

IN THE HIGH COURT OF PUNJAB & HARYANA, CHANDIGARH

Date of Decision: *September 5, 2016*

Criminal Appeal No.S-395-SB of 2014 (O & M)

Avtar Singh

..... APPELLANT

VERSUS

State of Punjab

..... RESPONDENT

...

Criminal Appeal No.S-1183-SB of 2014 (O & M)

Gaurav Sehgal

..... APPELLANT

VERSUS

State of Punjab

..... RESPONDENT

...

CORAM: **HON'BLE MR. JUSTICE JASPAL SINGH**

...

PRESENT: - Mr. Rajinder S. Aulakh, Advocate for the appellant.

Mr. B.S. Cheema, DAG, Punjab
for the respondent-State.

. . .

Jaspal Singh, J

1. This judgment shall dispose of two appeals viz. Criminal Appeal No.S-395-SB of 2014, titled 'Avtar Singh vs. State of Punjab' and Criminal Appeal No.S-1183-SB of 2014, titled 'Gaurav Sehgal Vs. State of

Punjab' as they have arisen out of a common judgment and a result of same FIR.

2. The instant appeals have been preferred by accused – Avtar Singh and Gaurav Sehgal challenging judgment of conviction and order of sentence dated January 9, 2014 rendered by the Judge, Special Court, Moga, in case bearing FIR No.130 dated September 28, 2011 under Section 15(c) of the Narcotics Drugs & Psychotropic Substances Act, 1985 (for short, 'Act'), registered at Police Station, City South, Moga, whereby they have been held guilty for the aforesaid offence and sentenced to undergo RI for ten years besides fine to the tune of ₹ 1 lac each and in default of payment of fine, the defaulter to further undergo RI for a period of one year.

3. Brief facts of the case are that on September 28, 2011, ASI Malook Singh along with HC Jagsir Singh, HC Bhagwant Singh and other police officials was present on bridge of canal minor situated at road leading from Ghal Kalan to Basti Bageana, Moga in Government Bolero vehicle bearing registration No.PB-29L-9606 when one Esteem car bearing No.GJ-4D-0001 was seen coming from the side of village Duneke. It was signaled to stop but the car driver got perplexed and tried to turn towards Bageana Basti, Moga. Car was nabbed on suspicion. One Manna Singh Dhaliwal son of Bagicha Singh resident of Nachhatar Singh Teacher Colony, Bahona Chowk, W.No.24, Moga was joined in policy party. On interrogation, driver of the car disclosed his name as Avtar Singh and the person sitting beside him disclosed his name as Gaurav Sehgal. Investigating Officer appraised them of their legal right to get the car searched in presence of a Magistrate or gazetted Officer, thereafter necessary formalities were got done. Shri Satpal Singh, DSP, City Moga reached the spot and disclosed his identity to the accused, thereafter on the direction of

containing poppy straw was recovered. Two gunny bags containing poppy straw were recovered from the dicky on the car.

4. After completion of necessary formalities and on receipt of report of Chemical Examiner, final report under Section 173 (2) Cr.P.C. was presented in the court. Copies of documents as required under Section 207 Cr.P.C. were supplied to the accused, free of costs. Finding a prima facie case, accused were charge-sheeted under Section 15(c) of the Act, to which, they did not plead guilty and claimed trial.

5. In order to substantiate its case, prosecution examined as many as seven witnesses viz. PW-1 HC Varinder Kumar; PW-2 HC Chamkaur Singh; PW-3 ASI Malook Singh (IO); PW-4 ASI Balraj Singh; PW-5 Nirbhai Singh; PW-6 ASI Jagsir Singh; PW-7 SP (D) Satpal Singh.

6. When incriminating circumstances appearing in prosecution evidence were put to accused, they denied the same and pleaded false implication. The defence plea taken by accused Accused Avtar Singh reads as under:-

“I am innocent. I have been falsely implicated in this case. No recovery has been effected from me. I did not thumb mark the memos prepared by the I.O at the time of recovery i.e. consent memo, recovery memo, personal search memo and ground of arrest memo. The police officials of city south Moga themselves prepared/forged the memos and my thumb impression. I have no connection with Gaurav Sehgal and I am not the owner of the vehicle from which as alleged by the prosecution recovery has been effected and nor it belongs to me.”

