

IN THE HIGH COURT OF PUNJAB & HARYANA, CHANDIGARH

Crl. Appeal-S-No. 1013-SB of 2002

Date of Decision: 12-2-2015

Devinder Singh and others Appellants

Versus

State of Punjab Respondent

Coram: Hon'ble Mr. Justice Ashutosh Mohunta

1.To be referred to the Reporters or not?

2. Whether the judgment should be reported in the Digest?

Present: Mr. Harinder Singh, Advocate
for the Appellants.

Ms. Munisha Gandhi, Addl. A.G.Punjab.

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ASHUTOSH MOHUNTA, J.

1. The present appeal arises out of impugned judgement and order of sentence dated 20/05/2002 passed by the Judge, Special Court, Mansa whereby the appellants have been held guilty under Section 15(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "The Act") and in furtherance thereof have been sentenced to undergo rigorous imprisonment for a period of 10 years and to pay a

fine of Rs.1 Lac. In default of payment of fine, the appellants have been ordered to further undergo rigorous imprisonment for 1 year each.

2. The factual matrix of the case is that on 30/04/1999, SI Baljit Singh SHO PS Sardulgarh alongwith ASI Suraj Bhan and other co-officials were on patrol duty in their official gypsy. When the said police party was some distance short of T-Point Lohgarh on left side of the road, 2 persons were found sitting on two gunny bags. On seeing the police party, they tried to escape. They were apprehended by SI Baljit Singh with the help of his other co-officials. The 1st person disclosed his name as Devinder Singh son of Zora Singh while the other person disclosed his name as Lakhwinder Singh son of Zora Singh. A scooterist coming from the side of the Bveeran Badi was stopped and joined into the police party, who disclosed his name as Bhola Ram son of Birbal Ram. The police party suspected some intoxicating substance in the gunny bags over which the suspects were sitting and accordingly apprised them that their search was to be conducted. SI Baljit Singh apprised the suspects that they had a legal right to get such bags searched at the spot in the presence of a gazetted officer or a magistrate. Both the suspects expressed their desire to get searched before some gazetted officer. Accordingly, wireless message to police station Sardulgarh was sent for sending some

gazetted officer at the spot so as to conduct the search. Within 45 minutes, Sh. Amarjeet Singh DSP, Sardlgarh alongwith his gunmen came at the spot in his official gypsy. He introduced himself to the accused persons and apprised them of their right to be searched before a magistrate as he suspected some intoxicating substance in the gunny bags possessed by them. The accused however reposed faith in the DSP and accordingly their search was conducted at the spot. Upon search, poppy straw was found in both the gunny bags. Two samples of 100 grams each were drawn from each bag and were sealed in a parcel. Remaining poppy straw contained in the gunny bags were weighed and each of the bags was found containing 34 Kgs. 800 gms. of the said contraband. Their parcels were prepared and were sealed by the SI with his seal 'BS'. The seal after use was entrusted to Bhola Ram, private witness. After completing the Formalities with regard to sample sealing and taking the same into possession vide recovery memos, ruka was sent to the police station for registration of Formal FIR. Search memos regarding personal search of the accused were also prepared. Rough site plan of the place of recovery was prepared. Accused were arrested and statement of prosecution witnesses under section 161 Cr.P.C. were also recorded. The case property was retained by SI Baljit Singh. Special report was also sent by the SI and the samples taken

from the crime scene were sent for analysis in the laboratory. As per the FSL report, crushed poppy heads were found in both sample parcels. 3. On completion of the investigation, challan was presented against the accused. On 02/03/2002, charge under Section 15 of the Act was framed against both the accused to which they pleaded not guilty and claimed trial.

4. Prosecution examined PW1 Baljit Singh Inspector, SHO PS, Sardulgarh (investigating officer), PW2 Amarjit Singh DSP Sardulgarh (gazetted officer), PW3 ASI Suraj Bhan, PW4 Constable Baldev Singh and tendered documents in evidence. The private witness, Bhola Ram being won over by the accused and Head Constable Mithu Singh, were given up by the prosecution.

