

CRA-S-314-SB-2004

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

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Date of Decision: 25.03.2015

Ajit Singh

... Appellant (s)

Versus

State of Punjab

... Respondent(s)

CORAM: HON'BLE MR. JUSTICE PARAMJEET SINGH

- 1) Whether Reporters of the local papers 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 ?

Present: Mr. D.S.Malwai, Advocate,
for the appellant.

Mr. B.S.Cheema, DAG, Punjab.

Paramjeet Singh, J.

Present criminal appeal has been preferred by the appellant against judgment of conviction and order of sentence dated 24.01.2004 passed by the Special Judge, Patiala whereby appellant-accused (for brevity, 'accused') has been convicted for the offence punishable under Section 15 (c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short, 'NDPS Act') and sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.1 lac, in default, to further undergo rigorous imprisonment for six months.

Brief facts of the prosecution case are to the effect that on

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11.12.1998, Karan Sher Singh, S.I. while posted as incharge C.I.A. Staff, Nabha along with other police officials, was performing patrolling duty and checking at village Kakrala. In the meantime, he received secret information that accused-Ajit Singh indulges in sale of poppy husk and if raided, poppy husk could be recovered. On the basis of this information, ruqa Ex.PE was sent to Police Station Sadar, Nabha, where formal F.I.R. Ex.PE/1 was recorded by Baljinder Singh, MHC. Later, the house of accused in village Kakrala was raided in the presence of police officials and Amarjit Singh, Ex-Sarpanch of the village.

Accused was found present in his house in Kakrala. After taking him into custody, he was interrogated whereupon he suffered disclosure statement Ex.PA that he has kept concealed five bags of poppy husk in the courtyard of his house underneath the sand and he could get those recovered. This disclosure statement Ex.PA was signed by the accused and attested by Dalbir Singh ASI, Manjit Singh HC and Amarjit Singh, independent witness. Later, accused vide memo Ex.PF which was signed by him and attested by aforementioned witnesses opted for the presence of a gazetted officer and, thereupon, Kulshinder Singh, DSP, was called at the spot to whom the disclosure statement Ex.PA and memo Ex.PF were presented.

Kulshinder Singh, DSP, disclosed his identity to the accused and the latter concurred to the search of his house in his presence. Later, pursuant to the disclosure statement, accused got recovered five bags of poppy husk from the place disclosed in the

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disclosure statement Ex.PA. Two samples of 250 grams each were drawn from each bag and the remaining poppy husk of each bag on weighment came to 35 kgs. All the 10 sample parcels and all the 5 bags containing remaining poppy husk each weighing 35 kgs. were separately sealed by Karan Sher Singh SI with his seal bearing impression 'KS' and seal after use was handed over to Amarjit Singh, independent witness. The case property was seized vide memo Ex.PB which was attested by Amarjit Singh, independent witness, Manjit Singh, HC, Dalbir Singh, ASI and Kulshinder Singh, DSP.

Later, Karan Sher Singh, SI, investigating officer, prepared rough site plan Ex.PG with correct marginal notes. Personal search of the accused resulted in recovery of Rs.130/- which were seized vide memo Ex.PH. Statement of prosecution witnesses were also recorded by the investigating officer who on return to Police Station Sadar, Nabha produced the case property before the then S.H.O. Sher Gir and the latter affixed his seal bearing impression 'SG' on all the parcels as also on chit and later, investigating officer deposited the case property with Baljinder Kumar, MHC and on the next day produced the same before the Illaqa Magistrate vide request Ex.PH and the latter passed order, thereon, Ex.PH/1 and later, case property was re-deposited with M.H.C who sent the sample parcels of this case to the Chemical Examiner through Constable Beant Singh and the former vide report Ex.PX declared contents of the sample parcels to be of chura poppy heads. After completion of investigation, challan against the accused was sent

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to the Court to face trial.

On finding a prima facie case, the accused was charge-sheeted under Section 15 of the NDPS Act, to which he pleaded “not guilty” and claimed trial.

