

Before M. Jeyapaul & Inderjit Singh, J.J.

RAM PAL—Appellant

versus

STATE OF PUNJAB—Respondent

CrI. A. No. 637-DB of 2008

May 09, 2013

Narcotic Drugs and Psychotropic Substances Act, 1985 - S. 15 - Accused were convicted and sentenced to undergo 11 years R.I. and to pay fine of Rs.1,25,000/- - Both accused filed separate appeals - Raised three points - Independent witness not examined - CFSL Form 29 not prepared at the spot - Seal after use handed over to a colleague police official instead of handing over to independent witness - Prosecution could not establish beyond reasonable doubt the charge - High Court allowed the appeals as alleged recovery of contraband was found to be doubtful and acquitted the accused.

Held, that the prosecution is not supposed to come with a standard excuse that a witness was won over and, therefore, they would not examine such a witness. Even if a witness was won over, the prosecution in order to demonstrate that they had in fact associated an independent witness to the recovery should have brought before the Court and examined him. Non-examination of the only independent witness shakes the very foundation of the case.

(Para 8)

Further held, that it is highly improper to entrust the seal after use to a colleague police official instead of handing over the same to an independent witness who was actually present. Such an improper act cast a doubt on the case of the prosecution. That non-preparation of CFSL Form at the spot and preparation of the same after a lapse of four days in fact raises suspicion as regard the recovery of contraband and a drawing of samples there from.

(Paras 9 & 12)

Satnam Singh Gill, Advocate with Mr. Akshay Jain, Advocate for the appellant in Criminal Appeal No.637-DB of 2008

G.K. Mann, Advocate with Mr. Amaninder Singh, Advocate, Amicus Curiae in Criminal Appeal No. 644-DB of 2008

B.S. Bhalla, Addl. Advocate General, Punjab.

M.JEYAPPAUL, J.

(1) The accused appellants were convicted under Section 1 of the NDPS Act and were sentenced to undergo 11 years R.I. and to pay fine of ₹1,25,000/- and in default to undergo R.I. for one year and six months.

(2) It is the case of the prosecution that on 29.12.2005, PW1 Inspector Amarjit Singh proceeded along with ASI Jaswant Singh and other police officials in connection with patrolling and checking of suspicious persons. When the police was 200 yards ahead of bus stand of village Gujjarwal, it met with Sarpanch Rachhpal Singh @ Pappu. PW2 joined him in the police party. When the police party was at a distance of 50 yards from electric motor of Kuldeep Singh, it sighted a tractor trolley driven by a Sikh gentleman with a thin person sitting by his left side on mudguard of

the tractor coming from opposite side. The person who was sitting on the mudguard tried to run away. PW1 apprehended Prem Singh who was the driver of the tractor and Rampal who was sitting on the mudguard of the tractor. PW1 introduced himself to the accused and apprised to the accused of their right to search in the presence of a Gazetted Officer or a Magistrate. The accused reposed confidence in him and allowed PW1 to check the trolley. Their consent statements Ex.PA and PB were recorded.

(3) PW1 checked the six gunny bags lying in the trolley. He separated two samples of 100 gms. from each bag. The remaining material in each bag weighed 39.800 grams. PW1 sealed the sample parcels as well as bulk parcels with his seal. He also prepared sample seal and after use entrusted his seal to ASI Jaswant Singh. He took the case property and the tractor trolley into possession vide recovery memo Ex.PC. On a personal search of accused Prem Singh, '28/- was recovered under memo Ex.PD and on a personal search of accused Ram Pal, '17/- was recovered under memo Ex.PE. Based on the ruqa Ex. PF sent by PW1 a formal First Information Ex.PF/1 was recorded by SI Sukhdev Singh. PW1 prepared rough site plan of the place of recovery. He also recorded the statements of the witnesses under Section 161 Cr.P.C. He produced the accused along with the case property to S.I. Sukhdev Singh, acting SHO of the police station. He also affixed his seal on the sample parcel and the remaining case property. The case property was thereafter deposited with MHC Gulab Singh, who was examined as PW3. PW1 filed final report under Section 173 Cr.P.C. against the accused.

(4) The trial Court having relied upon the witnesses examined on the side of the prosecution recorded conviction of both the accused under Section 15 of the NDPS Act.

(5) We heard the submission made by Ms. G.K. Mann, Advocate and Mr. Amninder Singh, learned counsel who was appointed as Amicus Curiae by us for the said accused. We also heard the submissions made by learned counsel Mr. Satnam Singh Gill, Advocate for the accused appellant Ram Pal and Mr. Akshay Jain, appointed as Amicus Curiae by us.

(6) The learned counsel appearing on the side of the appellants would vehemently submit that the independent witness Rachhpal Singh

associated by PW1 for the purpose of recovery was not examined. Therefore, the recovery of contraband is highly doubtful. It was not brought to the notice of the accused under Section 313 Cr.P.C. that they were in conscious possession of the contraband. Form No. 29 was prepared at the place of recovery. It was in fact filled up only on 2.1.2006 by PW1. The case property was taken out from the Malkhana on 30.12.2005, but the same was produced before the Judicial Magistrate only on 1.1.2006. Further, the case property was not kept in the Judicial Malkhana on 1.1.2006 as directed by Judicial Magistrate. The evidence of PW3, PW5 and PW7 as to the proper custody of the sample and bulk contraband cuts the very root of the prosecution. The seal was with the Investigating Officer on 30.12.2005. Therefore, there is every possibility for manipulating the contraband, it is submitted.

