

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRA-D-260-DB of 2011(O&M)

Date of Decision : 16.02.2017

Wardi Chand and others

..... Appellants

Versus

State of Haryana

..... Respondent

CORAM: HON'BLE MR. JUSTICE S.S.SARON

HON'BLE MR. JUSTICE DARSHAN SINGH

Present : Mr. R.S.Malik, Advocate
for appellants no.1.

Mr.K.S.Dhaliwal, Advocate
for the appellants no.2 and 4.

Mr. Dinesh Sharma, Advocate
for appellant no.3.

Appellant no.5 died.

Mr. Randhir Singh, Addl.AG. Haryana, and
Mr. S.S.Pannu, Deputy Advocate General, Haryana, with
Mr. Kiran Kumar, Senior Scientific Officer, NDPS (now
Assistant Director, NDPS, FSL) Madhuban and SI Har
Narain, Police Station, City Panipat for the respondent.

DARSHAN SINGH, J.

The present appeal has been preferred by the appellants mentioned above against the judgment of conviction dated 13.01.2011, vide which they have been held guilty and convicted by the learned Judge, Special Court, Panipat for the offence punishable under Section 18 of The Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'NDPS Act') and the order of sentence dated 15.01.2011, vide which they were ordered to undergo rigorous imprisonment for a period of thirteen years and to pay a fine of ₹ 1,50,000/- each and in default thereof, they were further ordered to undergo simple imprisonment for a period of one year each.

In nutshell, the facts giving rise to this prosecution are that on

07.01.2009, Inspector Jagdeep Singh (PW-7), the Investigating Officer of the case received the secret information that accused-appellant no.1-Wardi Chand, accused-appellant no.2-Balbir, accused-appellant no.3-Trilok, accused-appellant no.4-Kuldeep, accused-appellant no.5-Vikas (now deceased) travelling in Qualis vehicle bearing registration no. RJ-24-C-1987 were carrying contraband in huge quantity. The said vehicle was roaming around Panipat City and they can be apprehended if the '*Nakabandi*' is held. On receiving this information, the Investigating Officer entered the Daily Dairy Report no. 6 dated 07.01.2009 Ex.PW-6/A (for short 'D.D.R'). The said information was conveyed to DSP Randhir Singh (PW-8) through EHC Raj Kumar.

3. Inspector Jagdeep Singh along with other police officials started in the Govt. Sumo vehicle bearing registration no. HR-06-N-6798 in search of the said Qualis vehicle and the persons named in the secret information and also for laying the Nakabadi in the area of Police Station, City Panipat. The Nakabandi was held near G.T. Road opposite, the under construction Mini Secretariat, Panipat. After about one hour the Qualis vehicle bearing registration no. RJ-24-C-1987 was spotted coming from the side of bus stand, Panipat. The said vehicle was got stopped by the police party. All the four persons sitting on the rear seat of the vehicle and the driver of the said vehicle were apprehended. The driver of the vehicle disclosed his name as Tirlok. The persons sitting on the middle seat disclosed their names as Wardi Chand and Balbir. The persons sitting on the rear seat disclosed their names as Kuldeep and Vikas. One big size plastic box was lying in between the persons sitting on the middle seat and the another plastic box was lying in between the persons sitting on the rear seat. The Investigating Officer suspected some contraband contained in

