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IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRA No. S-3371-SB of 2013 (O/M)
Date of decision : 1.6.2016

Alexander Appellant

Versus

State of Punjab Respondent

CORAM : HON'BLE MR. JUSTICE KULDIP SINGH

Present:- Ms. Tanu Bedi and Mr. Shivam Grover, Advocates,
for the appellant.

Mr. A.P.S. Gill, Assistant A.G. Punjab.

1. Whether the Reporters of local newspaper may be allowed to see the judgment ?
2. To be referred to the Reporter or not.
3. Whether the judgment should be reported in the digest ?

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KULDIP SINGH J.

Alexander (appellant), a Nigerian national, has filed this appeal against the judgment of conviction and order of sentence dated 7.8.2013, passed by the learned Judge, Special Court, SAS Nagar, Mohali, vide which the present appellant was convicted under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985, (in short 'the NDPS Act, 1985'), and was sentenced to undergo rigorous imprisonment for three years and to pay fine of Rs. 10,000/-, in default thereof, to further undergo rigorous imprisonment for six months, for allegedly keeping in his possession 130 grams heroine on 4.7.2009.

The prosecution story, so far as relevant for disposal of the present appeal, is that on the night of 3/4.7.2009, Inspector Gurwinder Singh (then working as Sub Inspector, Incharge of CIA Staff, Mohali) alongwith fellow officials was present near Ambedkar Nagar in between

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Sector 70 and 71, Mohali, when he received a secret information that Nigerian citizens, namely, Alex son of Ajle, Favor son of Okko, Alexander son of Monye and Paul son of Uzemudia, who are presently residing in MIG House No. 2711/B, Sector 70, Mohali, are indulging in the sale of heroine, which is purchased from outside. They meet their customers in odd hours in the parks etc. and if a search is conducted in the parks of Sector-70 and 71, SAS Nagar, Mohali, then they can be apprehended with the large quantity of heroine. As the information was found to be credible, ruqa/information (Ex.PW6/A) was sent to the police station, on the basis of which formal FIR (Ex.PW6/B) was registered. Thereafter, the checking in different parks of Mohali was conducted. On 4.7.2009, at about 9:50 AM, Inspector Gurwinder Singh joined Jaspal Singh son of late Bachan Singh, resident of House No. 235, Phase-3-A, Mohali, as independent witness and reached the park of Sector-70, Mohali. There, four Nigerian nationals were found sitting. On seeing the police party, all the four said Nigerians tried to run away in different directions, but all of them were apprehended by different members of the police officials. All of them were given option to get their search conducted from a Gazetted Officer or a Magistrate and all of them, vide separate memos, consented for their search before the Investigating Officer. Then, Satinderpal Singh, DSP (D), SAS Nagar, Mohali, was called at the spot and thereafter, the search of all the accused was conducted in his presence. From accused Favor, 120 grams of smack, from accused Paul, 130 grams of heroine and from accused Alex 130 grams of heroine was recovered, from which the samples were separated. From the present accused-appellant Alexander, 130 grams of heroine was recovered, out of which two samples, weighing 5 grams each were separated. Then, the

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sample parcels and bulk parcel were sealed with the seal 'GS', belonging to SI Gurwinder Singh and the seal of DSP (D), SAS Nagar, Mohali, bearing inscription 'SPS'. The case property was taken into possession by the police through recovery memo Ex.PW3/E and the accused were arrested. On reaching the police station, the accused and the case property were produced before Harbir Singh, Inspector/SHO of the police station, who affixed his seal bearing impression 'HS' on bulk parcel, sample parcels as well as sample of seal. The case property was then deposited with MHC Lakhbir Singh. On 5.7.2009, the case property and the accused were produced before the learned Illaqa Magistrate and the inventories were prepared, which were certified by the Illaqa Magistrate. On the application of the police, the learned Illaqa Magistrate, vide order Ex.PW6/Q, allowed the disposal of the case property. The samples were sent to the chemical examiner, who vide his report reported that the substance recovered from accused Alexander was heroine. The report was also made regarding the remaining persons, apprehended at the spot.

Accused was chargesheeted under Section 21 of the NDPS Act, 1985, to which he pleaded not guilty and claimed trial.

In order to prove its case, the prosecution examined Lakhbir Singh MHC (PW1), ASI Charan Singh (PW2), Satinderpal Singh, DSP (PW3), ASI Ajaib Singh (PW4), DSP Harbir Singh, the then Inspector/SHO of the police station (PW5), Gurwinder Singh, Investigating Officer (PW6), Constable Kishan Kumar (PW7), ASI Pawan Kumar (PW8) and closed the evidence.

