

RAJ KUMAR
21/08/2015 12:10

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

CRA-S-No. 2298-SB OF 2015
DATE OF DECISION : 14th AUGUST, 2015

Pargat Singh

.... Appellant

Versus

State of Punjab

.... Respondent

CORAM : HON'BLE MR. JUSTICE SURINDER GUPTA

* * * *

Present : Mr. Kulbhushan Raheja, Advocate for the appellant.

Mr. Amritpal Singh Gill, Assistant Advocate General, Punjab.

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SURINDER GUPTA, J.

1. This appeal is against judgment and order of sentence dated 01.05.2015 passed by Judge, Special Court, Ferozepur, whereby the appellant was convicted for offence punishable under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short NDPS Act) and sentenced to undergo rigorous imprisonment for one year and to pay a fine of `5,000/- and in default of payment of fine to further undergo rigorous imprisonment for two months.

2. The case of the prosecution in brief is that on 26.07.2014 at about 11.30am ASI Parveen Kumar of CIA Staff, Ferozepur along with his police party was going in Government vehicle No.PB-05-L-5654 from village Nathuwala to village Shahdinwala. When the police party was at a distance of one kilometer from village Shahdinwala, a car bearing No.PB-62-2930 of cherry colour was seen coming from the side of village

Shahdinwala. On witnessing the police party the driver of the vehicle felt perplexed and tried to turn the vehicle hither and thither. On witnessing this, he was asked to stop the vehicle and was apprehended. ASI Parveen Kumar after giving him his introduction, expressed his desire to conduct the search, as he apprehended some narcotic substance in possession of the appellant. The appellant was apprised to get the search conducted in the presence of some Gazatted Officer or Magistrate. The appellant reposed faith in ASI Parveen Kumar. His consent memo Exhibit PB was prepared. On search, heroin wrapped in a glazed paper was found from the right *dubb* of the chadara (a cloth sheet, like single bed sheet, usually tied around the waist by many people in the villages) which the appellant was wearing. On weighment heroin was found to be 23 grams, out of which two samples of 1 gram each were separated and put in small plastic container. The remaining heroin was also put in a separate plastic container. Separate parcels of the container were prepared and sealed with the seal impression 'PK'. Form No.M-29 with sample seal was prepared. The sample and the case property were taken in to possession vide recovery memo Ex. PC. On personal search of the accused, ₹210/- and a mobile phone of sky blue colour, were recovered and taken into possession vide recovery memo Ex. PD. Ruqa Ex.PE was sent to the Police Station whereon the formal FIR Ex. PF was registered. Rough site plan of the place of recovery Ex. PG was prepared. On reaching the Police Station, the appellant along with entire case property was produced before ASI Gurbachan Singh, who was officiating as SHO. After verifying the facts ASI Gurbachan Singh put his seal bearing

impression 'GS' on the parcel and form No.M-29 (Ex.P1) and retained the case property with him.

3. After completion of investigation, challan against the accused was presented in Court. Finding a prima facie case for offence punishable under Section 21 NDPS Act, the appellant was chargesheeted to which he pleaded not guilty and claimed trial.

4. In support of its case the prosecution examined ASI Parveen Kumar as PW-2 who was heading the police party when the appellant was apprehended and recovery of contraband was effected from him; ASI Gurbachan Singh as PW-3, who was officiating as SHO of Police Station Sadar Ferozepur on 26.07.2014; recovery witness ASI Pippal Singh as PW-4 who was in the police party of ASI Parveen Kumar and formal witness Constable Sukhjant Singh as PW-1, who has taken the sample parcel from ASI Gurbachan Singh along with sample seal Form No.M-29 to the office of chemical examiner.

5. I have heard learned counsel for the appellant and learned State counsel and have perused the paper book and the lower Court record with their assistance.

6. Learned counsel for the appellant has argued that the case of the prosecution is suffering from infirmities as follows:

- (i) There is delay of four days in sending the sample to the office of chemical examiner.
- (ii) There is cutting in Ruqa Ex.PE at point 'A' vide which the time of *Ruqa* was altered and this is a material alteration.

