

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRA-S-390-SB-2004

Date of Decision: February 3, 2016

Atma Singh @ Baj Singh

...Appellant

Versus

State of Punjab

...Respondent

CORAM: HON'BLE MR. JUSTICE NARESH KUMAR SANGHI

Present: Mr. Mandeep Singh, Advocate,
for Mr. H.S. Brar, Advocate,
for the appellant.

Mr. P.S. Paul, DAG, Punjab,
for the respondent.

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| 1. | <i>Whether Reporters of local papers may be allowed to see the judgment?</i> | YES |
| 2. | <i>To be referred to the Reporters or not?</i> | YES |
| 3. | <i>Whether the judgment should be reported in the Digest?</i> | YES |

NARESH KUMAR SANGHI, J (Oral)

Challenge in the present criminal appeal is to the judgment of conviction and order of sentence, dated 15.1.2004, passed by learned Judge, Special Court, Sangrur, whereby the appellant, Atma Singh @ Baj Singh, son of Bachna Singh, resident of Rattangarh, Police Station, Ratia, District Fatiabad (Haryana), was held guilty for the offence punishable under

Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for brevity, 'NDPS Act'), and ordered to undergo rigorous imprisonment for ten years besides payment of fine of rupees one lac and in default thereof to undergo further rigorous imprisonment for a period of two years.

Learned counsel for the appellant has raised the following arguments:-

- i. The investigating officer and the complainant is one and the same person and, as such, the veracity of the prosecution case put up by the complainant cannot be believed;
- ii. There was huge delay in sending the samples to the Chemical Examiner, Punjab, at Chandigarh, because the same were allegedly drawn on 18.2.2002, while delivered on 20.3.2002 in the office of the Chemical Examiner;
- iii. The conscious possession of two gunny bags containing poppy husk with the appellant could not be substantiated by the prosecution;
- iv. The samples were not drawn by mixing the whole

contents properly;

- v. While recording the statement under Section 313, Cr.P.C., of the appellant, no question with regard to conscious possession of the contraband was put to him;
- vi. Ajaib Singh, the only independent witness from the public, was not examined during trial by the prosecution;
- vii. Copies of the FIRs (Exs. D5 and D6) of Police Station, Lehra, would clearly show that Ajaib Singh, i.e. the same person who was associated as a public witness in the present case, was also a prosecution witness in the said cases and, as such, he was a stock witness of the police belonging to Police Station, Lehra, District Sangrur;
- viii. There was non-compliance of sub-section (6) of Section 50 of the NDPS Act, since after effecting search of the appellant, the report was not sent to the senior police officers;
- ix. No Gazetted officer or the Executive Magistrate was

summoned at the spot from where the alleged poppy husk was recovered, to witness the recovery;

- x. All the documents were scribed in Punjabi language, while the appellant, who belonged to Ratia, District Fatiabad (Haryana), was a Hindi speaking person and did not know Punjabi, as such, his signatures were obtained without making him understand the contents of the documents;
- xi. Initially the samples were sent to the Chemical Examiner, Punjab, at Chandigarh on 25.2.2002, but he found certain irregularities in the forwarding letter and, as such, the samples were not retained by him and later on the same were once again sent and delivered in the office of the Chemical Examiner on 20.3.2002;
- xii. It has come in the deposition of Inspector Jaswinder Singh (PW-5) that the seal used for sealing the samples and the residue of the alleged contraband, was returned by Ajaib Singh on the very next day of the recovery, which would create doubt that the

samples remained in the police possession for a long time in the same state in which those were originally sealed;

- xiii. There were severe contradictions in the depositions of the prosecution witnesses;
- xiv. The grounds of arrest of the appellant were neither assigned nor the relative or friend of the appellant was informed regarding his arrest; and
- xv. Learned Trial Court without assigning cogent reasons has returned the verdict of guilt against the appellant.

On the other hand, learned counsel for the State has vehemently opposed the arguments raised by learned counsel for the appellant and submitted that the investigating agency had no enmity with the appellant to falsely implicate him in the present case; there was no delay in sending the samples to the Chemical Examiner since after seven days of the recovery of the contraband, the samples were sent on 25.2.2002, but due to deficiency in the forwarding letter, the samples were sent back by the Chemical Examiner to the investigating agency and, as such, time was consumed in delivering the samples; the

appellant was found sitting on the gunny bags containing poppy husk and from the said fact it would be clear that he was in conscious possession of the poppy husk; no prejudice has been caused to the appellant from the fact that no question was put to him in his statement recorded under Section 313, Cr.P.C., regarding conscious possession of the contraband; mere non-examination of Ajaib Singh, a person from the public, would not lead this Court to assume that whole case of the prosecution was false; the investigating officer had made an offer to the appellant to call for the Gazetted Officer or the Magistrate at the spot, but the appellant had himself declined the said offer of police and posed confidence in the Investigating Officer; and that the contradictions pointed out by learned counsel for the appellant were bound to occur in the depositions of the prosecution witnesses when they were examined after long lapse of time. He prayed for dismissal of the appeal.

