

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

CRA-S No.3086-SB of 2012 (O&M)
Date of decision: 04.02.2015

Surinder KumarAppellant

Versus

State of PunjabRespondent

CORAM: HON'BLE MR. JUSTICE JITENDRA CHAUHAN.

1. Whether Reporters of 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. Surinder Garg, Advocate
for the appellant.

Mr. Mehardeep Singh, DAG, Punjab.

JITENDRA CHAUHAN J. (Oral)

1. The present appeal is directed against the judgment of conviction and the order of sentence dated 06.10.2012, passed by the learned Judge Special Court, Sri Muktsar Sahib, vide which the appellant was convicted under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the 'Act') and sentenced to undergo rigorous imprisonment for a period of one year and six months and to pay a fine of Rs.5,000/- and in

default of payment of fine to further undergo rigorous imprisonment for one month.

2. The brief facts of the case in hand, recorded by the learned trial Court are that, on 21.10.2008, a police party headed by ASI Jasveer Singh having other police officials namely HC Amrik Singh and other police officials were going in connection with patrolling duty from village Middu Khera to Fatta Kera then at about 09:15 am. when the police party reached the bridge of drain in the area of Fatta Kera, then one man was seen coming on Motor Cycle bearing registration No.PB-30E-2648 along with a plastic bag which was lying on his thigh and on seeing the police party he become perplexed and turned his motorcycle, but he was apprehended on suspicion and the I.O. inquired him whereabouts. The I.O. told the accused that he suspected some contraband in his possession and the search is to be conducted by apprising him that he has legal right for the search in the presence of some Gazetted Officer or a Magistrate, but the accused reposed confidence in the I.O., who prepared the consent memo Ex.P1 of the accused, which was attested by HC Amrik Singh and HC Gurmeet Singh and by the accused. Thereafter, on search of the bag, it was found to contain poppy husk, out of which 250 grams of poppy husk was separated as sample and converted into a parcel. On weighment, the remaining poppy husk

came to be of 14 kilograms 750 grams of poppy husk and it was converted into another parcel. Both the parcels were sealed by the I.O. with his seal bearing impression JS. Specimen seal chit Ex.P2 was prepared and the seal after use was handed over to HC Amrik Singh and Form No.29 was filled on the spot. Then, I.O. took the case property along with motorcycle, R.C. Ex.P3 into possession vide separate recovery memo Ex.P4, attested by HC Amrik Singh and HC Gurmeet Singh. Ruqa Ex.P5 was sent to the Police Station through P.H.G. Wazir Singh and on the basis of which formal FIR Ex.P6 was registered by SI S.H.O Harinder Singh. Personal search of the accused was conducted and a sum of Rs.40/- and one Nokia mobile 1110 were recovered and the same were taken into possession vide recovery memo Ex.P9. The accused was arrested and grounds of arrest were disclosed to him vide memo Ex.P8. Rough site plan Ex.P7 was prepared by the I.O. at the spot. All the memos were attested by the same set of witnesses. Statements of the witnesses were recorded. On returning to the Police Station, the I.O. produced the accused and the case property before SHO/SI Harinder Singh along with personal search money, who checked the case property and verified the investigation and then the sealed it with his seal HS and took the same into his possession vide separate meo Ex.P10. On the next day, SHO/SI Harinder Singh produced the same

further in the Court vide police request/application Ex.P12, Ex.P13 & Ex.P14. The Court drew one additional sample from the bulk parcel and sealed the same alongwith bulk parcel with its seal impression FSDMLT and passed ordered Ex.P15 and then handed over the case property to the SHO, who thereafter deposited the same with MHC Kasturi Lal, with seals intact. He also sent detailed report Ex.P17 to the DSP concerned. Thereafter, on receipt of the report of the Chemical Examiner Ex.P11 and completion of the investigation, challan against the accused was presented in the Court.

3. On presentation of challan, copies of the same were supplied to the accused free of costs as envisaged under Section 207 Cr.P.C.