When examined under Section 313 Cr.P.C., the accused denied the evidence led against him as incorrect and stated that no recovery was

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effected from him and has been falsely implicated. The accused did not lead any evidence in defence.

After hearing the prosecution, defence and going through the evidence, the learned Judge, Special Court, SAS Nagar, Mohali, convicted and sentenced the accused, as aforesaid.

I have heard the learned counsel for the appellant, the learned State counsel and have also carefully gone through the file.

The learned counsel for the appellant has assailed the prosecution story on the ground that no compliance of provisions of Section 50 of the NDPS Act, 1985, was made. According to the learned counsel, the present appellant Alexander was apprehended by ASI Ajaib Singh (PW4). In examination-in-chief, ASI Ajaib Singh has stated that after his apprehension, he produced the accused Alexander before SI Gurwinder Singh and that SI Gurwinder Singh, after giving his introduction, gave the option of getting himself searched through him in English. The witness further stated that he told the accused and other persons in English that there is suspicion against them that they are in possession of some intoxicating substance and that SI Gurwinder Singh wants to conduct their personal search and if they desire, a Gazetted Officer or a Magistrate can be called to the spot. The accused agreed for their search before the investigating officer. Thereafter, the personal search of the accused was conducted, from which heroine was recovered from a packet. The witness has further stated that he had prepared the consent memo of Alexander and others in English on the instructions of SI Gurwinder Singh. Then, in the presence of DSP (D), a polythene envelope was recovered from the left pocket of trouser of accused Alexander, from which 130 grams of heroine was recovered. He

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also stated about separation of samples. However, in cross-examination, he has stated that after apprehension of accused Alexander, he did not search him. However, he stated that he took out the polythene envelope from the left pocket of the trouser of the accused and produced the accused alongwith said polythene envelope before the investigating officer. Thereafter, the search was conducted by SI Gurwinder Singh. The formal search of the accused was already conducted before the arrival of the DSP (D), but the official search was conducted after his arrival. Again said, the recovery was effected in the presence of DSP (D). This is in complete contradiction to the statement of SI Gurwinder Singh who maintained as PW6 that since accused were not able to understand Hindi or Punjabi, therefore, he communicated with them in English and that he had informed that he was having suspicion that they were in possession of intoxicating substance and their search is to be got conducted and that they have got legal right to get their search conducted in the presence of a Gazetted Officer or a Magistrate. He gave offer to the accused separately. Thereafter, the consent memo was prepared. However, the statement of ASI Ajaib Singh shows that as ASI Gurwinder Singh was not able to communicate in English with the accused, therefore, the offer of search was given to the accused through ASI Ajaib Singh. The offer given was that if they were interested in getting their personal search conducted and in case, they desire, the search to be conducted from a Gazetted Officer or a Magistrate, they could be called.

First of all, this is not the proper offer of personal search. The statement of ASI Ajaib Singh, who, according to him, had communicated with the accused in English, would show that the accused were not told that accused have legal right to get the search conducted from a Gazetted

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Officer or a Magistrate and that if they desire, a Gazetted Officer or a Magistrate can be called at the spot. Since the accused were not informed about their right of search, therefore, the search is otherwise bad in the eyes of law. Moreover, the manner of search and obtaining consent memo is also doubtful. It is not clear whether ASI Ajaib Singh gave the offer of search to the accused in English or it was SI Gurwinder Singh, who himself gave the offer of search and communicated with the accused. Admittedly, the accused are Nigerian nationals and they do not understand Hindi or Punjabi. Then the statement of ASI Ajaib Singh shows that on apprehension of accused Alexander, he took out the polythene/envelope from the left pocket of his trouser and then produced the accused and the polythene packet before the SI Gurwidner Singh, whereas SI Gurwinder Singh has stated that he himself conducted the search and took out the polythene packet from the left pocket of the trouser of the accused. If the statement of ASI Ajaib Singh is accepted, that would mean that before giving the offer of search after or before apprising the accused of their right of search, the search was already conducted by ASI Ajaib Singh, after he took out a polythene packet from the left pocket of the accused Alexander. This would mean that the compliance of provisions of Section 50 of the NDPS Act, 1985, was not made and the search is defective.

The learned counsel for the appellant has further argued that in this case, the compliance of provisions of Section 42 of the NDPS Act, 1985, was also not made. The police had received the information on the midnight of 3/4.7.2009. However, the said information was not reduced into writing and that the ruqa was sent to the police station, which registered the FIR.

