

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRA-S-1137-SB-2004

Date of Decision: December 22, 2015

Rajbir Singh

...Appellant.

Versus

State of Haryana

...Respondent

CORAM: HON'BLE MRS. JUSTICE RAJ RAHUL GARG

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

Present: Mr. Manish Verma, Advocate
Amicus Curiae for the appellant.

Mr. Sandeep Vashisht, DAG, Haryana
for the State.

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RAJ RAHUL GARG, J.

This appeal is directed against the judgement dated 2.4.2004 rendered by Special Judge, Rohtak whereby the appellant-accused was convicted for keeping in his possession 800 gms of charas without any permit or license thereby committing an offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter to be referred as the NDPS Act). Vide order on sentence dated 5.4.2004, appellant-accused was sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.1,00,000/- and in default of payment of fine to further undergo rigorous imprisonment for two years.

Brief facts of the prosecution case are like this that on 23.1.2002, Samunder Singh ASI alongwith police officials was present on the bridge of Minor Canal situated in the area of village Girawar on patrolling and checking of crime. At about 5.15 PM, he received secret information against Rajbir (accused)

that he indulges in narcotic drugs and was coming from village Girawar on his scooter bearing No.HR-15-1333. In the meanwhile, the aforesaid scooter came from the village Girawar side. He was apprehended with the help of police officials. On enquiry he disclosed his name as Rajbir son of Ram Singh Jat, resident of Ballamba. Suspecting that he was in possession of charas, notice under Section 50 of the NDPS Act was given to him, giving an option as to if he wanted to be searched by a Gazette Officer, Magistrate or by the police officer himself. The accused exercised his option in favour of Gazetted Officer. Notice to this effect is (Ex.PN) and reply is (Ex. PO). Through Constable Kuldeep Singh, a message was given to DSP, Meham through telephone to reach the spot. Accordingly, Rajinder Singh DSP arrived at the spot. He gave notice under Section 56 of the NDPS Act to accused, giving him an option as to if he wanted to be searched by a Gazetted Officer, Magistrate or by he himself. This notice is (Ex. PB). Accused exercised his option in favour of a Gazetted Officer. Reply is (Ex. PC). Rajinder Singh DSP then directed Samunder Singh ASI to take the search in accordance with law. On search of the scooter, charas was recovered from the dicky of the scooter. Charas was lying wrapped in a polythene bag. On weighment, it came to 800 gms. 50 gms of charas was separated as sample. Remainder was put into a plastic box whereas sample was also put in another plastic box. Sample as well as the remainder were separately sealed with seals of 'SS' and that of 'RS'. 'RS' seal belongs to DSP Rajinder Singh. Seal after use was handed over to Head Constable Mangat Ram. Sample seal was also prepared. Recovered charas as well as aforesaid scooter were taken into police possession vide memo (Ex.PD). Ruqa (Ex. PK) was sent to the police for registration of the case whereupon formal FIR (Ex.PL) was recorded. Rough site plan of the spot (Ex.PP) was prepared. Accused, witnesses, case property, sample, specimen seal impressions as well as scooter of the accused were produced before Inder Singh Inspector, the then SHO of Police Station Meham. He was apprised of the facts of the case. He verified the facts from the accused as well as from the witnesses and affixed his seal 'IS' on the case property as

well as on the sample. He also appended his signatures on the aforesaid parcels. Specimen seal of seal 'IS' was also prepared. Samunder Singh ASI was directed to deposit the case property and sample seals with the MHC of the Police Station, Meham whereupon he handed over the same to Phool Kumar MHC with seals intact. Report (Ex.PE) was also sent to Rajinder Singh DSP, Meham on the same day. Scooter was also handed over to MHC of Police Station, Meham. Report of FSL (Ex. PA) was obtained whereupon contents of sample were reported as that of charas (cannabis). After completion of necessary investigation, the challan was put in the Court.

Accused was charge-sheeted for committing offence under Section 20 of the NDPS Act. After taking entire prosecution evidence, statement of accused under Section 313 Cr.P.C. was recorded wherein accused denied each prosecution allegation and pleaded his innocence. By way of defence, accused simply pleaded that he is innocent and has been falsely implicated. Scooter bearing No.HR-15-1333 did not belong to him nor he was a registered owner of the same. He was not even knowing scooter driving. He was not holding the driving licence. No recovery of charas was effected from him. He was called in the Police Station, Meham and then arrested. The case is forged against him.

After hearing both the sides and appraising the entire evidence and material on record, the learned Special Judge, Rohtak held the accused guilty of committing offence punishable under Section 20 of the NDPS Act and also passed order on sentence dated 5.4.2004 as mentioned in the earlier part of this judgement.

I have heard Mr. Manish Verma, Advocate for the appellant-accused and Mr. Sandeep Vashisht, Deputy Advocate General, Haryana for the State, besides going through the entire material coming on record.

