IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Crl. Appeal No.864-SB of 2001

Date of Decision : 28.11.2008

Mohinder Pal S/o Chet Ram, ...Appellant
R/o Chhota Ghusrana,
P.S. & District Buland Shahr.

Versus

The State of Punjab ....Respondent

CORAM:HON'BLE MR. JUSTICE SHAM SUNDER

1. Whether Reporters of Local Newspapers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

Present: Mr. D.S.Pheruman, Advocate,
for the appellant.

Mr. T.S.Salana, DAG, Punjab,
for the respondent.

SHAM SUNDER, J.

This appeal is directed against the judgment of conviction, and the order of sentence dated 1.8.2001, rendered by the Court of Addl. Sessions Judge-cum Special Judge, Amritsar, vide which it convicted the accused/appellant, for the offence, punishable under Section 18 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 10 years, and to pay a fine of Rs.1 lac, and in default of payment of the same, to undergo rigorous imprisonment for another period of 2 years, for having been found in possession of 500 grams

opium, (now falling within the ambit of non-commercial quantity), without any permit or licence.

2. The facts, in brief, are that on 14.2.2000, Baldev Singh, Inspector, while posted as SHO, P.S. 'A' Division, Amritsar, alongwith other police officials, was present at chowk Mahan Singh Gate, Amritsar. At about 1.30 PM, a police party headed by Surjit Singh, ASI, also came there. At about 2.15 PM, two persons, came from the side of bus-stand. One was having a bag, on his sholuder, and the other was having a cotton made bag, in his hand. On seeing the police party, both of them tried to slip, but were apprehended, on suspicion. The accused was apprehended by Baldev Singh, Inspector, whereas, the other person namely Hira Lal, was apprehended by Surjit Singh, ASI. Baldev Singh, Inspector, suspected that the accused was carrying some contraband. He gave an option, to the accused, as to whether, he wanted his search to be conducted by a Magistrate or a Gazetted Officer. The accused opted that he wanted his search to be conducted, in the presence of a Gazetted Officer, and his consent memo Ex.PA, in this regard, was reduced into writing, which was signed by him, and attested by Gurdial Singh, ASI and Balwinder Singh, HC. Thereafter, a wireless message was sent to Rachhpal Singh Ghuman, DSP City, as a result whereof, he reached the spot, and disclosed his identity to the accused. The search of the bag, hanging on the left shoulder, of the accused, was conducted, as a result whereof, 500 grams opium, wrapped in a glazed paper, was recovered. A sample of 20 grams was taken out of the same, and the remaining opium, was put into a separate container. The sample, and the container, containing the remaining opium, 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 under Section 18 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 Baldev Singh, Inspector (PW-1), the Investigating Officer, Mangal Singh, HC (PW-2), Mukhtiar Singh, Constable (PW-3), and Rachhpal Singh Ghuman, DSP (PW-4). Thereafter, the Addl. Public Prosecutor for the State, closed the prosecution evidence.

5. The statement of the accused, under Section 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 Addl. 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 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 no independent witness was joined, despite availability, and ample opportunity, with the Investigating Officer. He further submitted that, on account of this reason, the case of the prosecution became doubtful. The submission of the Counsel for the appellant, in this regard, appears to be correct. No doubt, Baldev Singh, Inspector (PW-1), stated that he tried to join an independent witness, but none was ready. It means that the independent witnesses were available. In case, no person was ready to join the search and seizure, then he could take action against him. He did not record the names of the persons, who refused to join the search and seizure, in the case diary or any other document, prepared at the spot. Had no independent witness been available, the matter would have been different. In this case, independent witnesses, despite availability, were neither intentionally and deliberately joined by the Investigating Officer, nor an attempt was made to join them. Since, the minimum stringent punishment is provided for the offences, punishable under the Act, and according to the provisions of Section 51 of the Act, the provisions of the Code of Criminal Procedure, relating to search, seizure and arrest shall apply to the extent the same are not inconsistent with the provisions of the Act, it was imperative, on the part of the Investigating Officer, to join an independent witness, at the time of the alleged search, and seizure or at least to make a genuine, sincere and real effort, to join such a witness. The search and seizure, before an independent witness, would have imparted much more authenticity, and creditworthiness, to the proceedings, so conducted. It would have also verily strengthen the

