

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

CRA-S-1015-SB of 2004

Date of decision : 22.01.2015

Radha Bai

..... Appellant

Versus

State of Haryana

..... Respondent

CORAM : HON'BLE MR. JUSTICE DARSHAN SINGH

Present: Mr. Namit Sharma, Advocate
for the appellant.

Mr. Deepak Bura, Public Prosecutor
for the State of Haryana.

- 1. Whether Reporters of local papers may be allowed to see the judgement? Yes**
- 2. To be referred to the Reporters or not? Yes**
- 3. Whether the judgement should be reported in the Digest? Yes**

DARSHAN SINGH, J

1. The present appeal has been preferred by appellant-Radha Bai against the judgment of conviction dated 05.04.2004, vide which she was held guilty and convicted for the offence punishable under Section 18 of Narcotic Drugs & Psychotropic Substance Act, 1985 (hereinafter to be referred as 'Act') and the order of sentence

dated 06.04.2004, vide which she was sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs. One lac, in default of payment of fine to further undergo rigorous imprisonment for a period of one year.

2. The brief facts of the prosecution case are that on 10.04.1999, PW-5 ASI Virender Singh along with other police employees was present at the inner gate of bus stand, Panipat in connection with patrolling. Appellant-Radha Bai was spotted coming out from inside the bus stand with a bag in her hand. On seeing the police party, she suddenly took a back turn and started walking briskly. She was apprehended on suspicion and was suspected carrying some substance in her bag. Thereafter, ASI Virender Singh served a notice under Section 50 of the Act upon her apprising her as to whether she wants her bag to be searched by a Magistrate or a Gazetted Officer or ASI Virender Singh himself. In her reply to the notice, she opted for her search by a Gazetted Officer. PW-4, Banwari Lal, DSP Headquarter was telephonically summoned to the spot. After the arrival of DSP Banwari Lal, on his instructions the search of the bag of the appellant was carried out. A white colour rexine packet was recovered from the bag. On opening the rexine packet opium was recovered there from. On weighing, the opium came to be 3 kgs. Out of that 100

gms opium was separated as a sample. The separate sealed parcels of the sample and remainder opium was prepared. The seal after use was handed over to constable Sham Lal. These parcels were also sealed by DSP, Banwari Lal with his own seal. He kept his seal with him. These articles were taken into possession vide memo Ex. PD. The Investigating Officer also prepared the site plan of the place of recovery Ex.PF. Accused/appellant was arrested. The Investigating Officer sent ruqa Ex.PA to the police station. On the basis of which formal FIR Ex.PA/1 was registered.

3. Thereafter, ASI Virender Singh produced the appellant, witnesses and the case property before PW-3, Inspector Karam Singh, the then SHO, Police Station, City Panipat. He verified the facts of the case from the accused and the witnesses and affixed his seal own seal on the parcels of the case property. He directed ASI Verinder Singh to deposit the case property with the MHC of the Police Station. The sample parcel was sent to the Forensic Science Laboratory (for short F.S.L) for examination, which was found to be of opium vide report of F.S.L Ex.PK and on completion of the investigation, the report under Section 173 of Code of Criminal Procedure (for short Cr.P.C) was presented in the Court for trial.

4. Appellant was charge sheeted for the offence

punishable under Section 18 of the Act by the learned trial Court vide order dated 02.08.1999 to which the appellant pleaded not guilty and claimed trial.

5. In order to substantiate its case, the prosecution examined as many as five witnesses. The report of the F.S.L Ex.PK was also tendered into evidence.

6. In defence evidence, she tendered in evidence the certified copy of the statements of DSP, Banwari Lal Ex.DC and ASI Raghbir Singh Ex.DD recorded in case FIR no. 151 dated 10.04.1999 for the offence punishable under Section 18 of the Act, Police Station, City Panipat.

7. On appreciating the evidence on record and the contentions raised by learned counsel for the parties, learned trial Court held guilty and convicted the appellant for the offence punishable under Section 18 of the Act and she was awarded the sentence as mentioned in the upper part of the judgment.

