

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

CRA-S-1541-SB-2004

Date of decision: 17.11.2015

Ram Karan

..... Appellant

Versus

State of Haryana

..... Respondent

CORAM : HON'BLE MR. JUSTICE DARSHAN SINGH

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

Present: Mr. Vivek Goel, Advocate for the appellant.

Mr. Ashok Muthreja, Deputy Advocate General
for the State of Haryana.

DARSHAN SINGH, J.

The present appeal has been preferred against the judgment of conviction dated 27.07.2004, passed by the learned Judge, Special Court, Sonapat, vide which accused-appellant Ram Karan has been held guilty and convicted for the offence punishable under Section 20(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the Act') and the order on quantum of sentence dated 30.07.2010, vide which the appellant has been sentenced to undergo rigorous imprisonment for a period of two years and to pay a fine of ₹ 20,000/-, in default of payment of fine to further undergo rigorous

imprisonment for a period of one year.

2- As per the prosecution case, on 18.01.2003 PW6 Assistant Sub Inspector Balraj Singh, the Investigating Officer of the case, along with other police officials was present at Kalupur Octroi Post. At about 05:00 P.M., one car bearing registration No. HR-26K-8888, being driven by the accused-appellant, was seen coming from the side of village Bhaiyanpur. The Investigating Officer intercepted the car and asked the accused-appellant to disembark from the car and show the documents of the car. The accused-appellant took out one polythene bag from his jacket and tried to throw the same. He was apprehended in that process. The polythene bag was checked and it was found containing charas. On weighment, it was found to be 250 grams. 10 grams of charas was taken out as sample. The sample and the residue were converted into two separate parcels and sealed with seal bearing impression 'BS'. The seal after use was handed over to HC Hari Chand. Both the sealed parcels were taken into possession vide recovery memo Ex.PC. Balbir Singh SHO, Police Station - City Sonapat was telephonically informed and he also came at the spot. The Investigating Officer produced the accused, witnesses and case property before him. He verified the same and affixed his seal bearing impression 'RK'. The car and its documents were also taken into possession vide recovery memo Ex.PF. Ruqqa Ex.PD was sent to the police station, on the basis of which formal FIR Ex.PD/2 was recorded. The case property was deposited with the Moharir Head Constable. In due course, the sample parcel was sent to Forensic Science

Laboratory, Madhuban for examination. On receipt of the report Ex.PG of the FSL and completion of formalities of the investigation, the report under Section 173 of Code of Criminal Procedure, 1973 (here-in-after referred to as 'Cr.P.C.') was presented in the Court.

3- The accused-appellant was charge-sheeted for the offence punishable under Section 20(b) of the Act vide order dated 29.04.2003 by the learned trial Court, to which the accused-appellant pleaded not guilty and claimed trial.

4- In order to substantiate its case, prosecution examined as many as six witnesses.

5- When examined under Section 313 Cr.P.C., the accused-appellant pleaded innocence and false implication.

6- The accused-appellant did not lead any evidence in his defence.

7- Appreciating the evidence on record and the contentions raised by learned counsel for the parties, the accused-appellant was held guilty and convicted for the offence punishable under Section 20(b) of the Act and 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. Vivek Goel, Advocate, learned counsel for the appellant, Mr. Ashok Muthreja, learned Deputy Advocate General 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 no independent witness has been joined, though the recovery is alleged to have been effected at a public road. Thus, the statements of the police officials should not be relied upon.

11- He further contended that the recovery has been effected from the pocket of the jacket of the appellant but the Investigating Officer has not complied with the mandatory provisions of Section 50 of the Act. The non-compliance of these mandatory provisions of law vitiate the entire trial and conviction.

12- He further contended that there is delay of 19 days in sending the sample to the FSL. This delay is not explained and the tampering with of the case property cannot be ruled out.

13- He further contended that no question has been put to the appellant in his statement under Section 313 Cr.P.C. that he was in conscious possession of the contraband, which is also fatal to the prosecution case. Thus, he pleaded that the conviction of the appellant has been wrongly recorded.

