

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

CRA-S-3334-SB-2014

Date of decision: 21.09.2015

Vicky and another

..... Appellants

Versus

State of Haryana

..... Respondent

CORAM : HON'BLE MR. JUSTICE DARSHAN SINGH

1. Whether Reporters of the local papers may be allowed to see the judgment ? Yes
2. To be referred to the Reporters or not ? Yes
3. Whether the judgment should be reported in the Digest ? Yes

Present: Mr. Ravi Sharma, Advocate for the appellants.

Mr. Ashok Mutheraja, Deputy Advocate General
for the State of Haryana.

DARSHAN SINGH, J.

The present appeal has been preferred against the judgment of conviction dated 21.05.2014 passed by the learned Judge, Special Court, Yamunanagar, vide which accused-appellants Vicky and Vishu have been held guilty and convicted for the offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter called the 'Act') and the order on quantum of sentence dated 22.05.2014, vide which both the appellants have been sentenced to

undergo rigorous imprisonment for a period of four years and to pay a fine of Rs.20,000/-, each, and in default of payment of fine, to further undergo rigorous imprisonment for one year each.

2- As per the prosecution case, on 12.03.2013, PW5 SI Jai Pal Singh, the Investigating Officer in this case, along with other police officials was present at Khan Chand Chowk, Yamunanagar in connection with patrol duty. When he was talking to one Sushma wife of Ram Kumar, in the meantime, he received secret information that the accused-appellants would come from Saharanpur side on a silver colour motorcycle, without number, carrying ganja and in case Naka is laid at Truck Stand, they could be apprehended with ganja. Finding the information reliable, it was reduced into writing under Section 42(2) of the Act and was sent to the Deputy Superintendent of Police, Head Quarter, Jagadhri through Head Constable Ajay Kumar. The Investigating Officer along with other police officials laid Naka at Truck Stand, Yamunanagar. After sometime, the accused-appellants came on a motorcycle without number from Saharanpur side. They were apprehended. A plastic bag of white colour was held by accused-appellant Vishu. The Investigating Officer asked them that he had suspicion that they were carrying some contraband in the bag and served notice under Section 50 of the Act, requiring the accused as to whether they wanted to get their search conducted through him or any gazetted officer or a magistrate. Vide their consent memo Ex.PC, the accused-appellants opted that they want to get their search conducted by some

gazetted officer. Thereafter, DSP Phool Kumar reached at the spot and he directed the Investigating Officer to check the bag carried by the accused-appellants. On checking by the Investigating Officer, the white bag carried by the accused-appellants was found containing 3 kilograms and 200 grams ganja. Out of which, two samples of 100 grams each were separated. The samples and residue were converted into separate sealed parcels and were sealed with seal 'JS' and 'PK'. Thereafter, the sample parcels and residue parcel were taken into possession vide recovery memo Ex.PE. The DSP kept his seal with him whereas the seal of the Investigating Officer was handed over to ASI Balbir Singh. Ruqqa Ex.PM was sent to police station. On the basis of which, formal FIR Ex.PU was registered. The accused were arrested. The Investigating Officer prepared the site plan of the place of recovery Ex.PN.

3- While returning to the Police Station, the Investigating Officer met Inspector Sandeep Kumar, SHO Police Station City Yamunanagar near Jyoti Palace. The Investigating Officer produced the accused, witnesses and the case property before the SHO, who verified the recovery. He put his seal 'SK' on the parcels of the case property. Case property was deposited with the Moharir Head Constable. On the next day, the accused along with the case property were produced before the Illaqa Magistrate. Sample parcels were sent to the Forensic Science Laboratory, Haryana, Madhuban, Karnal for examination. On receipt of the report of the FSL Ex.PL and completion of formalities of the investigation, the report under Section 173 of Code of Criminal

Procedure, 1973 (hereinafter called 'Cr.P.C.') was presented in the Court.

4- The accused appellants were charge sheeted for the offence punishable under Section 20 of the Act vide order dated 13.06.2012 by the learned trial Court, to which the appellants pleaded not guilty and claimed trial.

5- In order to substantiate its case, prosecution examined as many as eleven witnesses.

6- When examined under Section 313 Cr.P.C., both accused-appellants pleaded innocence and false implication.

7- No evidence was adduced in their defence by the accused-appellants.