5. The statement of the accused were recorded under Section 313 Cr.P.C. wherein they denied the version of the prosecution and pleaded false implication. However, in support of their defence, they examined Bhola Ram as DW1 and thereafter closed their defence evidence.

6. On appraisal of the entire documentary as well as oral evidence in extenso, Trial Court convicted the appellants for the offence punishable under Section 15 of the Act for keeping in their unlawful and unauthorised possession, 70 Kgs. of poppy straw.

7. It has been argued by the Ld. Counsel for the

appellants that Form 29 which is a CFSL Form was not filled up at the spot containing the details of recovery which thus renders the entire recovery, a planted one. He is further argued that the samples in the present case were drawn on 13/11/1999 but the same was sent for analysis on 06/12/1999 and reached the laboratory on 07/12/1999 and thus there is delay of 6 days in sending the sample for analysis which is fatal for the prosecution and renders the entire story doubtful and improbable. He has further argued that the case property was kept with Bhola Ram, private witness who was given up by the prosecution and was examined as a defence witness by the accused which thus shows that the entire prosecution story has been manipulated and concocted just to falsely implicate the appellants in the present case. He has further argued that the mandatory provisions of Section 50 of the Act have not been complied with and therefore in view of the same, the appellants deserve to be acquitted in the present case.

8. Per contra, the Ld. Counsel for the State has argued that the prosecution has been successful in bringing home the guilt qua the appellants in as much as 70 Kgs. of poppy straw were recovered from the gunny bags being carried by them. As per the FSL, the contents when forensically analysed were found to be crushed poppy heads. She has further argued that there is no requirement in law to fill up

Form 29 at the spot and further that the delay caused in sending the samples for analysis is not fatal for the prosecution in as much as the case property was found intact. While concluding her arguments, she has prayed for dismissal of the present appeal filed by the appellants.

9. I have heard Ld. Counsel for the parties and perused the record of the case with the able assistance.

10. The facts of the case are culled out herein above and do not need repetition for the sake of brevity at this stage.

Drug peddling in modern times have become a menace in the society at large in this Country and thus needs to be dealt with stern hands. It has deepened its roots in all strata of our society and therefore has to be dealt with strictly.

11. It has been argued by the Ld. counsel for the appellant that recovery of 70 Kgs of poppy straw from the appellants is a planted recovery in as much as Form 29 which is CFSL Form was not filled up at the spot by the investigating agency. In support of the said contention, he has placed reliance upon the judgement delivered by this Court in the case of Gurjant Singh Versus State of Punjab [2007(4) RCR (Criminal) 226] wherein this Court held that non-filling up of Form 29 at the spot is fatal for the prosecution and accordingly benefit of doubt was given to the accused. I have considered the said argument raised by the Ld. counsel

for the appellants and after analysing the same under the backdrop of the present case, find no force and substance in the same. There is no requirement of law that Form 29 has to be filled up at the spot. There is no rule of evidence or procedure that every document must be prepared at the spot of recovery. The recovery in the present case was effected from the appellants before the presence of a gazetted officer and the samples of contraband which were sent for analysis to the laboratory were found intact and were opined to be crushed poppy heads. Mere non-filling up or preparing Form 29 at the spot does not make the prosecution story doubtful. The division bench of this Court in the case of Raj Kumar and another Versus State of Punjab [Criminal Appeal No.530-DB of 2006 decided on 19/07/2011], held as under:-

“Form No.29 on which a slip, Exhibit P1 has been pasted, having the report of Deputy Chemical Examiner to Government of Punjab, Exhibit PM at its back, appears to have been prepared by the investigating officer in triplicate. F.I.R. number is mentioned on this document which can be put only after registration of the case. No cross-examination has been conducted on this aspect of the case on the investigating officer. If he would have been questioned in this regard, he could

have told as to what he did at the spot and how F.I.R. number came to be recorded on Form No.29. Even if it is assumed that this form was not prepared at the spot and was prepared thereafter, there is no requirement of law that it should have been prepared at the spot. Otherwise, the form could have been prepared at the spot leaving the column meant for F.I.R. number and date to be blank which could be filled in later on and this could have satisfied the requirement of its preparation at the spot also.”