14- On the other hand learned State counsel pleaded that from the statement of PW3 HC Hari Chand the witness of recovery and PW6 ASI Balraj Singh the Investigating Officer of the case, which are fully corroborated from the testimony of PW5 Inspector Balbir Singh, it is established that 250 grams charas has been recovered from the conscious possession of the appellant. He contended that the non-joining

of the independent witness is not a ground to discredit the cogent and consistent testimonies of the police officials. He further contended that it was a case of chance recovery. Moreover, the accused was apprehended while he was throwing away the packet containing the charas. It was not a case of personal search, so the provisions of Section 50 of the Act shall not be applicable. Thus, he pleaded that there is no legal infirmity in the conviction of the appellant.

15- I have duly considered the aforesaid contentions.

16- This fact cannot be disputed that the place of recovery in this case is a public place i.e. Kalupur Octroi Post on the public road but no independent witness has been associated in the investigation. But PW6 ASI Balraj Singh has categorically mentioned that he tried to join some persons from the public but they expressed their inability. He has also mentioned this fact in the ruqqa Ex.PD, on the basis of which this case has been registered. Thus, it is not a case where no effort at all has been made by the Investigating Officer to rope in the independent witness in the investigation of the case. It is a fact of common knowledge that now a days the public at large show their disinclination to come forward to join the investigation. It may be due to various reasons as generally the public man does not want to invite the wrath of the accused by becoming a witness against him. Moreover, the worldly people had become more self-centred and they watch their own interest even in doing any public act. There are very few persons who come forward for the social cause and are prepared to sacrifice themselves for the larger interest of the

society. In case *Ajmer Singh Vs. State of Haryana 2010(2) RCR (Criminal) 132*, the efforts were made by the investigating party to join the public witness but none was willing. The Hon'ble Apex Court held that though in such cases independent evidence is required but accused cannot be acquitted merely because no independent witness was produced. In case *Kashmiri Lal Vs. State of Haryana 2013(3) RCR (Criminal) 259* also, no independent witness agreed to join the investigation though requested by the police. The Hon'ble Apex Court held that there is no absolute command of law that police officers cannot be cited as a witness and their testimony should always be treated with suspicion. The Hon'ble Apex Court further observed that ordinarily, the public at large show their disinclination to come forward to become witnesses. It was further laid down that if the testimony of police officer is found reliable and trustworthy, the court can definitely act upon the same. In the instant case, as already mentioned, the Investigating Officer has tried to associate the independent witnesses but they expressed their inability to associate in the investigation of the case. So, the non-joining of the independent witnesses in that situation is no ground to discard the testimonies of the prosecution witnesses particularly when there is no material on record to show that the police officials had any animus or ill will against the appellant and has any motive for his false implication.

17- As per the case of the prosecution mentioned in the ruqqa Ex.PD, when the Investigating Officer signalled the accused-appellant to stop the car and asked him to alight from the car and to get the documents

checked and while he was alighting from the car, he took out a packet from the pocket of his jacket and tried to throw it on the ground. In that process, the appellant was apprehended. The contraband wrapped in the glazed paper was recovered from his right hand. PW6 ASI Balraj Singh, the Investigating Officer of the case, has also categorically deposed that he signalled the car to stop. When the car stationed, he asked the driver i.e. accused Ram Karan to show the documents of the car in question. When the accused disembarked from the car, he tried to throw away polythene bag after taking it out from the pocket of his jacket, but he was apprehended in that process. When the polythene bag was opened, it was found containing charas. PW3 HC Hari Chand, the witness of recovery also deposed that a person from Bhaiyapur side came in Maruti car bearing registration No.HR-26K/8888. ASI Balraj Singh pointed out for checking and stopped. When he was alighted from the Maruti car, the accused present in the Court tried to throw away a polythene, which he was carrying in his right hand.