8- Appreciating the evidence on record and the contentions raised by learned counsel for the parties, the accused appellants were held guilty and convicted for the offence punishable under Section 20 of the Act and were awarded the sentence as mentioned in the upper part of the judgment.

9- Aggrieved with the aforesaid judgment of conviction and order of sentence the present appeal has been preferred.

10- I have heard Mr. Ravi Sharma, Advocate, learned counsel for the appellants, Mr. Ashok Muthreja, learned Deputy Advocate General for the State of Haryana and have meticulously examined the record of the case.

11- Initiating the arguments, learned counsel for the appellants contended that the recovery in this case is alleged to have been

effected on the basis of secret information and Nakabandi at a public place but no independent witness has been associated nor any explanation has been given by the Investigating Officer for non-joining of the independent witnesses, which renders his conduct and prosecution case doubtful.

12- He further contended that the entire documents in this case have been fabricated later on. The notice under Section 42 of the Act Ex.PA, notice under Section 50 of the Act Ex.PB and the search memo Ex.PC are alleged to have been prepared even before taking the search of the accused but all the particulars are mentioned therein, which shows the clear fabrication of the documents.

13- He further contended that the Investigating Officer has not collected any evidence to connect the accused with the motorcycle allegedly being used by them to transport the contraband.

14- He further contended that there are material contradictions in the statements of the prosecution witnesses and the presence of PW9 Phool Kumar DSP is extremely doubtful. He further contended that in fact the appellants, who are the real brothers, have been falsely implicated by the police as SI Jai Pal Singh has earlier falsely implicated their father, who had moved the complaints against him. Due to that grudge, the appellants have been falsely implicated in this case.

15- On the other hand, Mr. Ashok Muthreja, Deputy Advocate General for the State of Haryana, learned State counsel contended that from the statements of PW4 ASI Balbir Singh, PW5 SI Jai

Pal Singh, the Investigating Officer of the case, it is established that 03 kilograms and 200 grams ganja was recovered from the conscious possession of the appellants. The search and seizure has been conducted in the presence of PW9 Phool Kumar, DSP Head Quarter, Yamunanagar. He has also fully corroborated the prosecution version. The case of the prosecution is fully corroborated from the testimony of PW7 Inspector Sandeep Kumar, the SHO of Police Station - City, Yamunanagar before whom the accused, case property and the witnesses were produced. He contended that mere non-joining of the independent witness is no ground to reject the testimonies of the official witnesses. To support his contentions, he relied upon case ***Kashmiri Lal Vs. State of Haryana 2013(3) RCR (Criminal) 259.***

16- He further contended that it was the duty of the accused to establish that he has been falsely implicated but accused have not led any defence evidence to establish their defence plea. To support his contentions, he relied upon ***Joga Singh Vs. State of Punjab 2013(1) RCR (Criminal) 47.*** Thus, he contended that there is no legal infirmity in the conviction of the appellants recorded by the learned trial Court.

17- I have duly considered the aforesaid contentions.

18- I found considerable substance in the contentions raised by learned counsel for the appellants. It is the admitted case of the prosecution that while Investigating Officer SI Jai Pal Singh was present at Khan Chand Chowk, Yamunanagar and was talking to one Sushma wife of Raj Kumar, he received the secret information against the

appellants. Thereafter, he held the Nakabandi at Saharanpur Road at the bridge of canal towards the Truck Stand and, thereafter, the accused-appellants are alleged to have arrived on the motorcycle and were apprehended on the signal of the secret informer. So, the accused in this case are alleged to have been apprehended on the basis of prior secret information as a result of Nakabandi held at a public place. But no independent witness has been associated by the Investigating Officer. He has also not rendered any explanation for the non-joining of the independent witnesses. Rather, in the cross-examination he has stated that he did not join any independent witness after receiving the secret information. He further deposed that no public man was joined in the recovery proceedings. The presence of the public man at such a busy public place cannot be disputed. But the Investigating Officer has not made any effort to associate any public man in the investigating of the case, nor any explanation has been rendered by him for non-joining of the independent witnesses in the investigation of the case. No doubt, mere this fact that the independent witnesses have not been associated and the prosecution case is based solely on the testimonies of the official witnesses itself cannot be a ground to discard the testimonies of the prosecution witnesses but in those cases where no effort at all has been made by the Investigating Officer to join the public witness, the Court will put to the guards and as a rule of caution the prosecution case is to be minutely, carefully and consciously examined and even the minor circumstances will assume significance. Case *Kashmiri Lal Vs. State of*

Haryana (supra) relied upon by learned State counsel is distinguishable on facts as in that case the police officials had requested the persons present on the Dabha to join as witnesses but they decline to cooperate, whereas in the instant case, as per the testimony of the Investigating Officer, he had not made any effort at any stage of the investigation to rope in the public witness.

