

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

Date of decision : July 26, 2006

Sarban Ram

....Appellant

versus

State of Punjab

....Respondent

Coram: Hon'ble Mr. Justice Virender Singh

Present : Mr. A.S.Jattana, Advocate for the appellant
Mr. G.S.Bhandari, Deputy Advocate General, Punjab

Judgment

This detailed judgment is in continuation of my short order vide which the instant appeal already stands allowed and the appellant has been ordered to be released as he was stated to be in custody.

Appellant Sarban Ram son of Budh Raj son of Rattu Ram, resident of village Haryaon, Police Station Lehra, District Sangrur stands convicted vide impugned judgment of learned Judge, Special Court, Mansa dated 23.5.2002 under section 15 of the Narcotic Drugs & Psychotropic

Substances Act, 1985 (for short 'the Act') and has been sentenced to undergo RI for ten years and to pay a fine of Rs one lac, in default of payment of fine to further undergo RI for one year. Aggrieved by the said judgment, he has preferred the instant appeal.

It is worth mentioning here that the appellant is stated to be in custody since the date of his arrest i.e. 21.12.1999. Record reveals that at one stage, this appeal was ordered to be heard preferably on a Wednesday but the same could not be heard. An application bearing Criminal Misc. No. 33010 of 2006 was moved by the appellant for interim bail on the ground that he is of 80 years had suffered a paralytic attack in the jail for which he needs a proper care. For the purposes of disposing of the aforesaid miscellaneous application, the concerned doctor from District Jail, Sangrur was summoned with complete medical record who in compliance thereto had appeared before this Court on 24.7.2006 along with requisite record and stated that the left side of the appellant has no sensation at all and the jail authorities are not in a position to give him proper medical care on account of paucity of staff. Keeping in view the physical condition of the appellant and the fact that he had already undergone a substantial period of his substantive sentence, this appeal was listed for final disposal.

Succintly the case of the prosecution is that on 21.12.1999, SI Chanan Singh along with other police officials was going towards village Kishangarh on patrol duty in an official vehicle. When the police party

reached Bahadurpur Kainchian, they met one Leela Ram son of Rabi Ram resident of village Bareta who was also joined in the police party. They then proceeded towards Kishangarh. When the police party was one kilometer short of village Kishangarh, they noticed a man sitting on two bags near Bohar tree. On seeing the police party, he abruptly stood up and tried to run away. On the basis of the suspicion, ASI Chanan Singh made official vehicle to stop. The appellant was apprehended by the police party. On interrogation he disclosed his name as Sarban Ram son of Budh Ram resident of Haryana. As ASI Chanan Singh suspected the appellant carrying some contraband in the bags, he was apprised of his right of search as per the provisions of section 50 of the Act. He had shown his preference to be searched by some Gazetted Officer. In this regard option memo was prepared which was thumb marked by the applicant and witnessed by other witnesses. Intimation was sent to Sh. Baljit Singh DSP, Budhlada who reached the spot. He after introducing himself to the appellant interrogated him. The appellant reposed confidence in him. In this regard identity cum consent memo was also prepared which was thumb marked by the appellant and signed by DSP and other witnesses. Thereafter the search of bags was conducted. These were containing poppy straw. From both the bags, two samples of 100 grams each were drawn. Parcels of four samples were prepared. On weightment the remainder turned out to be 34 kgs in each bag. Their parcels were also prepared. Parcels of sample, and remaining poppy

straw were sealed by ASI Chanan Singh with his seal bearing description 'CS'. Separate sample seal was also prepared. The seal after use was handed over to aforesaid Leela Ram (independent witness) and the articles were taken into possession vide recovery memo. ASI Chanan Singh after completing all the formalities sent ruqa to the Police Station whereupon formal FIR was recorded. Rough site plan of the place of recovery was also prepared. Some currency was recovered from him. The personal search memo was prepared in this regard. On return from the place of recovery, the appellant and the case property were produced before SI Jalour Singh, SHO, Police Station Bareta. ASI Chanan Singh also prepared special report under section 57 of the Act and it was sent to the high police officials. The appellant and the articles of case property were produced before the Ilaqa Magistrate by SI Jalour Singh. Two samples of parcels were sent to the Laboratory for analysis and as per report, poppy straw was found therein. Consequently, the challan was presented against the appellant before the concerned court. He was charged under section 15 of the Act.

