

Crl. Appeal-S-2182-SB of 2003

[1]

IN THE HIGH COURT OF PUNJAB & HARYANA, CHANDIGARH

**Crl. Appeal-S-2182-SB of 2003
Date of Decision: 10-2-2015**

Prem Singh Appellant

Versus

State of Haryana Respondent

Coram: Hon'ble Mr. Justice Ashutosh Mohunta

1. To be referred to the Reporters or not?
2. Whether the judgment should be reported in the Digest?

Present: Mr. K.S.Dhaliwal, Advocate with
Mr. R.S.Bajwa, Advocate
for the Appellant.

Ms. Kirti Singh, DAG, Haryana.

...

ASHUTOSH MOHUNTA, J.

1. The present appeal arises out of impugned judgement and order of sentence dated 20/08/2003 passed by Ld. Special Judge, Faridabad whereby the appellant has been held guilty under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "The Act") and in furtherance thereof has been sentenced to undergo rigorous imprisonment for a period of 6 years and to pay a

fine of Rs.25,000/-. In default of payment of fine, the appellant has been ordered to further undergo rigorous imprisonment for 1½ year.

2. The factual matrix of the case is that on 16/10/2000, Randhir Singh, SI along with the police party was present near Kattan Pathak where he received a secret information that the appellant is indulging in selling of opium and is present near the Dayal Bagh Park. Believing the information to be correct, Kuldeep Singh DSP was called through V.T. message. The police party along with the secret information reached the place from whereupon, the accused was apprehended. He was having a plastic bag in his right hand. After appraising the accused of his right to be searched either before a magistrate or before a gazetted officer and the accused reposing faith to be searched in the presence of a gazetted officer, Kuldeep Singh DSP was called at the spot and the plastic bag of the accused was checked and was found containing 1½ Kgs. of opium. The same was taken into possession vide seizure memo Ex.PF after separating 20 gms opium as sample. Thereafter on completing all the investigational formalities, ruka Ex.PA was sent to the police station and on the basis of which formal FIR Ex.PA/2 was recorded and after receipt of the FSL report (Ex.PH), the accused was sent up to face trial.

3. In order to prove its case, prosecution examined Krishan Dev SI as PW1, Hari Chand Head Constable as PW2, Rajbir Constable as PW3, Ashok Kumar draftsmen as PW4, Nizamuddin Constable as PW5, Abhey Singh Head Constable as PW6, Randhir Singh Sub

Inspector as PW7, Kuldeep Singh (retired) DSP as PW8, ASI Rishi Pal as PW9 and thereafter closed the evidence.

4. The statement of the accused was recorded under Section 313 Cr.P.C. wherein he denied the version of the prosecution and pleaded false implication. In support of his defence, he examined Ram Sawek as DW1 and Sushil Kumar as DW2 and thereafter closed his defence evidence.

5. It has been argued by the Ld. counsel for the appellant that no public witness was joined in the police party at the time of conducting search upon the appellant and hence in the absence of any independent witness, the recovery of alleged opium from the appellant is a planted recovery. It has further been argued, that before searching the bag of the accused, no notice under Section 50 of the Act which is mandatory in nature has been served upon the appellant and thus his conviction in the present case on this score alone deserves to be set-aside. It is further been argued by the Ld. Counsel for the appellant that there are number of contradictions in the testimony of the recovery witnesses which makes the prosecution story doubtful and hence by giving benefit of doubt to the appellant, he be acquitted in the present case.

6. Per contra, it has been argued by the Ld. counsel for the State that the prosecution has been able to fully establish and bring home the guilt of the accused in as much as he was found in conscious possession of 1½ Kgs. of opium being carried by him in a bag, the contents whereof has duly been corroborated vide FSL report Ex.PH

and hence in view of the same, he has rightly been convicted for the said offence which does not need any interference by this Court.

7. I have heard Ld. counsel for the parties and gone through the records of the case.

8. The facts of the case are not in dispute and therefore needs no repetition at this stage for the sake of brevity.

9. While dealing with the first argument raised by the Ld. Counsel for the appellant that no independent witness was joined at the time of search upon the appellant by the investigating agency, it is apposite to mention that the appellant in the present case has been apprehended for possessing 1½ Kgs of opium in a bag on the basis of secret information. It has come on record from the statements of the prosecution witnesses namely PW6 and PW7 that the people passing by at the time of raid were asked to join the raiding party but however the expressed their inability to do so. There are 3 recovery witnesses to the present case and despite the lengthy cross examination, the accused is not been able to shatter the testimony. It is their consistent version that except the office of Mithlesh Property Dealer there is neither any shop nor houses near Dayal Bagh Park. Even the office of Mithlesh Property Dealer was closed at the time. Under the said backdrop, I find no infirmity by the prosecution in not joining any independent witness while conducting search upon the appellant as the contraband recovered from the bag held by the appellant has been found to be opium vide FSL report Ex.PH.