4. Thereafter, charge under Section 15(b) of Narcotic Drugs and Psychotropic Substances Act, 1985, was framed, to which he pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution examined the following witnesses:-

PW-1, ASI Jasveer Singh, Investigating Officer of the case, deposed that on 21.10.2008, he was posted as ASI at Police Post Killianwali and on that day, he alongwith HC Amrik Singh and other police officials were going in connection with patrolling duty from village Middu Khera to Fatta Khera. When the police

party reached near the bridge of drain of Fatta Khera the accused was apprehended on suspicion. He suspected some contraband in his possession and the search is to be conducted by apprising him that he has legal right for the search in the presence of some Gazetted Officer or a Magistrate, but the accused reposed confidence in him and he prepared the consent memo Ex.P1 of the accused, which was attested by HC Amrik Singh and HC Gurmeet Singh and signed by the accused. Thereafter, on search of the bag, it was found to contain poppy husk, out of which 250 grams of poppy husk was separated as sample and converted into a parcel. On weighment, the remaining poppy husk came to be of 14 kilograms 750 grams of poppy husk and it was converted into another parcel. Both the parcels were sealed by him with his seal bearing impression JS. Specimen seal chit Ex.P2 was prepared and the seal after use was handed over to HC Amrik Singh and form No.29 was filled at the spot. Then he took the case property, motorcycle and form No.29 R.C. Ex.P3 into possession vide separate recovery memo Ex.P4, attested by HC Amrik Singh and HC Gurmeet Singh. Ruqa Ex.P5 was sent to the Police Station through P.H.G. Wazir Singh and on the basis of which formal FIR Ex.P6 was registered by SI/SHO Harinder Singh. The accused was arrested and grounds of arrest were disclosed to him vide memo Ex.P8. Personal search of the accused was conducted and a sum of Rs.40/- and one mobile Nokia 1110 were recovered and the same were taken into possession vide recovery memo Ex.P9. Rough site plan Ex.P7 was prepared by him at the spot. All the

memos were attested by the same set of witnesses. Statements of the witnesses were recorded. On returning to the Police Station, he produced the accused and the case property before officiating SHO/SI Harinder Singh alongwith personal search money, who checked the case property and verified the investigation and then he sealed it with his seal HS and took the same into his possession vide separate memo Ex.P10. He proved the representative sample parcel Ex.MO1, bulk parcel as Ex.MO2, Motorcycle Ex.MO3.

PW-2, HC Amrik Singh, the recovery witness deposed that on 21.10.2008, he was posted as HC at the Police Post Killianwali and on that day, he alongwith HC Gurmeet Singh and other police officials joined the police party headed by ASI Jasveer Singh were going in connection with patrolling duty from village Middu Khera to Fatta Khera. When the police party reached near the bridge of drain of Fatta Khera then accused came there on motorcycle, one plastic bag laying on his thigh and on seeing the police party he become perplexed and tried to return back but he was apprehended on suspicion by the I.O. and I.O. inquired him whereabouts. He further deposed I.O. told the accused that he suspected some contraband in his possession and the search is to be conducted by apprising him that he has legal right for the search in the presence of some Gazetted officer or a Magistrate, but the accused reposed confidence in him and he prepared the consent memo Ex.P1 of the accused, which was attested by him

and HC Gurmeet Singh and signed by the accused. Thereafter, on search of the bag, it was found to contain poppy husk, out of which 250 grams of poppy husk was separated as sample and converted into a parcel. On weighment, the remaining poppy husk came to be of 14 kilograms 750 grams of poppy husk and it was converted into another parcel. Both the parcels were sealed by I.O. with his seal bearing impression JS. Specimen seal chit Ex.P2 was prepared and the seal after use was handed over to him and form No.29 was filled at the spot. Then I.O. took the case property, motorcycle and form No.29 R.C. Ex.P3 into possession vide separate recovery memo Ex.P4, attested by him and HC Gurmeet Singh. He further proved R.C. of the motorcycle Ex.P3, Ruqa Ex.P5, endorsement thereto Ex.P6/A, grounds of arrest Ex.P8 and personal search Ex.P9.

PW-3, HC Kasturi Lal, tendered into evidence his affidavit Ex.PW3/A.

PW-4, SHO/SI Harinder Singh, proved ruqa Ex.P5 sent by ASI Jasveer Singh and registration of the case. He proved the FIR Ex.P6 recorded by him. He also deposed about the factum of production of the case property and accused, by ASI Jasveer Singh before him and fully corroborated the statement of the I.O. by giving each and every detail and proved the recovery memo Ex.P10, vide which he took the case property into his possession. He also deposed about the fact of production of the case property and the accused before the Court vide police application/request Ex.P12 to Ex.P14 and

proved the orders Ex.P15 passed by the Court. He further deposed that he had deposited the case property with seals intact with MHC Kastur Lal. He proved the detailed report Ex.P17 sent to the DSP concerned. He also proved the report of Chemical Examiner Ex.P11.

