

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

CRA-S-1629-SB-2004

Date of decision: 08.12.2015

Upinder Parshad Yadav

..... Appellant

Versus

State of Punjab

..... 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. Navratan Singh, Advocate for
Mr. Navkiran Singh, Advocate for the appellant.

Mr. Manjit Singh Naryal, Additional Advocate General
for the State of Punjab.

DARSHAN SINGH, J.

The present appeal has been preferred against the judgment of conviction dated 13.08.2004, passed by the learned Judge, Special Court, Amritsar, vide which accused-appellant Upinder Parshad Yadav has been held guilty and convicted for the offence punishable under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the Act') and the order on quantum of sentence

of the even dated, vide which the appellant has been sentenced to undergo rigorous imprisonment for a period of six months and to pay a fine of Rs.500/-, in default of payment of fine to further undergo rigorous imprisonment for fifteen days.

2- As per the prosecution case, on 27.10.2002 PW2 ASI Balbir Singh, (the Investigating Officer of the case) along with other police personnels was present at Sultanwind Turning, G.T. Road, Daburji, when he received a secret information that accused-appellant was indulged in sale of opium and at that time, he was going on foot to Bus Stop - Sultanwind to sell opium. Meantime, one Mangal Singh came there and he was also joined in the police party. At about 06:00 P.M., the accused-appellant was seen coming from Daburji side. He was apprehended. The Investigating Officer asked him that he was suspected of carrying some narcotic and his person was to be searched. Accused- was apprised of his right to be searched before some gazetted officer or a magistrate. Vide memo Ex.PE, the accused-appellant opted to get his search conducted before some gazetted officer. Wireless message was sent to Shri Paramdeep Singh Teja, DSP-III, Amritsar and he reached at the spot at about 06:45 P.M. On the instructions of the DSP, search of accused-appellant was conducted by the Investigating Officer and from the right side pocket of the pants worn by the accused-appellant, opium wrapped in a glazed paper was recovered. 10 grams of opium was taken out as sample and the residue came to be 140 grams. The sample as well as residue were sealed in separate parcels with seal bearing impressions

'BS' and 'PS' of the Investigating Officer and the DSP, respectively. Sample seals were also prepared. All these articles were taken into possession vide recovery memo Ex.PC. The accused-appellant was arrested vide memo Ex.PF. Ruqqa Ex.PH was sent to the police station, on the basis of which, formal FIR Ex.PH/1 was registered. The Investigating Officer prepared the site plan of the place of recovery Ex.PG.

3- On return to the Police Station, the accused-appellant and case property were produced before SI Balkar Singh, the then SHO, Police Station - Daburji, who verified the facts and put his seal bearing impression 'BS' on the parcels of the case property. Case property was kept in double lock. On the next day, the Investigating Officer, took the case property and produced the same before the Illaqa Magistrate. The sample was sent to the Chemical Examiner, Chandigarh for examination. On receipt of the report of the Chemical Examiner Ex.PK and completion of formalities of the investigation, the report under Section 173 of Code of Criminal Procedure, 1973 (hereinafter called 'Cr.P.C.') was presented in the Court.

4- The accused appellant was charge sheeted for the offence punishable under Section 18 of the Act vide order dated 02.09.2003 by the learned trial Court, to which the appellant pleaded not guilty and claimed trial.

5- In order to substantiate its case, prosecution examined as many as four witnesses.

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

7- In the defence evidence, accused examined Ramesh Chander, Ahlmad as DW1.

8- 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 18 of the Act and was awarded the sentence as mentioned in the upper part of the judgment.

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

10- I have heard Mr. Navratan Singh, Advocate, learned counsel for the appellant, Mr. Manjit Singh Naryal, Additional Advocate General for the State of Punjab and have meticulously examined the record of the case.

11- Initiating the arguments, learned counsel for the appellant contended that Mangal Singh, the alleged independent witness, has not been produced in the witness box. In his absence there is no independent corroboration to the prosecution case.