First of all, it was argued by Mr. Manish Verma, advocate for the appellant-accused that in this case compliance of Section 50 of the NDPS Act has not been made. Though notices (Ex.PN and Ex.PB) were given to the accused giving him an option as to if he wanted to be searched by a Gazetted

Officers or Magistrate, he had also given him the option as to if he wanted to be searched by that officer as well. In fact both the aforesaid officers i.e. investigating officer and DSP, Meham did not tell the accused that he was having a right to be searched by or in the presence of a Gazetted Officer or Magistrate. Thus on account of this fact, the notice given to the accused under Section 50 of the NDPS Act is not in accordance with law and vitiates the trial. Besides this, even compliance of Section 42 of the NDPS Act has also not been made by the prosecution. Samunder Singh ASI received a secret information against the accused. As per prosecution story, he did not reduce that information into writing nor gave information to the senior police officers in this regard. The compliance of Section 42 of the NDPS Act is mandatory in nature and as such on this count as well, the accused is entitled to acquittal. In support of his contention, he has cited **Ajay Malik & others Vs. State of UT, Chandigarh, 2009(3) RCR (Criminal) 649.**

On the other hand, it was contended by Mr.Sandeep Vashisht, learned State counsel that in fact, after receipt of secret information, Scooter bearing No.HR-15-1333 came at the spot. Thus there was no time available with the police to reduce the secret information into writing and then to send the same to the senior police officers. Had the investigating officer indulged in doing so, the scooter in question might have been slipped away. Even otherwise, in this case, the recovery of contraband was effected from the dicky of the scooter at a public place, therefore, provisions of Section 42 of the NDPS Act are not applicable but that of Section 43 of the NDPS Act, where there is no mandate of reducing the secret information into writing and then to send the same to the senior police officers. Regarding notice under Section 50 of the NDPS Act, it was argued by learned State counsel that in the case in hand compliance of the provisions of Section 50 of the NDPS Act was not required at all. The recovery of contraband was effected after search from the dicky of the scooter on which accused was coming. The recovery was not effected from the person of the accused. Section 50 of the NDPS Act comes into play only when the recovery

was to be effected from the person of the accused. In support of his contention, he has cited **Saikaujabbi Vs. State of Maharashtra, 2004(1) RCC 57, Kalema Thumba Vs. State of Maharashtra and another, 2000(1) RCC 163 and Cyril Archibong Vs. State of Union Territory, Chandigarh, 2003(3) RCC 103.**

In view of the above proposition of law, it is evident that it is a case in which Charas was recovered after search of the scooter, from the dicky of the scooter. In this case, search of the person was not conducted nor the contraband was recovered from his person. As such **Ajay Malik's case (supra)** is not applicable to the facts of the present case. In that case, in fact, the personal search of accused was made but no recovery was effected. However, recovery was effected from the car. Under those circumstances, it was held that even if nothing was recovered from the personal search of the accused, compliance of Section 50 of the NDPS Act should have been made. In the present case, in fact, the person of accused was not searched for the purposes of effecting recovery of narcotic substance. As such, this Court sees no illegality in the impugned judgement on this point. For the same very reason, argument advanced by learned counsel for the appellant-accused that DSP, Meham was a Police Officer, as such search conducted on his orders not a sufficient compliance of Section 50 of the NDPS act, is also not tenable. In **Ajay Malik's case (supra)**, the DSP was a member of the police party which is not the case in hand. Even in the other two judgements relied upon in **Ajay Malik's case (supra)**, luggage of the accused as well as person of the accused were searched. Whereas in the case in hand, search of scooter alone was taken whereupon contraband was recovered. As in the case in hand for effective recovery of contraband, person of the accused was not searched, therefore, there was no need to comply with the provisions of Section 50 of the NDPS Act. Thus this contention of learned counsel for the appellant-accused is not tenable.

The next argument raised by Mr. Manish Verma, Advocate for the appellant-accused is this; that on the recovery memo and report under Sections

53, 54 and 57 of the NDPS act, FIR number finds mention. This shows that either the FIR in question was registered prior to the preparation of these documents of this case or the aforesaid memos were prepared after the registration of the FIR. In both the situations, the case of the prosecution cannot be said to be free from doubt. Again in support of his case, learned counsel for the appellant-accused cited **Ajay Malik's case (supra)**. He also cited **Giri Raj Vs State, 2000(83) DLT 201**. In fact, the facts and circumstances of the aforesaid judgements are different from the facts of the present case. In **Ajay Malik's case (supra)**, the recovery memos, rough site plan prepared at the spot contained reference to FIR No.235 dated 24.12.2003. Under those circumstances, it was held by this Court that it is inconceivable as to how memos prepared at the spot could bear reference to FIR number which came to be registered later at 5.30 am. In the case in hand, there is no such reference to FIR number which finds mention in any of the documents including the recovery memo (Ex.PD), report (Ex.PE) and site plan of the spot (Ex.PP) . Though at the top of these three documents, FIR number finds mention but that must have been done after registration of the FIR i.e. after obtaining the FIR number. Site plan (Ex.PP) of the spot does not bear the FIR number even on the top. Likewise, notice given under Sections 50 and 56 of the NDPS Act do not bear the FIR number. As such, on this count, it cannot be said that prosecution case is in any way doubtful.