18- Thus, from the aforesaid sequence of events and evidence on record it comes out that the contraband was recovered in the process when the appellant was trying to throw away it, wrapped in the glazed paper. So, it was not a recovery from the personal search of the appellant. Rather the packet was recovered from his hand, when he was trying to throw it away. The provisions of Section 50 of the Act are only attracted when the search and seizure of the contraband is from the personal search of the accused. To support this view reference can be

made to cases *Ashok Kumar Sharma Vs. State of Rajasthan 2013(2) RCR (Criminal) 1* and *Ajmer Singh Vs. State of Haryana* (supra). Moreover, it is a case of chance recovery. The Investigating Officer has signalled the accused to stop the car in order to check the documents of the car. The appellant after alighting from the car, tried to throw away the packet by taking it out of his pocket, which led to the recovery of the contraband. In such cases where the recovery is effected by chance, the provisions of Section 50 of the Act are not applicable. In case *State of Punjab Vs. Balbir Singh 1994 (1) RCR (Criminal) 376*, the Hon'ble Apex Court has categorically mentioned that though the provisions of Section 50 are mandatory but Section 50 is not attracted in case of chance recovery of narcotics drug. In a recent case titled as *State of H.P. Vs. Sunil Kumar 2014(2) RCR (Criminal) 139*, the accused-respondent was travelling in a bus. The bus was stopped by the police for traffic check up. One Constable who was also member of the checking party, noticed that accused was concealing something under his clothes. He was asked to disembark and when he was asked to open his trouser a polythene envelop tied below his belly with the help of the Parna was found found which was containing charas. The Hon'ble Apex Court held that it was a chance recovery and provision of Section 50 of the Act will not apply. This authority is squarely applicable to the facts of the present case. Thus, the provisions of Section 50 of the Act are not applicable in this case. Hence, there can be no question of the violation thereof.

19- The recovery in this case has been effected on

18.01.2003. As per the report of the F.S.L., the sample parcel has been received in the laboratory on 05.02.2003. So, there is delay of 19 days in sending the sample to the laboratory. In case ***Mohan Singh Vs. State of Punjab 2007(4) RCR (Criminal) 705***, there was delay of 10 days in sending the sample to the F.S.L. The Division Bench of this Court held that mere delay in sending the sample to the laboratory is not fatal where there is evidence that the seized articles were kept in proper and safe custody. The Hon'ble Apex Court also in case ***State of Orrisa Vs. Kanduri Sahoo 2004(1) RCR (Criminal) 196*** has also laid down that mere delay in sending the sample to the laboratory is not fatal where there is evidence that the case property was kept in proper and safe custody. In case ***Baggar Singh alias Gaggi Vs. State of Haryana 2009(4) RCR (Criminal) 183***, there was delay of 18 days in sending the sample to the F.S.L. and the another Division Bench of this Court held that it would not render the case of the prosecution doubtful if the seals remain intact when the sample reached to the F.S.L. In the instant case also, there is no material on record to establish that the sealed articles were tampered with. Rather, from the evidence on record it comes out that the sealed articles were kept in proper and safe custody and reached the F.S.L. in intact condition. PW6 ASI Balraj Singh, the Investigating Officer of the case, has stated that the case property was deposited with the Mohrir Head Constable. Then the prosecution examined the then MHC Randhir Singh as PW1, who has filed his affidavit Ex.PA and deposed that the case property remained intact in the Malkhana. PW2 Constable Ram

Virender, who has carried the sample parcels to the Chemical Examiner, has filed his affidavit Ex.PB, mentioning therein that the sample parcels remained intact. Ex.PG is the report of the F.S.L., which also depicts that the sample parcel was properly sealed and seals tallied with the specimen seal impression. Thus, from the aforesaid evidence, it is established that the sample parcel remained intact and was not tampered with at all at any stage of the proceedings. So, mere delay of 19 days in sending the sample will not create any dent in the prosecution case.