8. Aggrieved with the aforesaid judgment of conviction and order of sentence, the present appeal has been preferred.

9. I have heard Mr.Namit Sharma, Advocate learned counsel for the appellant, Mr. Deepak Bura, learned Public Prosecutor for the State of Haryana and have meticulously examined the record of the case.

10. Initiating the arguments, learned counsel for the appellant contended that even though the recovery is alleged to have been effected at the bus stand of Panipat, which is very busy public place and the police party remained at the spot for a considerable long period, but even then no public witness has been joined in the investigation, which renders the prosecution case doubtful. To support his contentions he relied upon cases **State of Punjab vs. Har Chand Singh and others 2002(3) RCR (Criminal) 746 and State of Punjab Vs. Jalaur Singh 2002(3) RCR (Criminal) 478**. He further contended that no action has been taken by the Investigating Officer against the persons who have refused to join the investigation.

11. He further contended that the mandatory provisions of Section 50 of the Act have been violated by the Investigating Officer. The appellant is a lady. As per Section **50 (4) of the Act**, she was required to be searched by a lady, but the Lady Constable, who has carried out the search has not been examined. The owner of the kiosk where the search was conducted has also not been examined. Thus he contended that the non compliance of Section 50 of the Act vitiate the entire prosecution. To support his contentions he relied upon cases **Union of India Vs. Shah Alam and another 2009(3) R.C.R**

(Criminal) 158.

12. He further contended that there is no corroboration to the statement of PW-5 ASI Virender Singh on the point of apprehension of the accused along with the bag containing the contraband. The other prosecution witnesses namely Constables Sewa Ram and Sham Lal have been given unnecessarily. The uncorroborated statements of the Investigating Officer can not be relied upon. Even as per the prosecution case DSP has come at the spot much after the apprehension of the accused.

13. He further contended that there are various material discrepancies in the statements of the prosecution witnesses, which renders their testimonies unworthy of credence. He further contended that the presence of PW-4 Banwari Lal, DSP at the place of recovery was extremely doubtful in view of copy of the statements Ex.DC and Ex.DD. A person can not be present at two places at the same time, which shows that the signatures of Banwari Lal have been obtained later on and he has not witnessed the search and seizure.

14. Learned counsel for appellant further contended that the witness to whom the seal was entrusted after use has also not been examined. So, there is no evidence to show that the case property remained intact.

15. He further contended that as per the prosecution version lady constable Urmila was present at the spot, when the appellant was apprehended. But as per the statement of the DSP and the memo of the personal search lady constable Nirmala was present, which is a serious contradiction and renders the entire case of the prosecution doubtful.

16. On the other hand learned State counsel contended that the search and seizure has been witnessed by the Gazetted police officer. The Investigating Officer has made efforts to join the independent witnesses, but they did not agree. The Investigating Officer has no motive to falsely implicate the appellant. So, the non joining of the independent witness is not fatal. He further contended that the provisions of Section 50 of the Act are not applicable in this case as the recovery was effected out of the search of the bag and not the person of the accused. He further contended that mere this fact that later on DSP, Banwari Lal has also joined the investigation of some other case cannot render his presence doubtful at the spot. Thus, he contended that the conviction of the appellant has been rightly recorded by the learned trial Court.

17. I have duly considered the aforesaid contentions.

18. First of all I take up the plea raised by learned

counsel for the appellant with respect to the violation of section of 50 of the Act. I do not find any substance in the contentions raised by learned counsel for the appellant with respect to the violations of the provisions of Section 50 of the Act, because the recovery in this case has been effected from a bag, which was in the hand of the appellant and not out of her personal search, which will not attract Section 50 of the Act as per the ratio of law laid down in cases **State of Himachal Pradesh versus Pawan Kumar 2005 Supreme Court Cases (Crl.) 943, Ajmer Singh vs. State of Haryana (2010) 3, Supreme Court Cases 746 and Ram Swaroop Vs. State (Government of NCT of Delhi) (2013)14, Supreme Court Cases 235.**

19. It is the settled principle of law that the prosecution is bound to establish its case by leading cogent, consistent and reliable evidence in the manner alleged by it. In the instant case, as per the prosecution version, the appellant was apprehended by PW-5 ASI Verinder Singh on 10.04.1999 at bus stand, Panipat when he was accompanied by Constable Sham Lal no. 346, Constable Sewa Ram No. 267 and lady constable Urmila No. 873, which led to the search and seizure of the contraband from the possession of the accused in the presence of PW-4 DSP, Banwari Lal and the aforesaid witnesses.