12- He further contended that the recovery is alleged to have been effected from the personal search of the appellant. The compliance of the mandatory provision of Section 50 of the Act was essential but in the instant case, the compliance of the provision of Section 50 of the Act is not established. He contended that non-consent memo Ex.PE is

attested by independent witness Mangal Singh and HC Mangal Dass but both of them have not been examined. Similarly, the consent memo Ex.PB is also attested by both these witnesses who have not been examined. So, the statement of the Investigating Officer and DSP Paramdeep Singh cannot be relied upon that the accused reposed confidence in PW2 Paramdeep Singh DSP.

13- He further contended that the consent/non-consent memos have been fabricated only to complete the paper formalities. Both these memos are in one hand and in the same ink. The FIR and other particulars have been written in the same flow, which shows that these memos have been fabricated. Thus, he contended that mandatory provision of Section 50 of the Act have been violated.

14- He further contended that there are material contradictions in the statements of the prosecution witnesses, which rendered the presence of PW2 Paramdeep Singh DSP extremely doubtful. It appears that his signatures have been obtained later on, on the papers. Thus, he contended that the conviction of the appellant is not sustainable.

15- On the other hand, learned State counsel contended that from the statement of PW3 ASI Balbir Singh, The Investigating Officer of the case and PW2 DSP Paramdeep Singh, it is established that the provision of Section 50 of the Act were duly complied with. The accused-appellant has opted his search in the presence of PW2 DSP Paramdeep Singh. He further contended that from the statements of both these witnesses, it is established that 150 grams opium was recovered from the

possession of the appellant. He further contended that independent witness Mangal Singh was given up as having been won over by the accused. Thus, he contended that there is no legal infirmity in the conviction of the appellant.

16- I have duly considered the aforesaid contentions.

17- As per the prosecution version, the accused-appellant has been apprehended on the basis of secret information and consequential Nakabandi. It is alleged that one Mangal Singh son of Gurnam Singh was associated as an independent witness in the investigation of the case. Said Mangal Singh has not been produced in the witness box and was given up having been won over by the accused by the learned APP vide his statement dated 23.04.2003. So, the entire prosecution story is based on the testimonies of the police officials. There is no dispute with the proposition of law that giving up the independent witness as having been won over by the accused is not a ground to discard the prosecution case, but at the same time in such cases as a rule of caution, the Court is required to scrutinise the prosecution evidence carefully and minutely.

18- As per the admitted version of the prosecution, the recovery of the opium has been effected from the personal search of the appellant i.e. from the right pocket of his trouser. So, it is a case of the recovery of the contraband from the personal search of the accused. The compliance of Section 50 of the Act was mandatory. PW3 ASI Balbir Singh, the Investigating Officer of the case has stated that he told the accused that his person was to be searched as he was suspected of having

some narcotic in his possession and that whether he wanted his person to be searched in his presence or in the presence of gazetted officer or a magistrate. The accused opted to have his personal search in the presence of a gazetted officer. Memo Ex.PE was accordingly prepared, which was signed by the accused in Hindi and was attested by the prosecution witnesses. He further deposed that DSP Paramdeep Singh Teja was telephonically requested to reach at the spot. PW2 DSP Paramdeep Singh Teja has deposed that he disclosed him his identity as DSP City III, Amritsar and a Gazetted Officer. He also disclosed to him that he was suspected to be in possession of some narcotic that he had a legal right to be searched in the presence of a gazetted officer or a magistrate. The accused opted to be searched in his presence. A consent memo Ex.PB was prepared. So, as per the case of the prosecution, the option of the accused was sought in the presence of prosecution witnesses Mangal Singh and HC Mangal Dass. They had also attested the non-consent memo Ex.PE and the consent memo Ex.PB but both these witnesses have not been examined by the prosecution. In the absence of these witnesses, there is no corroboration to the statement of PW3 ASI Balbir Singh the Investigating Officer of the case that the accused has opted for his search in the presence of a gazetted officer and has waived his right to be searched in presence of a magistrate. In the memo Ex.PB, prepared by PW2 DSP Paramdeep Singh, there is a partial compliance of Section 50 of the Act as in the memo Ex.PB, it has been mentioned as to whether the accused want his personal search to be conducted by him (DSP

Paramdeep Singh) or any magistrate. So, he has confined the option only to him and not to any other gazetted officer, which is a partial compliance of Section 50 of the Act and is bad in law.

