

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CRA-S No.659-SB of 2003

Date of decision: 9th September, 2015

Avtar Singh

... Appellant

Versus

Intelligence Officer, DRI, Amritsar

... Respondent

CORAM: HON'BLE MR. JUSTICE FATEH DEEP SINGH

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

Present: Mr. Animesh Sharma, Advocate
Amicus Curiae for the appellant.

Mr. D.D. Sharma, Advocate
Sr. Standing Counsel for DRI/Respondent.

FATEH DEEP SINGH, J.

The convict/appellant Avtar Singh is up in this appeal, whereby he has challenged the judgment of his conviction dated 10.09.2002 passed by the learned Special Judge, Amritsar in a criminal complaint under Sections 18/21/23/25 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short, 'the Act') preferred by complainant Intelligence Officer, Directorate of Revenue Intelligence, Amritsar whereby holding him guilty for commission of offence under Section 21 of the Act, the appellant was sentenced to

undergo rigorous imprisonment for 10 years and to pay a fine of ₹1.00 lac and in default of payment of fine to further undergo rigorous imprisonment for 1 year, whereas his co-accused Joginder Singh stood acquitted.

Heard the learned Amicus Curiae for the appellant, Mr.Animesh Sharma, Advocate and Mr. D.D. Sharma, Advocate, Senior Standing Counsel for the DRI as well as perused the records of the case.

The precise allegation of the DRI is that on receipt of specific information by the superior officers of DRI, a team comprising of officers of DRI, Border Security Force and the Punjab Police was constituted and a naka was laid on the bridge of Ganda Nallah back side of Chatiwind crematorium, Amritsar on 15.03.1997 at about 7.30 hours. It is thereafter, the accused was seen coming on a scooter mark LML Vespa bearing registration No.PB-02L-8498 carrying along a nylon travel bag which was tri-colour. The accused Avtar Singh was apprehended and to enable his search he was taken to DRI office and in the presence of two independent witnesses Ramesh Kumar and Ashok Kumar and after the accused's option of search whether before a Magistrate or a Gazetted Officer was sought to which the accused had shown inclination to be searched before a Gazetted Officer, search of the accused was conducted. From the bag being carried by the accused, 5 packets, totaling to 5 kg of brownish powder carrying Urdu/Arabic language on it, were recovered. On testing the articles at

the spot, the same was found to be Heroin. From each of the packets, equal amount of contraband was taken out and mixed together into a homogeneous mixture and prepared into separate parcels of 5 gm each which were sealed and subsequently the residual too was prepared into a parcel along with the travel bag in a steel trunk. All the parcels were sealed with the seal of Directorate of Revenue Intelligence. Rough site plan Ex.PD of the place of recovery was prepared and after necessary formalities, including receipt of report of the Chemical Examiner, Central Revenue Control Laboratory, Delhi, the accused was put to trial who denied the allegations. The prosecution at the trial examined PW1 V.K. Sharma, Superintendent Customs proving the information reduced into writing Ex.PA, consent memo of the accused Ex.PB, the residual contraband packets Ex.P1 to P5, test memo Ex.PC, site plan Ex.PD, memo of consent Ex.PE, arrest memo Ex.PF, process Ex.PG and the confessional statement of the accused in terms of Section 67 of the Act, being the Investigating Officer. The accused was produced before the concerned Court on 16.03.1997, regarding which application Ex.PJ was moved along with contraband parcels and his confessional statement Ex.PH. The seizure report-cum-intimation Ex.PE was also produced including inventory Ex.PK, PL and PO.

PW2 G.S. Kapoor, Senior Intelligence Officer of DRI, a Gazetted Officer, gave corroboration to the allegations of the Investigating Officer. PW3 Satnam Singh Inspector similarly

corroborated the recovery and the documents prepared during the same, proving the covering letter Ex.PS, test memo Ex.PC, containing sample seal impression of the Gazetted Officer and receipt Ex.PB as to the deposit of the samples in the laboratory. PW4 Kewal Krishan, Superintendent Customs brought about the summons Ex.PG, Ex.PG/1 and statement suffered by the accused under Section 67 of the Act Ex.PH. PW5 Sanjiv Prabhakar, Inspector, before whom articles were deposited, proved this fact bringing about memos Ex.PL, PK and their due verification through Ex.PT by Judicial Magistrate 1st Class and the relevant entries in the records of the Customs Department.

