

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRA No. S-1137-SB of 2003 (O&M)

Date of decision : July 14, 2015

Avtar Singh

.....Appellant

Versus

State of Haryana

....Respondent

CORAM:- HON'BLE MRS. JUSTICE LISA GILL

Present: Mr. R.P. Dhir, Advocate
for the appellant.

Mr. Vivek Saini, AAG, Haryana.

LISA GILL, J.

Appellant – Avtar Singh has preferred the instant appeal challenging judgment and order dated 07.06.2002 passed by the learned Additional Sessions Judge, Panipat whereby the appellant has been convicted for the offence punishable under Section 15 of the Narcotic Drugs and Psychotropic Substance Act (for short 'NDPS Act'), 1985 and sentenced to undergo rigorous imprisonment for ten years besides to pay a fine of ₹1,00,000/- and in default thereof to undergo rigorous imprisonment for one year.

Briefly stated facts are that Ramesh Kumar, ASI, PW6 was on patrol duty on 18.07.2000 alongwith UGC Chatter Singh, Constable Sewa Singh and Constable Ram Niwas in front of the bus

stand, Panipat. A person (appellant) was seen sitting on a plastic gunny bag besides the road where buses going towards Chandigarh and Punjab stopped. There was another gunny bag under the plastic bag on which the said person was sitting. This person seem to become confused at the sight of the police party. On suspicion, ASI Ramesh Kumar alongwith others apprehended him. He revealed his name and address to be Avtar Singh son of Darshan Singh, caste Kashyap Rajpoot, resident of Baistani, Police Station Haryana, District Hoshiarpur. Notice under Section 50 of NDPS Act was served upon him. He was apprised that he was suspected of carrying some narcotic substance in the plastic gunny bag. On being asked, whether he would like to be searched in the presence of some Gazetted Officer or a Magistrate, the appellant opted for the search to be conducted in the presence of Magistrate. Thereafter, ASI Ramesh Kumar, telephonically called Pankaj Kumar, Tehsildar, PW5, Revenue Department, Panipat and requested him to reach the place of occurrence. Pankaj Kumar, PW5 reached the spot alongwith other staff members on a Government jeep. He was apprised of the facts. Pankaj Kumar, PW5 introduced himself to the accused and on his directions ASI Ramesh Kumar searched the bag on which the appellant was sitting. Stitches of the bag were opened. In one of the bags, 34 kg poppy husk was found and in the other plastic gunny bag 26 kg poppy husk was found. Sample of 250 grams each from both the bags was separated. Separate samples were prepared and the remainder poppy husk was also made into two parcels. All the four parcels were separately sealed with seal RK and taken in possession

vide recovery memo Ex. PF, which was duly attested by Pankaj Kumar, Tehsildar, UGC Chatter Singh and Constable Sewa Singh. Seal after use was handed over to UGC Chatter Singh. Ruqa Ex. PD was sent to the police station on the basis of which formal FIR Ex. PD/1 was recorded. Intimation to higher officials was sent. Rough site plan Ex. PH was prepared by ASI Ramesh Kumar, PW6. Accused was formerly arrested. Case property, accused and the witnesses were produced before Raghbir Singh, SHO, PW7 for verification. Raghbir Singh, PW7 verified the investigation and affixed his seal RS on all the four parcels and directed PW6, ASI Ramesh Kumar to deposit the case property with MHC. Case property was thereafter deposited with MHC, Naresh Kumar, PW1. Samples were sent to Forensic Science Laboratory, Madhuban Karnal for examination on 07.08.2000. Samples were identified as poppy straw.

On completion of investigation, report under Section 173 Cr.P.C. was presented. Appellant-accused claimed trial. Charge was framed against the accused for the offence punishable under Section 15 of the NDPS Act.

Prosecution examined as many as seven witnesses to prove its case. Appellant-accused while denying incriminating material/evidence put to him under Section 313 Cr.P.C. pleaded innocence and false implication. No evidence was led in defence.

Learned trial Court on appreciation of evidence on record concluded that the prosecution had proved its case beyond reasonable doubt against the accused thereby convicting him for the offence punishable under Section 15 of the NDPS Act and

sentencing him as detailed above. Aggrieved therefrom present appeal has been preferred.

