

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

CRA-S-380-SB-2004

Date of Decision : 21.1.2015

Gurnam Singh

.....Appellant

Versus

State of Punjab

.....Respondent

CORAM:- HON'BLE MR. JUSTICE GURMIT RAM

Present: Mr. R.S. Bajwa , Advocate for the appellant.

Mr. D.S. Mann, AAG, Punjab.

GURMIT RAM, J.

The appellant Gurnam Singh has come up in this appeal against the judgment and order dated 6.1.2004 passed by the learned Judge, Special Court, Patiala vide which he has been held guilty for the offence punishable under Section 21(b) of the Narcotic Drugs & Psychotropic Substances Act, 1985 (in short – the Act) and convicted thereunder.

2. The case of the prosecution, in brief was that on 8.10.2002, a letter addressed to SHO, Civil Lines, Patiala was received at Police Station Civil Lines, Patiala from Superintendent, Central Jail, Patiala with regard to convict Gurnam Singh lodged in said jail on the suspicion that he is having in his possession intoxicant capsules. If his search be conducted, then the same could be recovered in heavy quantity from his possession. On this ASI Piare Lal, Police Post Tripri, along with

some police officials arrived at Central Jail, Patiala and contacted Sh.Gamdoor Singh, Deputy Superintendent, Jail. He took the police officials to 'Murgi Haata' in the premises of said jail, where convict Gurnam Singh was found present. In the presence of witnesses, ASI Piare Lal asked said Gurnam Singh about his search, who expressed his desire that his search be conducted in the presence of DSP Gamdoor Singh. Accordingly, memo with regard to his consent was prepared which was thumb marked by him and attested by the witnesses and certified by the said DSP. Search of Gurnam Singh convict was conducted as per rules, during which 400 capsules make PARVON SPAS wrapped in four plastic envelopes were recovered from the right pocket of his pants and 200 capsules make DOTSY wrapped in two plastic envelopes were recovered from the left packet of his pants. Out of the said recovered capsules of two varieties, 10 capsules each were separated as samples and the remaining 580 capsules were put into a 'dabba' tin. The parcels of the sample capsules and of the remaining capsules were prepared which were sealed by ASI Piare Lal with his seal of PL as well as by above-said DSP with his seal bearing impressions GS and then all these three parcels were taken into police possession vide a memo. Prior to that, sample seal was also prepared. Seals after use were handed over to HC Jaspal Singh. Accordingly, a ruqqa was sent to the police station, on the basis of which instant case under Section 21 of the Act was registered against the accused, since the accused could not produce any licence/permit to keep in his possession above-said intoxicant capsules. The statements of witnesses were recorded. Site-plan of the spot of recovery was also

prepared. On returning to police station, the case property along with the accused was produced before the SHO of Police Station, who verified the same. Accused was formally arrested in this case after obtaining requisite permission from the Court concerned. Sample parcels were sent to the office of Chemical Examiner for the chemical analysis. On completion of investigation and on receipt of report of Chemical Examiner, challan was presented in the Court of learned Special Judge, Patiala.

3. Compliance of the provisions of Section 207 of Cr.P.C. was made.

Finding a prima-facie case under Section 21 of the Act against the accused, he was charge-sheeted accordingly, to which, he pleaded not guilty and claimed trial.

4. The prosecution in order to prove its case examined as many as six witnesses in total before the learned trial Court.

5. Then the accused was duly examined as per the provisions of Section 313 of Cr.P.C. Entire incriminating evidence as brought on the file against him during trial of the case was put to him, which was denied by him entirely. Further he pleaded his innocence and stated that he had a dispute with another prisoner. He disobeyed the order of Deputy Superintendent, Central Jail, Patiala and due to that reason, he had been implicated in this case falsely. However, he did not lead any evidence in his defence.

6. The learned trial Court after hearing the learned Public Prosecutor for the State, learned defence counsel and going through the record as well held the accused guilty for the offence

punishable under Section 21(b) of the Act and sentenced him accordingly vide the impugned judgment and order of sentence dated 6.1.2004.

