

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

1. **CRA-S-2819-SB of 2009**

DATE OF DECISION: JULY 6, 2015

CHAND SINGH & ANOTHER ...APPELLANT

VERSUS

STATE OF PUNJAB ...RESPONDENT

2. **CRA-S-2380-SB of 2009**

HARBHAJAN SINGH ...APPELLANT

VERSUS

STATE OF PUNJAB ...RESPONDENT

3. **CRA-S-2665-SB of 2010**

GURMAIL SINGH ...APPELLANT

VERSUS

STATE OF PUNJAB ...RESPONDENT

CORAM: HON'BLE MR. JUSTICE M. JEYAPPAUL.

1. Whether the judgement should be reported in the digest? Yes

PRESENT: MR. VARINDER SINGH RANA, ADVOCATE
FOR APPELLANT NO.1 &
DR.SURYA PRAKASH, ADVOCATE
FOR APPELLANT NO.2. IN CRA-S-2819-SB OF 2009.

NONE FOR THE APPELLANT IN CRA-S-2380-SB-2009.

MR. JAGPAL SINGH CHANCHAL, ADVOCATE
FOR MR. CHANCHAL SINGH SINGLA, ADVOCATE
FOR THE APPELLANT IN CRA-S-2665-SB OF 2010.

MS. RITU PUNJ, ADDL.A.G., PUNJAB.

M. JEYAPPAUL, J.

1. Accused Chand Singh, Sukhpal Singh and Harbhajan Singh were jointly tried by the Special Court, Mansa. They were convicted under Section 15 of the Narcotic and Psychotropic Substances Act, 1985 (for short 'NDPS Act') and sentenced to undergo 10 years R.I. and to pay a fine of ₹1 lac each and in default of fine to undergo a further period of 1 year R.I. each. Accused Chand Singh and Sukhpal Singh have jointly preferred CRA-S-2819 of 2009 and accused Harbhajan Singh who was convicted alongwith the above two accused chose to prefer appeal in CRA -S-2380-SB of 2009. Accused Gurmail Singh who was charge-sheeted in the same case was tried later on by the Special Court, Mansa and was sentenced to undergo 10 years R.I. and to pay a fine of ₹1 lac and in default to undergo a further period of 6 months R.I. He has challenged the conviction and sentence recorded by the trial Court in CRA -S-2665-SB of 2010.

2. It is the case of the prosecution that on 4.8.2005, when PW5 SI Harvinder Singh alongwith other police officials were engaged in patrolling duty near bus stand at village Barnala, an independent witness Gurjant Singh met him. In the meanwhile, PW5 received a secret information to the effect that Gurmail Singh @ Gela, Harbhajan Singh @ Bhikha and Sukhpal Singh, etc. were bringing a truck of poppy husk for selling the same at Narinderpura. On receipt of this information, he informed PW1 DSP Balbir Singh Khaira over telephone, who also reached the bus stand, Barnala after some time. Thereafter, PW5 alongwith about 10 officers held a naka at canal minor bridge of Narinderpura. A truck bearing registration No.RJ-13-

G-9562 came from the side of village Kulheri. The truck driven by accused Chand Singh was stopped. He made an attempt to run away, but he was apprehended on the spot. Accused Harbhajan Singh, Gurmial Singh and Sukhpal Singh who were sitting on the bags loaded in the truck managed to escape. The identity card of Gurmail Singh which fell down in the truck was recovered. PW1 DSP Balbir Singh disclosed his identity to accused Chand Singh and gave an option to the accused for carrying out his search. Accused Chand Singh reposed faith in PW1. A consent memo Ex.PA was prepared. All the 25 bags in the truck were unloaded. On checking, the gunny bags were found to have contained poppy husk. Out of each gunny bag, 2 samples of 100 gms. each were separated and converted into separate parcels. On weighment, each gunny bag weighed 30 kgs. and the sample parcels and gunny bags which contained the remaining poppy husk were separately sealed and the seal impression 'HS' of PW1 was put on the samples. The seal after use was handed over to independent witness Gurjant Singh. The entire case property including the truck and the identity card of Gurmail Singh was taken into possession vide recovery memo Ex.PB. The same was attested by PW1 DSP Balbir Singh, SI Baldev Singh and the above independent witness Gurjant Singh. Accused Chand Singh was arrested. The case property was kept in the custody of PW5. On the next day, PW5 produced the accused alongwith the case property in the Court of Illaqa Magistrate. The Illaqa Magistrate after breaking open the seals of the gunny bags drew 100 gms. of poppy husk from each bag as representative sample and converted the same into separate parcels. After producing the

case property in the Court, PW5 kept the same in his custody.

