

*Before Jitendra Chauhan, J.*

**HARBANS SINGH @ KALA—Appellant**

*versus*

**STATE OF PUNJAB—Respondent**

**CRA No.409-SB of 2001**

September 26, 2013

*Narcotic Drugs and Psychotropic Substances Act, 1985 - Ss.18, 55 & 57 - Appellant apprehended by police - 5 Kgs. 230 gms. Opium recovered from bag lying near foot brake of scooter - Tried by Special Court - Convicted u/s 18 of NDPS Act - Appeal filed - Allowed - Held, delay in sending samples to FSL not explained - Genuine effort not made to join any independent witness - Registered owner of scooter not associated in investigation - Investigating Officer did not produce case property before officer-in-charge - Deposited directly in malkhana - S.55 violated - Report under S.57 not on judicial file - Violation of S.57 - Conduct of Investigating Officer also suspicious - Appeal allowed - Appellant acquitted.*

*Held*, that in the instant case, the alleged recovery was effected from the appellant on 01.03.1995. The sample was sent to the Forensic Science Laboratory at Chandigarh, on 25.04.1995, i.e. after a long delay of about two months. The prosecution has not rendered any explanation in affidavit, Ex.PAOfC. Gurmit Singh, with regard to the above delay. Delay in sending the samples for chemical analysis is not always fatal to the prosecution case, however, when such delay is inordinate and unexplained coupled with the fact that the link evidence is either missing or unreliable or deficient, the prosecution story is rendered doubtful.

(Para 11)

*Further held*, that As regards the non-joining of independent witness, the learned trial Court has observed that the recovery was effected in the dead of night at 2.00 a.m., therefore, no independent witness could have been joined. On the other hand, it has come in the statement of the Investigating Officer that 3 or 4 passer-by were asked to join, however,

they refused but he has not been able to name anyone, who tried to join but they refused. It has also come on record that Sarabha Hospital was situated near the place of recovery, which is open 24 hours. Therefore, it is crystal clear that in the instant case, no genuine effort was made by the police party to join any independent witness.

(Para 12)

*Further held*, that the recovery was effected from the scooter being driven by the appellant. Admittedly, the appellant was not the owner of that scooter. However, for the reasons best known to the prosecution, the registered owner of the scooter was not associated in the investigation. In the absence thereof, except from the presumption drawn by the prosecution and believed by the trial Court that the scooter was stolen by the appellant, there is nothing on record to link the said scooter with the appellant.

(Para 13)

*Further held*, that it has also come on record that after the alleged recovery, the Investigating Officer did not produce the accused and the case property before the officer in-charge, in terms of Section 55 of the NDPS Act. The Investigating Officer directly deposited the case property with the Malkhana, without bringing it to the notice of the in-charge of the police station. It is not out of place to mention here that the provisions are mandatory in nature as provided under the Act. In the instant case, Section 57 of the NDPS Act has also not been complied with. Although, the prosecution story says that report under Section 57 of the NPDS was prepared and sent to the immediate superior but the very fact that no such report was proved on the judicial file, itself shows that no such report was prepared or sent to the superior officer.

(Para 14)

*Further held*, that Apart from the above mentioned facts, the conduct of the Investigating Officer in putting the question to the accused that he suspects that the accused is in possession of opium also raises suspicion in the eyes of the Court.

(Para 15)

Shivya Sehgal, Advocate/amicus curiae, for the appellant.

Luvinder Sofat, AAG Punjab.

**JITENDRA CHAUHAN, J.**

(1) The present appeal assails the judgment and order dated 05.03.2001, passed by the learned Judge, Special Court, Ludhiana, (hereinafter referred to as the trial Court), whereby, the appellant, Harbans Singh @ Kala, has been convicted for commission of offence punishable under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, and sentenced to undergo rigorous imprisonment for a period 10 years and to pay a fine of Rupees one lac, and in default of payment of fine, to further undergo rigorous imprisonment for a period of two years.

