

CRA S-626-SB of 2008

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

CRA S-626 SB of 2008

Decided on: 26.7.2016

State of Haryana

... Appellant

Versus

Kashmira

... Respondent

CORAM: Hon'ble Mr. Justice Jitendra Chauhan

Present:- Mr. Naveen Kaushik, Additional AG, Haryana

Mr. J.S. Yadav, Advocate,
for the respondent.

JITENDRA CHAUHAN.J.

This appeal is directed against judgment dated 16.11.2007, passed by Special Judge, Panipat whereby the accused-respondent was acquitted in case FIR No.24 dated 18.5.2006 under Section 18 of the Narcotic Drugs Psychotropic Substances Act, 1985 (for short "the Act"), Police Station, Bapoli, District Panipat.

2. In brief the case of the prosecution as recorded in the judgment by the Trial Court is as under:-

"As per the allegations contained in FIR on 18.5.2006, ASI Jai Bhagwan alongwith EASI Ishwar Singh, EHC Samunder Singh and constable Pawan Kumar was present in front of the grain market in connection with routine patrolling duty. There he received a secret information that accused Kashmira son of Mansa Ram, resident of Village Tamsabad, who used to indulge

in the sale of narcotics was likely to come on his motor-cycle make Bajaj CT 100 from village Tamsabad Chowk, Samalkha and at that time, he was wearing kurta and pajam and if he could be stopped and checked, then some narcotics could be recovered from his possession. Thereafter, a naka was laid down and after some time the accused came from the side of village Jalalpur on his motor-cycle and on seeing the police party, he slowed down the speed of the motor-cycle and then started moving falsely but he was apprehended by him with the help of other police officials. On interrogation he disclosed his name and address. Since ASI Jai Bhagwan suspected that he was carrying some narcotics, so he served a notice under section 50 of the Act upon the accused asking his option as to whether he intended to get his search conducted through a Gazetted Officer or Magistrate. In response to the same the accused opted to give search to a Gazetted Officer. Thereafter, Shri Kuldeep Singh, DSP, Samalkha was telephonically informed that after some time said DSP Kuldeep Singh arrived at the spot. As per his written direction, he searched the person of the accused in the presence of one independent witness Raja Ram and found that one piece of polythene which had been wrapped around the waist under shirt of the accused contained opium. On weighment the same was found to be 1 Kg. Out of the same two samples of 20 grams each were separated as samples and put in small plastic dibbies and converted into parcels. Remaining opium was put in another

plastic container and converted into parcels. Thereafter, both samples as well as residue opium were duly sealed with seal JB. DSP Kuldeep Singh also affixed his seal KS o ne on each parcel and t hereafter those were taken in possession. Seal after use was handed opver to ASI Ishwar Singh and DSP Kuldeep singh retained his seal himself. Since, the accused did not have any permit or licence to possess 1 Kg. of opium, so an information was sent to the police station through constable Pawan Kumar for registration of the case.”

3. After appraisal of the evidence, the learned Trial Court acquitted the accused/respondent on the ground that there was non-compliance of Section 42 of the Act as the information was not reduced into writing and the same was not sent to the higher officer. It was further observed by the Trial Court that the notice Ex.PD served upon the accused soliciting his consent for being examined in the presence of a Gazetted Officer or a Magistrate, was not attested by the witnesses present on the spot. Further, the reply Ex PD/1 given in pursuance to notice Ex.PD was also not attested by any of the witnesses who were present on the spot. The Trial Court further went on to observe that the independent witness, namely, Raja Ram was not examined by the prosecution and he was examined as a defence witness. While appearing as defence witness, he deposed that no such contraband was recovered from the accused on the relevant date. There is further finding recorded by the Trial Court that as per the case of the prosecution, the notice under Section 50 of the Act was served upon the accused prior in time and thereafter on telephonic call, Kuldeep Singh, DSP

was called on the spot whereas, in the testimony of ASI Jai Bhagwan, PW3, it has come on record that the notice Ex.PD under Section 50 of the Act was served in the presence of DSP Kuldeep Singh. Once the presence of DSP Kuldeep Singh was secured on the spot, there was no necessity of serving notice under Section 50 of the Act. Therefore, the notice Ex.PD lost its significance. On these premises, the learned Trial Court acquitted the accused/respondent vide judgment dated 16.11.2007.

4. Feeling dis-satisfied, the State of Haryana has preferred the instant appeal against the judgment dated 16.11.2007, passed by the Trial Court.

5. It is contended by the learned State Counsel that the Trial Court fell in error in not appreciating the fact that there was a complete compliance of Section 42 of the Act. The accused was given every opportunity to get himself searched in the presence of a Gazetted Officer or a Magistrate. The mere fact that no information was forwarded to the Senior Officer in terms of Section 42 of the Act does not vitiate the whole proceedings, particularly, when the other evidence in the shape of prosecution witnesses is present on the record.

6. On the other hand, the learned counsel for the respondent/accused vehemently opposes the contentions raised by the learned counsel for the appellant and submits that the non-compliance of the provisions of Section 42 of the Act has resulted into vitiation of the whole of the proceedings. The learned trial court has rightly interpreted the provisions.

He cites “Beckodan Abdul Rahiman versus State of Kerala”

2002(2)RCR(Criminal)387(SC)” to contend that the official who takes down information in writing or records the grounds under the proviso to Section 42 should forthwith send a copy thereof to his immediate officer superior. The non-compliance of the provisions affects the case of the prosecution. Reliance has further been placed on authority “**State of Haryana Vs. Bajinder Singh**” **2007(3)RCR(Criminal 893(P&H)**”.

7. I have heard the learned counsel for both the parties and have gone through the record of the case.

8. Admittedly, the secret information was neither reduced into writing nor the information was sent by the Investigating Officer to his Senior Officer. There is no denial to this fact even by the State Counsel. In **Beckodan Abdul Rahiman’s Case** (Supra); and **Bajinder Singh’s Case** (Supra), it has been held by Hon’ble the Supreme Court as well as this Court that sending of information by the Investigating Officer to the Senior Officer is mandatory if the case is registered on secret information. The effect of non-compliance of the provisions is that the whole proceeding stands vitiated. This Court concurs with the view taken by the Trial Court. The independent witness was not examined as a prosecution witness. The notice Ex.PD and the reply Ex.PD/1 were not attested from by any of the persons who were present on the spot. Moreover, the presence of DSP Kuldeep Singh on the spot is also doubtful because as per the case of the prosecution, the accused was first served upon notice seeking his consent for being examined in the presence of either a DSP or a Magistrate. Once the DSP was present on the spot, there was no necessity of serving notice Ex.PD upon the accused. This

aspect of the matter further weakens the case of the prosecution. It is a settled law as has been held in **C. Antony Vs. K.G. Raghavan Nair, 2002(4) RCR (Criminal) 750** that even if a second view on appreciation of evidence is possible, the Court will not interfere in the acquittal of the accused. In the cases of acquittal, there is double presumption in his favour; first the presumption of innocence, and secondly the accused having secured an acquittal, the Court will not interfere until it is shown conclusively that the inference of guilt is irresistible.

9. Having considered the matter, this Court is of the opinion that the Trial Court appreciated the evidence in right perspective. There is no perversity, illegality or irregularity calling for interference by this Court. Consequently, finding no merit in the present appeal, the same is hereby dismissed.

26.07.2016
SN

(JITENDRA CHAUHAN)
JUDGE

Whether reportable :	Yes/No
Whether speaking/reasoned :	Yes/No