- (iii) On recovery memo and other documents prepared at the spot, FIR number was mentioned, which shows that these documents were prepared after the registration of FIR.
- (iv) Sample seal was not sent to the chemical examiner as stated by PW-1.
- (v) No independent witness was joined and there was no explanation of non-joining the independent witness.
- (vi) There are material contradictions in the testimony of prosecution witness ASI Parveen Kumar PW-2 who has stated that the mobile recovered from the appellant was not functional while ASI Pippal Singh PW-4 has stated that the mobile phone recovered from the appellant was in working order.
- (vii) The visibility on the road where the appellant was apprehended, was about one kilometer. The appellant could have seen the police party from that distance and had tried to flee from the spot. It is highly improbable that he made no such attempt and ended up landing in police custody.
- (viii) The appellant was not specifically confronted with this fact when his statement was recorded that he was in 'conscious possession' of the contraband substance.

7. He has further argued that recovery of heroin alleged to have been effected from the appellant was quite small and such of small recovery are usually planted.

8. In support of his above contentions learned counsel for the appellant has relied upon the observations made in the cases of ***Randhir***

Singh versus State of Haryana, 2010(2) RCR (Criminal) 388; Paramjit Singh versus State of Punjab, 2008(2) RCR (Criminal) 514; Satpal @ Pala versus State of Haryana, 2015 (2) RCR (Criminal) 646; Kaka Singh versus State of Punjab, 2009(5) RCR (Criminal) 741; Amarjit Singh versus State of Haryana; 2008(3) RCR (Criminal) 502; Bahadur Singh versus State of Haryana; 2009(5) RCR (Criminal) 774 and Bakshish Singh Versus State of Haryana, 2011(5) RCR (Criminal) 11.

9. Learned State counsel has argued that the police party was on routine patrolling on 26.07.2014 when the appellant came across it and was apprehended on the basis of suspicion. There was no reason, chance or opportunity with the police party to join independent witness before conducting the search. Even otherwise, the police party made attempts to join the independent witness but failed and this fact in no manner vitiate the recovery effected from the accused or create any dent in the testimony of official witnesses which is worthy of reliance as they have no animus to depose against the appellant or for his false implication. None of the submission raised by learned counsel for appellant is material or can be given any weight to discard prosecution version or disbelieve testimony of prosecution witnesses. The cutting in the *Ruqa* is immaterial. ASI Parveen Kumar when appeared as PW-2, has admitted that there is overwriting on the time of sending *Ruqa* but he was never enquired about the reason for such cutting/overwriting. The perusal of the recovery memo and the other memos at the spot clearly show that the place in front of the FIR number was kept blank and it was filled up later on. This fact is quite apparent on perusal of these memos. When the investigating officer appeared in this case as PW-2

he was not cross-examined with regard to the above facts. Had he been cross-examined he would have given explanation to this effect. The argument of learned counsel for the appellant that no separate sample seal was sent, is also without merits as the sample seal was affixed on form No.M-29 Ex.P-1 itself, which was taken by Constable Sukhjant Singh in the office of Chemical Examiner. The contradiction referred by learned counsel for the appellant in the testimony of PW-2 ASI Parveen Kumar and SI Pippal Singh PW-4, are immaterial. The appellant was coming in a car from the side of village Shadinwala. Even if he had seen the police party from a distance of 1 kilometer, ASI Pippal Singh has stated that there was no chance of the accused to slip away as there was no other way for him to turn aside. He wanted to convey that the appellant had no turn or side row where he could take his vehicle, as such, he had no other option but to come straight.