(2) The brief facts of the present case as narrated in para 2 of the impugned judgment, are reproduced as under:-

*"2. The prosecution case is that on 1.03.95, a police party headed by PW5 Inspector Jarnail Singh, the Investigating officer and consisting inter alia of PW4 ASI Rajinderpal Singh, was present alongwith Allwyn Nissan official vehicle bearing Regn. No. PB-10B-9456, in connection with Nakabandi (picketing), on that point of the culvert of the canal minor within the area of Village Sarabha, from where a metalled road goes from Vill. Pakhowal to Ludhiana. At about 2 a.m., the accused was seen coming on scooter bearing Regn. No. PJB-3344 from the side of Vill. Leel on the embankment of the canal minor. The Investigating officer gave a signal to the accused with a light to stop. Instead of stopping, the accused turned back the scooter and tried to escape. He was apprehended on suspicion. The Investigating officer told the accused that it was suspected that he was in possession of opium and gave him an offer of search before a Gazetted officer or a magistrate. The accused reposed trust in the Investigating officer. His statement Ex.P1D was recorded, which was attested by the Investigating officer, ASI Rajinderpal Singh, ASI Darshan Singh and signed by the accused. Thereafter, the Investigating officer searched the scooter of the accused. A faded jhola (bag) was found lying near the foot brake of the scooter. It was searched and found to contain opium wrapped in a glazed paper. Two samples of 10 gms. each out of the same were separated and put in separate empty match boxes. The remaining opium was*

*weighed and found to be 5 kgs. 230 gms., which was wrapped in glazed paper and put in a separate empty tin container. Parcels of the samples and the bulk were prepared which were sealed at the spot by the Investigating officer with his seal bearing letters JS and along with the chits containing specimen impressions of the seal including chit Ex.PI and the jhola were taken into possession vide memo Ex.PE, which was attested by the Investigating Officer and the aforesaid witnesses. The seal after use was handed over to ASI Rajinderpal Singh. The Investigating officer then sent ruqa Ex.PB to the police station through C. Jagdish Singh on the basis of which formal FIR Ex.PB/I was recorded by SI Sakattar Singh. The Investigating officer also prepared rough site plan of the place of recovery Ex.PG. Currency notes of Rs.28/- were recovered from the personal search of the accused, which were taken into possession vide memo Ex.PF, which was signed by the accused and attested by the Investigating officer and the witnesses. The Investigating officer also furnished ground of arrest to the accused orally. On reaching the police station, the Investigating officer deposited the case property and the chits with MIIC Devinder Singh. On the same day, the Investigating officer took the case property from the said MIIC and produced it alongwith the accused before the Magistrate vide his application Ex.PH on which the Magistrate passed order Ex.PH/I and then returned the case property to the Investigating Officer. Thereafter, the Investigating officer deposited the case property with the said MIIC. The scooter was taken into possession u/s 102 of the Cr.P.C. One of the two sample parcels was got tested from the Forensic Science Lab., Pb. Chandigarh and vide its report Ex.PJ was opined to be opium"*

(3) Upon presentation of challan, copies of the documents relied upon by the prosecution were supplied to the accused. The learned trial Court, after finding prima facie case against the accused, charged him for commission of offence punishable under Section 18, of the NDPS Act, to which he pleaded not guilty and claimed trial.

(4) In order to prove its case, the prosecution examined as many as five witnesses. PW1, C. Gurmeet Singh and PW3 ASI/MHC Devinder Singh are formal witnesses of the link evidence and tendered in evidence their affidavits, Ex.PA and PC, respectively. PW2, SI Sakattar Singh recorded FIR, Ex.PB/1. PW4, ASI Rajinderpal Singh is an official witness to the recovery, who has corroborated the version put forth by the Investigating Officer. PW5, Inspector Jamail Singh, is the Investigating Officer of the case who supported the case of the prosecution. He also proved documents Ex.PB to PJ, one chit containing specimen impression of the seal Ex.P1, second sample parcel Ex.P2 and bulk parcel, Ex.P3, Jhola Ex.P4 and scooter Ex.P5.

(5) During his examination under Section 313 Cr.P.C., the accused-appellant denied the prosecution allegations and pleaded false implication. He stated that he is the husband of the sister of C. Kuldip Singh. There was a dispute between him and his wife. He was called to the police station at the instance of C. Kuldip Singh and compelled to rehabilitate his wife. On refusal, he was falsely implicated in the instant case. In defence, he examined DW-1, Jamail Singh, Ex. Sarpanch, who deposed that there used to be differences and quarrels between the appellant and his wife. Brother of the wife is a police officer, who took the appellant to PP Jodhan. Jamail Singh also followed by the police official refused to release the appellant.