3. PW2 Constable Baldev Singh received the samples of case property on 17.8.2005 from PW5 SI Harvinder Singh. The next day he reached the office of FSL, Chandigarh for entrusting the samples which were, however, returned. The samples were again returned to PW5 SI Harvinder Singh on 18.8.2005. PW2 again received the samples on 22.8.2005 from PW5 and entrusted the same to FSL, Chandigarh. The samples were turned out to be poppy husk on examination as per the FSL report (Ex.PX).

4. Totally, 7 witnesses were examined on the side of the prosecution. The accused set up a plea in their statements under Section 313 Cr.P.C. that they were falsely implicated in the present case.

5. On the side of the defence, one Gurjant Singh S/o Baldev Singh was examined as DW1 to speak about the fact that the said truck bearing registration No.RJ-13-G-9562 was possessed by one Hansa Singh R/o village Mohar Singh Wala.

6. The trial Court having adverted to the entire evidence on record came to the conclusion that all the accused were found in conscious possession of the commercial quantity of poppy husk.

7. PW5 SI Havinder Sikkh who conducted raid had held nakabandi based on the secret information he received when he was engaged in patrol duty. Of course, he telephonically informed PW1 DSP Balbir Singh Khaira. PW1 was the DSP of Sub Division, Budhlada. He has categorically admitted during the course of cross-examination that village

Narinderpura and Barnala fell under the jurisdiction of Sub Division Mansa where many Magistrates and Gazetted officers were stationed. In other words, it is found that he was not the official superior to PW5 who took part in the raid based on the secret information he received.

8. Learned counsel appearing for the appellants would submit that as per Section 42(2) of the NDPS Act, 1985, PW5 who received a secret information as regards the poppy husk being transported through a truck should have reduced into writing the information he received and sent a copy thereof to his immediate official superior. To support their contention, they referred to certain decisions of the Hon'ble Supreme Court.

9. *Per contra*, learned Addl.A.G., Punjab would submit that inasmuch as the Gazetted officer empowered under Section 41(2) of the NDPS Act was engaged for search and seizure of narcotic drugs, the mandatory requirement contemplated under Section 42(2) of the NDPS Act of forwarding the information to his immediate official superior becomes totally redundant. He also referred to the decisions of the Hon'ble Supreme Court to support her argument.

10. In *M.Parabhulal vs. Assistant Director, Directorate of Revenue Intelligence, 2004(1) RCR (Criminal) 160* and in *State of Haryana vs. Jarnail Singh and others, 2004(2) RCR (Criminal) 960*, it has been, of course, held that when the Gazetted Officer contemplated under Section 41(2) of the NDPS Act was engaged for the purpose of search and seizure by the police officer heading the raid, a mandatory requirement made under Section 42(2) of the NDPS Act loses its efficacy.

11. On a careful perusal of the above decision in *M.Prabhulal's case* (supra), it is found that search of the material contraband had taken place in the Customs office under the very nose of the superior officials of the raiding party. Thereafter, it was held that when the search and seizure was held under the supervision of the official superior in the Customs Department, the raid conducted by the Customs Officer in compliance of Section 42(2) of the NDPS Act, 1985 does not vitiate the trial. In *Jarnail Singh's case (supra)*, the raid was conducted by the police official in the very presence of the Superintendent of Police who got direct control over his official duty. Therefore, it is held that adherence to the mandatory requirement under Section 42(2) of the NDPS Act pales into insignificance.

12. Despite the fact that the aforesaid two decisions could be factually differentiated from that of the factual scenario in this case, the Hon'ble Supreme Court in *Karnail Singh vs. State of Haryana, 2009(5) RCR (Criminal) 515*, having posed a direct question as to whether compliance under Section 42 of the NDPS Act, 1985 was mandatory or not, held categorically that it was mandatory to comply with the dictates of Section 42(2) of the NDPS Act. Delay, if any, that occurred beyond 72 hours as contemplated under Section 42(2) of the NDPS Act could be explained by the prosecution. But, at any rate, Section 42(2) of the NDPS Act will have to be complied with as per the above decision rendered by the Constitutional Bench of the Hon'ble Supreme Court.

13. Coming to the facts of this case, it is the admitted position that PW1 DSP Balbir Singh Khaira was not the superior official having control

over the official functions of PW5. PW1 was the DSP having jurisdiction over Sub Division, Budhlada, whereas PW5 had served in Sub Division, Mansa where his superior officials have their office.

14. Section 42(2) of the NDPS Act has been incorporated in the NDPS Act, 1985 only to have a check by the official superiors over the raids being conducted by the subordinates. The crime under the NDPS Act is very serious. The punishment contemplated for the offence committed under the NDPS Act is also highly punitive. Therefore, such a check has been incorporated under Section 42(2) of the NDPS Act.