Similarly, the defence plea put-forth by accused Gaurav Sehgal is ut-infra:-

“I am innocent. I purchased one motorcycle model 2007 bearing Chasis no. 01446, Engine No. 05425 from one Amandeep Singh son of Hakam Singh r/o Bukan wala in Rs. 35,000/-. Rs. 25,000/- were paid to him and Rs. 10,000/- remained to be paid and motorcycle was handed over to me on 29.07.2011. I alongwith Amandeep Singh and one Thana Singh had gone to purchase Stamp paper from Mini Secretariat at about 4.15 P.M and when we were busy in purchasing stamp paper. Amandeep took away the motorcycle with second key which was with

him in his possession about which application made by me to SSP Moga on 10.09.2011. SP(D) marked that application to E.O Wing Moga and asked for report on 15.09.2011, in which inquiry was held by ASI Jagtar Singh of E.O Wing Moga. During inquiry Amandeep Singh was called and myself also made statement before ASI Jagtaar Singh on 26.09.2011. In the above said application during inquiry Satpal Singh then DSP City Moga was doing favour of Thana Singh. So I moved application to Hon'ble High Court against Satpal Singh then DSP (City) Moga and other police officials Amandeep Singh in connivance with I.O/ASI Malook Singh and other police officials got apprehended me from my house on 27.09.2011 and got this false case planted against me. No recovery was effected from me. Nor I am having any connection with Avtar Singh.”

7. Both the accused did like to adduce evidence in defence and they examined DW-1 Sanjeev Sharma, Finger Prints & Handwriting Expert, Ferozepur.

8. After hearing learned counsel for the parties and on appraisal of evidence, the trial court vide impugned judgment of conviction and order of conviction held the accused guilty, convicted and sentenced them as detailed above.

9. Aggrieved by the aforesaid judgment/order of trial court, both the accused – appellants have approached this Court by way of two separate appeals, which are being decided through this common judgment.

10. Learned counsel for the appellants has contended that the impugned judgment of conviction and order of sentence is absolutely against the evidence available on file and settled canons of law. Misappreciation of evidence as well as legal proposition has resulted into miscarriage of justice. Presence of accused – appellant Gaurav Sehgal at the spot is not established in as much as no document bears his signatures or thumb impressions. Moreover, thumb impressions of accused – appellant Avtar Singh have not been proved. DW-1 Sanjeev Sharma, Finger Prints & Handwriting Expert, has opined that disputed thumb impressions on non-consent memo Ex.P3

have not been affixed by the same person (Avtar Singh). No expert has been examined by the prosecution to rebut the aforesaid opinion. Though one Manna Singh Dhaliwal was joined in the police party but has not been examined which casts a serious doubt in the prosecution story. There is a delay of about a week in sending the samples to the office of Chemical Examiner. There is a violation of Section 50 of the Act as no proper opportunity was afforded to the accused – appellants. Link evidence is incomplete. There are contradictions in the testimonies of prosecution witnesses. Lastly, learned counsel for the appellants has submitted that the impugned judgment of conviction and order of sentence suffers from material infirmities, as such, the same are not sustainable in the eyes of law and liable to be set aside by way of acceptance of instant appeal and consequently, accused – appellants deserve acquittal.

11. Learned counsel for the State has supported the judgment of conviction and order of sentence. Recovery of contraband has been duly established. Proper opportunity was afforded to the accused for their search to conducted before a Magistrate or a gazetted officer. There is no infirmity in the impugned judgment/order.

12. After bestowing due consideration to the rival submissions made by learned counsel for the parties and appraising the documents available on file, this Court finds that the prosecution has failed to establish a case against the appellants beyond reasonable shadow of doubt.

13. As regards the contention of learned counsel for the appellants that accused did not thumb marked or signed the consent memo, recovery memo, personal search memo and ground of arrest memo; and police officials themselves prepared/forged the same. Though, non consent memo bears the thumb impressions of appellant Avtar Singh, however, it

Sehgal. Moreover, DW-1 Sanjeev Sharma, Finger Print & Handwriting Expert, Ferozepur, examined and compared four disputed thumb impressions, allegedly of Avtar Singh on Ex.P3, Ex.P4, Ex.P7 and Ex.P13, marked as Q1 to Q4 with 21 specimen thumb impressions of Avtar Singh, which were taken on specimen sheet dated October 14, 2013 and marked as L1 to L11 (LTIs), R1 to R10 (RTIs). As per report dated October 26, 2013 (Ex.DA), he opined that “disputed thumb impressions marked as Q1 to Q4 are superimposed thumb impressions and their visible portion are non-identical in their individual ridge characteristics as compared to specimen thumb impressions marked as L1 to L11 (LTIs). Hence, the disputed thumb impressions marked as Q1 to Q4 had not been affixed by the same person (Avtar Singh) whose specimen thumb impressions are marked L1 to L11, R1 to R10”. In order to counter the aforesaid statement/opinion of Handwriting & Finger Print Expert, no expert has been examined by the prosecution.