prosecution case. The said safeguard was also intended to avoid criticism of arbitrary and high-handed action, against the authorized Officer. In other words, the Legislature, in its wisdom, considered it necessary to provide such a statutory safeguard, to lend credibility to the procedure, relating to search and seizure, keeping in view the severe punishment, prescribed under the Act. That being so, it was imperative for the authorized Officer, to follow the reasonable, fair and just procedure, as envisaged by the Statute, and failure to do so, must be viewed with suspicion. The legitimacy of judicial procedure, may come under cloud, if the Court is seen to condone acts of violation of statutory safeguards, committed by the authorized officer, during search and seizure operation and may also undermine respect of law. That cannot be permitted. In the instant case, the alleged recovery being minor, now falling within the ambit of non-commercial quantity, and chances of plantation of the same, against the accused, could not be ruled out, it became the bounden duty of the Investigating Officer, to observe all the safeguards, provided under the Act, at the time of search and seizure. It is, no doubt, true that, in the absence of corroboration through an independent source, the evidence of the official witnesses, cannot be disbelieved and distrusted, blind-foldely, if the same is found to be creditworthy. However, when the evidence of the official witnesses, is found to be not cogent convincing, reliable and trustworthy, then on account of non-corroboration thereof, through an independent source, certainly a doubt is cast, on the prosecution story. In the instant case, the evidence of the prosecution witnesses, does not inspire confidence, in the mind of the Court. In this view of the matter, non-corroboration of the evidence of the official witnesses, through an

independent source, certainly makes the case of the prosecution suspect. In **State of Punjab Vs. Bhupinder Singh 2001 (01) RCR (Crl.) 356**, a Division Bench of this Court, held the case of the prosecution, to be doubtful, on account of non-joining of an independent witness, though the recovery was effected from a busy locality. **In State of Punjab Vs. Ram Chand 2001 (1) RCR (Crl.) 817**, a Division Bench of this Court, held that it was imperative to join an independent witness, to vouchsafe the fair investigation. On account of non-joining of an independent witness, it was held that the accused was entitled to be given the benefit of doubt. The principle of law, laid down, in the aforesaid authorities, is fully applicable, to the facts of the instant case. On account of non-joining of an independent witness, at the time of the alleged search and seizure, especially when the other evidence does not inspire confidence, in the mind of the Court, the case of the prosecution, became highly doubtful. The trial Court failed to take into consideration, this aspect of the matter, in its proper perspective, as a result whereof, it fell into an error, in coming to the conclusion, that the accused was guilty of commission of offence, under Section 15 of the Act.

10. It was next submitted by the Counsel for the appellant, that the alleged recovery, in this case, was effected on 14.2.2000, whereas, the sample was sent to the office of the Chemical Examiner, on 18.2.2000. No explanation, was furnished regarding the delay of 4 days, in sending the sample, to the office of the Chemical Examiner. The Counsel for the appellant, therefore, submitted that the possibility of tampering with the same, could not be ruled out, especially when the sample parcel, and the

seals, remained with the police officials. The submission of the Counsel for the appellant, in this regard, appears to be correct. It is, no doubt, true that mere delay in sending the sample to the office of the Chemical Examiner, in itself, is not sufficient to come to the conclusion, that the sample parcel, was tampered with, at any stage, until it reached the laboratory. The prosecution could certainly produce other evidence on record, to prove that the link evidence was complete, and none tampered with the sample parcel, until it reached the office of the Chemical Examiner. In the instant case, the evidence produced by the prosecution, to prove the completion of link evidence is not only deficient, but also unreliable. In this view of the matter, it could be safely held that the sample parcel, did not remain untampered with, until it reached the office of the Chemical Examiner, especially when the seals after use, remained with the police officials, with whom the case property, and the sample parcel remained. In ***Gian Singh Vs. State of Punjab 2006(2) RCR (Criminal) 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. In ***State of Rajasthan Vs. Gurmail Singh 2005(2) RCR (Criminal) 58, (Supreme Court)***, the contraband remained in the Malkhana for 15 days. The malkhana register was not produced, to prove that it was so kept in the malkhana, till the sample was handed over to the Constable. In these circumstances, in the aforesaid case, the appellant was acquitted. In ***Ramji Singh Vs. State of Haryana 2007 (3) RCR (Criminal) 452***, the sample was sent to the office of the Chemical

Examiner after 72 hours, the seal remained with the police official, and had not been handed over to any independent witness. Under these circumstances, it was held that this circumstance would prove fatal to the case of the prosecution. The principle of law, laid down, in the aforesaid authorities, is fully applicable to the facts of the present case. The delay of 4 days, in sending the sample to the office of the Chemical Examiner, and non-strict proof, by the prosecution, that the same was not tampered with, till it was deposited in that Laboratory, must prove fatal to the case of the prosecution, as the possibility of tampering with the same, could not be ruled out. The case of the prosecution, thus, became doubtful. The submission of the Counsel for the appellant, in this regard, being correct, is accepted.