(6) After hearing learned counsel for both the parties and considering material/evidence on record, the learned trial Court convicted and sentenced the appellant, as detailed at the outset of this judgment.

(7) Hence, the present appeal, which was admitted by this Court on 05.04.2001.

(8) The learned counsel for the appellant contends that there is an inordinate and unexplained delay of about two months in sending the samples to the Forensic Science Laboratory, therefore, the possibility of tampering with the same, cannot be ruled out. The learned counsel further contends that the recovery was allegedly effected from a public place, however, the prosecution did not join any independent witness. The learned counsel further contends that the grounds of arrest were told to the appellant orally, which is in clear violation of the provisions laid down under Section 52 of the NDPS Act. The learned counsel further contends that there is also a violation of Section 55 of the NDPS Act inasmuch as the accused

and the case property were not produced by the Investigating Officer before the officer incharge of the police station, rather it was directly deposited in the Malkhana. The learned counsel further contends that special report under Section 57 of the Act regarding arrest and seizure was allegedly sent to the immediate superior which are not proved on the file. The link evidence, which is the scooter in the instant case, could not be connected with the accused as the owner thereof was not associated in the investigation.

(9) On the other hand, the learned State counsel contends that the delay in sending the samples to the FSL is not fatal to the prosecution case unless it is proved that the seals were tampered with. He further states that the instant case is a case of chance recovery, therefore, Sections 52, 54 and 57 of the NDPS Act are not attracted. Section 50 of the NDPS Act is not attracted as the recovery was not effected from the person of the accused. The learned counsel further contends that the recovery was effected at 2.00 a.m. (night time), therefore, no independent witness was available.

(10) I have heard learned counsel for the parties and perused the record with their able assistance.

(11) In the instant case, the alleged recovery was effected from the appellant on 01.03.1995. The sample was sent to the Forensic Science Laboratory at Chandigarh, on 25.04.1995, i.e. after a long delay of about two months. The prosecution has not rendered any explanation in affidavit, Ex.PA Of C. Gurmit Singh with regard to the above delay. Delay in sending the samples for chemical analysis is not always fatal to the prosecution case, however, when such delay is inordinate and unexplained coupled with the fact that the link evidence is either missing or unreliable or deficient, the prosecution story is rendered doubtful.

(12) As regards the non-joining of independent witness, the learned trial Court has observed that the recovery was effected in the dead of night at 2.00 a.m., therefore, no independent witness could have been joined. On the other hand, it has come in the statement of the Investigating Officer that 3 or 4 passer-by were asked to join, however, they refused but he has not been able to name anyone, who tried to join but they refused. It has also come on record that Sarabha Hospital was situated near the place of recovery, which is open 24 hours. Therefore, it is crystal clear that in the instant case, no genuine effort was made by the police party to join any independent witness.

(13) The recovery was effected from the scooter being driven by the appellant. Admittedly, the appellant was not the owner of that scooter. However, for the reasons best known to the prosecution, the registered owner of the scooter was not associated in the investigation. In the absence thereof, except from the presumption drawn by the prosecution and believed by the trial Court that the scooter was stolen by the appellant, there is nothing on record to link the said scooter with the appellant.

(14) It has also come on record that after the alleged recovery, the Investigating Officer did not produce the accused and the case property before the officer in-charge, in terms of Section 55 of the NDPS Act. The Investigating Officer directly deposited the case property with the Malkhana, without bringing it to the notice of the in-charge of the police station. It is not out of place to mention here that the provisions are mandatory in nature as provided under the Act. In the instant case, Section 57 of the NDPS Act has also not been complied with. Although, the prosecution story says that report under Section 57 of the NPDS was prepared and sent to the immediate superior but the very fact that no such report was proved on the judicial file, itself shows that no such report was prepared or sent to the superior officer.

(15) Apart from the above mentioned facts, the conduct of the Investigating Officer in putting the question to the accused that he suspects that the accused is in possession of opium also raises suspicion in the eyes of the Court.

(16) Thus, it is established that the prosecution has failed to prove its case beyond a reasonable shadow of doubt, as projected in the challan.

(17) Accordingly, the present appeal is allowed; the impugned judgment of conviction and order of sentence, passed by the learned trial Court, on 05.03.2001, is hereby set aside and the accused-appellant is acquitted of the charges. The appellant is stated to be on bail. His bail bonds shall stand discharged.