20. Admittedly, the place of recovery is bus stand, Panipat. It can not be disputed that the place of recovery is a busy public place being the bus stand of city like Panipat. The presence of number of independent witness at such a busy place and at such a day time can not be disputed. But, no independent witness has been associated by the Investigating Officer. There is absolutely no dispute with the proposition of law that the prosecution case can not be thrown away simply on the ground that the independent witnesses have not been associated and the statements of the official witnesses should also be relied upon if those inspires the confidence. But, at the same time, where the place of recovery is a busy place and the presence of number of independent witnesses can not be disputed and no independent witness is associated, it becomes the duty of the Court to scrutinize the prosecution case carefully, consciously and minutely. In that eventuality even the minor circumstances may assume significance.

21. It is admitted case of the prosecution that PW-4, DSP Banwari Lal was summoned at the spot by the Investigating Officer only after the appellant was served with a notice under Section 50 of the Act Ex.PE and when vide her reply Ex.PE/1, she opted for search of her bag in the presence of Gazetted Officer. So, PW-4, DSP Banwari Lal

was not present at the spot when the appellant was apprehended and the bag allegedly containing contraband was spotted. At that time, the Investigating Officer was accompanied with as per the ruqa Ex.PA by constables Sham Lal, Sewa Ram and lady constable Urmila. But, none of them have been examined by the prosecution. PW Constables Sewa Ram and Sham Lal were given up as unnecessary by the learned Public Prosecutor vide statement dated 29.05.2001. So, on the point of apprehension of the accused, there is only the solitary statement of PW-5 ASI Virender Singh, which is not corroborated from any other source. The withholding of constables Sham Lal and Sewa Ram, the witnesses of recovery raises an adverse inference against the prosecution. Due to non-examination of anyone out of them, the testimony of the Investigating Officer is totally uncorroborated. It has also resulted in serious prejudice to the accused as the accused has been deprived of an opportunity to project his defence and assail the prosecution case by comparing the cross-examination of PW-5, ASI Virender Singh with the other recovery witness. At the costs of repetition, PW-4 DSP came into picture later on when the appellant exercised the option for the search of her bag in the presence of a Gazetted Officer. The police

officials, who were accompanying the Investigating Officer at the initial stage of the apprehension of the appellant were very material witnesses to corroborate the prosecution story. But, they have been given up surprisingly, being unnecessary. Thus, the uncorroborated testimony of PW-5 ASI Vreinder Singh, the Investigating Officer of the case with respect to the apprehension of the accused along with bag containing contraband is not safe to rely upon.

22. There is another very serious contradiction in the prosecution case, which totally demolishes its veracity. The appellant is a lady. As per the memo of arrest, she was arrested on 10.04.1999 at 06.50.p.m at bus stand Panipat. Before her arrest her personal search has been taken by lady constable Nirmala no. 783. It is not known from where this lady constable Nirmala no. 783 figured in the memo of personal search. As per the ruqa Ex.PA and FIR Ex.PA/1, lady constable Urmila no. 873 was present with the Investigating Officer at bus stand, Panipat, when the appellant was apprehended. PW-5 ASI Virender Singh, the Investigating Officer of the case has also categorically stated that he along with constable Sham Lal, constable Sewa Ram and lady constable Urmila was on patrolling duty on the road near entry of bus stand, Panipat, when the appellant was intercepted having a 'thaila' in her hand. So, as per