10. Now dealing with the second argument raised by the Ld. Counsel for the appellant that mandatory provisions of Section 50 of the Act has not been complied with as no notice of search was served upon the appellant of his right to get himself searched in the presence of some gazetted officer or magistrate. The said argument though seems attractive is devoid of any force being not at all penetrating so as to shake the prosecution version in the present case. PW7-Randhir Singh SI, on receiving secret information with regard to appellant standing at Dayal Bagh Park with opium, immediately sent a VT message to PW8-Kuldeep Singh DSP. The search of the bag held by the appellant was conducted in the presence of DSP, who is a gazetted officer. The provisions of Section 50 of the Act are not attracted in the present case as no personal search of the appellant was conducted in as much as the opium was found from the bag held by him weighing 1½ Kgs. In the case of **Krishan Kumar Versus State of Haryana [2014 (6) SCC 664]** it has been held by their lordships of the Supreme Court that where no search or seizure was to be conducted on the person of the accused as like in the present case, then the provisions of Section 50 of the Act are not attracted. Para Nos.12 & 13 of the said judgment are culled out herein below:-

“12. It is clear from the reading of the aforesaid provision that it is applicable only where search of a person is involved. It is not made applicable in those cases where no search of a person is to be conducted. In the instant case the appellant was carrying a bag which was to be

searched and on his request Chet Ram was summoned in whose presence search was conducted which pertained to a bag. In *Ajmer Singh v. State of Haryana*; (2010) 3 SCC 746 this aspect is specifically considered and dealt with. Following earlier Constitution Bench judgment, the Court held that when search and recovery from a bag, brief case, container etc. is to be made, provisions of Section 50 of the Act are not attracted. It is so stated in the following manner:

“14. The object, purpose and scope of Section 50 of the Act was the subject-matter of discussion in a number of decisions of this Court. The Constitution Bench of five Judges of this Court in *State of Punjab v. Baldev Singh*; (1999) 6 SCC 172 after exhaustive consideration of the decisions of this Court in *Ali Mustaffa Abdul Rahman Moosa v. State of Kerala*; (1994) 6 SCC 569 and *Pooran Mal v. Director of Inspection (Investigation)*; (1974) 1 SCC 345 have concluded in para 57:

- (I) When search and seizure is to be conducted under the provisions of the Act, it is imperative for him to inform the person concerned of his right of being taken to the nearest gazetted officer or the nearest Magistrate for making search.
- (II) Failure to inform the accused of such right would cause prejudice to an accused.
- (III) That a search made by an empowered officer, on prior information, without informing the

accused of such a right may not vitiate trial, but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction is solely based on the possession of the illicit article recovered from his person, during such search.

- (IV) The investigating agency must follow the procedure as envisaged by the statute scrupulously and failure to do so would lead to unfair trial contrary to the concept of justice.
- (V) That the question as to whether the safeguards provided in Section 50 of the Act have been duly observed would have to be determined by the court on the basis of the evidence at the trial and without giving an opportunity to the prosecution to establish the compliance of Section 50 of the Act would not be permissible as it would cut short a criminal trial.
- (VI) That the non-compliance of the procedure i.e. informing the accused of the right under sub-section (1) of Section 50 may render the recovery of contraband suspect and conviction

and sentence of an accused bad and unsustainable in law.

- (VII) The illicit article seized from the person of an accused during search conducted without complying with the procedure under Section 50, cannot be relied upon as evidence for proving the unlawful possession of the contraband.

15. The learned counsel for the appellant contended that the provision of Section 50 of the Act would also apply while searching the bag, briefcase, etc. carried by the person and its non-compliance would be fatal to the proceedings initiated under the Act. We find no merit in the contention of the learned counsel. It requires to be noticed that the question of compliance or non-compliance with Section 50 of the NDPS Act is relevant only where search of a person is involved and the said section is not applicable nor attracted where no search of a person is involved. Search and recovery from a bag, briefcase, container, etc. does not come within the ambit of Section 50 of the NDPS Act, because firstly, Section 50 expressly speaks of search of person only. Secondly, the section speaks of taking of the person to be searched by the gazetted officer or a Magistrate for the purpose of search. Thirdly, this issue in our considered opinion is no more res integra in view of the observations made by this Court in *Madan Lal v. State of H.P.*; (2003) 7 SCC 465. The Court has observed:

“16. A bare reading of Section 50 shows that it only applies in case of personal search of a person. It does not extend to search of a vehicle or a container or a bag or premises (see *Kalema Tumba v. State of Maharashtra*; (1999) 8 SCC 257, *State of Punjab v. Baldev Singh*; (1999) 6 SCC 172 and *Gurbax Singh v. State of Haryana*; (2001) 3 SCC 28. The language of Section 50 is implicitly clear that the search has to be in relation to a person as contrasted to search of premises, vehicles or articles. This position was settled beyond doubt by the Constitution Bench in *Baldev Singh* case. Above being the position, the contention regarding non-compliance with Section 50 of the Act is also without any substance.”

