
10. The prosecution version with regard to recovery was testified by P.W.-1 Inspector Teja Singh Investigating Officer and P.W.-3 Major Singh, Superintendent of Police (Operations), who was then posted as DSP. Four bags of poppy-husk which were prepared into sealed parcels were produced as Ex. P-2 to P-5 during examination of P.W.-1. Both these witnesses stated that sample seal was also prepared separately as Ex. P-1 at the spot which was affixed on the report of Chemical Examiner.

11. P.W.-3/A Inspector Gurjant Singh then posted as SHO of the police station recorded the statement of Transport Registration Clerk, DTO office, Bathinda. The witness stated that owners of truck No. PB-03-2808 are entered as Naresh Kumar and Rikhi Ram.

12. Learned counsel for the appellants challenged the conviction of appellants inter alia on the grounds:-

(i) That the evidence of prosecution comprises only of official witnesses and the only independent witness allegedly joined was not produced;

(ii) that the link evidence is not free from suspicion; and

(iii) that there is non-compliance of the provisions of Sections 50, 52, 55 and 57 of the Act.

13. On the other hand, the learned State counsel has supported the findings of the trial Court. It is contended that there was no ulterior motive with the police officials to falsely implicate the appellants, and that a heavy recovery was made from possession of appellants.

14. The only witnesses of recovery examined by the prosecution are, P.W.-1 Inspector Teja Singh (Investigating Officer) and to support him is the testimony of P.W.-3 Major Singh DSP.

15. The present seems to be basically a one man show and various safeguards supposed to have been adopted were given a complete go-bye. It must be remembered that the offences under the Act of 1985 prescribe minimum harsh punishment. It is the settled principle that stringent the punishment, stricter the proof.

16. According to both the witnesses, seal after use was handed over to ASI Dinesh Kumar, a member of police party who also attested the recovery memo but ASI Dinesh Kumar was not examined to bring confidence in the version. Normally, when an independent witness was associated in the investigation, the seal after use would have been handed over to him instead of a police official much junior in rank to the investigating officer. The fact, however, remains that even the independent witness was also not produced, depriving the appellants of opportunity to cross-examine the witness. Chand Singh, independent witness was given up as having been won over by the accused but that is only a convenient method which was adopted. Except for attestation of the DSP on the recovery memo Ex. PA, even the memo of taking into possession the truck is not attested by the DSP.

17. The non-examination of independent witness or factum of the seal after use having not been handed over to the independent witness cannot per se demolish the case of prosecution but would assume significance on the cumulative effect of entire evidence led in support of the charge especially when ASI Dinesh Kumar was

also not examined. In [Ram Swaroop Vs. State \(Govt. NCT\) of Delhi](#), and [Sumit Tomar Vs. The State of Punjab](#), it was held by Hon"ble Supreme Court that non-examination of independent witness cannot have affect on the prosecution case. The said principle was elaborately discussed by the Full Bench of this Court in [Piara Singh Vs. State of Punjab](#), and it was held that there is neither a statutory requirement nor precedential mandate for handing over the seal used by the police officer in the course of an investigation to a third witness forthwith. It was further held that it necessarily follows therefrom that even where it has been so done, the non-production of such a witness cannot by itself affect the merits of the trial.

18. In the instant case it was more appropriate if the parcels of bags and samples were also sealed with the seal of DSP, to remove any suspicion of any tampering at the subsequent stage because the case property remained in the custody of P.W.-2 himself for the whole night and the same was produced before the Chief Judicial Magistrate on the next day.

19. The contention that there has been non-compliance of Section 50 of the Act is untenable as it is the settled principle that when the recovery was made from the vehicle and not from the person of the accused, this provision would not be attracted. The above principle was reiterated by the Apex Court in Ram Swaroop's case (supra).

20. There is, however, total non-compliance of Sections 52, 55 and 57 of the Act. Section 52 of the Act says in Sub-section (1) that any officer arresting a person under section 41, section 42, section 43 or section 44 shall, as soon as may be, inform him of the grounds for such arrest. Subsection (3) of Section 52 says that every person arrested and article seized under sub-section (2) of Section 41, Section 42, Section 43 or Section 44 shall be forwarded without unnecessary delay to:-

(a) the officer-in-charge of the nearest police station, or

(b) xx xx xx xx xx

21. P.W.-1 in cross-examination stated that the grounds of arrest were disclosed to Kulwant Singh-appellant but no memo of arrest was prepared. The above testimony of P.W.-1 would have been substantial compliance of Section 52(1) of the Act but the evidence on the subject is quite discrepant. P.W.-3 in cross-examination stated that he did not disclose grounds of arrest to the accused. Even none else in his presence had disclosed the appellant about the grounds of arrest.

22. The settled principle is that the provision of Section 52 of the Act are directory but there is also non-compliance of Section 55 of the Act. Section 55 of the Act says that 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. (emphasis laid)

23. It was thus required that on return to the police station the case property should have been handed over to the SHO-Incharge of the police station in order to comply with Section 55 of the Act to say that apart from the seal of investigating officer, it was also bearing another seal to ensure there is no scope of tampering. P.W.-2 Inspector Manohar Lal was posted as Additional SHO of Police Station Kotwali, Bathinda. P.W.-2 arrested Bhura Singh co-accused on 18.05.1994 but he does not state a word about production of case property before him by P.W.-1 on return to police station being additional SHO of Police Station Kotwali. Hon"ble Supreme Court in [Karnail Singh Vs. State of Rajasthan](#), observed that if resort is had to the procedure prescribed under Section 52(3)(a), the applicability of Section 55 of the Act would be attracted.