10. Now I take the submission by learned counsel for the appellant in seriatim to find whether these can be given any weight to discard the prosecution version of recovery of contraband from the appellant. Firstly, I take the argument of learned counsel for the appellant about the delay in sending sample to the office of chemical examiner. There is delay of nine days in sending the sample to the chemical examiner in this case. Before sending the sample parcel, the case property remained in possession of ASI Gurbachan Singh, till it was handed over to Constable Sukhjant Singh on 31.07.2014. ASI Gurbachan Singh has specifically stated that the case property was not tempered with during the period it remained in his custody and his statement in this regard has gone unrebutted. In the citations

Randhir Singh versus State of Haryana (supra), *Paramjit Singh versus State of Punjab (supra)*, *Satpal @ Pala versus State of Haryana (supra)* and *Kaka Singh versus State of Punjab (supra)*, the delay in sending the sample from five days to 13 days, was one of the circumstances found in favour of the accused. However, in the case of *Mohan Lal Verses State of Rajasthan, 2015 (2) RCR (Criminal) 779* Hon'ble Apex Court has observed that mere delay in sending the sample is not a circumstance which weigh against the case of the prosecution if it is proved on file that the sample were kept intact till it reached the office of Chemical examiner. In the report of Chemical Examiner Ex. PM, this fact is specifically mentioned that the seal on the parcel were found intact and tallied with sample seal impression. PW-3 ASI Gurbachan Singh has stated that he did not temper with the parcel during the period it remained in his possession. Constable Sukhjant Singh had stated that he kept sample parcel intact during the period it remained in his possession till it was deposited in the office of Chemical Examiner. In these circumstances, the observations made in the cases referred by learned counsel for the appellant, are not applicable in the facts and circumstances of this case. The delay in sending the sample is immaterial in the absence of any evidence that sample was tampered, particularly when the report of the Chemical Examiner says that the seals were intact when it reached the office of the Chemical Examiner. The above argument of learned counsel for the appellant, as such, is discarded.

11. Much stress has been put by learned counsel for the appellant on the point that sample seal was not sent to the office of Chemical Examiner. He has referred to the statement of Constable Sukhjant Singh

PW-1, wherein he has stated that he had not carried the sample seals with him on the day the sample was deposited. Perusal of Lower Court record shows that testimony of this witness is factually correct. In this case no separate samples of seals were prepared. He had taken the samples and the form No.M-29, which was deposited with the office of Chemical Examiner. The sample of the seals were on the form No.M-29 itself. In view of the above fact the statement of Constable Sukhjant Singh PW-1 cannot be interpreted in any other manner to draw any other conclusion regarding the sample seal.

12. On *Ruqa* Ex.PE there is a cutting at point A. This cutting is on the time of sending the *Ruqa*. In the FIR the time of *Ruqa* is mentioned as 11.30 hours. No question was put to ASI Parveen Kumar that he has tempered with the *Ruqa* Ex.PE or has changed the time for particular reason. He was the best person to explain the cutting. As he was not enquired about this cutting, the same is immaterial.

13. The non-joining of independent witness is also not a circumstances which, in any manner, vitiate the testimony of the prosecution witnesses regarding the factum of search and seizure of contraband from the possession of appellant. When the recovery of contraband is effected from a public place and no one comes forward to witness the recover proceedings, it is not fatal to the case of the prosecution. Division Bench of this Court in the case of ***Ramesh Kumar Versus State of Punjab, 2013(4) RCR (Criminal) 320***, has observed that the testimony of official witnesses cannot be discarded until it is proved that they have any animus or hostility against the accused for his false implication. While discussing the question of non-

joining of the independent witnesses, it was observed that they are averse to join the police and depose in favour of prosecution as they are afraid of the fact that joining the police and deposing in favour of the prosecution may expose them to serious consequences. Hon'ble Division Bench in para 21 of the judgment has observed as follows:

*“21. It was held by the Hon'ble Supreme Court of India in **Ajmer Singh v.State of Haryana, 2012(2) RCR (Criminl) 132: 2010(2) Recent Apex Judgments (R.A.J.) 13: 2010(2) JT 175**; though in cases like the case in hand, independent evidence is required, but accused cannot be acquitted merely because no independent witness produced. Hence conviction was upheld inter alia on said ground. So, the contention raised by the learned counsel for the appellant to the effect that evidence of PW-5 (HC Sham Lal) and PW-7 (ASI Jai Kishan) cannot be relied upon for want of corroboration by the evidence of independent witness, is repelled, in view of the judgment (supra).”*

14. In the case of **Sumit Tomar versus State of Punjab, 2013(1) SCC 395**, Hon'ble Supreme Court on the point of non-examination of independence witness joined by the police, has observed as follows

“In view of the above discussion, we hold that though it is desirable to examine independent

witness, however, in the absence of any such witness, if the statements of police officers are reliable and when there is no animosity established against them by the accused, conviction based on their statement cannot be faulted with. On the other hand, the procedure adopted by the prosecution is acceptable and permissible, particularly, in respect of the offences under the Narcotic Drugs and Psychotropic Substances Act.”