Learned counsel for the appellant vehemently argues that the appellant in this case has been falsely implicated. There is infact no evidence on record to inculcate the appellant in the present case. First and foremost, no independent witness has been associated at the time of alleged recovery by the prosecution even though it is an admitted position that the alleged recovery was effected at the bus stand which is a busy place frequented by a number of people. It is submitted that no effort was even sought to be made by the police to associate an independent witness which vitiates the entire trial.

It is further argued that the sample in question was sent for forensic examination to the Forensic Science Laboratory at Madhuban after a lapse of 20 days. There is no plausible explanation for this inordinate delay in sending the sample for examination. Therefore, eventuality of tampering cannot ruled out. Furthermore, seal after use by ASI Ramesh Kumar, PW6 is stated to have been handed over to UGC Chatter Singh, who has not been examined by the prosecution. Therefore, conviction of the accused is illegal and unjustified.

Learned counsel for the appellant submits that the seals on the case property were found to be broken when produced in Court at the time of trial. Slips were not present. Therefore, creating a serious doubt on the veracity of the prosecution version. He also urges that two samples from each of the bags have not been taken

by the police, which is a mandatory condition. Furthermore, there is no mention of any docket or the FSL form. Reference is made to the testimony of PW1, MHC Naresh Kumar in this respect. It is further submitted that the case property was never produced before the Magistrate, which clearly indicates false implication of the appellant. Non-compliance of mandatory provision of Section 50 of NDPS Act is pleaded though it is admitted that the recovery has not been made from the person of the appellant. However, learned counsel for the appellant submits that once an offer is actually given to the accused under Section 50 of the NDPS Act there should be complete and proper compliance with the mandate of law even if recovery is not effected from the person of the accused.

In view of the above, Sh. R.P. Dhir, learned counsel for the appellant vehemently argues that the conviction of the appellant is liable to be set aside. Learned trial Court has committed a grave error and rendered a completely perverse judgment convicting the appellant. Therefore, he prays that the present appeal be allowed and the appellant be acquitted of the charges against him.

Learned counsel for the State while refuting the above said arguments submits that there is overwhelming evidence on record which is sufficient to inculcate the appellant. There is no reason to falsely implicate the appellant in this case. None has even been pleaded by the appellant. Furthermore, link evidence in this case is complete and there is no failing on the part of the police while complying with mandatory provisions of the NDPS Act. He, therefore, prays for upholding the conviction and sentence imposed upon the

appellant.

I have heard learned counsel for the parties and gone through the record. It is borne out from the record that the appellant was sitting on two bags in front of the bus stand, Panipat. He was apprehended on suspicion. He was informed vide memo Ex. PG that there was suspicion of presence of narcotic substance in the bags on which he was sitting and he had the option of having the search conducted in the presence of a Gazetted officer or a Magistrate. Appellant preferred search to be conducted before a Magistrate. Consequently, Pankaj Kumar, PW5, who was posted as Naib Tehsildar, Panipat exercising the powers of Executive Magistrate was called at the spot. He reached the spot and it is in his presence that the search of both the bags was conducted. He has authenticated the recovery effected from the appellant-accused. There is neither any averment much less any evidence on record to show that the concerned officials were in any manner inimical to the appellant. They had no axe to grind against the appellant who was even not known to them. No mala fides have been alleged much less proved on record. In such a situation, absence of an independent witness cannot be fatal to the prosecution case. It is only that the prosecution version would have to be subjected to greater and more intense scrutiny. Prosecution version cannot be rejected only on account of non-joining of an independent witness when there is evidence on record to show that the case of the prosecution is trustworthy.

Similarly, the argument raised by learned counsel for the appellant that there was no occasion for Pankaj Kumar, Naib

Tehsildar, PW5 to be present in his office at 6.00 p.m. is clearly untenable. Undoubtedly office timings are 9.00 a.m. to 5.00 p.m. as stated by Pankaj Kumar, PW5 but at the same time he has specifically deposed that he was present in office at about 6.00 p.m. in connection with his official work. There is no reason to disbelieve or discard the testimony of this witness on this account. It is not unnatural or improbable for a Tehsildar to be present in his office at 6.00 p.m. There is no bar or prohibition on an officer working after 5.00 p.m.