In support of its case, the prosecution examined Sher Gir, SI as PW 1, Kulchhinder Singh, DSP as PW 2, Beant Singh, Constable as PW 3, Baljinder Kumar, ASI as PW 4, Karan Sher Singh, SI as PW 5 and Dalbir Singh, SI as PW 6. Besides this, report of chemical examiner was also tendered in prosecution evidence as Ex.PX.

Statement of accused under Section 313 Cr.P.C. was recorded. All the incriminating evidence appearing against the accused was put to him. He denied the same and pleaded false implication. In his defence, the accused examined Gurmail Singh as DW 1, Devinder Singh, Constable as DW 2 and Ram Singh as DW 3.

It is expedient to have a bird's eye view of the relevant prosecution witnesses hereunder:

- (i) Sher Gir, Sub Inspector, PW 1 stated that on 12.12.1998, Karan Sher Singh, SI, produced before him the entire case property and after verification, he sealed all the parcels with his seal bearing impression 'SG' which was also affixed on chit Ex.P-1. Later, he directed Karan Sher Singh SI to deposit the case property with M.H.C.
- (ii) Kulchhinder Singh, DSP, PW 2 deposed that Karan Sher Singh SI had recorded disclosure statement of the accused Ex.PA to the effect

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that he has kept concealed and buried 5 bags containing poppy husk under the sand in the courtyard of his house. In pursuance thereof, accused got recovered 5 bags of poppy husk and that two samples of 250 grams each were separated from each bag and made into parcels. After taking out samples, each bag contained 35 kgs of poppy husk. The samples and the bags were sealed with the seal bearing impression 'KS' of SI Karansher Singh. The sample seal Ex.P-1 was also prepared. The seal after its use was handed over to Amarjit Singh, independent witness. The case property was seized vide memo Ex.PB. Five bags Ex.P2 to P6 and four samples Ex.P7 to Ex.P10 were produced during the deposition of this witness who also stated that his statement was recorded.

- (iii) PW 5 Karan Sher Singh, SI, investigating officer of the present case, stated that on 11.12.1998, he along with other police while on patrolling duty in village Kakrala, received secret information that accused indulges in sale of poppy husk and if raided, the same could be recovered. On the basis thereof, he sent ruqua Ex.PE to the police station and formal FIR was registered. On the way to house of accused, Amarjit Singh, Ex-Sarpanch of village was joined in the investigation. The accused was apprehended and arrested. During interrogation, the accused suffered disclosure statement Ex.PA

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that he has kept concealed five bags of poppy husk underneath the sand in the courtyard of his house. DSP Kulshinder Singh was also called at the spot. Later, the accused got recovered five bags of poppy husk and that two samples of 250 grams each were drawn from each bag and the remaining poppy husk in each bag on weighment came to 35 kgs. and that all the bags and parcels were sealed by him with his seal bearing impression 'KS' which was also affixed on chit Ex.P-1 and seal after its use was handed over to Amarjit Singh. He further testified that the case property was seized vide memo Ex.PB. He identified the case property.

- (iv) PW 6 Dalbir Singh stated that on 11.12.1998, he was posted in C.I.A.Staff, Nabha. On that day, he joined the police party headed by Karan Sher Singh SI and in the area of village Kakrala, the investigating officer received secret information that Ajit Singh-accused indulges in the sale of poppy husk and if raided, same could be recovered and on the basis of this information, ruqua Ex.PB was sent to the police station which formed the basis of formal FIR Ex.PB/1 and thereafter, Amarjit Singh, ex-sarpanch of village Kakrala was joined in the police party and the house of the accused was raided who was found present in his house who was interrogated and taken into custody. He also stated that the accused had suffered

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disclosure statement Ex.PA that he has kept concealed 5 bags of poppy husk underneath the sand in the courtyard of his house and he could get those recovered. He also stated that the accused signed the disclosure statement Ex.PA which was attested by him, Head Constable Manjit Singh, Amrjit Singh, public witness and later, Kulshinder Singh, DSP was called at the spot and in his presence accused led the police party to the place of concealment and got recovered 5 bags of poppy husk and that two samples of 250 grams each were drawn from each bag and remaining poppy husk of each bag on weighment came to 35 kgs. and all the parcels were sealed by karan Sher Singh SI who is the investigating officer of this case with his seal bearing impression "KS" which was also affixed on chit Ex.P1. He also stated that the case property was seized vide memo Ex.PB which was attested by him, Amarjit Singh and Manjit Singh HC and that further personal search of the accused resulted in recovery of Rs.130/- which were seized vide memo Ex.PH.