24. In some cases it has been held that if the parcel is bearing seal of investigating officer and also the DSP who had come to the spot and puts his seal on the case property, there is Jitender Kumar substantial compliance of the provisions of Section 55 of the Act as DSP is an officer much senior in rank to the SHO of the Police Station. But in the present case, the DSP has not put his seal on the case property for unexplained reasons. These facts would make presence of the DSP suspicious and suggest that he only signed the memo of recovery while sitting at the police station or his office. The DSP has not even signed the document in the normal course but has put the word attested over it before signing Ex. PA.

25. There is even non-compliance of Section 57 of the Act. P.W.-1 in cross-examination stated that no special report was sent to senior officers regarding the recovery of poppy-straw from the accused. It may be contended that DSP being senior officer was himself present at the spot but this is not a case where DSP was called at the spot by sending information to supervise the proceedings but DSP was already present for imparting necessary instructions for checking of the vehicles. P.W.-3 in cross-examination stated that he also did not send special reports with regard to this case.

26. In [Thandi Ram Vs. State of Haryana](#), before the Hon"ble Supreme Court, there was non-compliance of Sections 55 and 57 of the Act and the conviction of accused was set aside. In [Gurbax Singh Vs. State of Haryana](#), Hon"ble Supreme Court held that it is true that provision of Sections 52 and 57 are directory and violation of these provisions would not ipso facto violate the trial or conviction. However, I.O. cannot totally ignore these provisions and such failure will have a bearing on appreciation of evidence regarding arrest of the accused or seizure of the article. It was admitted in that case that the seal which was affixed on the muddamal article was handed over to the witness (P.W.-1) and was kept with him for 10 days. It was also admitted that the muddamal parcels were not sealed by the officer in charge of the police

station as required under Section 55 of the Narcotic Drugs and Psychotropic Substances (NDPS) Act. The prosecution also did not lead evidence whether the Chemical Analyser received the sample with proper intact seals. It was found as a matter of fact that investigating officer had not followed the procedure prescribed under Section 57 of the NDPS Act by making full report of all particulars of arrest and seizure to his immediate superior officer. In the facts of the said case and faulty investigation by the prosecution, it was found not safe to convict the appellant for a serious offence of possessing poppy-husk.

27. Learned counsel for the appellants referred to the affidavit Ex. PG of Manjit Singh MHC of the police station who dealt with the case property till the time it was entrusted to the constable for being deposited in the office of Chemical Examiner. In this affidavit Ex. PG it is stated that the sample parcels were entrusted to Constable Buta Singh for being deposited in the office of Chemical Examiner on 11.05.1996. In paragraphs No. 4 and 5, it was stated that sample parcels were deposited by the constable on 12.05.1996 and Constable Buta Singh handed over the receipt of the same on 13.05.1996.

28. It must be remembered that instant case is of the year 1994. I am of the view that though this is a hyper-technical point which cannot be given undue importance for discarding the affidavit of MHC as the facts stated in the affidavit of Constable Buta Singh, Ex. PH, contain the correct dates. Some mistake or error in mentioning the year in the affidavit Ex. PG, thus cannot provide any advantage to the appellants. It is also to be noted that the prosecution tendered affidavits of formal witnesses and they were not cross-examined. The accused had subsequently made statements separately recorded by the trial Court, that they do not want to cross-examine these witnesses whose affidavits have already been tendered.

29. The learned appellants' counsel further contended that the affidavits of formal witnesses to complete the link evidence are defective in as much as these do not bear the seal of Magistrate. This was the precise contention raised before this Court in [Jarnail Singh Vs. State of Punjab](#), that the affidavits of formal witnesses were not bearing seal of the Court before whom the affidavit was sworn. It was held that such being the position such affidavit is no affidavit in the eyes of law. It was thus concluded that there was no evidence on record for stating that the contents of the boiler which were tested and Jitender Kumar reported by Excise Inspector to be illicit lahan, was the same which was recovered from the petitioner as a result of the raid. This Court observed as under:-

"..... This point was raised before the lower appellate Court also but the contention was repelled on the ground that this point had not been raised on behalf of the defence before the trial Court. I am constrained to say that the lower appellate Court gravely erred in taking such a view. What evidence the prosecution decides to produce is the function of the prosecution. The Court has to decide the matter on the evidence that is adduced. It was the duty of the appellate Court to take notice of

the lacuna in question in the evidence, when the point was raised before the appellate Court. It was not open to the lower appellate Court to take protection behind the argument that the contention in question was not raised before the trial Court and no objection raised before that Court regarding the admissibility of the said affidavit.

It may be observed that it is no function of the accused to point out any such defect in the prosecution evidence when it is adduced in Court."

From the discussion made above and finding serious defects, it is very difficult in the facts and circumstances of the case to hold that the case of the prosecution stands proved beyond suspicion. The instant appeal is, therefore, allowed and judgment of conviction and consequently the sentence are set aside. The appellants would stand acquitted and the bail bonds furnished by them during pendency of instant appeal shall stand discharged.

A copy of this order be sent to all concerned for necessary compliance.