Prosecution evidence was put to the accused in his stand under Section 313 Cr.P.C., who denied the allegations and in his defence examined DW1 HC Mohinder Singh regarding registration of another case bearing FIR No.32 of 1997 at Police Station 'B' Division, Amritsar Ex.DA and through DW2 Ranjit Singh, Reader to the Court of Judicial Magistrate 1st Class, Amritsar proved application Ex.PJ for judicial remand of the accused and orders passed thereon Ex.PJ/1, application of the accused Ex.DC for his medical examination on which order Ex.DC/1 was passed by the Court and subsequent application of the accused Ex.DD retracting from his confessional statement and orders passed thereon Ex.DD/1. It is consequent thereupon the conviction of the appellant was made and that is how he is impugning the same before this Court.

The first and the foremost argument that has been advanced by learned counsel for the appellant, is that the prosecution has failed to examine the independent witnesses and entire testimony is based on the statement of official witnesses which does not inspire confidence. Arguing that there has been clear-cut violation of the provisions of Sections 50 and 55 of the Act, and to hammer home the fact that there is no evidence against the accused and his connection with the alleged recovery, as he has withdrawn from his confessional statement under Section 67 of the Act and has sought to impress on the fact that the recovery is alleged to have been made on a public highway but in fact the documents of the DRI in itself suggest that the same was recovered upon search in the office of the DRI and therefore, in terms of Section 42 of the Act, is a clear-cut violation necessitating acquittal of the accused.

The submissions of learned counsel for the appellant have been thwarted with much elance by Mr.D.D. Sharma, Senior Standing Counsel for DRI, who has submitted that the applicability of Section 50 of the Act is not made out and that it is obligatory for all witnesses to be examined including the independent witnesses and that the credibility of official witnesses cannot be eroded on such a premise. It is submitted that it is at a belated stage that the accused has moved application for withdrawing from his confession and which is well proved on the record against him. Arguing that from the very conscious possession of the convict/appellant recovery of 5 kg of

Heroin has been effected and which possession has been well elaborated from the prosecution witnesses necessitating drawing a presumption in terms of Section 54 of the Act.

Appreciating the arguments that have been sought to be advanced by the two sides, it is abundantly established from the witnesses of the complainant that it was during the course of time a secret information was received as to the fact of transportation of contraband by the accused and which, as has been contended by the learned State counsel, was got reduced into writing by way of Ex.PA and which shows that specific information has been received by the Senior functionaries of the rank of Assistant Director and which has been reduced into writing, elaborating it to be against the present appellant and his co-accused, who was acquitted, to whom it is stated the appellant was supposed to supply the contraband in question. The very provisions enshrined by way of Section 42 of the Act stand fulfilled together with the fact that it is not disputed that the persons so associated with this search and seizure were duly empowered officers in terms of Section 42 of the Act as well. The contentions that have been sought to be raised on behalf of the appellant that necessary intimation as to this secret information was never sent, is thus highly fallacious and untenable. Even otherwise, considering it from another angle, the accused has been apprehended while going on a scooter at a public place and thus, even by that analogy it is provisions of Section 43 and not 42 of the Act that are attracted and thus, makes it

non-obligatory for the officials to send such information. Even if it is assumed so, the office of DRI is a place which is also intended and accessible to the public, thus, clearly rules out the arguments of learned counsel for the appellant as to the violation of Section 42 of the Act. Even otherwise, since search has been made and conducted by a Gazetted Officer himself, even then attraction of Section 42 of the Act is not a legal necessity.

Though, the alleged recovery is from a bag and baggage being carried by the accused and in view of the law laid down in '**2000 Cri.L.J. 507 (SC) 'Kalema Tumba v. State of Maharashtra'** provisions of Section 50 of the Act are not attracted as it is clearly not a recovery as a consequence of search of the person of a person. More so, such provisions are by way of safeguard and intended to serve dual purpose to protect the person against false accusation and frivolous charges as also to lend credibility to the search and seizure conducted by the empowered officer, and therefore, in view of the settled position of law even provisions of Section 50 of the Act are inapplicable to this case.