It is also expedient to have a bird's eye view of the relevant defence witnesses hereunder:

- (i) DW 1 Gurmail Singh stated that the police had come at about 9.00 A.M. The police searched the house of the accused. About 10-20 neighbours had gathered there. The

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police did not join either from any neighbour or from the locality. Nothing was recovered in his presence. The police took away Ajit Singh on the pretext that he would be let off after verification in the evening and later on they came to know that police has falsely registered a case against the accused.

- (ii) DW 2 Devender Singh produced Register No.19 pertaining to FIR No.119 dated 11.12.1998, Police Station Sadar, Nabha and admitted that there is over writing on the figure.
- (iii) DW 3 Ram Singh deposed in the same breath of DW 1.

I have heard learned counsel for the parties and perused the record.

Learned counsel for the appellant vehemently contended that Amarjit Singh in whose presence recovery was effected, has not been examined by the prosecution. The examination of independent witness was necessary. Even no reason has been assigned why the independent witness has not been examined. Learned counsel further contended that ten sample parcels were prepared but only five were deposited in the Malkhana. There is a cutting in Register No.19 regarding deposit of the case property. The recovery was effected prior to the arrival of DSP.

Learned counsel for appellant further contended that the recovery is alleged to have been effected from the courtyard of the house

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of the accused at about 9.40 a.m in village Kakrala. The house of the petitioner is situated in a thickly populated area and no one was called from the adjacent houses. Learned counsel further contended that in spite of the fact that recovery was effected in a thickly populated area, the investigating officer is not aware of the residents of the adjoining houses, rather he stated that no house is situated adjoining the house of the accused whereas DSP Kulchhinder Singh admitted that house of accused is situated in a thickly populated area and there are houses adjoining the house of the accused. Learned counsel further contended that Sarpanch of the village was not called before entering in the house. Learned counsel further contended that five bags and samples were produced before the Illaqa Magistrate, but the same have not been shown in Malkhan Register No.19. DW 2 Devender Singh has brought the register no.19 and admitted that there is an overwriting in the figure. Learned counsel further contended that no report was sent to the higher authorities from the spot. Learned counsel further contended that there is a delay of three days in sending the samples to the Chemical Examiner.

Per contra, learned State counsel vehemently opposed the contentions of learned counsel for the appellant and contended that there are minor variations in the statements of prosecution witnesses which are generally bound to occur with the passage of time. Learned counsel further contended that case property was produced before the Court which consisted of five bags of poppy husk and 10 samples. The cutting in register No.19 is immaterial and a heavy recovery has been effected

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from the accused. Learned State counsel further contended that generally, independent witness being neighbour of accused or resident of same very village does not support the prosecution case.

I have considered the rival contentions of learned counsel for the parties.

Admittedly, the raid was conducted on the basis of secret information and at the time of alleged recovery, one independent witness was joined but subsequently he was not examined in the Court and was given up by the prosecution being won over by the accused. The story of the prosecution appears to be doubtful as the seal was handed over to said independent witness but he has been kept off the witness box. In ***State of Punjab vs. Surjit Singh***, 2008(1) Recent Criminal Reports (Crl.), 266, a Division Bench of this Court has held that when the prosecution alleged that a material witness has been won over by the accused, it is still necessary that such witness must be examined to reveal truth. In ***Baldev Singh vs. State of Punjab***, 2005(1) Recent Criminal Reports (Crl.), 823, it has been held that till the case property has not been dispatched to the office of the Chemical Examiner, the seal should not be available to the Prosecution Agency and in absence of such safeguard, the possibility of seal being tampered with, substance being changed and the containers being re-sealed, cannot be ruled out. In the instant case, in the absence of examination of Amarjit Singh, independent witness, it is very difficult to assume that the seal was returned by him after the dispatch of the sample parcels for chemical

