

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

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CRA-S-1075-SB of 2005

Date of decision : 09.02.2015

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Jagsir Singh @ Jagga and another

.....Appellants

Versus

State of Punjab

.....Respondent

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CORAM: HON'BLE MS. JUSTICE RITU BAHRI

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Present: Mr. S.S Sidhu, Advocate for the appellants.

Mr. Gurveer Sidhu, AAG, Punjab.

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

RITU BAHRI, J

This criminal appeal has been filed against the judgment of conviction and order of sentence dated 10.6.2005 passed by the Judge, Special Court, Mansa, whereby the present appellants-accused, Jagsir Singh @ Jagga and Darshan Singh were convicted under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the NDPS Act') and each accused was sentenced to undergo rigorous imprisonment for a period of 2 years and to pay a fine of Rs. 25,000/-. In default of payment of fine, each convict was further directed to undergo rigorous imprisonment for a period of 6 months.

As per the prosecution version SI, Malkiat Singh, Station House Officer, Police Station, Sardulgarh along with ASI Lalinder Singh and a few other police officials was on patrol duty on 25.5.2002 and to apprehend bad element he had laid picked at a point one kilometer away from village Jatana Kalan on the link road, Rori, in the revenue estate of Jatana Kalan. Kaur Singh PW came there from the side of Jatana Kalan and was joined with the police party. After sometime, two persons were seen coming on a motor cycle. They were carrying a gunny bag in between them. On seeing the police post, they felt perplexed. This aroused suspicion in the mind of Sub Inspector Malkiat Singh (herein after referred as the 'IO'). Both the occupants of the motorcycle were apprehended on account of such suspicion. Accused Jagsir Singh alias Jagga was driving the motorcycle while the other accused Darshan Singh was riding the pillion. IO told both the accused that they were suspected of carrying some narcotic in the bag which was in their possession and that they had a right to get the bag searched in the presence of a Gazetted Officer or a Magistrate. Both the accused opted to get the search conducted in the presence of a Gazetted Officer, individually. Two memoranda (Ex.PJ and Ex.PK) were prepared in this respect. These were signed by the respective accused and were witnessed by ASI Lalinder Singh and Kaur Singh PWs. IO then sent a wireless message to summon a Gazetted Officer to the spot. After some time, DSP Raminder Singh (PW) came to the spot and after being acquainted with the facts and circumstances of the case he disclosed

his identity before the accused as a Deputy Superintendent of Police and a Gazetted Officer. He also asked both the accused, one after the other, whether they wanted to be searched in the presence of any other Gazetted Officer or a Magistrate. Both the accused opted to be searched in the presence of said DSP Raminder Singh. Two memoranda (Ex. PA and Ex.PB) were prepared in this respect. These were signed by the respective accused and were attested by ASI Lalinder Singh and Kaur Singh PWs as also by DSP Raminder Singh. The motorcycle which the accused were riding was without a registration number.

On the directions of DSP Raminder Singh, IO searched the gunny bag which the accused were carrying on the motorcycle. It was found to contain poppy husk. Two samples each weighing 100 grams were separated and the remainder weighed 35 Kgs, which included the weight of the gunny bag. Samples and remainder were made into separate parcels. The parcels were sealed with seal bearing impression 'MS'. Sample seal was also prepared. Seal after use was handed over to PW Kaur Singh. Parcels of sample and remainder were taken into possession vide memo of recovery (Ex. PC) which was witnessed by ASI Lalinder Singh, DSP Raminder Singh and Kaur Singh Pws. IO then wrote a note (Ex. PS) and sent the same to the police station whereupon a Formal First Information Report (Ex.PS/1) came to be recorded by ASI Joginder Singh. IO then prepared rough site plan (Ex.PT) of the place of occurrence with correct marginal notes and arrested the accused after disclosing to

them grounds of arrest vide memo of arrest (Ex.PL and Ex.PM). These were signed by the respective accused and were witnessed by ASI Lalinder Singh and Kaur Singh PWs. Personal search was effected vide Ex.PN and Ex.PO. Statements of the witnesses were recorded. The case property was kept by the IO in his safe custody. Thereafter on 27.5.2002, it was produced before the Area Magistrate. On 27.5.2002, he handed over sample parcel along with sample seal and form No. 29 (Ex.PY) to Constable Ram Singh who took the same and deposited with Forensic Science Laboratory, Punjab, Chandigarh on 28.5.2002 and receipt given by that Laboratory was given to the IO.

After getting the report from the Forensic Science Laboratory, Punjab Chandigarh (Ex. PY/1), both the accused were charged under Section 15 of the NDPS Act.

In the trial, Investigating Officer SI Malkiat Singh appeared as PW-5, ASI Lalinder Singh as PW-4, Gazetted Officer, DSP Raminder Singh who supervised the search as PW-1, Constable Ram Singh, who took the sample parcel to Forensic Science Labortuary, Punjab, Chandigarh as PW-2 and Jaspal Singh of Sunam Auto Agency as PW-3 to prove that motorcycle used in the occurrence was sold by the said agency to accused Jagsir Singh. PW Kaur Singh has been given up by the prosecution as having been won over by the accused and report of Forensic Science Laboratory, Punjab, Chandigarh has been tendered as Ex.PY/1.