The next line of arguments that have been sought to be raised on behalf of the appellant is non-examination of the independent witnesses Rakesh Kumar and Ashok Kumar. It is a settled position of law that it is not a mandate but only a rule of caution that has evolved over the years to rule out any false implication. It is unacceptable nor could be highlighted by the accused in his defence

that he has any animus with such a large spectrum of empowered officers from the Customs, Directorate of Revenue Intelligence, Border Security Force as well as Punjab Police. More so, it cannot be accepted that on account of such animus, if any, such a huge quantity of contraband can be implanted which is clearly unthinkable. The accused himself in his confessional statement under Section 67 of the Act Ex.PB has shown his inclination of search before the Senior Intelligence Officer DRI, G.S. Kapoor, who has been cross-examined as PW2 and therefore such a stand negates contentions of learned counsel for the appellant. More so, it was right in the presence of the accused at the time of recovery by virtue of test analysis Ex.PC, it was found that the contraband was none other than Heroin being referred to as Diacety Morphine. Learned counsel for the appellant could not bring to the notice of this Court any material contradiction that has come up in the cross-examination of the witnesses of the prosecution. Mere fact that recovery has been effected from a public place where independent witnesses were available does not warrants that it is mandatory for the prosecution to examine the same. Though they have associated two independent witnesses but for obvious reasons as is often seen that people rarely come forward to support such allegation with ulterior motive. Furthermore, it cannot be impressed upon this Court how the testimonies of these official witnesses are devoid of credibility.

The stand of the defence during the trial and during recording of statement under Section 313 Cr.P.C. is that the accused was illegally detained on 13.03.1997 and after giving him beatings, his signatures and thumb impressions were obtained and consequently involved in a false case on 15.03.1997. However, to the very query of the Court learned counsel for the appellant could not bring forth before the Court any tangible evidence to that effect and the entire defence so examined could not come to the rescue of the convict as learned counsel for the appellant could not bear out in his submissions how the two witnesses so examined and the documents were of any relevance except to bring about retraction of the confessional statement made under Section 67 of the Act.

It has been rightly contended that even Customs officers, DRI officials in the present case, are covered within the definition of 'Police Officer', for which reference is taken note of the law laid down in '**Noor Aga v. State of Punjab and another**' **2008(3) RCR(Criminal) 633**, and thus, to the mind of this Court any confession made to such an officer cannot be legitimately taken to be a legal piece of evidence much less its admissibility by virtue of embargo of Sections 25 and 26 of the Indian Evidence Act. Even otherwise, it is well enunciated principle of law that the statement of an accused recorded under Section 67 of the NDPS Act is admissible in evidence, provided the same is voluntarily made, without any inducement, fear, threat or coercion. Though in the instant case, the

accused has sought to retract from his confession and before considering the same, it is essential to satisfy if it was voluntary, without any undue influence or pressure.

A perusal of the confessional statement shows that apparently it is in the handwriting of the accused and each of the paper is duly signed by him, are matters which shows voluntariness and spontaneity with which it was made by the appellant. It is subsequent thereto, after a much delay the same apparently on legal advice has sought to be retracted, are matters which weigh heavily in the mind of the Court. More so, the prosecution by other independent evidence together with the stand of the defence whereby they do not deny that the vehicle on which the accused was coming with the contraband does not belong to him or the container bag from which it was recovered, are matters which inch towards invariable admission of the accused as to their ownership. More so, much of the details made in the confessional statement of the accused are something which are only within the knowledge of the accused and cannot be mere handiwork of the officials of the DRI. The factum of recovery sought to be accepted in the statement under Section 67 of the Act is corroborated on material particulars by the evidence of the prosecution and the documents proved by them, and therefore, to much extent lends credence to the same. Thus, in the totality of what has come before it, the prosecution have succeeded in establishing the recovery of the contraband, which is commercial quantity, from the

conscious possession of the accused and thus, a presumption arises in terms of Section 54 of the Act, are matters which further lends credence to the case of the prosecution.

Thus, in the totality of what has been detailed and discussed above, there is apparently no illegality or perversity in the impugned findings and thus, there appears to be no merit in the present appeal and the same as such stands dismissed.

(FATEH DEEP SINGH)
JUDGE

September 9, 2015
rps