

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

Criminal Appeal No.S-1022-SB of 2001

Date of Decision : May 06, 2015

Sahabudin

.....Appellant

VERSUS

State of Punjab

.....Respondent

CORAM: HON'BLE MR. JUSTICE T.P.S.MANN

Present : Mr. S.P.S. Sidhu, Advocate.

Mr. Vikram Bishnoi, Assistant Advocate General, Punjab.

T.P.S. MANN, J.

Aggrieved of the judgment and order dated 29.8.2001 passed by the Judge, Special Court, Bathinda whereby the appellant was convicted under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'the NDPS Act') and sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.1,00,000/- and in default of payment of fine, to further undergo rigorous imprisonment for one year, he has filed the present appeal.

The prosecution case, in nutshell, is that on 8.6.1999 Inspector Barjinder Singh Dhillon, Station House Officer, Police Station Talwandi Sabo, alongwith other police officials and one Laddar Singh, an independent witness, was going from bus stand of village Sekhpur towards village Jodhpur Pakhar. When the police party had covered a distance of 200 yards, the appellant was seen coming on

the *katcha* passage from the side of village Jodhpur Pakhar. He was holding a Jhola (bag) in his hand. On seeing the police party, the appellant tried to take a turn towards his left. This aroused suspicion in the mind of Inspector Barjinder Singh Dhillon, who after apprehending him, gave him the offer of search in the presence of a Magistrate or a Gazetted Officer. However, the appellant reposed confidence in Inspector Barjinder Singh Dhillon and required him to conduct his search. The search of the bag led to recovery of 1.5 kgs. of opium. Out of the same, 10 grams was separated as sample. The sample as well as the remainder were packed in separate parcels and taken into the possession after preparing requisite memo. Personal search of the appellant led to recovery of currency worth Rs.120/- which was also taken into possession. Ruqa was, thereafter, sent to the Police Station, on the basis of which FIR No.61 dated 8.6.1999 under Section 18 of the NDPS Act was registered at Police Station Talwandi Sabo.

During the investigation of the case, the appellant was formally arrested. Grounds of arrest were disclosed to him. Rough site plan of the place of recovery was prepared. On the next date, the appellant and the case property were produced before the Ilqa Magistrate who directed that the case property be kept in the judicial Malkhana. However, as there was no space in the judicial Malkhana, the case property was deposited in the Police Station Malkhana. The sample of the contraband was sent to the Chemical Examiner, Patiala. On receipt of the report therefrom and after completion of the investigation, the appellant was challaned. He was, thereafter,

charged for committing the aforementioned offence to which he pleaded not guilty and claimed trial.

In support of its case, the prosecution examined PW1 H.C. Babu Singh, PW2 Constable Harjinder Singh and PW3 Inspector Barjinder Singh Dhillon, who by then stood promoted as Deputy Superintendent of Police. While Laddar Singh, the independent witness, was given up as having been won over by the appellant, ASI Santokh Singh and Constable Gora Singh were given up as unnecessary.

When examined under Section 313 Cr.P.C., the appellant pleaded false implication and in defence he examined DW1 Munshi Ram.

The trial Court, after hearing learned counsel for the parties and going through the evidence available on the record, came to the conclusion that the prosecution had proved its case against the appellant beyond any shadow of reasonable doubt of keeping 1.5 kgs. of opium in his possession without any permit or licence and, therefore, committed the offence punishable under Section 18 of the NDPS Act and, accordingly, convicted and sentenced him, as mentioned above.

Learned counsel for the appellant has submitted that the mandatory provisions of Section 50 of the NDPS Act requiring the presence of either a Magistrate or a Gazetted Officer, while effecting the search and recovery of the contraband, have not been complied with. It has also been submitted that Laddar Singh, who was an

independent witness, has been given up by the prosecution as having been won over by the appellant. In the process, the appellant has been deprived of his statutory right to cross-examine him. It has also been submitted that the link evidence is missing as the Moharrar Head Constable with whom the case property was deposited has not been examined by the prosecution nor his affidavit placed on the record.

Learned State counsel has refuted the submissions made by learned counsel for the appellant and submitted that the prosecution had led cogent and convincing evidence to establish the guilt of the appellant.