Further this Court in the case of Gurbachan Singh and another Versus State of Punjab [Criminal Appeal S No.1033-SB of 2007 decided on 29/08/2014], held as under:-

The fact that form No.29 was not filled at the spot, do not affect the case of the prosecution in any manner. There is no rule of evidence or procedure that every document must be prepared at the spot of recovery. In case of Wazir Singh versus State of Haryana, 2010(1) RCR (Criminal) 480 (P&H) (SB), it was observed that non-filling up of the CFSL form at the time of recovery does not create any doubt about the recovery of contraband from the accused. In para 17 of the aforesaid judgment it was observed as follows:

“17. Of course, it does not surface in the testimony of Maha Singh (sic) that the CFSL form was filled at the spot. It is pertinent to point out here that the CFSL form is to be prepared for sending the same to the Laboratory along with the sample so that the laboratory can test the sample and give its result. Such document contains the details of the seals affixed on the samples, FIR number, date and place of seizure, date of deposit of samples and the date of withdrawal of sample from the Malkaha. True that, as revealed by the FSL report, CFSL form was filled up on 10.12.2001 though the recovery was made on 02.12.2001, but its preparation on the said date in no manner evidences the prejudice, if any, caused to the appellant particularly when the certification on Exh. PK tends to show that the seals were intact and tallied with the specimen seal as per forwarding authority's letter. The filling up of this form on the aforesaid date in itself does not create any doubt about the recovery of Charas from the appellant.”

In view of the aforesaid law on the issue coupled

with the facts of the present case, I find no infirmity and lapse on the part of the prosecution in not filling up Form 29 at the spot of recovery and thus accordingly reject the said contention raised by Ld. Counsel for the appellants.

12. The next argument raised by Ld. counsel for the appellants is that there is delay of 6 days in sending the sample for analysis, which under the facts and circumstances of the present case is fatal for the prosecution especially when the same has to be sent within 72 hours of the search. The said argument though attractive is bereft of any merit. Further, strengthening his arguments, reliance has been placed by the Ld. Counsel on the case of Gurjant Singh, *supra* in support of the said contention. However, the said judgment cited by the Ld. Counsel is not applicable to the facts and circumstances of the present case as the facts therein were peculiar to that case. In the present case, it has come on record that the samples of poppy straw sent for analysis were found intact. Exhibit PO shows that on both the sample parcels, impression 'BS' were found and analyst had satisfied himself about its intactness and presence of morphine and Maconia acid in the contraband. Ld. counsel has miserably failed to point out any prejudice having been caused to the appellants due to delay in sending the sample for analysis by the investigating agency and thus accordingly I hold that the delay of 6 days

in sending the samples of contraband for analysis to the forensic laboratory is not fatal for the prosecution.

13. It has further been argued by the Ld. counsel for the appellants that adverse inference has to be drawn against the prosecution in as much as the recovery witness namely Bhola Ram who was cited as a prosecution witness has not supported the case of the prosecution and thus accordingly has been examined as a defence witness in the present case. In support of the said contention, he has relied upon *Mangal Singh Versus State of Punjab* [1999 (3) RCR (Criminal) 373]. However perusal of the facts of the said case appears to be peculiar to that case and cannot be applied to the facts and circumstances of the present case being distinct and not applicable. In the present case even though the recovery witness who was joined into the police party at the time of search was given up by the prosecution as having been won over by the accused, the same to my mind does not shake the pillars of the prosecution in as much as the search and recovery was effected in the presence of a gazetted officer in whom the appellants had reposed faith and confidence. The sample seals when sent for analysis were found intact by the analyst and on its analysis, the samples were found to be that of crushed poppy heads. Just because the recovery witness has turned hostile, does not in any manner weaken the case of the

prosecution under the facts of the present case as it is not the case of the appellants-accused that the prosecution had tampered with the case property and thus accordingly, I reject the said argument raised by Ld. Counsel for the appellants.