In order to prove its case, the prosecution has examined ASI Chanan Singh (PW1). He is the Investigating Officer of this case. The entire evidence conducted by him is depicted, in brief, in the preceding paras.

SI Jalour Singh PW2 was SHO of Police Station Bareta. His evidence is with regard to the compliance of section 55 of the Act. He had

also produced the appellant and the case property before the Ilaqa Magistrate along with formal application. His evidence is to the effect that since sufficient space was not available in the Malkhana to accommodate the case property, he retained the possession over the same. Challan is also signed by him.

HC Gurmail Singh PW3 is another witness to the recovery. He corroborates the statement of ASI Chanan Singh, Investigating Officer.

DSP Baljit Singh PW5 is again a witness to the recovery.

The prosecution has also tendered affidavit Ex. PG/1 of Constable Gardaur Singh in which he states that on 29.12.1999, he had taken two samples of poppy straw for analysis and had deposited the same in the office of FSL on 30.12.1999. Ex. P1 is the report of FSL. Certain police constables were given up as unnecessary whereas aforesaid Leela Ram independent witness was given up as having been won over.

The case of the appellant as it emerges from his statement under section 313 of the Code of Criminal Procedure is of false implication. The appellant has not led any defence evidence.

After appreciating the entire evidence, the trial court has convicted and sentenced the appellant as stated herein above.

I have heard Mr. A.S.Jattana, learned counsel for the appellant and Mr. G.S.Bhandari, learned Deputy Advocate General. With their assistance I have also gone through the entire record.

Mr. Jattana contends that the basic infirmity in the case of the prosecution is that the investigating officer has not made an attempt to trace the source of supply of poppy straw by investigating the case further in that direction and simply because the appellant was found sitting on two bags allegedly carrying poppy straw would not prove the conscious possession of the appellant. Baljit Singh (DSP) in his cross-examination has stated that before leaving the place of recovery he had instructed ASI Chanan Singh, the investigating officer to know the source but ASI Chanan Singh when stepped into witness box has not stated a word about it. To strengthen his arguments, the learned counsel relies upon a Division Bench Judgment of this Court rendered in **Sukhdev Singh alias Sukha Vs. State of Punjab**, 2006 (1) R.C.R. (Criminal) 4.

Mr. Jattana while dwelling upon his arguments further contends that the prosecution case is resting upon the evidence of police officials alone who were interested in the success of the case and the only independent witness (Leela Ram) to whom the seal was handed over, has not been produced. This again is a vital flaw which dents the prosecution case. According to learned counsel, the explanation rendered by the prosecution in the shape of an application (Mark 'A') moved by the concerned police official stating that the said witness has been won over by the accused, is without any basis and cannot be said to be plausible explanation in itself.

Another flaw in the case of the prosecution as pointed out by Mr. Jattana is that two sample parcels out of four drawn at the spot have been sent to the FSL for analysis but it is not made clear by the prosecution as to whether the said two sample parcels sent for analysis were from two different gunny bags allegedly carrying poppy straw and possibility of the said two samples extracted from one bag cannot be ruled out. In this eventuality, the appellant at the most can be held to be liable for allegedly carrying half of the contraband and not 68.200 Kgs in two different gunny bags as is the case of the prosecution.