19- The documents prepared by the Investigating Officer are extremely doubtful. The prosecution is bound to establish its case in the manner alleged by it. As per prosecution story, on receiving the secret information, the Investigating Officer sent the information/notice Ex.PA to the superior police officer. After the apprehension of the appellants, the Investigating Officer had served upon them the notice under Section 50 Ex.PB. Then it is alleged that PW9 DSP Phool Kumar arrived at the spot and on his direction, the search of the police officials was conducted in the presence of the appellants. The memo Ex.PC to this effect was prepared. All these three documents are alleged to have been prepared even before taking the search of the accused-appellants. But it is very surprising that on all these three documents, the full particulars of the case i.e. name of the police station, State through SI Jaipal Singh, name and particulars of both the appellants, case FIR number and offence etc. are categorically mentioned in the same sequence and ink. It is highly surprising that even on receiving the secret information the Investigating Officer came to know about the actual narcotic substance in the possession of the appellants and he has mentioned the offence punishable

under Section 20 of the Act in the notice under Section 42 Ex.PA itself. Same is the position with respect to the documents Ex.PB, the notice under Section 50 of the Act and Ex.PC the memo of the search of the police officials. There is no explanation as to how and in what manner the Investigating Officer came to know about the nature of the contraband in the possession of the appellant even before taking their search and how the FIR number and other particulars came to be mentioned in these documents, which shows that these documents have simply been prepared later on just to complete the paper work which renders the entire prosecution case doubtful.

20- There are also some contradictions in the prosecution case, which further renders the story of the prosecution unreliable. As per the ruqqa Ex.PM, immediately on apprehension of the accused-appellants, the Investigating Officer served them with a notice under Section 50 of the Act to obtain their consent which were signed by the appellants and, thereafter, PW9 Phool Kumar DSP arrived at the spot but the statements of witnesses are otherwise. PW4 ASI Balbir Singh stated that the consent memo was prepared in the presence of DSP Head Quarter namely Phool Kumar. PW5 SI Jaipal Singh the Investigating Officer has also deposed that the consent of the accused was obtained in the presence of the DSP and no consent was obtained prior to the reaching of the DSP at the spot. Whereas, PW9 DSP Phool Kumar has stated that when he reached at the spot SI Jai Pal Singh produced before him the notice under Section 50 of the Act, which was seen by him. So, PW5 SI Jai Pal Singh

the Investigating Officer and PW4 ASI Balbir Singh have deposed against the basic story of the prosecution mentioned in the ruqqa Ex.PM, on the basis of which, FIR has been registered.

21- Ex.PC is the memo with respect to the search of the police officials. In the memo Ex.PC it is mentioned that before taking the search of the accused Vishu and Vicky, as per the directions of the DSP Head Quarter, present at the spot, the Investigating Officer gave his search to the accused and after that the Investigating Officer took the search of the police officers present at the spot in the presence of the accused. So, as per the memo Ex.PC the search of the Investigating Officer has been taken by the accused-appellants and the search of other police officials was conducted by the Investigating Officer but the evidence is entirely otherwise. PW9 DSP Phool Kumar stated that he had taken the search of the Investigating Officer vide memo Ex.PC. He did not depose about the search of the other police officials. PW4 ASI Balbir Singh stated that the DSP conducted their personal search and the personal search memo Ex.PC was prepared. PW5 SI Jai Pal Singh stated that the DSP conducted their personal search and the personal search memo Ex.PC was prepared. All the three prosecution witnesses are deposing against the documentary evidence i.e. memo Ex.PC. In the memo Ex.PC, it is nowhere mentioned that the search of the Investigating Officer and other police officials was taken by PW9 DSP Phool Kumar. So, all the three witnesses have deposed against the documents prepared by the Investigating Officer.