14. Next argument raised by Ld. counsel for the appellants is that mandatory provisions of Section 50 of the Act have not been complied with in the present case at the time of search by the prosecution and therefore the appellants deserve to be acquitted herein the present case. In support of the said contention, he has relied upon Mohd. Ramzan Khan Versus State of Punjab [2000 (2) RCR (Criminal) 370] to contend that if the accused is not informed of his right to get himself searched before a gazetted officer or a magistrate, the same is violative of Section 50 of the Act. In the present case, the accused were not only apprised of the right to get themselves searched in the presence of gazetted officer or a magistrate by the investigating officer (PW1- SI Baljit Singh) but was also given the said option by the DSP who came on the spot being a gazetted officer to conduct search. Even otherwise, the search was conducted by the investigating agency upon the gunny bags which the appellants were carrying and thus for the search of the same, there is no requirement in law for complying with the mandatory provisions of Section 50 of the Act as the same

are not attracted and applicable thereto. In the case of Krishan Kumar Versus State of Haryana [2014 (6) SCC 664] it has been held by their lordships that where no search or seizure was to be conducted on the person of the accused as like in the present case, then the provisions of Section 50 of the Act are not attracted. Para Nos.12 & 13 of the said judgment are culled out herein below:-

“12. It is clear from the reading of the aforesaid provision that it is applicable only where search of a person is involved. It is not made applicable in those cases where no search of a person is to be conducted. In the instant case the appellant was carrying a bag which was to be searched and on his request Chet Ram was summoned in whose presence search was conducted which pertained to a bag. In Ajmer Singh v. State of Haryana; (2010) 3 SCC 746 this aspect is specifically considered and dealt with. Following earlier Constitution Bench judgment, the Court held that when search and recovery from a bag, brief case, container etc. is to be made, provisions of Section 50 of the Act are not attracted. It is so stated in the following manner:

“14. The object, purpose and scope of Section 50 of the Act was the subject-matter

of discussion in a number of decisions of this Court. The Constitution Bench of five Judges of this Court in *State of Punjab v. Baldev Singh*; (1999) 6 SCC 172 after exhaustive consideration of the decisions of this Court in *Ali Mustaffa Abdul Rahman Moosa v. State of Kerala*; (1994) 6 SCC 569 and *Pooran Mal v. Director of Inspection (Investigation)*; (1974) 1 SCC 345 have concluded in para 57:

(I) When search and seizure is to be conducted under the provisions of the Act, it is imperative for him to inForm the person concerned of his right of being taken to the nearest gazetted officer or the nearest Magistrate for making search.

(II) Failure to inForm the accused of such right would cause prejudice to an accused.

(III) That a search made by an empowered officer, on prior inFormation, without inForming the accused of such a right may not vitiate trial, but would render the

recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction is solely based on the possession of the illicit article recovered from his person, during such search.

(IV) The investigating agency must follow the procedure as envisaged by the statute scrupulously and failure to do so would lead to unfair trial contrary to the concept of justice.

(V) That the question as to whether the safeguards provided in Section 50 of the Act have been duly observed would have to be determined by the court on the basis of the evidence at the trial and without giving an opportunity to the prosecution to establish the compliance of Section 50 of the Act would not be permissible as it would cut short a criminal trial.

(VI) That the non-compliance

of the procedure i.e. inForming the accused of the right under sub-section (1) of Section 50 may render the recovery of contraband suspect and conviction and sentence of an accused bad and unsustainable in law.