Learned counsel then submits that the case property remained in the possession of SI/SHO Jalour Singh throughout till the samples were sent to the FSL on 29.12.1999 through constable Gardaur Singh who has tendered his affidavit Ex.PG/1 and the same was not deposited in the judicial Malkhana despite the order of the learned Ilaqa Magistrate. He states that the explanation given by S.I. Jalaur Singh is that there was no sufficient space in judicial Malkhana to accommodate the case property, therefore, he retained the possession over the same with him, is not at all appealing. According to the learned counsel if this witness was not in a position to deposit the case property in the Malkhana as directed by the trial Court, he could move an application before the concerned Court for getting a fresh order in this regard. Once it is not done, possibility of tampering with the case property before it reached the hands of the Chemical

Examiner cannot be ruled out. This again is a very material flaw in the case of the prosecution and can be said to be sufficient to discard it.

Mr. Jattana lastly points out certain discrepancies in the statements of the police officials and submits that the same coupled with the aforesaid infirmities are sufficient to show that the prosecution has not been able to prove its case beyond shadow of reasonable doubt qua the appellant and as such he deserves acquittal.

On the other hand, Mr. Bhandari, learned Deputy Advocate General Punjab, contends that the recovery has been effected in the presence of a senior police officer (DSP) and, therefore, there cannot be any reason to doubt the investigation conducted by ASI Chanan Singh. Even otherwise, it can not be false implication.

The appellant has not been able to project any defence which would show that he has been falsely implicated. The learned State counsel then submits that even if the independent witness has not been produced by the prosecution, the same would not affect the case of the prosecution which is otherwise proved from the evidence of the official witnesses and the other flaws pointed out by Mr. Jattana are not that vital so as to discard the case of the prosecution in its totality. Therefore, the appellant has no escape.

After considering rival contentions of both the sides and going through the entire case file minutely, I am of the considered view that the prosecution has not proved the charge against the appellant to the hilt. I

shall now be entering into a detailed discussion.

The case of the prosecution is that when the police party headed by ASI Chanan Singh (PW1) was going to village Kishangarh from Bareta, the appellants was found sitting on two bags containing poppy straw and was apprehended at the spot. A fact which is very relevant is that the appellant is resident of village Haryaon, which falls within police station Lehra, District Sangrur. The present case is registered in Police Station Bareta (District Mansa). Since the appellant was from a different place which falls in another District, it was the bounden duty of the investigating officer to conduct further investigation to know as to how he was in possession of those bags at a particular place. The appellant is an illiterate person of the age of about 70 years which fact is clear from the records. No doubt, he has not been able to give any explanation of being present at the place but that fact by itself does not go to show that he was in the conscious possession of the contraband being carried in two gunny bags. It has come in the statement of DSP Baljit Singh that he had instructed ASI Chanan Singh, the investigating officer, to know the source of the poppy straw but when ASI Chanan Singh stepped into the witness box, he does not say a word about it. This shows that the police has not conducted further investigation at least to prove that the appellant was really in conscious possession of the contraband. The judgment rendered in **Sukhdev Singh alias Sukha's case (supra)**, cited by Mr. Jattana squarely covered this

aspect. In the said case the appellant was found sitting on six bags of poppy husk and the police had not conducted further investigation to prove that he was really in possession of those bags. The appellant was, thus, acquitted. In the aforesaid judgment the Division Bench of this Court while acquitting the accused on the point of conscious possession has also relied upon two judgments of Hon'ble the Apex Court rendered in **Saiyad Mohd. Saiyed Umar Saiyed & Ors. Vs. The State of Gujarat JT 1995 (3) Supreme Court 489** and **State of Punjab Vs. Balkar 2004 Supreme Court Cases (Criminal) 838**. In **Balkar's case (supra)** the accused were allegedly found present at a place from where 100 bags of poppy husk were recovered. They were found sitting on the bags. They also failed to give any satisfactory explanation for being present at that place. The question arose before the Bench was whether it was proof enough of conscious possession of the contraband. It was in that context held by the Apex Court that merely by being found to be present at a place where the poppy husk bags were found and not giving any satisfactory explanation for being so present did not prove that the accused persons were actually in possession of the said poppy husk bags. The accused in the aforesaid case belonged to different villages. It was observed that in all fairness the police should have conducted further investigation as to the carriage of the poppy husk bags to a place of incident, ownership of poppy husk etc. to prove that the accused were really in possession of the said articles.