22- Even the presence of PW9 DSP Phool Kumar at the place of recovery seems to be doubtful. It is alleged that the memo Ex.PC with respect to the personal search of the police officials was prepared in the presence and the personal search was conducted on the directions of the DSP but the memo Ex.PC has been prepared by the Investigating Officer and signed by ASI Balbir Singh and HC Rohan. This memo does not bear any attestation of PW9 DSP Phool Kumar. If he would have been present at the spot and the searches of the police officials would have been conducted on his direction and in his presence, he must have attested this memo also. Then the motorcycle being used by the accused has been taken in possession vide memo Ex.PG. This memo also does not bear any signature or attestation of PW9 DSP Phool Kumar. This memo is also very important as, as per the prosecution story, the appellants were travelling on this motorcycle while carrying the contraband but surprisingly the signatures of PW9 DSP Phool Kumar are not available on this memo Ex.PG. Similarly, the memo Ex.PF is the memo with respect to the specimen seal impressions, alleged to have been prepared at the spot, which also bears the specimen seal impressions of the seal of the DSP but again, this memo does not bear any signature and attestation of PW9 DSP Phool Kumar. If PW9 DSP Phool Kumar would have been present at the spot, he must have attested all these documents. So, the presence of PW9 DSP Phool Kumar at the place of recovery is extremely doubtful, which further renders the prosecution case doubtful.

23- The prosecution has not been able to establish in what

form the contraband was at the time of its recovery. PW4 ASI Balbir Singh stated that the ganja allegedly recovered was the crushed form of leaves and colour was of black green, whereas PW5 SI Jai Pal Singh, the Investigating Officer of the case has stated that the colour of the contraband was light brown and contraband was in the shape of sepals (Patiyan). In the report of the Chemical Examiner Ex.PL, the physical appearance of the contraband has been noted down as greenish brown vegetative material having flowering/fruiting tops and seeds etc. So, PW4 ASI Balbir Singh has not even able to tell correctly the physical appearance of the contraband and his statement is contradictory to the testimony of the Investigating Officer as well as the report of the FSL, which is a material contradiction and even rendered his presence at the spot doubtful as if he would have been present at the spot and had seen the contraband, he would have been able to tell the correct position of the contraband.

24- It is alleged that at the time of apprehension the accused was travelling on a motorcycle. The prosecution has not led any evidence to establish any connection between the appellants and the motorcycle. The Investigating Officer has not collected any evidence with respect to the ownership of the said motorcycle. Though, the same was also taken into possession by the Investigating Officer. The Investigating Officer has deposed in the cross examination that he does not know who was the owner of the motorcycle on which the alleged contraband was found. This is again a lacuna in the case of the prosecution.

25- I do not found any substance in the plea raised by learned State counsel that it was the duty of the accused to establish his innocence and false implication. This contention is against the well settled principle of the criminal jurisprudence. It is settled proposition of law that it is incumbent upon the prosecution to establish its case beyond shadow of reasonable doubt. The prosecution cannot take any benefit in the weakness of the defence of the accused. It is not that if the accused is not able to prove his defence plea the case of the prosecution will automatically be proved. No such principle of law has been laid down in case ***Joga Singh Vs. State of Punjab*** (supra) relied upon by learned State counsel. So, mere this fact that the accused appellants have not led any evidence to prove the defence plea raised by them that their father had moved some complaints against PW5 SI Jai Pal Singh and due to that grudge they have been falsely implicated is no ground to conclude that the case of the prosecution stands proved.

26- Thus, keeping in view my aforesaid discussion, as no independent witness has been associated in spite of ample opportunity, the material documents have been manipulated later on just to complete the paper formality which renders the entire proceedings conducted by the Investigating Officer doubtful, the presence of PW9 DSP Phool Singh is extremely doubtful and there are material contradictions in the case of the prosecution. When all these circumstances are taken together the case of the prosecution is rendered doubtful. Consequently, the conviction of the appellant as recorded by the learned trial Court and the sentence

awarded to them cannot be sustained in the eyes of law.

27- Resultantly, the present appeal is hereby allowed. The conviction and sentence of the appellants is hereby set aside. As a result of benefit of doubt, both the appellants namely Vicky and Vishu are hereby acquitted of the charges. They be released from custody forthwith, if not detained in any other case.

Dated: 21.09.2015.

sunil yadav

**(DARSHAN SINGH)
JUDGE**