Much stress has been laid on the fact that samples were sent for forensic examination after an inordinate delay which vitiates the trial. Incident in question occurred on 18.07.2000 and the samples were sent on 07.08.2000. Perusal of the report of Forensic Science Laboratory, Ex. PJ clearly indicates that the seals on the samples were found intact and they tallied with specimen seal as per the forwarding authority.

Affidavit, Ex. PB, has been submitted by Constable Jasmer Singh, PW2 to the effect that two samples weighing 250 gram each of poppy husk having seals RS and RK alongwith same seal vide RC No. 150 dated 07.08.2000 were handed over to him and he deposited the same with FSL, Madhuban, Karnal and deposited the receipt back in the interregnum. There was no tampering of the samples or the sample seals.

Similarly, PW1 MHC Naresh Kumar has submitted his affidavit Ex. PA to the effect that the case property was deposited with him on 18.07.2000 and he handed over the same for being

deposited with FSL Madhuban on 07.08.2000 to Constable Jasmer Singh. There was no tampering with the same in the interregnum. The seals were intact as revealed by Ex.PJ, FSL report. In such a situation, delay in sending the sample to the Laboratory does not prove fatal to the prosecution case. It has been held by the Hon'ble Supreme Court in Hardip Singh versus State of Punjab (2008) 8 Supreme Court Cases 557 that once it comes in evidence that till the date of parcels of samples are received by the Chemical Examiner, the seal is intact, said fact in itself proves and establishes that there was no tampering with the aforesaid seal in the sample at any stage and the sample received by the analyst for chemical examination contained the same contraband which was recovered from the possession of the accused. In the said case, the delay of 40 days in sending the sample for examination was found irrelevant.

Thus, it is apparent that the said delay in sending the samples for chemical examination is immaterial in the facts and circumstances of this case and no prejudice has been caused to the appellant.

Contention that the FSL form was not prepared at the spot is not borne out from the record. ASI Ramesh Kumar has specifically stated that he prepared the FSL form on the spot, which was got forwarded from the DSP/SP. He has categorically stated that the FSL form was deposited with the MHC. Not much benefit can be derived by the appellant from the statement of PW1 MHC Naresh Kumar that he did not make a mention about the FSL form in his statement under Section 161 Cr.P.C. in the given facts and

circumstances of the case. It is a settled position of law that every deviation of procedure cannot make a recovery illegal. It is only in a situation where the search and seizure was in complete defiance of law and possibility of evidence collected is likely to have been tampered with or interpolated during the course of such search or seizure that it can be held that the trial is vitiated on such counts. There is nothing on record to show that the contraband in question was not recovered from the appellant or that it was tampered with by the officials.

Another contention of learned counsel for the appellant is that the seals on the case property produced in Court were found to be in torn/broken condition and the slips not being present thereon also point to the false implication of the appellant and show that the contraband was infact never recovered from the appellant. This contention is noticed only to be rejected. Subsequent condition of the case property in isolation cannot be indicative of false implication of the appellant in view of the attending evidence.

A perusal of the record does not reveal any shortcoming in the procedure followed by the police officials. It is admittedly a case of chance recovery. 60 kg poppy husk was recovered from the conscious possession of the appellant in the presence of the police officials as well as PW5 who was Naib Tehsildar at that time. It is reiterated that there is nothing on record to show any animosity which the officials might have against the appellant in question.

It has been held by the Hon'ble Supreme Court in

Dharampal Singh Vs. State of Punjab, 2010 (9) SCC 608 that once

possession is established, Court can presume that accused had a culpable mental state and had committed the offence. Section 54 of the Act raises a presumption against the person in possession of illicit articles. Accused appellant in the instant case has not been able to rebut this presumption.

Thus, in the facts and circumstances of the case, it is not possible to conclude that the appellant has been falsely implicated in the present case. Commercial quantity of poppy husk has been recovered from the appellant. There is no ground whatsoever to impugn the conviction and sentence imposed upon the appellant. There is no infirmity or illegality in the conviction and sentence imposed upon the appellant. Prosecution has indeed succeeded in proving its case beyond reasonable doubt against the appellant. No other arguments has been raised.

Consequently, this appeal is dismissed.

(Lisa Gill)
Judge

July 14, 2015
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