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analysis. Only his examination would have unfolded as to whether before or after sending of the sample parcels, the seal was returned by him. Thus, owing to his non-examination, the material link in the chain of evidence is missing. In the present case, the recovery was allegedly effected from the courtyard of house of the accused, but the neighbours of the accused have not been joined in the investigation. Merely on the testimony of the official witnesses, the accused cannot be held guilty.

It is also an admitted fact that there is a delay of 3 days in sending the sample to Chemical Examiner and no explanation whatsoever has been given in this regard. Even from the prosecution story, it appears to be doubtful that the recovery was effected from the courtyard of house of the accused as neither the house number nor the presence of other family members was mentioned. Simply, it has been mentioned that on the basis of disclosure statement, the search was made and the recovery was effected from the courtyard of the house of the accused. There are discrepancies in the statements of the prosecution witnesses. DW 2 Devender Singh has admitted that there is an overwriting in the register No.19.

The punishment under the provisions of the NDPS Act is stringent and, therefore, the safe-guards have been provided which require strict adherence and the failure to do so, causes sufficient doubt and the benefit of the same necessarily has to go to the accused persons.

The Hon'ble Supreme Court in ***Abdul Rashid Ibrahim Mansuri v. State of Gujarat*** 2000(1) RCR (CrL.) 611, in regard to non-

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compliance of Section 42 of the NDPS Act has held :-

"When the same decision considered the impact of non-compliance of Section 50 it was held that "it would affect the prosecution case and vitiate the trial". But the Constitution Bench has settled the legal position concerning that aspect in State of Punjab v. Balbir Singh (supra), the relevant portion of which has been extracted by us earlier. We do not think that a different approach is warranted regarding non-compliance of Section 42 also. If that be so, the position must be the following:

If the officer has reason to believe from personal knowledge or prior information received from any person that any narcotic drug or psychotropic substance (in respect of which an offence has been committed) is kept or concealed in any building, conveyance or enclosed place, it is imperative that the officer should take it down in writing and he shall forthwith send a copy thereof to his immediate official superior. The action of the officer, who claims to have exercised on the strength of such unrecorded information would become suspect, though the trial may not vitiate on that score alone. Nonetheless the resultant position would be one of causing prejudice to the accused."

In *State of West Bengal and others Vs. Babu Chakraborty*,

AIR 2004 Supreme Court 4324, the Hon'ble Supreme Court again has gone into the aspect of violation of the provisions of Section 42 of the Act and came to conclude as under:-

"Great significance has been attached to the mandatory nature of the provisions, keeping in mind the stringent punishment prescribed in the Act. This Court has attached great importance to the recording of the information and the ground of belief since that would be the earliest version that will be available to a Court

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of law and the accused while defending his prosecution. This Court also held that failure to comply with S.42(1), proviso to S.42(1) and S.42(2) would render the entire prosecution case suspect and cause prejudice to the accused."

From the above discussion and also the settled law position, it can safely be inferred that although the alleged recovery effected in the present case is on the higher side, but in view of the material flaws in the prosecution case that the prosecution has failed to prove its case beyond reasonable doubt and it cannot be said that the prosecution version is not free from doubt for upholding the conviction and sentence as recorded by the trial Court.

In view of the infirmities catalogued hereinbefore, this appeal is accepted. Sequelly, the impugned judgment of conviction and order of sentence are hereby set aside and the appellant-accused is hereby acquitted of the charge framed against him. The appellant-accused is already on bail as his sentence was suspended by this Court. The bail/surety bonds, if any furnished, shall stand discharged.

25.03.2015
parveen kumar

(Paramjeet Singh)
Judge