

(2008) 07 P&H CK 0120
In the Punjab And Haryana At Chandigarh
Case No : Criminal Appeal No. 381-SB of 1997

Raj Bahadur

APPELLANT

Vs

The State of Punjab

RESPONDENT

Date of Decision : 11-07-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 313, 385, 386
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 15, 51, 52, 55, 57

Citation : (2008) 4 RCR(Criminal) 34

Hon'ble Judges : Sham Sunder, J

Bench : Single Bench

Advocate : S.S. Bhullar, DAG, Punjab, for the Respondent

Final Decision : Allowed

Judgement

Sham Sunder, J.—This appeal is directed against the judgment of conviction dated 2.4.1997, and the order of sentence of the even date, rendered by the Addl. Sessions Judge, Faridkot, vide which it convicted the accused/appellant Raj Bahadur, 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 ten 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 one year, for having been found in possession of 40 Kgs. 250 grams poppy-husk (now falling within the ambit of non-commercial quantity), without any permit or licence.

2. The facts, in brief, are that on 21.2.1994, Raj Singh, ASI, alongwith other police officials, was going in Govt. Canter from the side of village Chal Kalan, towards village Safu Wala, via metalled road, and when the police party reached near the bridge of canal minor, in the revenue estate of village Ghal Kalan, the accused came from the opposite side, on the bank of the canal, with a gunny bag, on his head. On seeing the police party, he tried to retreat, but was

apprehended, on suspicion. The search of the bag, was conducted, in accordance with the provisions of law, as a result whereof, 40 kgs. 250 grams crushed poppy-husk, was recovered therefrom. A sample of 250 grams poppy-husk, was separated therefrom, and the remaining poppy-husk, was put into the same bag. The sample, and 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, the formal FIR was registered. The accused was arrested. Rough site plan of the place of recovery, with correct marginal notes, was prepared. The statements of the witnesses were recorded. 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 trial.

4. The prosecution, in support of its case, examined Bhupinder Singh, HC (PW-1), witness to the recovery, Kashmir Singh, SHO, (PW-2), before whom the accused was produced by the Investigating Officer, Raj Singh, ASI (PW-3), the Investigating Officer, and Surinder Pal Singh, Constable (PW-4), who tendered into evidence, affidavit Ex. PH. Thereafter, the Addl. 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, examined Naranjan Singh (DW-1) and Gurcharan Singh (DW-2), in his defence. Thereafter, he closed the defence evidence.

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, as stated hereinbefore.

7. Felling 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. When the appeal was fixed for regular hearing, on the Board of this Bench, and a due notice, in this regard, had been issued to the Counsel for the appellant, none appeared on behalf of the appellant. Under these circumstances, no alternative was left, with this Court, than to decide the appeal, on merits, after going through the record, and the evidence, as also hearing the Counsel for the respondent, as that amounted to due compliance of the provisions of Sections 385 and 386 Cr.P.C., in view of the ration of law, laid down, in *Dharam Pal v. State of U.P.*, 2008 (2) RCR (Cri) 133 : 2008 (2) RAJ 149 : 2008 (1) Law Her 255 (SC).

9. I have heard the learned Counsel for the respondent, and have gone through the evidence and record of the case, carefully.

10. In the memorandum of appeal, one of the grounds taken up, by the appellant, was to the effect that though the alleged recovery was effected from a thoroughfare, as admitted by Raj Singh, ASI, the Investigating Officer, yet no independent witness was joined, despite availability. Raj Singh, ASI, the Investigating Officer, (PW-3), during the course of his cross-examination, stated that Lakhwinder Singh, Constable, was sent to bring scale and weights. He further stated that he was instructed to bring some independent witness, but he on return, told that nobody was willing to join the police party. Raj Singh, ASI, the Investigating Officer, (PW-3), did not state even a single word, in his statement, that no independent witness was available, at the time of the alleged recovery. The statement of Raj Singh, ASI, the Investigating Officer, to the effect that Lakhwinder Singh, Constable, told him on return, that no independent witness was ready to join, is not at all correct. He did not make any independent witness was ready to join, is not at all correct. He did not make any independent witness was ready to join, is not at all correct. He did not make any entry, either in the case diary, or any other document, prepared, at the time of the alleged recovery, that Lakhwinder Singh, Constable, was sent to bring weight and scale, and was also directed to bring an independent witness, but, on return, he told that none was ready. Had the Investigating Officer entered the names of the persons, either in the case diary or any other document, who refused to join the police party, it would have been said that efforts were made, by the investigating Officer, to join the independent witnesses, but he could not succeed. Since 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-foldedly, if the same 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 v. Bhupinder Singh*, 2001 (1) 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 v. 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, the case of the prosecution, became highly doubtful. The trial Court failed to take into consideration, this aspect of the matter, as a result whereof, miscarriage of justice occasioned.