15. In this case ASI Parveen Kumar PW-2 and ASI Pippal Singh PW-4 fully supported the prosecution case. In their cross-examination, no suggestion was given that they had any animus, reason or motive either for false implication of the appellant or to depose against him. Even in his statement recorded under Section 313 Cr.P.C. the appellant has not come up with any reason for his false implication by the police. This argument of learned counsel for the appellant that when the recovery is of small quantity of contraband the possibility of false implication is always there, has no basis in the facts and circumstances of this case. The citations referred by learned counsel for the appellant, on the above point, are not applicable to the facts and circumstances of this case.

16. When the statement of the appellant under Section 313 Cr.P.C. was recorded, it was specifically enquired from him that the recovery of contraband was effected from right *dubb* of the Chadder tied by him. This clearly suggests that the recovery of contraband was effected from the

conscious possession of the appellant. The mere fact that the word 'conscious possession' is not there in the statement recorded under Section 313 Cr.P.C., does not mean that the appellant was not apprised that the recover of the contraband was effected from his possession. A person who is carrying contraband on his person, until or unless specifically proves that it was not in his specific knowledge, can be presumed to be in conscious possession of the same. In the facts and circumstances of this case the above inference can be safely drawn and the appellant has nowhere attempted to rebut the same.

17. Learned counsel for the appellant has tried to impress upon the point that the recovery memo, Farad Jama Talashi (personal search memo), site plan Ex. PG, arrest memo Ex.PH etc. were not prepared before the registration of the FIR as these find mention of the FIR number at the top where description of the case has been mentioned. This submission of learned counsel for the appellant has no merits. It is clear on the perusal of the recovery memo Ex.PC, personal search memo Ex.PD rough site plan Ex.PG and arrest Memo Ex.PH, that the column against the FIR was kept blank and was filled up later on by using different pen and ink then the pen and ink with which the body writing of these documents was scribed. The investigating officer when appeared as PW-2 was not confronted with any such suggestion that he had prepared these documents after the registration of the FIR. This shows that the appellant had no such plea to raise when the prosecution witnesses were examined. Raising of plea at this stage has no meaning or is substantiated by any evidence on record.

18. Learned counsel for the appellant has pointed out discrepancies in the statements of ASI Parveen Kumar PW-2 and ASI Pippal Singh PW-4 on the point as to whether the mobile recovered from the appellant was functional or not. On consideration of this discrepancy I find that it is not material to go to the root of the case to discard the prosecution version. The recovery was made by the investigating officer ASI Parveen Kumar and it was not required that all the members of the police party will check the functioning of the mobile recovered from the appellant at the spot to find out that it was in working order or not. Being a minor discrepancy it can be easily overlooked.

19. In view of the facts and circumstances discussed above, the prosecution has successfully proved beyond any shadow of doubt that the recovery of 23 grams of heroin was effected from the possession of the appellant. I find no factual or legal infirmity in the judgment of the trial Court convicting the appellant for offence punishable under Section 21 NDPS Act. The conviction of the appellant under Section 21 NDPS Act is upheld.

20. Learned counsel for the appellant has requested for a lenient view with regard to the quantum of sentence, submitting that the appellant is an old man of the age of 68 years without any previous adverse antecedents. Recovery effected in this case is also of non-commercial quantity.

21. The perusal of the lower Court record shows that the appellant is 68 years of age. He is neither a previous convict nor has any previous adverse antecedents. Keeping in view the above facts the sentence of the appellant is modified and is reduced from rigorous imprisonment from one

year to rigorous imprisonment for nine months. However the sentence of fine is maintained.

22. The appeal is disposed of with above modification of sentence of the appellant.

14TH AUGUST, 2015
'raj'

(SURINDER GUPTA)
JUDGE