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

The brief facts of the case are that on 18.2.2002,

Inspector Jaswinder Singh (PW-5), who was then posted as Station House Officer, Lehra, along with the fellow police officials, in a Government vehicle, was on patrolling. Ajaib Singh (not examined) met and associated in the police party. During patrolling, the police party noticed that in a pit the appellant was sitting on two gunny bags. On suspicion, he was intercepted. Inspector Jaswinder Singh (PW-5) suspected that there was intoxicant in the gunny bags on which the appellant was sitting. Offer was made to the appellant that if so desired, the Gazetted Officer or the Magistrate could be summoned at the spot to witness the search of the gunny bags. The appellant reposed confidence in Inspector Jaswinder Singh (PW-5) and asked him to conduct the search. On opening of the mouth of gunny bags, Inspector Jaswinder Singh (PW-5) found that both the gunny bags were full of poppy husk. Samples were drawn, sealed and taken into police possession. The residue was also taken into police possession. During investigation at the spot, the appellant was arrested and his personal search was effected. A pistol and five live cartridges were recovered. The same were also taken into police possession. The police memo was

sent to the Police Station, Lehra, for registration of the case, on the basis of which FIR No. 20, dated 18.2.2002 (Ex. PH/1), for the offence punishable under Section 15 of the NDPS Act, was registered at Police Station, Lehra.

After arrival of the police party at the police station, the case property was deposited with the Moharrir Head Constable Joginder Singh (PW-2).

The samples were sent to the Chemical Examiner, Punjab, at Chandigarh. After completion of the investigation, the charge-sheet (report under Section 173, Cr.P.C.), was presented before learned Court below. Finding a *prima facie* case, the charge under Section 15 of the NDPS Act, was framed against the appellant to which he pleaded not guilty and claimed trial.

In order to substantiate its allegations, the prosecution examined the following witnesses:-

HC Dharamvir Singh (PW-1). Deposed that on 18.2.2002, during patrolling he was accompanying the Station House Officer. The appellant was apprehended while in possession of two gunny bags

containing poppy husk. He reiterated the facts in his deposition as mentioned in the initial part of this judgment. In his cross-examination, he fairly conceded that recovery of the contraband was not got verified from the Deputy Superintendent of Police. He also admitted that all the documents were prepared at the spot by him (HC Dharamvir Singh).

HC Joginder Singh (PW-2). Tendered his affidavit (Ex. PE) to be read in evidence, *inter alia*, deposing that the case property was handed over to him on 18.2.2002, when he was posted as Moharrir Head Constable at Police Station, Lehra.

Constable Harpal Singh (PW-3). Tendered his affidavit (Ex. PF) to be read in evidence, *inter alia*, deposing that on 25.2.2002, the samples were handed over to him by the Moharrir Head Constable to deliver the same to the Chemical Examiner, Punjab, at Chandigarh. He further deposed that for want of seal on the Road Certificate, the samples could not be delivered to the office of the Chemical Examiner and

after getting the said shortcoming removed, the samples were again taken and delivered to the office of the Chemical Examiner on 20.3.2002.

Smt. Shushobhita Kumari Sharma, Deputy Chemical Examiner, Government of Punjab, Chandigarh (PW-4). Deposed that the Chemical Examination Report (Ex. PG) was prepared under her signatures. She fairly conceded that percentage of Morphine was not detailed in the report (Ex. PG).

Inspector Jaswinder Singh (PW-5). Deposed that on 18.2.2002, he was posted as Station House Officer, Police Station, Lehra, and further deposed regarding the patrolling; joining of Ajaib Singh in the police party; finding the appellant sitting over the gunny bags containing poppy husk; offer made to the appellant for calling the Gazetted Officer or the Executive Magistrate at the spot; drawing of the samples from two gunny bags and sealing the samples etc.; after completion of the investigation at the spot, the samples were deposited with the

Moharrir Head Constable of Police Station, Lehra; and that after completion of the investigation, the charge-sheet (report under Section 173, Cr.P.C.) was presented before the learned Court below.

During cross-examination, he fairly conceded that he had not prepared a single document at the spot, however, the same were scribed on his dictation. He also conceded that the case property was not produced before the Area Magistrate. He further admitted that the accused belonged to Haryana and his village was about 80-90 kilometers away from the spot. He further admitted that Ajaib Singh was known to him since he was visiting the police station in connection with Panchayat work etc. It was also admitted by him that the seal used for sealing the samples etc., was returned by Ajaib Singh on the very next day.

After completion of the prosecution evidence, the statement in terms of Section 313, Cr.P.C., of the appellant, Atma Singh, was recorded. He denied the incriminating evidence

emerging against him and in answer to the last question stated that nothing was recovered from him. He alongwith Balwinder Singh and Jagsir Singh had come to Punjab for purchase of buffaloes. They were arrested from the house of Balwinder Singh at village Daska. Rupees thirty-thousand were snatched by HC Dharamvir Singh and the matter was brought to the knowledge of the Panchayat and also to DSP Indermohan Singh.