It has also come in the evidence that from the search memo of the appellant, only Rs.10/- was recovered. Recovery of the said meagre amount also shows that the appellant could not be the owner of the contraband. It is quite possible that he was engaged as a labourer for taking those bags from one place to another place without even in his knowledge that the bags contained contraband. He could be present there for any other purpose but so far as conscious possession qua the contraband is concerned, the argument of Mr. Jattana is tenable that the same is not proved to the hilt.

No doubt, the case of the prosecution if it is proved to the hilt on the basis of the evidence of the police officials, the conviction can be maintained even if it does not get corroboration from independent source. But if the case of the prosecution is suffering from certain inherent flaws, then in that eventuality it does cause some damage to it. In the present case, the recovery was allegedly effected in the presence of Leella Singh, the solitary independent witness. He has been given up as having been won over. He is resident of village Bareta. As stated above, the appellant is resident of village Haryaon a different District. ASI Chanan Singh was SHO of police station Bareta. It is not appealing that the appellant who was resident of other village could win over Leella Ram in this situation. For the sake of argument even if it is taken to be true that the appellant could go to that extent, still the story as projected by ASI Chanan Singh with regard to joining of PW Leella Singh is not convincing and it appears that a

convenient witness of the police has been introduced in this case in order to give some sanctity to the search. The seal was given to this witness by the investigating officer. His non-examination certainly creates doubt about the link evidence which can be said to be fatal to the prosecution. The case of the prosecution is being appreciated in that regard also in the succeeding paras.

It has come in the statement of SI/SHO Jalaur Singh that the accused and the case property were produced before the Ilaqa Magistrate on the next day of the arrest of the appellant i.e. 22.12.1999 and on a formal application Ex.PJ, order Ex.PJ/1 was passed by the concerned court directing to deposit the case property in the Malkhana. Jalaur Singh states that he did not deposit the case property in the Malkhana as there was no sufficient space to accommodate the case property and retained the same with him. This shows that the entire case property including the sample parcels remained with him upto 29.12.1999 when two of the parcels were handed over to constable Gardaur Singh for the purposes of delivering the same in the office of Chemical Examiner. The aforesaid independent witness Leella Singh to whom seal of Chanan Singh bearing impression 'CS' was allegedly handed over, could be approached very conformably for the purpose of resealing the case property. So far as seal of SI Jalaur Singh is concerned, it remained with him only as he after putting impression of his seal on the case property kept it with him. So chances of tempering with the

same can not be ruled out. The sample parcels could be kept safe with the incharge of the Malkhana of Police Station Bareta. The admitted position is that the same also remained with S.I. Jalaur Singh throughout. It is not understandable that if S.I. Jalaur Singh could not deposit the case property as per the direction of the court on account of any problem, he could have moved an application for obtaining a fresh order in this regard. The same is not done in the case in hand. It not only amounts to defiance of the order of the Court but leaves no room for doubt to infer that there was ample scope for the police to tamper with the case property. All these formalities act as safeguard and in absence thereof, the possibility of the seal being tampered with, substance being changed and the parcel being resealed cannot be ruled out.