7. Appellant/accused feeling aggrieved against this judgment and order of sentence has come up in the instant appeal. Record of the learned trial Court was also requisitioned and perused.

8. I have heard the learned counsel for the appellant, learned State counsel and have also gone through the record with their valuable assistance.

9. Learned counsel for the appellant has contended that the impugned judgment is merely based on surmises and conjectures and as such the same is not sustainable in the eyes of law. It is further his contention that the prosecution has failed to bring on the record any sort of evidence to prove that the appellant was in conscious possession of the alleged recovered contraband. Then he has also pointed out about the failure of the Investigating Officer to comply with the provisions of Section 50 of the Act before conducting the alleged search of the appellant. Then it is also his contention that the appellant was in jail since the last so many years at the time of alleged recovery and as such the question that he was found in possession of the alleged contraband does not arise at all. Then he has further submitted that the prosecution has also failed to join any independent witness in the police party at the time of the alleged search of the accused, which led to the recovery of alleged contraband. Then he has contended that search of the accused was made in the premises of central jail Patiala during day time. It is a fact that in each and every district Central Jails, regular Medical Officers are

appointed who attend the under-trials as well as the convicts in case they have any health problem. Even in some jails, official residences of the Medical Officers are also made in the vicinity of the jail premises. So in the case in hand, the Investigating Officer could have associated any Medical Officer of the Central Jail, Patiala in the police party before conducting the alleged search of the accused in order to ascertain the genuineness of the alleged recovery of contraband. Lastly he has also contended that as per law, two samples are to be drawn from each of the recovered lots of contraband and whereas in the present case in hand, only one sample has been drawn from the lots of recovered intoxicant capsules of two varieties and as such it is in violation of the provisions of Standing Order No.1/89 dated 13th June, 1989 issued by the Ministry of Finance (Department of Revenue), Government of India.

10. But on the other hand, learned State counsel has denied the above entire contentions of the learned counsel for the appellant and has supported the version of prosecution. He has submitted that compliance of all the provisions as required under the law has been made in this case and as such there is nothing on the file to discard the version of prosecution. The impugned judgment and order of sentence are very much tenable in the eyes of law being based on the evidence and other record available on the file. Further he has prayed for dismissal of this appeal.

11. Now let me have a bird's eye view of the evidence as has been brought on the file by the prosecution to establish its case against the accused.

PW1 ASI Piare Lal was the Investigating Officer in this case. His testimony in brief is that on 8.10.2002 on receipt of letter Ex.PA from Superintendent, Central Jail, Patiala, he went to the said jail along with some police officials, where DSP of the said jail namely Gamdoor Singh met him. He took them inside the jail which is known as 'Murgi Hatta' where the accused present in Court was found present under the supervision of Head Warden Ajit Singh and Major Singh. Then he told the accused that he wanted to take his search since he is having some drugs in his possession by giving him an offer that some gazetted officer or Magistrate can be called if he (accused) so desired. Accused reposed confidence in him for his search and accordingly his consent memo Ex.PB was prepared which was thumb marked by the accused and attested by HC Major Singh, Ajit Singh, HC Jaspal Singh and Gamdoor Singh, DSP, Jail. Then it is further in his statement that during search of the accused four packets containing 400 capsules of PARVON SPAS wrapped in polythene paper were recovered from the right pocket of his pants and two packets containing 200 capsules of DOTSY wrapped in polythene paper were recovered from the left pocket of his pants. From the recovered two varieties of capsules, 10 capsules from each were taken out as a sample, which were put into two metallic tins and the remaining 580 capsules in total were put into a separate metallic tin. All the said three parcels were sealed by him with his seal of PL and as well as with the seal of DSP bearing impressions GS and the same were taken into police possession vide memo Ex.PC attested by the abovesaid witnesses. Specimen seal impression Ex.P1 and specimen seal chit were prepared.