Counsel for the appellants has argued that in the present

case after arresting the appellants, the provisions of Section 52 (3) have not been complied with by the Investigating Officer. The IO after seizing the articles was required to forward the same to the Officer incharge of the nearest police station or the Officer empowered under Section 53. In the present case and in compliance of the Section 55 of the Act, the Investigating Officer was required to deposit the articles seized in the police station of the local area pending the orders of the Magistrate. As per Section 55 of the Act, it is the duty of the Officer Incharge of the Police Station to receive the seized articles and thereafter affix a seal on such articles or to take samples and to fix a seal on such articles. He has referred to the judgments passed by the Supreme Court in the case of ***Gurbax Singh vs State of Haryana, 2001 (1) RCR (Criminal) 702, Karnail Singh vs. State of Haryana, 2008(3) RCR (Criminal) 543, Rupa Ram vs. State of Haryana, 2008 (1) RCR (Criminal) 820, Dharmabir vs The State of Haryana 2008 (4) RCR (Criminal) 40, Ram Saran vs State of Haryana 2006 (4) RCR (Criminal) 334*** to contend that if the provisions of Section 55 were not complied with by the Investigating Officer, the prosecution version becomes doubtful and the conviction is liable to be set aside.

Moreover, the final arguments of the counsel for the appellants is that Kaur Singh, prosecution witness was not produced. The independent witness Kaur Singh was given up by the prosecution and he had made a complaint to the police Ex. D1 on 1.8.2002 that the police had called him in a complaint case and taken

blank papers signed from the appellants and thus were used in the present trial showing that he was eye witness to the incidents.

Counsel for the State has argued that the provisions of Section 52 & 55 are directory in nature. To support his contentions, he has referred to the judgment passed by a Division Bench of Himachal Pradesh High Court in the case of '**State of Himachal Pradesh vs Sudarshan Kumar, 1989(2) RCR (Criminal) 317**' and in a case of High Court of Calcutta in '**T.Paul Kuki alias Pabul Youthand alias T.P Kuki vs. State of West Bengal, 1992 Law Suit (Cal) 285**'.

Heard counsel for the parties. Hon'ble Supreme Court in the case of **Gurbax Singh's case (supra)** has examined the effect of non-compliance of Section 52 and Section 57 of the NDPS Act. In this case, Supreme Court has observed that provisions of Sections 52 and 57 are directory. Violation of these provisions would not ipso facto violate the trial. However, Investigating Officer cannot totally ignore these provisions and such failure will have bearing on appreciation of evidence regarding arrest of accused or seizure of article. In this case the parcels containing samples were not sealed by the Officer Incharge and the prosecution could not lead any evidence that the parcels were received by the Chemical Examiner with seals intact. The Supreme Court held that the Investigating Officer did not follow the provisions prescribed under Section 57 of the NDPS Act. The Supreme Court held that the investigation was faulty and the appellants were acquitted. A Division Bench of

Himachal Pradesh High Court in the case of **State of Himachal Pradesh vs. Sudarshan Kumar, 1989(2) RCR (Criminal) 317**, has held that the provisions incorporated under Section 52 are directory in nature and if these provisions are not strictly complied with the prosecution will not fail. In paragraph 12 of the judgment, it has been observed as under:

12. And then, Chapter V of the Narcotic Act lays down the procedure to be followed after the search and arrest of the accused. According to Section 52(1), the person arrested is to be informed, as soon as may be, about the grounds of arrest. Section 52(2) says that the person arrested and articles seized are to be forwarded to the Magistrate who issued the Warrant under Section 41(1). However, in cases other than warrants, the person arrested and articles seized are to be forwarded to the Officer-in-Charge of the nearest Police Station or the Officer invested with powers of Officer-in-Charge of a Police Station for the investigation of offence under the Act (Sub-Section (3) of Section 52). Section 55 casts a duty on the Officer-in-Charge to keep articles in safe custody and allow any officer, who may be accompanying such articles, to put his seal or take sample. Then comes Section 57 which postulates that any person

making arrest or seizure shall make full report to his immediate superior officer within 48 hours.