PW-5, HC Rajbir Singh, deposed by way of direct evidence and deposed about the fact of deposit of the case property by officiating SHO/SI Harinder Singh, with MHC Kastur Lal with seals intact, who further sent sample of the case property to the office of Chemical Examiner on 03.11.2008 through HC Rajbir Singh, who further deposited the same there on 04.11.2008. Version of MHC Kastur Lal i.e. PW-3, is corroborated by this witness.

6. After the conclusion of evidence of prosecution, the statement of appellant-accused was recorded under Section 313 Cr.P.C. and the entire incriminating evidence which the prosecution produced against him was put to him to tender explanation for the same. The appellant-accused pleaded his innocence and also stated that he has been falsely implicated in the present case. He denied all the allegations in *toto* and pleaded that no incriminating article was recovered from his possession. However, in defence two witnesses, namely, Raj Kumar and Baldev Singh were examined as DW-1 and DW-2. Thereafter, he closed his defence evidence.

7. The learned trial Court, after hearing learned counsel for

the parties and after appreciating the evidence on record, convicted and sentenced the appellant-accused as under:-

Name of Convict	Sentenced to Rigorous Imprisonment	Under Section	Fine of Rs.	In default of payment of fine
Surinder Kumar	One year and six months	15 of NDPS Act	5,000/-	One month rigorous imprisonment

8. Aggrieved against the judgment of conviction and order of sentence dated 06.10.2012, the accused/appellant has preferred the present appeal, which was admitted on 31.10.2012.

9. It is submitted that the case of the prosecution rest upon the testimony of official witnesses. There is no independent corroboration. The official witnesses being interested witnesses, the judgment of conviction and order of sentence ought not to have been passed without any corroboration. Even in the statements of official witnesses, there are material contradiction. It has come in the statement of PW-1, ASI Jasveer Singh, that the seals are broken when the case property was produced in the Court and when he handed-over the case property to SHO, then no DDR was registered. The delay of 15 days in sending the sample has not been complained.

It is well established law that the sample is to be sent to the Chemical Examiner within a period of 72 hours of the recovery. There is non-compliance of Section 57 of the Narcotic Drugs and Psychotropic Substances Act, 1985, which is fatal to the prosecution case, as no detailed report regarding the particulars of arrest and seizure was sent to the immediate officer of the superior rank. The appellant was working as a Mate with the Irrigation Department and the appellant examined two witnesses, namely, Raj Kumar as DW-1 and Baldev Singh as DW-2, who are working as Beldars in the same department, to prove that the appellant has been falsely implicated in the present case as some police officials had come to fell certain tree from the canal and the appellant protested against the same, which led to the false implication of the appellant in the present case.

10. On the other hand, learned State Counsel has supported the judgment passed by learned trial Court.

11. I have heard the learned counsel for the parties and have gone through the record with their able assistance.

12. It is argued by the learned Counsel for the appellant that there is breach of Section 50(1) of the NDPS Act as in the present case the recovery was effected by the officer who was part of the Raiding Party., whereas, spirit of Section 50(1) of the NDPS Act is that the accused be searched in the presence of the Gazetted Officer

and the Officer, who was part of the Raiding Party cannot be called an Independent Officer. He further argued that when the search of the bag was carried out along with the search of his person then Section 50 of the Act is to be complied with by the I.O. As in the present case the bag as well as the person of the appellant was searched, so the recovery ought to have been effected in the presence of any Gazetted Officer or Magistrate. In support of his arguments, the learned Counsel for the appellant relied upon the Judgment of Hon'ble Supreme Court titled as "State of Rajasthan Vs. Parmanand and Another" 2014(2) RCR CrI. 40 (SC).