Further he also proved the parcel containing remaining 580 capsules Ex.P2. Then he also proved the ruqqa Ex.PE, FIR Ex.PE/1, site plan Ex.PD and deposed that he arrested the accused in this case after procuring permission from the Court by moving application Ex.PF on which the Court passed the order Ex.PF/1. On the same day, on returning to the police station, he produced the case property before Inspector/SHO Gurpreet Singh, who also affixed his seal of GS upon all the said three parcels after verifying the same. He further deposited the case property with MHC Gurmeet Singh of the police station on the same day with seals intact.

PW5 Gamdoor Singh, DSP Jail was the Gazetted Officer, in whose presence the search of the accused was conducted which led to the recovery of the contraband in question. He proved the letter Ex.PA which was sent by him to the SHO of Police Station Civil Lines, Patiala with a request to send the police party to proceed against convict Gurnam Singh. Further he fully corroborated with the above-said statement of PW1 ASI Piare Lal and supported the version of the prosecution. He also proved the memo Ex.PB prepared with regard to the consent of the accused and recovery memo Ex.PC vide which the contraband allegedly recovered from the accused was taken into police possession.

PW3 HC Ajit Singh was one of the members of the police party headed by ASI Piare Lal on the date of the alleged recovery of contraband and in whose presence the search of the accused was conducted, which led to the recovery of said contraband. Seal after use was handed over to him by ASI Piare Lal. His statement is found to be

consistent with the above discussed statement of PW1 ASI Piare Lal.

PW4 Inspector Gurpreet Singh was posted as SHO, PS Civil Lines, Patiala on the date of the alleged recovery. He stated that on 9.10.2002, the case property of this case consisting of three parcels bearing seal impressions of GS and PL along the accused were produced before him. He verified the same and affixed his own seal bearing impressions of GS on these parcels and also on the sample chit Ex.P1.

PW6 HC Gurmit Singh was posted as MHC of Police Station Civil Lines, Patiala on the date of alleged recovery. He had tendered in his statement his duly sworn affidavit Ex.PG to the effect that case property of this case duly sealed was deposited with him by ASI Piare Lal. He sent the sample parcels of this case to the office of Chemical Examiner, Punjab through HC Kulwant Singh who deposited the same in the said office against a receipt on 24.10.2002. He also stated that so long the case property and sample parcels of this case remained in his possession, he kept the same in intact condition and nobody was allowed to tamper with the same.

The said HC Kulwant Singh appeared in this case as PW2. He also stated about the depositing of sample parcels of this case in the office of FSL(Punjab), Chandigarh after receiving the same from MHC Gurmeet Singh. He also stated that so long the parcels of this case remained in his possession, neither he nor anybody else had tampered with the same.

12. Regarding non-compliance of the provisions of Section 50 of the Act as pointed out above, the learned counsel for the

appellant, has referred to the case law as laid down in **Man Bahadur Versus State of H.P., 2008(4) R.C.R.(Criminal) 563** in support of his contention. In this case, one of the questions which arises for consideration was as to whether the Investigating Officer was bound to make the appellant-accused aware that he had also a right to be searched before a Magistrate or a Gazetted Officer. This case law is further based upon another case law of the Hon'ble Apex Court as delivered in **State of Punjab Versus Baldev Singh, 1999(3) RCR(Criminal) 533** wherein it was laid down as under:-

- (1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the person concerned of his right under sub-section (1) of Section 50 of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.*
- (2) That failure to inform the person concerned about the existence of his right to be searched before a gazetted officer or Magistrate would cause prejudice to an accused.*

There is also another authority on this point as delivered by the Hon'ble Apex Court in **Vijaysinh Chandubha Jadeja Versus State of Gujarat, (2007) 1 SCC 433** in which it was laid down that accused must be told of his right to be searched before a gazetted officer or a Magistrate. The ratio of the case law **State of Punjab Versus Baldev Singh**(supra) is further followed by the Hon'ble Apex Court in a later case law titled **K. Mohanan Versus State of Kerala, 2000(10) SCC 222.**

