

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRA-S No.1958-SB of 2011 (O&M)

Date of Decision: 29.04.2015

Avineesh Kumar

...Appellant.

Versus

State of Punjab

...Respondent

CORAM: HON'BLE MR.JUSTICE R.P. NAGRATH

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. Bipan Ghai, Senior Advocate with
Mr. Mandeep Kaushik, Advocate
for the petitioner.

Mr. Gurveer Sidhu, AAG, Punjab
for the State.

R.P. Nagrath, J. (Oral)

The appellant faced trial of the charge under Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short referred to as “the Act”) on the allegation that he entered into a criminal conspiracy with Kiranpal Singh co-accused for transporting 250 gms of cocaine on 14.02.2008 at about 7:00 PM in the area of village Gaunsabad.

The prosecution story briefly stated was that the police party headed by Swaran Singh, SHO, Amritsar, was going for patrolling and search of the suspects. When the police party reached at turning of Gaunsabad, they saw two youths coming on

foot from the side of village Gaunsabad. One of them was holding an envelope in his hand and the other accompanying him. The accused persons suddenly turned back and were apprehended on suspicion. The police party suspected them to be possessing some intoxicant. The Sub-Inspector first asked Kiranpal Singh, co-accused that he has a legal right to be searched in the presence of a Gazetted Officer or a Magistrate. Kiranpal Singh co-accused expressed himself to be searched in the presence of a Gazetted Officer for which memo Ex.PA was reduced into writing and signed by the accused and attested by other witnesses. A similar memo in respect of the appellant Avineesh Kumar Ex.PB was also prepared. Thereafter, a message was sent to the circle DSP Jagdeep Singh who reached there and introduced himself to the accused persons that he was posted as DSP and a Gazetted Officer. He also offered the accused persons if they wanted their search in the presence of another Gazetted Officer or Magistrate. Both the appellants are stated to have reposed confidence in the DSP. Their consent memos were again recorded as Ex.PD/1 and PE/1 and reduced into writing, similarly signed by both the accused persons and attested by witnesses.

It is pertinent to note that Kiranpal Singh co-accused absented during the trial when the prosecution case was at the stage of recording statement of accused under Section 313 Cr.P.C. and he was ultimately declared a proclaimed offender.

From polythene envelope recovered from Kiranpal Singh

co-accused, cocaine was found. Out of which 10 gms was separated as sample and rest of the quantity was found to be 240 gms. These were prepared into sealed parcels bearing impression 'SS' and 'JS' and taken into possession vide recovery memo Ex.PC. The seal after use was handed over to ASI Sawinder Singh. The DSP kept his seal 'JS' with himself and Sub-Inspector after use handed over his seal 'SS' to ASI Sawinder Singh. Panchnama Ex.PF was prepared. On search of the appellant, however, nothing incriminating was recovered except the cash amount of ₹ 110/- for which separate memo was prepared.

Ruqa Ex.PG was sent to the police station on the basis of which FIR Ex.PH was registered at the police station and the site plan Ex.PJ was also prepared. The contents of the sample sent for analysis were found to be cocaine as per report of the Chemical Examiner Ex.PL. The challan was then presented before the Judge Special Court.

The prosecution examined five witnesses in support of its case. The appellant denied all the incriminating evidence appearing against him in the prosecution evidence during his examination under Section 313 Cr.P.C. and pleaded innocence.

The learned trial Court convicted the appellant of the charge and awarded him the sentence to undergo rigorous imprisonment for 10 years and to pay fine of ₹ 1,000,00/-, in default to further undergo rigorous imprisonment for one year. As per the custody certificate placed on record by learned State counsel, the

appellant has undergone more than 7 years and 2 months of imprisonment out of 10 years imprisonment awarded to him.

I have heard learned senior counsel for the appellant, learned State counsel and perused the records.

The recovery witnesses in support of the charge against the appellant are PW1 ASI Sawinder Singh to whom the seal after use was allegedly given, PW-2 SI Swaran Singh the Investigating Officer and PW3 DSP Jagdeep Singh who came to the spot after message was sent to him.

I am of the clear view that even on acceptance of the testimony of witnesses to be true, it was not possible to hold the appellant to have entered into a conspiracy with his co-accused simply because he was walking with the co-accused who was holding a polythene envelope in his hands. In the cross-examination, PW-2 stated that nothing incriminating was recovered from possession of the appellant except the cash amount of ₹ 110/-. Similarly, PW-3 DSP Jagdeep Singh stated that no recovery of incriminating article was made from this appellant. The instant is a case of recovery from personal search of Kiranpal Singh for which vicarious liability cannot be fastened upon the appellant.

Learned State counsel relies upon the judgment of Hon'ble Supreme Court in ***Jagdish Rai Vs State of Punjab, AIR 2011 SC 1568***, but that was a case in which accused persons were travelling in a vehicle loaded with a bag containing 4 Kgs of opium which was in the lap of pillion rider. That case is absolutely on

different facts. Therefore, it was not possible to hold appellant Avineesh Kumar guilty of the charge under Section 29 of the Act as there has to be something more than the appellant simply walking with the co-accused. For attracting Section 29 of the Act it was required to prove that the appellant abetted or was a party to the criminal conspiracy to commit an offence punishable under the chapter. In **Jagdish Rai's** case (supra) substantive charge against both the persons was Section 18 of the Act, but herein the charge against the appellant is under Section 29 of the Act.

From the above discussion, I find that the charge against the appellant remains doubtful. Consequently the appeal is allowed setting aside the judgement of the conviction and sentence awarded to the appellant and he stands acquitted of the charge framed against him.

(R.P. Nagrath)
Judge

29.04.2015
sk