(VII) The illicit article seized from the person of an accused during search conducted without complying with the procedure under Section 50, cannot be relied upon as evidence for proving the unlawful possession of the contraband.

15. The learned counsel for the appellant contended that the provision of Section 50 of the Act would also apply while searching the bag, briefcase, etc. carried by the person and its non-compliance would be fatal to the proceedings initiated under the Act. We find no merit in the contention of the learned counsel. It requires to be noticed that the question of compliance or non-compliance with Section 50 of the NDPS Act is relevant

only where search of a person is involved and the said section is not applicable nor attracted where no search of a person is involved. Search and recovery from a bag, briefcase, container, etc. does not come within the ambit of Section 50 of the NDPS Act, because firstly, Section 50 expressly speaks of search of person only. Secondly, the section speaks of taking of the person to be searched by the gazetted officer or a Magistrate for the purpose of search. Thirdly, this issue in our considered opinion is no more res integra in view of the observations made by this Court in *Madan Lal v. State of H.P.*; (2003) 7 SCC 465. The Court has observed:

“16. A bare reading of Section 50 shows that it only applies in case of personal search of a person. It does not extend to search of a vehicle or a container or a bag or premises (see *Kalema Tumba v. State of Maharashtra*; (1999) 8 SCC 257, *State of Punjab v. Baldev Singh*; (1999) 6 SCC 172 and

Gurbax Singh v. State of Haryana; (2001) 3 SCC 28. The language of Section 50 is implicitly clear that the search has to be in relation to a person as contrasted to search of premises, vehicles or articles. This position was settled beyond doubt by the Constitution Bench in Baldev Singh case. Above being the position, the contention regarding non-compliance with Section 50 of the Act is also without any substance.”

16. In State of H.P. v. Pawan Kumar; (2005) 4 SCC 350 this Court has stated:

“11. A bag, briefcase or any such article or container, etc. can, under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body of a human being. Depending upon the physical capacity of a person, he may carry

any number of items like a bag, a briefcase, a suitcase, a tin box, a thaila, a jhola, a gathri, a holdall, a carton, etc. of varying size, dimension or weight. However, while carrying or moving along with them, some extra effort or energy would be required. They would have to be carried either by the hand or hung on the shoulder or back or placed on the head. In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore, it is not possible to include these articles within the ambit of the word 'person' occurring in Section 50 of the Act.”
(emphasis in original)

17. After discussion on the interpretation of the word “person”, this Court concluded:

“14. ... that the provisions of Section 50 will come into play only

in the case of personal search of the accused and not of some baggage like a bag, article or container, etc. which [the accused] may be carrying.” The Court further observed:

“27. ... In view of the discussion made earlier, Section 50 of the Act can have no application on the facts and circumstances of the present case as opium was allegedly recovered from the bag which was being carried by the accused.”

13. Moreover, even if we proceed on the basis that Section 50 applies, we find that the requirement of Section 50 is the search by Gazetted Officer or nearest Magistrate. It was not disputed by the learned Counsel for the appellant, at the time of arguments, that Chet Ram was a Gazetted Officer. Therefore, even otherwise we find that the requirement of Section 50 was fulfilled.”

In view of the law laid down in Krishan Kumar’s case supra, the argument on behalf of the appellants with regard to non-

compliance of mandatory provision of Section 50 of the Act, is untenable and is hereby rejected.

15. No other argument has been raised by the Ld. counsel for the appellants except as noticed hereinabove.

16. As an upshot of the discussion held above, I affirm the judgment of conviction and order of sentence dated 20/05/2002 passed by Special Court, Mansa against the appellants under Section 15(c) of the Act for possessing 70 Kgs of poppy straw without any lawful authority and accordingly dismiss the present appeal filed by them.

17. The appellants if on bail in the present case, are directed to be taken into custody forthwith to serve out the remaining part of the sentence imposed upon them.

Appeal dismissed.

(ASHUTOSH MOHUNTA)
JUDGE

12.2.2015
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