19- Moreover, the entire case of the prosecution with respect to the compliance of Section 50 of the Act is based on the memos Ex.PE and Ex.PB. Both these documents seem to have been prepared later on just to complete the paper formality. Admittedly, both these memos were prepared even before taking the search of the accused i.e. before registration of the case but it is highly surprising that the FIR number and all other particulars of the case are mentioned in both these documents in the same ink and hand. It is evident to the bare eyes that both these documents are in the same hand, ink and sequence. Both these documents have been prepared in the same flow. Even no blank space was left to fill in the FIR number later on, rather the FIR number, date, offence and the name of the police station in both these documents are in the same ink and sequence/flow, which shows that both these documents have been prepared later on at one and the same time containing the entire contents therein including the FIR number and other particulars, only to complete the paper formality to show the compliance of provision of Section 50 of the Act. Once the memos Ex.PE and PB are rendered doubtful, the testimonies of PW2 DSP Paramdeep Singh and PW3 ASI Balbir Singh, the Investigating Officer of the case, with respect to the compliance of Section 50 of the Act, cannot be relied upon. Consequently, the prosecution has not been able to establish that the

mandatory provisions of Section 50 of the Act were complied with and the non-compliance thereof vitiate the conviction.

20- As already mentioned the independent witness of recovery has not been examined. Thus, the Court is required to scrutinise the prosecution evidence minutely. If the said test is applied even the presence of PW2 DSP Paramdeep Singh becomes extremely doubtful at the spot. PW3 ASI Balbir Singh, the Investigating Officer of the case, has stated that weighing scale and weights were with him and seal material was also with him but PW2 DSP Paramdeep Singh has given a materially contradictory version on this aspect. He deposed that implements for weighing and sewing of the sample etc. were requisitioned by the Investigating Officer. He does not know the name of the official who brought these things. He does not recollect the time spent by him and during this period ASI Balbir Singh continued writing the proceedings. So, as per the statement of PW2 Paramdeep Singh, a police official was sent from the spot to requisition the weighing scale and weights and material for preparing the sealed parcels, whereas the Investigating Officer has stated that all this material was available with him, which is a material contradiction. PW2 DSP Paramdeep Singh has also stated that during the period the weighing material and material for preparing the sealed parcels was arranged, ASI Balbir Singh carried on the writing work. But there can be no writing work before weighing of the contraband, separation of the samples and preparing the sealed parcels thereof. The seizure memos and the ruqqa are to be prepared only

after completing the aforesaid formalities. PW2 DSP Paramdeep Singh has stated that his statement was recorded after the ruqqa had been sent but PW3 ASI Balbir Singh has stated that the statement of DSP was recorded before the ruqqa was sent. Thus, the cumulative effect of the discrepancies discussed above, renders the testimonies of the official witnesses unworthy of credence in the absence of independent corroboration and makes the prosecution case doubtful.

21- Thus, keeping in view my aforesaid discussion and totality of the circumstances, the prosecution has failed to establish beyond shadow of reasonable doubt the charges levelled against the appellant. Thus, the conviction of the appellant and sentence awarded to him by the learned trial Court is not sustainable in the eye of law.

22- Consequently, the present appeal is hereby allowed. The conviction and sentence of the appellant as recorded by the learned trial Court is hereby set aside. By giving the benefit of doubt, the accused-appellant is hereby acquitted of the charges. The amount of the fine, if deposited by him with the learned trial Court, be refunded to him in accordance with rules.

Dated: 08.12.2015

sunil yadav

(DARSHAN SINGH)
JUDGE