Reference can be made to a Division Bench judgement of the High Court of Calcutta in the case of **T.Paul Kuki Alias Pabul Youthhand Alias T.P Kuki vs. State of West Bengal, 1992 Law Suit (Cal) 285** has observed in paragraph 10 as under:-

“A careful perusal of the provisions of Section 55 of the Act reproduced above, will clearly show that it is only an enabling provision and gives an option to the officer making a seizure under the Act to deposit the seized articles in the local police station and by no means it contains any mandate for such deposit. It further provides that if such deposit is made, the officer- in-charge of the police station is bound to take charge of it for safe custody and also to allow the officer making the deposit to take sample etc. Such an interpretation is manifest from the words "may" regarding delivery of the seized articles and "shall" regarding taking charge of it by the officer-in- charge of the police station and allowing the Seizing Officer to take sample etc. But for this provision it would not be within the power of the officer making any seizure under the Act to keep seized article in police station for safe custody and even if he delivered it to the police station, the officer- in-charge would be in a position to refuse to take charge of it or even after taking charge

thereof, refuse the Seizing Officer to take sample etc. It is clearly to save such a situation that this provision has been incorporated in the Act. Such an interpretation is not based on any undue emphasis on the words "may" and "shall" used in Section 55 of the Act but rather, the use of these words by the legislature in the-same sentence unmistakably suggest its intention that while an option is given to a Seizing Officer to deliver the seized articles to a police station, the officer-in-charge has no option but to take charge of it for safe custody and to allow the Seizing Officer to take sample etc.,. The learned Advocate for the appellant has cited the decision of Guahati High Court in Md. Jainulabdin @ Nahamacha etc. v. State of Manipur etc., 1991 Cri LJ 696 wherein it was held that provisions of Section 55 of the Act are mandatory and unless followed, it would go in favour of the accused. Their Lordships were of the opinion that while incorporating this section, the legislature had two intentions, viz. actual seized articles are produced at the time of trial and samples of the said articles are sent for analysis by expert and secondly, after the articles are produced before the officer-in-charge, these are not substituted by other articles. If really, it was the intention of the legislature that the samples should be drawn only in the presence of the officer-in-charge of a police station, then

nothing prevented it to specifically make a provision to this effect. Indeed, Section 52 of the Act inter alia provides for forwarding seized articles without unnecessary delay to the officer-in-charge of the nearest police station or to an officer empowered under Section 53 of the Act. In case seized articles are forwarded to an officer empowered under Section 53 of the Act to investigate into an offence under the Act, it is quite within his power to draw sample and send it for analysis by an expert which is a part of investigation. It is also pertinent to note in this connection that a contrary view has been taken by a Division Bench of Himachal Pradesh High Court in State of Hirmalchal Pradesh v. Sudarshan Kumar etc., 1989 Cri LJ 1412 wherein it was held that the provisions of Section 55 of the Act are merely directory in nature and violation thereof could not result in order of discharge.”

In the case in hand, the Investigating Officer while appearing as PW-5, Sub Inspector Malkiat Singh stated that two samples were sealed on the spot with his seal bearing impression 'MS'. The seal after use was handed over to prosecution witness, Kaur Singh. This fact was corroborated by the evidence of PW-4 and PW-5. The case property was kept by the Sup Inspector PW-5, Malkiat Singh with seals intact and was thereafter handed over to Constable Ram Singh. Constable Ram Singh while appearing as

PW-2 stated that sample parcel was handed over to him with seals intact. This sample was deposited by him with Forensic Science Laboratory, Punjab, Chandigarh with seals intact. The report of the Forensic Science Laboratory Ex.PY/1 was placed on record without any objection from the defence. The deposition of all the prosecution witnesses were not cross-examined. Hence once the samples taken were sealed in the presence of the prosecution witness Kaur Singh and was handed over with seals intact before the Forensic Science Laboratory, the intent of Section 55 of the Act was carried out. As per the ratio of judgment in ***Gurbax Singh's case (supra)***, even if the samples were kept by the Investigating Officer in his custody it did not violate the investigation as the samples were received by the Chemical Examiner with seals intact. In the case before Hon'ble the Supreme Court, procedure was not followed as the sample was received by the chemical examiner without the seals intact and there was no explanation by the Investigating Officer with regard to the breach of procedure in the trial. The Supreme Court acquitted the accused in that case. However, in the present case, no such infirmity has been pointed out by the defence. Rather they have chosen not to cross-examine the prosecution witnesses on this account and no prejudice has been caused to the appellants. The prosecution witness Kaur Singh was not produced would not create a dent in the prosecution version as the recovery samples and the report of the chemical examiner fully prove the prosecution case that the appellants were carrying two boxes of 35 Kg poppy husk while they

were apprehended driving on a motorcycle.

Having examined the impugned judgment, no illegality, much less irregularity has been found therein warranting interference by this Court. Accordingly, it is upheld. However, a lenient view can be taken on the quantum of sentence of the appellants.

As per the custody certificates, both the appellants have undergone 3 months and 13 days in custody. They were convicted for two years. The recovery in the present case was effected on 25.5.2002. As per the custody certificate, after their sentence was suspended, they have not misused the concession of bail as there is no other case pending against them. They have been facing a criminal trial for almost 12 ½ years. They were ordered to be released on bail on 22.6.2005. Accordingly, keeping in view the facts and circumstances of the case, it would be just and expedient to reduce the sentence of imprisonment to already undergone by the appellants.

With the above modification, this appeal is disposed of.

09.02.2015
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(RITU BAHRI)
JUDGE