13. Now let us see the situation of this case from the point of view of contention of learned counsel for the appellant as above raised. For this purpose, the alleged consent memo Ex.PB of the accused is relevant. From its perusal it is found that the Investigating Officer had simply asked from the accused as to whether he wants his search to be conducted from him or from any Magistrate or any gazetted officer. He was not informed of his right which he has under the law for getting his search to be conducted in the presence of any Magistrate or gazetted officer. So, in the light of the principle as laid down in the above discussed case laws, it is held that in the case in hand there is non-compliance of the provisions of Section 50 of the Act on the part of the Investigating Officer. So the above contention of learned counsel for the appellant is held to be correct.

14. Then in the ruqqa Ex.PB, it is recorded that the accused expressed his desire that his personal search be conducted before Sh.Gamdoor Singh, DSP Jail. Then ASI Piare Lal – PW1 has stated that on his asking about the search, the accused reposed confidence in him and he accordingly conducted his personal search. So this is also a basic infirmity in the case of prosecution with regard to the compliance of the provisions of Section 50 of the Act.

15. Then, it is also contended by learned counsel for the appellant that two samples are to be drawn from each of the container/bags from which the recovery of the alleged contraband was made during search. In support of this contention, learned counsel for the appellant has cited the case law as laid down in **Jaswinder Singh and**

another Versus State of Punjab, 2013(1) R.C.R.(Criminal) 257. In this case law, some bags containing poppy-husk were recovered. One parcel was drawn from each of the bag. It was held that as per the Standing Order No.1/89 dated 13th June, 1989 issued by the Ministry of Finance (Department of Revenue), Government of India, it is mandatory that two samples are to be drawn from the recovered substance, failing which the whole recovery procedure will be vitiated. The relevant portion of this order is as under:-

2.2 Drawal of samples. All the packages/containers shall be serially numbered and kept in lots for sampling. Samples from the narcotic drugs and psychotropic substances seized, shall be drawn on the spot of recovery, in duplicate, in the presence of search witnesses Panchas and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchnama drawn on the spot.

In the case in hand as above said, only one sample each from two varieties of the recovered intoxicant capsules was drawn. So in the light of the provisions of the above-said Standing Order No.1/89 dated 13th June, 1989 issued by the Ministry of Finance (Department of Revenue), Government of India and the principles laid down in the case law (cited supra), the entire recovery procedure in this case has been vitiated and for this reason, this contention of learned counsel for the appellant is also accepted.

16. So far the delay of 16 days in depositing the parcels in the office of FSL, Punjab is concerned, it has no material effect on the case of the prosecution, because such like delay can usually occur, since the police has multifarious duties to discharge such as maintenance of law and order, investigation of the cases, producing the accused/undertrials in the Courts etc. etc.

17. Then the learned counsel for the appellant has also argued that the appellant was already in the jail since long prior to the date of alleged recovery and the Investigating Officer did not collect any evidence as to how the alleged intoxicant capsules came into his possession, which also makes the case of the prosecution to be doubtful. This point is also relating to an important part of investigation of this case, which the Investigating Officer in this case had failed to do. But now-a-days jail premises have become the safer places to run any business or unlawful activities either sometimes in connivance of jail officials or otherwise. So, if the Investigating Officer did not probe this aspect of this case, then the prosecution version as alleged is not be discarded on this count.

18. In the light of the above discussion as mentioned in para Nos,12, 13, 14 and 15 of this judgment, there is substance in this appeal and it is liable to be accepted. So, accordingly, it stands accepted. The judgment and order of sentence under appeal are set aside. The appellant is acquitted of the charge under Section 21(b) of the Act by giving him benefit of doubt. He is ordered to be released immediately, if he is in jail in this case and not required in any other case.

Intimation be sent to the quarter concerned for compliance.

21.1.2015

Brij

(GURMIT RAM)

JUDGE

1. To be referred to the Reporters or not? Yes
2. Whether the judgment should be reported in the Digest? Yes