Another infirmity pointed out by Mr. Jattana with regard to identity of the samples sent to the FSL for analysis is again of no less consequence. Admittedly, four samples of 100 grams each of poppy straw were extracted in this case i.e. two samples of 100 grams each from each gunny bag. Those were kept by Jalaur Singh SI/SHO of Police Station Bareta and out of those parcels two were handed over to constable Gardaur Singh. Jalaur Singh in his examination-in-chief states that on 29.12.99 two parcels containing poppy straw, which were of sample, were entrusted to Gardaur Singh. He does not say that one sample from each bag were handed over to the said constable. So is the factual position in the affidavit

Ex.PG/1 tendered by aforesaid constable Gardaur Singh. It has also not come in the evidence of any of the prosecution witness that separate identification marks were put on two different type of samples. In that eventuality, it is quite possible that the two sample parcels extracted from one bag would have gone to the Chemical Examiner and the sample parcel from the other bag would have not been sent. In that manner, the quantity would be reduced to just half of the main which is 68 kgs 200 grams. This fact by itself would not entitle the appellant to acquittal but at the same time it can certainly be said to be an infirmity in the case of the prosecution which weakens it interalia with other flaws.

Another fact which in my view is going to dent the case of the prosecution to a great extent is that Form No.29 was not prepared at the spot at the time of alleged recovery. The admitted position is that it is dated 29.12.1999 and is signed by S.I./SHO Jalaur Singh and the same is exhibited as Ex.P1/1. No doubt on the said form another chit is pasted bearing the seal impressions of 'CS' (Chanan Singh) and 'JS' (Jalaur Singh), the same would again be of no effect as this all has been done subsequently. It has been held by this Court in **Bhola Singh Vs. State of Punjab 2005 (2) RCR (Criminal) 520** that CFSL form should be prepared at the spot and deposited in Malkhana on which specimen of the seal should be fixed and non-compliance thereof has been taken as a serious defect in the case of the prosecution considering that filling up of such form at the spot is a very

valuable safeguard to ensure that the sample seal is not tampered with till the analysis of the sample parcel by the analyst.

Form No.29, in fact is a statement showing details of suspected articles being forwarded to the Chemical Examiner for analysis. It gives description of the case, articles, weight, the seals used on the articles and the remarks. There are different columns in this regard. If form no.29 is filled up at the spot by the investigating officer and his seal impression is also put on one of the columns where description of seal is shown and thereafter also another seal is put on the same column of the SHO of the concerned Police Station in order to show the compliance of Section 55 of the Act, who is otherwise supposed to verify all the facts and then the accused and the case property along with form no. 29 are produced before the Ilaqa Magistrate on the following day of the arrest, it would be very convenient for the Magistrate to verify/cross check all the investigation done. He may put his own initials on the said form. A formal order can also be passed in this regard. If need be the learned Ilaqa Magistrate, before whom the accused is produced, can put his own seal at least on the sample parcels so that the possibility of tampering with it is absolutely ruled out and the same can then be sent to FSL without delay. To my mind, this would be a very valuable safeguard. Some guidelines can be evolved in this respect. This point can also be taken up while imparting training to the concerned police officials may be by Special Agency

(Narcotic Control Bureau) dealing with such type of cases or by any other investigating agency.

Another fact, which is also worth consideration, is that whenever the search is conducted in the presence of a senior police official, the said senior police official should put his own seal on the case property as well as form no.29. This would also be an ensuring factor about the sanctity of the search. Generally it is not done.

Another procedural formality, which can also be followed very conveniently is that the sample packets should also have the signatures or thumb mark of the accused and the same can be cross checked in that respect when they are produced before the Ilaqa Magistrate along with the accused. After all stringent punishment is provided under the statute and therefore, all efforts should be made that the investigation is flawless. At the same time it is very important that guilty persons should not go scot free because of procedural lapses. It has far reaching effect.

I do not feel the necessity of entering into discussion with regard to the discrepancies pointed out by Mr. Jattana in the statements of the official witnesses for the reason that on the basis of the aforesaid discussion, my considered view is that the prosecution has not been able to prove its case against the appellant beyond shadow of all reasonable doubt and the benefit arising out of such a doubtful situation must go to the appellant.

Resultantly, the instant appeal is allowed, the conviction and sentence of the appellant as recorded by the trial Court in its impugned judgment is hereby set aside. He is acquitted of the charge framed against him.

July 26 , 2006
'dalbir/rana'

(Virender Singh)
Judge