20- No doubt, in the statement of the accused-appellant under Section 313 Cr.P.C., no specific question has been put to him with respect to his conscious possession but that omission in the statement under Section 313 Cr.P.C. is also no ground to vitiate the conviction. In the instant case, 250 grams charas has been recovered from the accused-appellant in the process when he was trying to throw away it. Every error or omission in the statement under Section 313 Cr.P.C. does not necessarily vitiate the conviction/trial. The accused has to show that some prejudice has been caused to him due to that omission. The Hon'ble Supreme Court in case ***Paramjeet Singh @ Pamma Vs. State of Uttarakhand 2010(4) RCR (Criminal) 548*** after considering large number of cases on this issue authoritatively laid down as under:-

“Thus, it is evident from the above that the provisions of Section 313 Cr. P.C make it obligatory for the court to question the accused on the evidence and circumstances against him so as to offer the accused an opportunity to explain the same. But, it would not be enough for the accused to show that he has not been questioned or examined on a particular circumstance, instead he must show that

such non-examination has actually and materially prejudiced him and has resulted in the failure of justice. In other words, in the event of an inadvertent omission on the part of the court to question the accused on any incriminating circumstance cannot ipso facto vitiate the trial unless it is shown that some material prejudice was caused to the accused by the omission of the court”

21- Similarly, in case *Gian Chand and others Vs. State of Haryana 2013(3) RCR (Criminal) 916*, the Hon'ble Apex Court has reiterated the same legal position and laid down as under:-

“So far as Section 313 Cr.P.C. is concerned, undoubtedly, the attention of the accused must specifically be brought to inculpable pieces of evidence to give him an opportunity to offer an explanation if he chooses to do so. A three-Judge Bench of this Court in *Wasim Khan v. The State of Uttar Pradesh, AIR 1956 SC 400*; and *Bhoor Singh & Anr. v. State of Punjab, AIR 1974 SC 1256* held that every error or omission in compliance of the provisions of Section 342 of the old Cr.P.C. does not necessarily vitiate trial. The accused must show that some prejudice has been caused or was likely to have been caused to him.”

22- In view of the aforesaid consistent rule of law, it would not be enough for the accused to show that the specific question regarding conscious possession has not been put to him but he has to further show what prejudice has been caused to him due to such non-examination and how it had resulted in failure of justice. All these aspects are totally lacking in this case. The appellant has not been able to point out as to what prejudice has been caused to him due to omission of the specific question with respect to his conscious possession and how it had caused failure of justice. Hence it cannot advance the case of the appellant in view of the aforesaid circumstances.

23- Thus, from the testimonies of PW3 HC Hari Chand and PW6 Balraj Singh, it is established that 250 grams charas has been recovered from the possession of the appellant. Their testimonies are further corroborated from the testimonies of PW5 Inspector Balbir Singh, the then SHO, Police Station - City Sonapat, who had also arrived at the spot. There is also no material to establish that the police officials had any ill will or motive for the false implication of the appellant. The recovery in this case has been effected when the accused-appellant was trying to throw away the packet containing the contraband, which also shows that he was in conscious possession of the contraband. Thus, I have no reason to differ with the finding of the learned trial Court that it is proved beyond shadow of reasonable doubt that accused-appellant was found in conscious possession of 250 grams charas.

24- However, I find substance in the contentions raised by learned counsel for the appellant with respect to reduction in the quantum of sentence. It is not disputed that accused-appellant has faced the agony of these proceedings for the last more than 12 and a half year. As per the custody certificate placed on record by the learned State counsel, the accused-appellant is not involved in any other criminal case. The recovery of charas effected from the appellant is far below than the commercial quantity. So, some lenient view in the matter of sentence will suffice the ends of justice.

25- Thus, keeping in view my aforesaid discussion, I do not find any illegality or impropriety in the conviction of the appellant

recorded by the learned trial Court. Thus, the conviction of the appellant as recorded by the learned trial Court is hereby maintained and confirmed. However, the substantive sentence awarded by the learned trial Court is reduced to rigorous imprisonment for a period of one year instead of two years. With this modification in the matter of sentence, the present appeal being devoid of merits is hereby dismissed.

26- The accused-appellant is on bail. His bail stand cancelled. He will surrender within 15 days from the date of this judgment before the learned Chief Judicial Magistrate, Sonapat who shall send him to jail to undergo the remaining part of his sentence. If, he fails to surrender, the learned Chief Judicial Magistrate, Sonapat shall take coercive steps to secure his presence and send him to jail to undergo the remaining part of the sentence.

Dated: 17.11.2015.

sunil yadav

**(DARSHAN SINGH)
JUDGE**