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Now, the question would arise whether the ruqa amounts to compliance of provisions of Section 42 of the NDPS Act, 1985 ?

The matter was recently examined by the Apex Court in Darshan Singh Versus State of Haryana, MANU/SC/1425/2015 (arising out of CrI. A. Nos. 216 and 217/2009, decided on 2.9.2015), wherein in a similar case, on receipt of secret information in an NDPS case, it observed as under :-

“9. The solitary question that arises for our consideration in the instant appeal, is whether the registration of the first information report, narrating the factual position as has already been described at the beginning of this order, as also, the communication of the first information report to the Superintendent of Police, Panipat, would constitute an effective compliance of the provisions contained in Section 42 of the NDPS Act.

10. Having given our thoughtful consideration to the submission advanced at the hands of learned counsel for the respondent, we are of the view that the mandate contained in Section 42 (1) of the NDPS Act, requiring the recording in writing, the details pertaining to the receipt of secret information, as also, the communication of the same to the superior officer are separate and distinct from the procedure stipulated under the provisions of the Code of Criminal Procedure. Sub-section 1 of Section 41 of the NDPS Act provides that a Metropolitan Magistrate or a Magistrate of the First Class or any Magistrate of Second Class specially empowered by the State Government may issue a warrant for the arrest of any person whom he has reason to believe to have committed any offence punishable under Chapter IV. Sub-section (2) of Section 41 refers to issue of authorization for similar purposes by the officers of the Departments of Central Excise, Narcotics, Customs, Revenue Intelligence, etc. Sub-section (1) of Section 42 of the NDPS Act lays down, that the

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empowered officer, if he has a prior information given by any person, should necessarily take it down in writing, and where he has reason to believe from his personal knowledge, that offences under Chapter IV have been committed or that materials which may furnish evidence of commission of such offences are concealed in any building, etc. he may carry out the arrest or search, without warrant between sunrise and sunset and he may do so without recording his reasons of belief. The two separate procedures noticed above are exclusive of one another. Compliance of one, would not infer the compliance of the other. In the circumstances contemplated under Section 42 of the NDPS Act, the mandate of the procedure contemplated therein will have to be followed separately, in the manner interpreted by this Court in Karnail Singh's case (supra) and the same will not be assumed, merely because the Station House Officer concerned had registered a first information report, which was also dispatched to the Superintendent of Police, in compliance with the provisions of the Code of Criminal Procedure.”

Therefore, a distinction has to be made about non recording of secret information separately and recording of secret information in the FIR. The secret information is required to be separately recorded.

The learned counsel for the appellant has further argued that in this case, the independent witness Jaspal Singh was not examined.

I am of the view that it is very difficult on the part of the police to obtain the services of an independent witness at the time of effecting recovery of narcotics and many times, the witnesses, if joined during investigation, are not willing to come forward for fear of reprisal by the accused. Therefore, non examination of independent witness is not material.

The learned counsel for the appellant has further argued that the

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Station House Officer, who had put his seal on the case property and deposited the same with the MHC, who kept his seal with him. Therefore, the possibility of the case property being tampered with cannot ruled out.

I am of the view that the Station House Officer is to handle many case properties. There were two other seals i.e. of DSP (D) and of the Investigating Officer. There is no evidence on file that the case property was ever tampered with, nor it is shown that despite the fact that the case property was ultimately sent on 10.7.2009, there was any tampering with the case property.

The learned counsel for the appellant has further argued that the sample was taken before the Court, but the same was not produced. However, this fact itself is not sufficient to throw out the prosecution case. Similarly, if while complying with the provisions of Section 52-A of the NDPS Act, 1985, the photographs were not taken, it would not be fatal to the prosecution case. Moreover, in this case, according to the prosecution, four persons were arrested from the spot. From the three persons, similar quantity i.e. 130 grams of heroine was recovered, which rather appears to be strange. This fact coupled with the discussion above makes the prosecution case doubtful.

Therefore, from the foregoing discussion, I come to the conclusion that the prosecution could not prove its case beyond all reasonable doubts. Accordingly, the present appeal is allowed and the impugned judgment of conviction and order of sentence dated 7.8.2013, passed by the learned Judge, Special Court, SAS Nagar, Mohali, are set aside. The accused-appellant stands acquitted of the charges framed against him under Section 21 of the NDPS Act, 1985. He be released forthwith, if

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not required in any other case.

The present appeal is accordingly allowed.

(KULDIP SINGH)
JUDGE

1.6.2016
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