Para 15 reads as under:-

"The idea behind taking an accused to a nearest Magistrate or a nearest Gazetted Officer is to give a chance of being searched in the presence of an Independent Officer, as the search has been conducted in the presence of the members of the Raiding party who cannot be said to be an independent Officer, so in view of this it is breach of provisions of Section 50(1) of the NDPS Act, so in the present case it is to be held that there is non compliance of Section 50(1) of the NDPS Act. It is further held in Para No.12 of the above said Judgment that when the bag as well as the personal search of the accused were carried out then Section 50 of the NDPS Act will be applicable."

In Para No.12 it is observed as under:-

“12. Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application. In this case, respondent No.1 Parmanand’s bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of respondent No.2 Surajmal was also conducted. Therefore, in light of Judgments of this Court mentioned in the preceding paragraphs, Section 50 of the NDPS Act will have application.”

In Para No.15 it is observed as under:-

“15. We also notice that PW-10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate or before a nearest Gazetted Officer or before PW-5 J.S. Negi, the Superintendent, who was a part of the raiding party. It is the prosecution case that the respondents informed the officers that they would like to be searched before PW-5 J.S. Negi by PW-10 SI Qureshi. This, in our opinion, is again a breach of Section 50(1) of the NDPS Act. The idea behind taking an accused to a nearest Magistrate or a nearest Gazetted Officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer. Therefore, it was improper for PW-10 SI Qureshi to tell the respondents that a third alternative was available and that they could be searched before PW-5 J.S. Negi, the Superintendent,

who was part of the raiding party. PW-5 J.S. Negi cannot be called an independent officer. We are not expressing any opinion on the question whether if the respondents had voluntarily expressed that they wanted to be searched before PW-5 J.S. Negi, the search would have been vitiated or not. But PW-10 SI Qureshi could not have given a third option to the respondents when Section 50(1) of the NDPS Act does not provide for it and when such option would frustrate the provisions of Section 50(1) of the NDPS Act. On this ground also, in our opinion, the search conducted by PW-10 SI Qureshi is vitiated. We have, therefore, no hesitation in concluding that breach of Section 50(1) of the NDPS Act has vitiated the search. The conviction of the respondents was, therefore, illegal. The respondents have rightly been acquitted by the High Court. It is not possible to hold that the High Court's view is perverse. The appeal is therefore dismissed."

13. The next argument raised by the Counsel for the appellant is that the case property produced in the Court is not identifiable as the seal of the same were broken when the same was produced in the Court. He draws my attention to the cross examination of ASI Jasvir Singh who admitted that he has seen the case property in the Court and the seals of which are broken which itself shows that the case property is not identifiable.

14. It is further argued that no independent witness has been joined in the present case. Although the area where the alleged

recovery has been made is surrounded by many persons. He referred to the cross examination of ASI Jasvir Singh PW1 who admitted in the cross examination that the persons had been passing from the spot but nobody was joined, which shows that although the independent witnesses were available, but the same were not joined for the reasons best known to the police. Even no effort was made to join any public witness.

15. I have considered the above said arguments raised by the Counsel for the appellant but the non-joining of the independent witness *ipso facto* does not vitiate the recovery and even it is for the accused to prove that with the non-joining of the independent witness a serious prejudice has been caused to the accused and in the present case serious prejudice has been caused to the accused because of non-joining of the independent witnesses who were available at the spot. If any independent witness could have been joined, it would have lend credence to the prosecution story. It is one of the circumstance which weaken the case of the prosecution.

16. The next argument raised by the Counsel for the appellant is that the investigation carried out by the Investigating Officer is faulty, because neither the statement of the official who took ruqa to the Police Station as well as of the SHO were not recorded under Section 161 Cr.P.C. so in the absence of the recording of the said

statement the link evidence is missing. The counsel referred to the cross examination of I.O. Jasvir Singh, where he admitted that the IO did not write statement of Official who took the ruqa as well as of the SHO under Section 161 Cr. P.C. This shows that neither the sending of ruqa to the Police Station was proved nor the handing over of the case property as well as the appellant/accused has been proved.

16. No other argument has been raised by the Counsel for the appellant.

17. Keeping in view the above facts and circumstances, the prosecution has failed to prove its case beyond reasonable doubt.

18. For the reasons stated above, this appeal is allowed, judgment of conviction and sentence is set-aside and the accused-appellant is acquitted of the charge framed against him under Section 15 of the NDPS Act by giving him the benefit of doubt.

04.02.2015

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(JITENDRA CHAUHAN)
JUDGE