14. Undisputably, non consent memo does not bear the thumb impression or signatures of other accused Gaurav Sehgal. Non appearance of signatures or thumb impressions of accused Gaurav Sehgal on the non consent memo (Ex.P3) is suggestive of the fact that he was not present at the spot or accompanying Avtar Singh. It further appears that he has been subsequently dragged in the instant case.

15. As regards non-examination of independent witness. Case of prosecution solely hinges on the testimony of official witnesses and PW Manna Singh Dhaliwal who is alleged to have joined the investigation, has given up for the reasons best known to prosecution and was not examined to corroborate their version. Non-examination of independent witness Manna Singh Dhaliwal also goes to the root of the case and shatters the basic prosecution version. This Court finds full force in this contention raised by

prosecution, PW Manna Singh Dhaliwal was associated with the police party but to the utter surprise, he has not been examined by the prosecution. He has simply been given up as having been won over by the accused. Non-examination of PW Manna Singh Dhaliwal also casts a serious doubt, who was the only independent witness allegedly associated with the police party. Moreover, seal after use was not entrusted/handed over to him either by DSP or by the Investigating Officer.

16. As per the prosecution case, recovery of three bags containing 30 kg of poppy straw is alleged to have been effected in Esteem Car bearing registration No.GJ-4D-0001 on September 28, 2011, whereas samples for analysis were sent to the office of chemical Examiner on October 04, 2011. There is no explanation what to talk of a plausible explanation regarding delay of about a week in sending the samples to the office of Chemical Examiner.

18. Moreover, no proper opportunity was afforded to the accused – appellants before their alleged search and recovery of contraband, in as much as, PW-3 ASI Malook Singh (IO) when subjected to cross-examination, stated that it is correct that infact as per record no offer was given to accused Gaurav Sehgal. He also stated that offer was given by the DSP in his presence. DSP given offer of himself or of Magistrate. No offer was given about any other gazetted officer, which is clearly in violation of provisions of Section 50 of the Act. Accordingly, an inference can be drawn that accused were not made aware of their right to get search effected in the presence of a Magistrate or gazetted officer.

19. Moreover, ASI Malook Singh, in his examination, stated that non consent memo (Ex.P3) was thumb marked by accused Avtar Singh, however, during cross examination, he stated that it is correct that on Ex.P3

admitted that consent memo Ex.P4 only bears thumb impressions of Avtar Singh. He is silent about obtaining the signatures of Avtar Singh on Ex.P3. Possibility cannot be ruled that signatures of Avtar Singh were obtained at subsequent stage. Investigating officer, in his cross examination, also stated that no sample seals were prepared by him at the spot. If it was not prepared, then how it was sent to the Chemical Examiner who allegedly compared the same with the seals appearing on the sample. It casts a shadow of doubt.

20. Moreover, Inspector Harjit Singh was the regular SHO of Police Station, City South, Moga. Investigating Officer did not meet him for going to the Naka or coming back. No DDR etc. has been placed on record to show that SHO was not present in the premises of police station on September 28, 2011. He was also not called in the police station, rather case property was allegedly produced before ASI Balraj Singh. Link evidence is also incomplete.

21. Investigating Officer Malook Singh says that documents were prepared at his dictation by ASI Jagsir Singh, whereas DSP Satpal Singh says that documents were prepared by Investigating Officer Malook Singh. PW-6 ASI Jagsir Singh, one of the recovery witnesses, when subjected to cross examination stated that offer for conducting search before a gazetted officer or a Magistrate, was given to the accused after their personal search. Non Consent memo Ex.P3 neither bears the signature of accused Gaurav Sehgal nor his name finds mention on it. PW-6 stated in examination-in-chief that non consent memo Ex.P3 was prepared which was thumb marked by accused Avtar Singh and signed by him, whereas ASI Malook Singh during his cross examination stated that non consent memo Ex.P3 bears the thumb impression and signatures of accused Avtar Singh.

The contradictory statements also go to the root of the case and shatter the

22. Thus, it can be safely concluded that case of the prosecution suffers from material infirmities and illegality. As such, the appellants are entitled to the benefit of doubt.

23. Taking into consideration the aforesaid aspects, instant appeal is allowed. Impugned judgment of conviction and order of sentence dated January 9, 2014 are set aside and accused – appellants stand acquitted of the charge.

September 05, 2016
avin

(Jaspal Singh)
Judge

Whether Speaking/ Reasoned:

Yes/ No

Whether Reportable:

Yes/ No