15. PW5 has categorically admitted that he never recorded the secret information he received as regards the transportation of poppy husk in a truck by the accused. Consequently, he had also not informed his official superior as regards the secret information he received. In the above facts and circumstances, I am of the considered view that PW5 has not follow the mandatory provisions under Section 42(2) of the NDPS Act.

16. The whole case of the prosecution, therefore, becomes suspicious. On the above sole ground, the appellants are entitled to acquittal.

17. Learned counsel appearing for the appellants would vehemently submit that the case property including the samples allegedly collected by the investigating official were not deposited in the judicial malkhana as directed the Chief Judicial Magistrate.

18. *Per contra*, learned Addl.A.G., Punjab would submit that the properties were deposited only in the judicial Malkhana and the samples

were taken away from the judicial malkhana for handing over to the FSL for examination.

19. It is relevant to refer to the evidence of PW5 SI Harvinder Singh and PW2 Constable Baldev Singh to resolve the above controversy cropped-up in this case.

20. PW5 has categorically deposed that on reaching the police station after recovery of contraband was made by him, he kept the case property in his custody. It is his further version that after production of the case property in the Court, he kept the same in his custody.

21. It is to be noted that PW5 never whispered that the case property was kept at least in the police Malkhana. The Chief Judicial Magistrate on production of the material objects by PW5 chose to pass an order on 5.8.2005 for depositing the case property alongwith the samples in judicial Malkhana. PW5 never adhered to the above direction given by the Chief Judicial Magistrate to rule out tampering of the material objects by the police officials. PW2 Constable Baldev Singh has also deposed that he received the material objects only from PW5 and entrusted the same to the FSL, Chandigarh.

22. The conduct of PW5 even after a specific direction that flowed from the Chief Judicial Magistrate on production of the material object gives rise to a material doubt as regards the safe custody of the samples. The police officer is not supposed to keep the samples in his personal custody despite the direction given by the Chief Judicial Magistrate to keep it in the judicial malkhana. For about 13 long days, the samples had been in

the personal custody of PW5. In my considered view, there is every reason to doubt the veracity and genuineness of the sample sent for examination. Therefore, the accused are entitled to acquittal on this ground as well.

23. PW5 has stated during the course of evidence that one Gurjant Singh, an independent witness was associated during the course of recovery of the material objects. After putting his seal on the samples at the place of recovery, PW5 handed over the seal to the independent witness Gurjant Singh on 4.8.2005 itself. It is found that he has come out with a contradictory version that in the presence of the learned Chief Judicial Magistrate he also affixed his seal on the representative samples drawn by the Chief Judicial Magistrate. The proceedings of the Chief Judicial Magistrate also would confirm the fact that PW5 affixed his seal 'HS' on the representative samples drawn by the learned Chief Judicial Magistrate alongwith him on 5.8.2005. It is to be noted that there was no explanation from the prosecution as to how the seal handed over after use by PW5 to the independent witness Gurjant Singh on 4.8.2005 reached the hands of PW5 on 5.8.2005. The independent witness Gurjant Singh was not examined to clear the doubt as to the handing over of the seal to PW5 on 5.8.2005. At any rate, the seal of PW5 was with him on 5.8.2005. The samples were in his personal custody for about 13 long days. Therefore, there is every possibility for tampering with the samples allegedly collected in this case.

24. There had been 10 police officials armed with weapons alongwith PW5 at the time when the raid was conducted after PW5 stopped the truck on identification based on the secret information he received. He

had come well equipped with armed manpower. It is quite surprising that at about 6.30 a.m. in the month of August, 11 police officials with arms even did not choose to open fire in the air to frighten the fleeing accused Sukhpal Singh, Gurmail Singh and Harbhajan Singh. The above unusual behavior of the police officials in the face of other material lapses on the part of the investigating official throws suspicion in the story of prosecution.

25. The prosecution has miserably failed to bring home the charge under Section 15 of the NDPS Act against the accused-appellants. They are found not guilty of the aforesaid charge and therefore, they are entitled to acquittal.

26. Consequently, all the three appeals are allowed and the appellants, Chand Singh, Sukhpal Singh, Gurmail Singh and Harbhajan Singh are acquitted of the charge under Section 15 of the NDPS Act framed as against them. The judgements of conviction and orders of sentence recorded by the trial Court are set aside. Appellants, namely, Gurmail Singh and Chand Singh are undergoing sentence in connection with these cases. They be set be at liberty forthwith, if their custody is not required in connection with any other case.

27. Appellants Sukhpal Singh and Harbhajan Singh are on bail. The bail bonds executed by them shall stand discharged.

July 6, 2015
Gulati

(M. JEYAPPAUL)
JUDGE