16. In *State of H.P. v. Pawan Kumar*; (2005) 4 SCC 350 this Court has stated:

“11. A bag, briefcase or any such article or container, etc. can, under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body of a human being. Depending upon the physical capacity of a person, he may carry any number of items like a bag, a briefcase, a suitcase, a tin box, a thaila, a jhola, a gathri, a

holdall, a carton, etc. of varying size, dimension or weight. However, while carrying or moving along with them, some extra effort or energy would be required. They would have to be carried either by the hand or hung on the shoulder or back or placed on the head. In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore, it is not possible to include these articles within the ambit of the word 'person' occurring in Section 50 of the Act." (emphasis in original)

17. After discussion on the interpretation of the word "person", this Court concluded:

"14. ... that the provisions of Section 50 will come into play only in the case of personal search of the accused and not of some baggage like a bag, article or container, etc. which [the accused] may be carrying." The Court further observed:

"27. ... In view of the discussion made earlier, Section 50 of the Act can have no application on the facts and circumstances of the present case as opium was allegedly recovered from the bag which was being carried by the accused."

13. Moreover, even if we proceed on the basis that Section 50 applies, we find that the requirement of Section 50 is the search by Gazetted Officer or nearest Magistrate. It was not disputed by the learned Counsel for the appellant, at the time of arguments, that Chet Ram was a Gazetted Officer. Therefore, even otherwise we find that the requirement of Section 50 was fulfilled.”

Thus in view of the law laid down in Krishan Kumar’s case supra, the argument on behalf of the appellant with regard to non-compliance of mandatory provision of Section 50 of the Act, is untenable and is hereby rejected.

11. Lastly, it has been argued by the Ld. Counsel for the appellant that there are number of contradictions in the testimony of recovery witnesses which makes the prosecution story doubtful and hence the appellant deserves to be acquitted in the present case. The recovery of contraband in the present case was affected from the bag of the accused on 16/10/2003 and statement of the official witnesses was recorded on oath before the Court after a gap of more than 1½ years. Minor discrepancies here and there are normal and bound to occur with fading human memory which thus shows that the same is not concocted and tutored. It is not the case of the appellant that the said witnesses have given a parrot-like version of the said occurrence. Even their testimony could not be shaken by him during their lengthy cross examination. In the said backdrop, it can safely be held that the testimony of the official witnesses does not corrode the prosecution story but rather lends credibility to it.

12. In view of the aforesaid discussion, I find no infirmity in the findings recorded by the Special Judge, Faridabad while convicting the appellant in the present case under Section 18 of the Act for possessing 1½ Kgs of opium without any lawful authority and thus accordingly while dismissing the present appeal of the appellant, uphold the judgement of conviction and sentence passed by Special Judge, Faridabad dated 20/08/2003.

13. At this stage, Ld. Counsel for the appellant has argued that the appellant is not a previous convict nor is a habitual offender and having faced the agony of protracted trial since the year 2000, leniency be shown in the quantum of sentence awarded to him by the Ld. Trial Court.

14. I find force in the argument raised by the Ld. Counsel for the appellant. In the present case, the appellant was arrested on 16/10/2000 and thereafter was released on bail. On his conviction in the present case, he again was sent behind the bars and was released on bail by this Court vide order dated 02/12/2004 after having undergone 1 year and 6 months of actual sentence out of total sentence of 6 years imposed upon him. The contraband of 1½ Kgs of opium recovered in the present case is a non-commercial quantity. The appellant has already faced the agony of protracted trial for the last about more than 14 years and considering the fact that he is a first offender and the contraband recovered is a non-commercial quantity, I deem it appropriate to reduced the sentence of imprisonment of R.I. 6 years imposed upon him to R.I. for 3 years.

Ordered accordingly. However the sentence of fine imposed upon the appellant is maintained. The period of incarceration already undergone by the appellant in the present case shall be set off from the modified sentence of R.I. for 3 years as awarded by me vide the said judgment. The appellant is directed to be taken into custody to serve out the remaining part of his sentence as indicated in the said judgment.

15. With the said modification in the quantum of sentence, the present appeal is dismissed.

**(ASHUTOSH MOHUNTA)
JUDGE**

10.2.2015
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