In defence evidence, HC Ranjit Singh was examined as DW-1. He deposed that on 18.2.2002, the case properties of the cases belonging to FIR No. 20, dated 18.2.2002; FIR No. 22, dated 18.2.2002; and FIR No. 23, dated 18.2.2002, all under Section 15 of the NDPS Act, were deposited in the police station. During cross-examination, he fairly admitted that the entries in the Daily Diary Register and in Register No. 19, were scribed by the Moharrir Head Constable.

Defence witness Constable Harjoginder Singh (wrongly numbered as DW-1) had produced the summoned record pertaining to FIR Nos. 22 and 23, dated 18.2.2002 (Exs. D3 and D4), registered in the Police Station, Lehra, against Jagsir Singh and Balwinder Singh.

After tendering copies of FIR No. 90, dated 21.6.2002(Ex. D5) and FIR No. 10, dated 11.7.2002, Ex. D6), the defence evidence was closed.

After hearing counsel for the parties, learned Trial Court held the appellant guilty and awarded the sentence as noticed in the initial part of this judgment.

The first argument of learned counsel for the appellant that on the complaint of Investigating Officer, the FIR of the present case was registered and, as such, the whole case of the prosecution should be disbelieved, is not tenable. In the matter of **State v. Jayapaul, 2004 (2) R.C.R. (Criminal) 317**, Hon'ble the Supreme Court has held that the whole case of the prosecution cannot be thrown on the ground that the Investigating Officer and the complainant is one and the same person.

The next argument of learned counsel for the appellant that there was huge delay in sending the samples to the Chemical Examiner might not be beneficial to him in isolation but the Court has to see totality of the facts and circumstances of each case. In the present case, the alleged

contraband was recovered on 18.2.2002 while the samples were delivered to the office of the Chemical Examiner, Punjab, at Chandigarh, on 20.3.2002. No doubt, in the interregnum the samples were also sent on 25.2.2002, but the same were not accepted by the Chemical Examiner for want of deficiency in the documentation. The fact remains that the samples were delivered in the office of the Chemical Examiner, Punjab, at Chandigarh, on 20.3.2002 and there was no explanation for such a huge delay. The said delay would assume significance when Inspector Jaswinder Singh (PW5) very fairly conceded during his cross-examination that the seal used for sealing the samples was handed over to Ajaib Singh (a witness from the public), but it was returned by him (Ajaib Singh) on the very next day of the recovery. It will create doubt in the mind of the Court that if the same seal, which was used for sealing the samples, was available with the investigating officer, then there was every chance of tampering with the samples before sending the same to the Chemical Examiner. This fact assumes more importance when during investigation the police had associated a person who was a stock witness. Copies of the FIRs (Exs. D5 and D6) of

the same police station, i.e. Lehra, would clearly show that Ajaib Singh was a witness of the police in the said cases relating to the NDPS Act.

The investigating agency though joined Ajaib Singh, a person from public, but he was already a witness in two more cases, but failed to examine him during trial, which would further create a doubt in the veracity of the prosecution case.

There appears to be substance in the submission of learned counsel for the appellant when he submitted that the appellant belonged to Ratia (Haryana) and was a Hindi speaking person. All the documents prepared by the investigating agency were in Punjabi. It has nowhere emerged on record that before obtaining the signatures of the appellant on different papers by the police, the contents thereof were explained to him (appellant).

There appears to be substance in the statement of learned counsel for the appellant when he submitted that neither the Executive Magistrate nor the Gazetted Officer, was summoned at the spot to witness the recovery. While discussion this issue, this Court is conscious of the fact that non-compliance

of Section 50 of the NDPS Act, would be mandatory only when the contraband is recovered from the person of the accused. But in view of the backdrop and the shortcomings in the prosecution case, this issue also assumed importance in favour of the appellant.

While perusing the material, this Court finds that the samples were not drawn while mixing the whole contents properly. If the investigating officer had effected the recovery from the upper part of the gunny bags, then it cannot be said that the samples drawn were representative samples of the whole bulk. This issue would assume importance when the report of the Chemical Examiner (Ex. PG) is perused, in which percentage of Morphine has not been described by the Chemical Examiner. No doubt, the Court cannot and should not through the whole case of the prosecution on that score and the Court has to take into consideration the overall issues involved in the case.

The Court is not much impressed from the argument raised with regard to non-putting a question relating to conscious possession of the contraband to the appellant in his

statement recorded under Section 313, Cr.P.C., and, as such, that argument is not accepted in favour of the appellant. However, it has been put to the appellant that he was seen sitting on the gunny bags.

It is settled proposition that if sentence to be awarded is severe like minimum rigorous imprisonment for ten years in addition to a minimum fine of rupees one lac, then the Court has to look for qualitative prosecution evidence.

This Court on the overall scanning of the case of the prosecution and the evidence led in defence, has arrived at the conclusion that there are severe lapses in the prosecution case and the benefit of the same has to be extended to the appellant.

As a sequel to the above discussion, while accepting the appeal the impugned judgment of conviction and the order of sentence passed by learned Judge, Special Court, Sangrur, is hereby set aside. The appellant/accused is hereby acquitted of the charge levelled against him.

(NARESH KUMAR SANGHI)
JUDGE

February 3, 2016
Pkapoor