statement of ASI Virender Singh, the ruqa Ex.PA and FIR Ex.PA/1, lady constable Urmila no. 873 was present with the Investigating Officer. Whereas, PW-4 DSP Banwari Lal has stated that the police party was consisting of ASI with three constables including one lady constable. He further stated that lady constable Nirmala was already with the Investigating Officer. He further deposed that lady constable was present at the spot, when he left the spot. So, as per the statement of PW-4 DSP, Banwari Lal and the memo of the personal search, it was lady constable Nirmala no. 783, who was present at the spot and has carried out the personal search of the appellant before her arrest. The memo of personal search also bears the signatures of lady constable Nirmala no. 783. As per the basic story of the prosecution, lady constable Urmila No. 873 was accompanying the Investigating Officer. Then, from where lady constable Nirmala no. 783 came on surface. This substitution of the lady constable clearly indicates that the proceedings have not been conducted at the spot and in the manner alleged by the prosecution, which goes to the root of the case and even renders the recovery doubtful.

23. There is again a serious contradiction in the prosecution case about the person to whom the seal after use was entrusted by the Investigating Officer. PW-4 DSP

Banwari Lal has stated that the seal after use was handed over to constable Sewa Ram by ASI Virender Singh. But, PW-5 ASI Virender Singh stated that he entrusted the seal after use to constable Sham Lal. However, none of these witnesses has been examined by the prosecution and both of them have been given up as unnecessary. So, even the witness of seal has not been examined by the prosecution to establish that the case property remained intact.

24. The presence of PW-4, DSP Banwari Lal at the spot is also not free from doubt, because a person can not be present at two places at the same time. Ex.DC is the certified copy of the statement of PW-4, Banwari Lal recorded in case FIR No. 151 dated 10.04.1999 under Section 18 of the Act, Police Station, City Panipat. In the cross-examination PW-4 has admitted that his statement Ex.DC was recorded. As per the statement of PW-4, Banwari Lal in the present case, he received the telephonic message from ASI Verinder Singh at 4.15.p.m and within ten minutes he reached at the spot. Meaning thereby, he reached at the spot at about 4.25.p.m. He further deposed in the cross-examination that he stayed at the spot for 1- 1 ¼ hours. Meaning thereby, he remained present at the spot up to 5.30/ 5.40 p.m. The copy of the statement Ex.DC shows that in case FIR No. 151, he received the telephonic

message from the Investigating Officer of that case at 5. p.m when he was present at his residence and he reached the spot of that case at 5.15.p.m. If that was so, then the presence of PW-4 DSP, Banwari Lal at the place of recovery of this case is rendered extremely doubtful that is why he has not been able to correctly tell the name of the constable to whom the seal was entrusted after use and has deposed on that point against the record. Similarly, as per the prosecution version, the contraband was allegedly recovered from a rexine packet, which was kept in the bag by the appellant. But, PW-4 DSP, Banwari Lal has stated that opium was wrapped in one polythene, which was of white colour. He further stated that it was in the form of an envelope. There is vital difference between rexine packet and polythene envelope. This is again material contradiction with respect to the container of the contraband and goes to the root of recovery. If, PW-4, DSP, Banwari Lal would have witnessed the search and seizure, he must have been able to correctly tell the container of the opium as per the prosecution version. Thus, presence of PW-4, DSP Banwari Lal at the spot is extremely doubtful.

25. Thus, keeping in view of my aforesaid discussion, as the statement of PW-5 Virender Singh is not corroborated from any other source, the material witnesses of the

prosecution have been withheld. The witness of seal has not been examined. The presence of DSP, Banwari Lal at the time of search and seizure is extremely doubtful. There is a serious contradiction in the prosecution case about the identity of the Lady Constable present at the spot and there are also some other contradictions in the statements of the prosecution witnesses, in the absence of any independent corroboration, the cumulative effect of the aforesaid circumstances renders the prosecution case doubtful and the prosecution has failed to establish its case beyond shadow of reasonable doubt.

26. Consequently, the present appeal against conviction and order of sentence is hereby allowed. The conviction of the appellant and sentence awarded to her stands set aside. She stands acquitted of the charges. Bail bonds stand discharged.

January 22, 2015**s.khan****(DARSHAN SINGH)
JUDGE**