11. The next ground taken up by the appellant, in the memorandum of appeal, was to the effect, that though according to Kashmir Singh, SHO (PW-2), the case property was deposited by him with the MHC namely Sukha Singh, yet his affidavit, Ex.PA, was tendered by the Addl. Public Prosecutor for the State, vide statement dated 7.9.1994, but he was not produced for cross-examination, as a result whereof, the valuable and indefeasible right of the accused, to examine this witness, was defeated. It is evident from the record that the affidavit of Sukha Singh, MHC, was tendered into evidence on 7.9.1994, by the Addl. Public Prosecutor for the State. He was not produced in the witness-box, so as to enable the accused, to cross-examine him. The affidavit aforesaid, without offering an opportunity to the accused, to cross-examine the deponent thereof, could not be taken into consideration, as legally admissible evidence. The accused has a valuable and indefeasible right to cross-examine the witnesses. He must be afforded an opportunity to do so. It is a different matter, whether he avails of that opportunity or not. The prosecution cannot take up the plea, that when the affidavit of this witness, was tendered into evidence, the accused could make a prayer that he wanted to cross-examine him, and thus, he could be produced. By not producing this witness for cross-examination by the accused, he was deprived of his valuable and indefeasible right. In *Padam Singh v. State of Haryana*, 1997 (4) RCR (Cri) 172 (DB) (P&H), the affidavits of the formal witnesses were tendered, but they were not produced for cross-examination by

the accused. It was held that the affidavits could not be read into evidence. Ultimately, the appellant was acquitted, inter-alia, on this ground. In *Gian Singh v. State of Punjab*, 2006(2) RCR (Cri) 611, the affidavits of police Constables, were tendered into evidence, but they were not produced, in the Court for cross-examination. In these circumstances, it was held that the link evidence was missing, which was a material infirmity, and ultimately, the conviction was set aside. In *Jai Singh v. State of Haryana*, 1995 (3) RCR 627, the affidavits of the Police Constable and the HC, were tendered into evidence, but both of them, were not kept present, in the Court for cross-examination. In these circumstances, it was held that the affidavits could not be read into evidence and, as such, the link evidence was incomplete, and the case of the prosecution, was bound to fail. The principle of law, laid down, in the aforesaid authorities, is fully applicable to the facts of the present case. Under these circumstances, the affidavit, Ex.PA, without offering the deponent thereof, for cross-examination, to the accused, could not be read into evidence. As such, the link evidence, being incomplete, the appellant is liable to be acquitted. The trial Court, in my opinion, was wrong in holding that the link evidence was complete.

12. The provisions of Section 57 of the Act, were not complied with. No report was sent by the Investigating Officer, to his Superior Officer, with regard to the alleged apprehension of the accused, and the alleged recovery of contraband, from him. No doubt, the provisions of Section 57 of the Act, are directory in nature. That does not mean that the same should not be complied with, by the Investigating Officer, deliberately and intentionally. In *Gurbax Singh v. State of Haryana*, 2001 (1) RCR (Crl.) 702 (SC), it was held that non-compliance of the provision 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, as such failure, will have bearing on the appreciation of evidence, regarding search of the accused, the seizure. The object of provisions of Section 57, is that the Superior Officer should be informed, immediately, after the alleged recovery of contraband, so that he must be aware of the genuineness of the proceedings, conducted by his junior, to ensure that no innocent person was implicated, and the allegations of high-handedness, against the Police officials, are averted. Had any explanation been furnished, by the Investigating Officer, as to what prevented him, from complying with the provisions of Section 57 of the Act, the matter would have been different. In the absence of any explanation, what to speak of plausible, the Court cannot coin any of its own, to fit in with the prosecution case. Since, the provision of Section 57 of the Act, were observed, more in breach, than in compliance, by the Investigating Officer, intentionally and deliberately, prejudice was caused to the accused, and the case of the prosecution became doubtful, on account of this matter, as a result whereof, it committed an error, in recording conviction and awarding sentence.

13. No doubt, Raj Singh, ASI (PW-3), stated that he produced the case property before Kashmir Singh, Inspector/SHO (PW-2), in compliance with the provision of

Section 55 of the Act, yet his statement, in this regard, does not appear to be correct. Kashmir Singh, Inspector/SHO (PW-2) also stated that he case property was produced before him, and he verified the same. His statement, in this regard, also does not appear to be correct. During the course of cross-examination, Kashmir Singh, Inspector/SHO (PW-2), stated that his statement u/s 161 Cr.P.C. was not recorded, by the Investigating Officer. There is no other document, on the record, to show that the case property, the accused, and the witnesses, were actually produced before him, and that he verified the same. Why the statement of Kashmir Singh, Inspector/SHO (PW-2), a material witness, was not recorded, by the Investigating Officer, is not known. Had any explanation, been furnished by the Investigating Officer, in this regard, the matter would have been considered, in the light thereof. In the absence of any explanation, having been furnished by the Investigating Officer, the Court cannot coin any of its own, to fit in with the prosecution case. In Padam Singh's case (*supra*), the statement of 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 makes 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 statement of Kashmir Singh, Inspector/SHO, a material witness, by the Investigating Officer, clearly proved that the case property had not been produced, before him. This irregularity made the evidence of Kashmir Singh tainted. On account of this irregularity, serious prejudice was also caused to the accused, as he was deprived of challenging the veracity of this witness, by confronting him with his previous statement. The case of the prosecution, therefore, became highly doubtful, on account of this reason.

14. 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 u/s 15 of the Act. The judgment of conviction, and the order of sentence are, thus, liable to be set aside.

15. For the reason recorded, hereinbefore, the appeal is accepted. The judgment of conviction, and the order of sentence dated 2.4.1997, 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, then he shall be set at liberty, at once, if not required, in any other case.