those plastic boxes. He served a notice under Section 50 of the NDPS Act (Ex.PW6/B) upon the accused-appellants giving an option to them to get their personal search and search of the bags conducted before any Magistrate or Gazetted Officer. They opted their personal search and search of their bags to be taken in the presence of a Gazetted Officer. The Investigating Officer telephonically informed (PW-8) DSP Randhir Singh, City Panipat. After 15 minutes, he reached at the spot. The Investigating Officer disclosed the facts of the case to him. DSP Randhir Singh also disclosed his identity to the accused-appellants. Thereafter, he gave a written direction Ex.PW6/D to the Investigating Officer to conduct the search of all the five persons and of the two big size plastic boxes. The said boxes were found containing opium. The opium was shifted to two big size polythene bags and they were found containing 10 kg 850 gms opium each. Out of the said opium, 2/2 samples of 50 gms opium each from each polythene bag were separated. The samples of the opium were kept in four empty small plastic boxes ('Dibbi's). The remainder opium was put in the same plastic containers. All the four sample parcels and both the boxes containing remainder opium were kept in the sealed parcels and were sealed by the Investigating Officer bearing seal impression 'SS'. DSP Randhir Singh (PW-8) also affixed his seal bearing impressions 'RS' on all the parcels. The specimen seal impressions were prepared. The parcels of the case property along with Qualis vehicle no. RJ-24-C-1987 were taken into possession vide memo Ex.PW6/E, which was attested by the witnesses as well as by DSP. The investigating Officer sent the written information EX.PW3/A to the police station, on the basis of which, the formal FIR Ex.PW3/B was registered. The investigating Officer prepared

the site plan of the place of recovery. The accused-appellants were arrested.

4. Thereafter, Inspector Jagdeep Singh produced the accused, witnesses and the articles of the case property before PW-4-Inspector Ram Kumar, the then SHO, Police Station City Panipat. He after verifying the facts affixed his seal bearing impressions 'RK' on the samples and the residue parcels. Thereafter, he directed the Investigating Officer to deposit the articles of the case property in the Malkhana of the Police Station, City Panipat.

5. On 08.01.2009, the Investigating Officer took over the case property and sample parcels etc. from the Malkhana and produced the same before the learned Illaqa Magistrate for compliance of the provisions of Section 52-A of the NDPS Act vide application Ex.PW7/B. He had also prepared the inventory of the case property Ex.PW7/C. The photographs of the case property were also taken. The learned Illaqa Magistrate after examining the case property issued the certificate Ex.PW7/E. On return to the police station, the articles of the case property were again deposited in the malkhana. Two sample parcels were sent to Forensic Science Laboratory, Madhuban (for short 'F.S.L.') for examination, which were found to be of opium vide report Ex.PX and on completion of the investigation, the report under Section 173 of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.') was presented in the Court.

6. After compliance of the provisions of Section 207 Cr.P.C, the accused-appellants were charge sheeted by the learned Judge, Special Court, Panipat for the offence punishable under Section 18 of the NDPS Act vide order dated 18.02.2009 to which they pleaded not guilty and claimed trial.

7. In order to substantiate its case, the prosecution examined as many as eight witnesses.

8. When examined under Section 313 Cr.P.C, the accused-appellants pleaded false implication and that nothing was recovered from their possession. Accused-appellant-Vikas (now deceased) further pleaded that he has been apprehended at the instance of Ex-Sarpanch of village Daffarpur, District Sonapat due to monetary dispute. Accused-appellant-Wardi Chand pleaded that he had visited village Daffarpur, District Sonapat with Vikas regarding his monetary dispute with Ex-Sarpanch Ram Kumar of that village. He had participated in the Panchayat in this regard and Ram Kumar was having grudge against him and Vikas. No evidence was led by the accused-appellants in their defence.

9. On appreciating the evidence on record and the contentions raised by learned counsel for the parties, the learned Judge, Special Court, Panipat held guilty and convicted all the accused-appellants for the offence punishable under Section 18 of the NDPS Act and they were sentenced as mentioned in the upper part of the judgment.

10. Aggrieved with the aforesaid judgment of conviction dated 13.01.2011 and the order of sentence dated 15.01.2011, the present appeal has been preferred.

11. It is pertinent to mention that during the pendency of the present appeal, accused-appellant-Vikas had died on 09.11.2015 at PGI, Chandigarh. Thus, appeal qua him stands abated as per the order dated 14.02.2017.

12. We have heard Mr. R.S.Malik, Advocate, learned counsel for appellant no.1, Mr. K.S.Dhaliwal, Advocate, learned counsel for appellants no.2 and 4, Mr. Dinesh Sharma, Advocate, learned counsel for

appellant no.3, Mr. Randhir Singh, Addl.AG for the State of Haryana and have carefully perused the record of the case.