11. It was next submitted by the Counsel for the appellant, that the statements of Mangal Singh, HC (PW-2) and Mukhtiar Singh, Constable (PW-3), material witnesses, under Section 161 Cr.P.C., were not recorded, as a result whereof, a great prejudice was caused to the accused. Both these witnesses did not state even a single word, that their statements, under Section 161 Cr.P.C., were recorded, by the Investigating Officer. The Investigating Officer also did not specifically state, that the statements of these witnesses, under Section 161 Cr.P.C., were recorded. The submission of the Counsel for the appellant, in this regard, appears to be correct. It may be stated here, that in the absence of the statements of these witnesses, under Section 161 Cr.P.C., the accused was deprived of confronting them, with their previous statements, so as to challenge their veracity. In ***Padam Singh Vs. State of Haryana 1997 (4) RCR (Criminal) 172 (Division Bench) (P&H)***, the statement of the

DSP, who allegedly reached the spot, at the time of search and seizure, under Section 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. The case of the prosecution, therefore, became highly doubtful, on account of this reason. The submission of the Counsel for the appellant, in this regard, being correct, is accepted.

12. It was next submitted by the Counsel for the appellant, that the bag, wherefrom, the opium was allegedly recovered, was not taken into possession. He further submitted that, had the recovery been effected from the accused, as deposed to, by the prosecution witnesses, then the bag, being a material piece of evidence, must have been taken into possession. He further submitted that, on account of this reason, the case of the prosecution became doubtful. Rachhpal Singh Ghuman, DSP (PW-4), in his cross-examination, in clear-cut terms, stated that the bag, wherefrom, the opium was recovered, was not taken into possession. He could not explain, as to why the bag, was not taken into possession. This clearly goes to show that either no recovery was effected, from the accused, or he was falsely implicated, in the instant case. This circumstance, therefore, clearly proved the falsity of the case of the prosecution.

13. No doubt, Baldev Singh, Investigating Officer, stated that the

case property was produced before the Illaqa Magistrate. However, his statement, in this regard is belied by the record. The alleged recovery was effected, in this case, on 14.2.2000. The accused was produced before the Illaqa Magistrate, for the first time, on 15.2.2000, vide a written remand request. There is nothing, in this remand request, that the case property, was produced before the Illaqa Magistrate. There is also no order of the Illaqa Magistrate, that the case property was also produced before him. Thus, there was violation of the provisions of Section 55 of the Act. According to the provisions of Section 55 of the Act, an Officer Incharge of the 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. The perusal of the provisions of Section 55 of the Act, clearly reveals that the case property and the samples are required to be produced before the Magistrate, so as to ensure, that there was no false implication of the accused, and that actually a specific quantity of the contraband was recovered from the accused. 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, before the Illaqa Magistrate, immediately after the search and

seizure, 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 Vs. State of Haryana 2001 (1) RCR (Crl.) 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 vitiate 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, he could not say that the provisions of Section 55 being 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 provision 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 provisions 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, miscarriage of justice occasioned.

14. No other 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. Had the trial Court, taken into consideration, the aforesaid infirmities and lacunae, it would not have reached the conclusion, that the accused committed the offence, punishable under Section 18 of the Act. The judgment of conviction, and the order of sentence are, thus, liable to be set aside.

16. For the reasons recorded, hereinbefore, the appeal is accepted. The judgment of conviction, and the order of sentence dated 1.8.2001, 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, he is in custody, he shall be set at liberty, at once, if not required in any other case. The Chief Judicial Magistrate, Amritsar, shall comply with the judgment, in accordance with the provisions of law, and send compliance report, within 2 months, from the date of receipt of certified copy of the judgment.

November 28, 2008 **(SHAM SUNDER)**
Vimal **JUDGE**