From the testimonies of PW3 Inspector Barjinder Singh Dhillon and PW2 Constable Harjinder Singh, it is made out that on 8.6.1999, when the police party headed by Inspector Barjinder Singh Dhillon had covered a distance of 200 yards from village Sekhpur towards village Jodhpur Pakhar, the appellant was seen coming on the *katcha* passage from the side of village Jodhpur Pakhar and was carrying a bag in his hand. The search of the bag conducted by Inspector Barjinder Singh Dhillon led to recovery of 1.5 kgs. of opium. The recovery having been effected from the bag held by the appellant in his hand, the provisions of Section 50 of the NDPS Act were not required to be complied with. Only if the recovery had been effected upon search of a person, Section 50 of the NDPS Act would have been attracted which required giving of an offer to the accused that if he so wished, he could be searched in the presence of a Gazetted Officer or the Magistrate. Even otherwise, after noticing the conduct

of the appellant in taking a turn towards his left on seeing the police party, which aroused suspicion in the mind of Inspector Barjinder Singh Dhillon that the latter, after apprehending, gave him the offer of search in the presence of Magistrate or a Gazetted Officer. However, it was the appellant who reposed confidence in Inspector Barjinder Singh Dhillon and required him to conduct the search. The search of the bag, as mentioned above, led to recovery of 1.5 kgs. of opium. Therefore, it cannot be said that the recovery of contraband has been effected in violation of the provisions of Section 50 of the NDPS Act.

As regards the non-examination of Laddar Singh, who was an independent witness, it may be noticed that on 25.10.1999, the Additional Public Prosecutor made a statement before the trial Court that he was giving up Laddar Singh as having been won over by the accused. The said statement of the Additional Public Prosecutor was made on the basis of application dated 25.10.1999 made by ASI Santokh Singh, Police Station Talwandi Sabo wherein it was stated that Laddar Singh was in league with the appellant and was put off appearing in the case, therefore, he be given up. Once specific reasons have been stated by ASI Santokh Singh as to why Laddar Singh had been given up, the defence could not insist upon the prosecution for producing Laddar Singh before the trial Court for his cross-examination in order to bring on record some material evidence. If the defence so wanted it could produce him as a defence witness in support of its case.

In his testimony before the trial Court, PW3 Inspector

Barjinder Singh Dhillon, who by then stood promoted as DSP, stated that on reaching the Police Station, he had kept the case property with him whereas the appellant was put in the lock up. On 9.6.1999, after he produced the appellant and the the case property before the Ilaqa Magistrate, besides submitting application Ex.PG, the Ilaqa Magistrate vide order Ex.PG/1 directed him to deposit the case property in the judicial Malkhana. Further, as there was no space in the judicial Malkhana, he filed another application Ex.PH to the Ilaqa Magistrate for obtaining orders Ex.PH/1. Further, on 9.6.1999, he sent the sample parcel to the office of the Chemical Examiner, Patiala through Constable Harjinder Singh, who, on return on 11.6.1999, produced the receipt before him. He, also recorded his statement on 22.6.1999. As the sample of the contraband remained with PW3 Inspector Barjinder Singh Dhillon all the time and being sent to the Chemical Examiner on 9.6.1999 through Constable Harjinder Singh, it cannot be said that the link evidence was missing as the prosecution did not produce the Moharrar (Incharge Police Malkhana) regarding the safe custody of the contraband. The defence did not challenge the testimony of PW3 Inspector Barjinder Singh Dhillon regarding keeping the sample of the contraband with him before sending it to the Chemical Examiner through Constable Harjinder Singh. What was suggested to him was that being the Investigating Officer, he was deposing falsely as he was interested in the success of the case and the appellant was apprehended from the brick kiln of Mohni where he was working as a labourer on tractor and falsely implicated in the case. Both the suggestions were specifically denied. Therefore, the

prosecution case cannot be thrown out on the ground that the incharge of police Malkhana was not produced by the prosecution in order to establish that the sample was not tampered with till it was entrusted to PW2 Constable Harjinder Singh.

In his testimony PW2 Constable Harjinder Singh tendered his affidavit Ex.PE. It was stated therein that on 9.6.1999 Barjinder Singh Dhillon, SHO, Police Station Talwandi Sabo had handed over the sample parcel to him alongwith sample impression of the seal for being deposited in the office of the Chemical Examiner after obtaining necessary orders from the office of Senior Superintendent of Police, Bathinda. Subsequently, he took the sample and deposited the same alongwith the sample impression of the seal with the office of the Chemical Examiner on 10.6.1999. He also deposed that till the time the sample remained with him neither he nor anyone else tampered with the same. Thus, no fault can be found in the prosecution case regarding the link evidence.

In view of the above, no case is made out for any interference in the impugned judgment of conviction and sentence passed by the trial Court.

The appeal is without any merit, and therefore, dismissed.

May 06, 2015
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(T.P.S. MANN)
JUDGE