(7) We heard the submission made by learned Additional Advocate General appearing for the State supporting the verdict of conviction recorded by the trial Court as against the accused under Section 15 of the NDPS Act.

(8) The independent witness Rachhpal Singh was associated by the police party at the time of alleged recovery effected by PW1. We find that he was not examined as one of the witnesses to the recovery of the contraband. The lame excuse advanced by the prosecution was that Rachhpal Singh was won over by the accused. It is only the Court which could decide whether a witness was won over by the other side. The prosecution is not supposed to come with a standard excuse that a witness was won over and, therefore, they would not examine such a witness. Even if a witness was won over, the prosecution in order to demonstrate that they had in fact associated an independent witness to the recovery should have brought before the Court and examined him. Non examination of the only independent witness shakes the very foundation of the case.

(9) PW1 who headed the police party would depose that the seal was the seal after use was handed over by him to ASI Jaswant Singh. In our opinion, it is highly improper to entrust the seal after use to a colleague police official instead of handing over the same to an independent witness who was actually present. Such an improper act cast a doubt on the case of the prosecution.

(10) It is an admitted case that CFSL Form No. 29 was not prepared by PW1 at the spot. It is his admission that the CFSL Form was prepared only on 2.1.2006. PW3 HC Gulab Singh also would admit that the CFSL Form was filled only on 2.1.2006. In other words the CFSL Form was filled up only after the direction was issued by the learned Judicial Magistrate to keep the case property in the Malkhana on 1.1.2006.

(11) The Bench of this Court in *Didar Singh @ Dara versus The State of Punjab 2010 (1)* has held as follows:-

“In *Bhola Singh v. State of Punjab, 2005 (2) RCR (CrI.) 520*, this Court has held that CFSL Form No. 29 should be prepared by the Investigating Officer at the spot and be deposited in the Malkhana along with sealed. It has been further held that after sealing the sample parcel of the contraband as well as remaining contraband, the seal should be handed over to the independent person so that till the case property had been deposited to the Forensic Science Laboratory, the same should not be available to the prosecuting agency. This is necessary to safeguard the possibility of the sealed contraband and the sample being tampered with by the police official. It was further held that CFSL Form should not only be prepared and sealed by the officer making seizure at the place where the case property is seized from the accused, it should also be sealed by the SHO, to whom the sample and the case property is handed over and deposited in the Malkhana along with the sample parcel. It should accompany the sample to Chemical Examiner. In another case, titled as *Gurcharan Singh v. State of Punjab, 2005 (4) RCR (CrI.) 681*, the accused was acquitted on the grounds that the seal affixed on seized opium was given to the Head Constable and not an independent witness. The Seizing Officer failed to prepare CFSL Form on the spot, which creates a further doubt about the credibility of the entire prosecution exercise.”

(12) In the light of the above ratio laid down by the coordinate Bench of this Court, we find that non preparation of CFSL Form at the spot and preparation of the same after a lapse of four days in fact raises suspicion as regards the recovery of the contraband and drawing of samples therefrom.

(13) PW3 H.C. Gulab Singh would categorically depose that on 30.12.2005 he handed over the case property to PW7 ASI Charanjit Singh for production of the same in the Court. The latter would state that on 30.12.2005, he produced the case property before the learned Judicial Magistrate. But the latter simply remanded the accused to the police custody. It is to be noted that PW7 did not speak to the fact that the case property was again entrusted to PW3 on 30.12.2005 itself. It is to be noted that there is no record to establish that the case property was in fact produced on 30.12.2005 before the Judicial Magistrate who did not entertain the production of the case property on that day. But in the application dated 30.12.2005, the Judicial Magistrate passed an order on 1.1.2006 directing the police to produce the case property before the Judicial Magistrate. But quite unfortunately PW5 had deposited the case property with PW3 and not in the Judicial Magistrate as directed by the Judicial Magistrate.

(14) There is no acceptable evidence as regards the production of the case property on 30.12.2005 before the Judicial Magistrate. It is quite clear that the case property had been taken out from the Magistrate's Chamber on 30.12.2005. PW7 also did not depose that he redeposited the case property to PW3 on 30.12.2005.

(15) The seal used for affixing on the cover of contraband was with PW1 on 30.12.2005. As rightly pointed out by learned counsel appearing for the appellants, there is every possibility of tempering of the seal and manipulating the contraband.

(16) Of course no question was put to the accused regarding their conscious possession of the contraband. The trial Court is supposed to bring to the notice of the accused only the incriminating portion in the evidence let in by the prosecution. When no witness had spoken to the conscious possession of the contraband, the question of putting such a question to the accused under Section 313 Cr.P.C. does not arise for consideration.

(17) We find that the alleged recovery of the contraband from the accused is found to be doubtful. The benefit of doubt will have to be passed on to the accused. The accused are entitled to acquittal as the prosecution could not establish beyond reasonable doubt the charge under Section 15 of the NDPS Act.

(18) In view of the above, the judgment of conviction and sentence passed by the trial Court as against the appellants in both the cases is set aside. Both the accused are acquitted of the charge under Section 15 of the NDPS Act. The bail bond executed by the accused Prem Singh stands discharged. It is directed that the accused Ram Pal shall be set at liberty forthwith if his custody is not required in connection with any other case. Consequently, both the appeals are allowed.

A. Jain