The next point of argument raised by learned counsel for the appellant-accused is this that no question was put to the accused at the time of recording his statement under Section 313 Cr.P.C. that he was found in conscious possession of 800 gms of charas. For this defect, accused is entitled to acquittal. Learned counsel for the appellant-accused on this point relied upon **Naim S/o Jamiroddin Sheikh and etc. Vs. State of Maharashtra, 2009(2) AIR Bom.R 373, Surinder @ Sudama Vs. State of Haryana, 2010(3) RCR (Criminal) 86 and Bhola Singh & another Vs. State of Punjab, 2015(3) Law Herald 1958**.

Hon'ble Madras High Court in **Ramesh Vs. State Rep by its Inspector of Police, NIB, CID, Salem, 2010(3) MLJ (Criminal) 55**, discussed the meaning of the word 'conscious possession'. Explaining this term, it was observed that possession in terms of the Narcotic Drugs and Psychotropic Substances Act, 1985 must be 'conscious possession'. In that case, there were 13 bags containing 'ganja' which were kept behind the driver's seat in the jeep. Under those circumstances, it was held that it cannot be said that such a huge quantity could have been kept in the vehicle by other accused without the knowledge of the appellant. In that case, accused had failed to show that his possession was not 'conscious possession' for the logical background of Sections 35 and 54 of the NDPS Act. It was further held that possession of this contraband in the jeep was a 'conscious possession' on the part of the appellant. If we peruse the statement of the accused recorded under Section 313 Cr.P.C., each and every circumstance regarding keeping of contraband in the dicky of the scooter driven by him was put to the accused. He nowhere explained that he was not aware of this fact or that somebody else had kept the same in the dicky of the scooter. As such, possession of 800 gms of charas recovered from the dicky of the scooter in question is said to be 'conscious possession' of the accused and simply because the word 'conscious' is not mentioned in the statement recorded under Section 313 Cr.P.C., it would not mean that the question regarding 'conscious possession' of contraband of the accused was not put to him. When each and every circumstance leading to recovery of 800 gms of charas from the 'conscious possession' of the accused was put to him, no prejudice can be said to have been caused to him. As such this contention of learned counsel for the appellant-accused is also devoid of any force.

It was further contended by learned counsel for the appellant-accused that the scooter in question does not belong to the accused. It belonged to Vijay Singh who had taken the same on *superdari*. Vijay Singh was not challaned in this case nor examined by the investigating officer. As such link evidence is said to be missing. When accused was not possessing driving

licence nor knew how to drive the scooter, he cannot be held guilty for the same. Of course, in this case Vijay Singh has taken the scooter on *superdari* and the investigating officer also did not enquire about ownership of the scooter in question nor he took any action against the owner of the scooter yet it cannot be said that for carelessness, slackness or defect in the investigation, no benefit can be given to the accused. Accused was found riding the scooter in question. At that very time he was apprehended and on search of the scooter 800 gms of charas was recovered from his possession without any permit or license. Therefore, since accused was found in possession of charas, he cannot be let off only for the reason that police has not taken any action against the owner of the scooter. Again on this point as well, **Ajay Malik's case (supra)** is not applicable as in the aforesaid case, the car in question was not seized by the police, whereas in the case in hand, scooter in question was taken into possession by the police vide recovery memo (Ex.PD) and even at the time of passing judgement, the Court started proceedings regarding confiscation of the scooter in question by invoking the provisions of Section 63 of the NDPS Act.

It was next argued by learned counsel for the appellant-accused that in this case no independent witness was joined in the investigation. Independent witnesses were very much available at the spot but none was joined. Of course, the investigating officer deposed that place of recovery is a busy road but he did not join any independent witness because none became ready. They showed their helplessness; yet this is sufficient explanation for non-joining of independent witnesses in the investigation of this case. It is normally expected that there should be independent witness to support the case of the prosecution. However, it is not an inviolable rule. Therefore, in the facts and circumstances of this case, I am satisfied that it would be travesty of justice if the appellant is acquitted merely because no independent witness has been produced. In **Ajmer Singh Vs. State of Haryana, 2010(2) JT 175**, the Hon'ble Apex Court observed that "We cannot forget that it may not be possible to find independent witness at all places, at all times. The obligation to take public

witnesses is not absolute. If after making efforts which the court considered in the circumstances of the case reasonable, the police officer is not able to get public witnesses to associate with the raid or arrest of the culprit, the arrest and the recovery made would not be necessarily vitiated. The court will have to appreciate the relevant evidence and will have to determine whether the evidence of the police officer was believable after taking due care and caution in evaluating their evidence.” In the case in hand, the statements of PW8 Mangat Ram Constable, PW9 Samunder Singh ASI and PW1 Rajinder Singh DSP, Meham are consistent and inspire confidence in the mind of the Court regarding guilt of the accused. It is also settled proposition of law that testimonies of the police officials are at par with the testimonies of non-official witnesses in case they are consistent and inspire confidence in the mind of the Court. For this reason, even if no independent witness was joined, the accused cannot be acquitted only on that count.

In this case, investigating officer received a secret information and thereafter intercepted the accused while he was riding the scooter in question and then recovered 800 gms of charas from the dicky of the scooter of the accused. In fact Samunder Singh ASI is investigating officer of the case who conducted the investigation. In such like cases, question of investigating officer being complainant is not there. Investigating officer cannot be said to be complainant in such like cases. Even otherwise, it cannot be said that the investigating officer was in any way an interested party. He was not to derive any benefit out of the success of this case. As such for this reason, contention of learned counsel for the appellant-accused that investigating officer is also the complainant of this case, is not tenable.

It was further argued by learned counsel for the appellant-accused that Rajinder Singh DSP, Meham had given direction to Samunder Singh ASI to conduct the search of the scooter of accused. The DSP himself had not taken the search. Thus for this reason as well, the search proceedings vitiate. This argument is again devoid of any force. If Samunder Singh ASI has taken search

of the scooter of accused on the direction of DSP and under his supervision, the search is said to have been conducted by the DSP himself. As such, it can not be said that the search taken in this case by Samunder Singh ASI is in any way defective.

The next point of argument of learned counsel for the appellant-accused is this that there is delay of 12 days in sending the sample to the FSL. During this period, the seal which was given by Samunder Singh ASI to Mangat Ram PW8 was also taken back by him. Even on 23.1.2002, PW3 Phool Kumar MHC as well as PW4 Surat Singh Head Constable were Moharer Malkhana. Their date of transfer is not on record. As such for this reason, the link evidence cannot be said to be complete and the prosecution case cannot be said to be free from doubt. On this point, learned counsel for the appellant-accused cited Surinder @ Sudama's case (supra).

The above argument of learned counsel for the appellant-accused is again not sustainable as in fact, prosecution examined Phool Kumar Head Constable as PW3. He tendered in evidence his affidavit (Ex. PF), Surat Singh Head Constable who was examined as PW4 tendered in evidence his affidavit (Ex.PG), Harbhaj Constable who took sample to the FSL, tendered in evidence his affidavit (Ex. PH) while appearing as PW5. All these three witnesses deposed that so long the case property was in their possession, nobody tampered the same and the seals were intact. This contention finds corroboration from the report of FSL (Ex. PA) which says that seals on the sample were found intact and tallied with specimen seals as per the forwarding authority letter. Thus when the seals on the sample were found intact by the FSL, it cannot be said that there was any possibility of tampering with the sample because the seal was handed over to Samunder Singh ASI after 4/5 days by PW8 Mangat Ram Constable. In fact, the seal sample was not having seal impressions 'SS' alone. It was also having seal of the DSP with the inscription 'RS' and that of Inder Singh Inspector, SHO Police Station, Meham with the inscription 'IS'. In the absence of these two officers, it was not possible for the investigating officer to tamper with the seal of

sample even if he obtained his seal 'SS' from Mangat Ram PW8.

It was also argued by learned counsel for the appellant-accused that there is non-compliance of Section 55 of the NDPS Act as Inder Singh Inspector did not take the case property in his possession and on the other hand, he had given the case property in question to Samunder Singh ASI with the direction to deposit the same in the Malkhana. Since Inspector Inder Singh did not take the case property in his custody, therefore, provisions of Section 55 of the NDPS Act cannot be said to be complied with.

For facility of reference, Section 55 of the NDPS Act is being reproduced as follows: –

“55. Police to take charge of articles seized and delivered.—An officer-in-charge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that police station and which may be delivered to him, and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station.”

Thus in view of the aforesaid provisions of law, the SHO of the Police Station could well direct Samunder Singh ASI to deposit the case property with MHC of the Police Station. For this reason, it cannot be said that there is non-compliance of Section 55 of the NDPS Act.

For the reasons recorded above, finding no merit in this appeal, maintaining the impugned judgement of conviction dated 2.4.2004 and the order on sentence dated 5.4.2004, this appeal is dismissed.

December 22, 2015
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(RAJ RAHUL GARG)
JUDGE