13. Initiating the arguments, learned counsel for the appellants contended that the recovery is alleged to have been effected from the search of a private vehicle after sunset on the basis of secret information. But, the Investigating Officer has not complied with the mandatory provisions of Section 42 of the NDPS Act as he was required to obtain the search warrant or authorization to carried out the search. He has also not recorded any reason not to do so. Thus, they contended that the violation of the mandatory provisions of Section 42 of the NDPS Act vitiated the conviction. To support their contentions, they relied upon case **State of Rajasthan Vs. Jag Raj Singh @ Hansa 2016 (3) R.C.R. (Criminal) 539**.

14. They further contended that it is not plausible that the secret information containing all the particulars of the accused can be furnished to the Investigating Officer. The prosecution has also not examined EHC-Raj Kumar, who allegedly conveyed the copy of Daily Dairy Report (for short 'D.D.R.') with respect to the secret information to DSP Randhir Singh (PW-8). They contended that on this account also there is violation of Section 42 of the NDPS Act.

15. They further contended that as per prosecution case and statements of the prosecution witnesses, sample parcels were stored in a plastic box. But, in the F.S.L. report (Ex.PX), it is mentioned that the samples were in polythene. They further contended that as per the case of the prosecution 50 gms of opium was separated as sample. But, the report of the FSL shows that one of the sample was weighing 55.2 gms and the other sample was weighing 64.2 gms. There was much difference of

weight of sample parcels sent to the F.S.L. Thus, they contended that it is not established that the same sample parcels, which are alleged to have been separated, have been sent to the F.S.L. for examination.

16. They further contended that in-fact the entire prosecution story has been fabricated. PW-5-Mahabir Singh Nain, Photographer has categorically stated that he has taken the photographs on 07.01.2009. In the cross-examination, he has stated that he took the photographs at 12 'o clock noon, whereas the recovery is shown to have been effected after 5 pm of 07.01.2009 and this version of PW-5 has not been challenged by the prosecution. They further contended that the photographs Ex.PW5/A bears the date as 07.01.2009, whereas the second photograph Ex.PW5/B bears the date as 08.01.2009. No reference has been given in the Ruqa Ex.PW3/A that the photographs of the case property were taken on 07.01.2009. They contended that such fabrication renders the testimonies of the prosecution witnesses unworthy of credence.

17. They further contended that the recovery is alleged to have been effected at a public place. But, no independent witness has been associated by the Investigating Officer nor any satisfactory explanation has been given for non joining thereof. Thus, they contended that the learned trial Court has wrongly recorded the conviction of the appellants.

18. On the other hand, learned State counsel contended that there is complete compliance of Section 42 of the NDPS Act. The secret information was reduced into writing in Daily Dairy Register and copy of the report was sent to DSP Randhir Singh (PW-8). He further contended that the search was conducted on the basis of written authorization given by the DSP. So, there is no violation of the provisions of Section 42 of the

NDPS Act.

19. He further contended that there is no material on record to show that the sample parcels were tampered with at any stage. The sample parcels were sealed with the seal of the Investigating Officer, the SHO and the DSP. All the sample parcels were produced before the learned Illaqa Magistrate, who also found the seals to be intact. Within two days of recovery, the sample parcels were sent to the F.S.L., where also the seals were found intact. He contended that as per the worksheet prepared by the F.S.L., the container of the samples is mentioned as “plastic”. There appears to be some mistake in the F.S.L. report (Ex.PX). He further contended that the investigating Officer has weighed the samples with pen scale, which is not accurate, whereas in the F.S.L. the electronic digital scale is used. So, the difference of few grams is bound to occur.

20. He further contended that as per the record of the case, no photographs of the case property were taken on 07.01.2009. The photographs were only taken on 08.01.2009. Moreover, mere contradiction of the date written in the photographs will not be a ground to disbelieve the prosecution version with respect to the recovery.

21. He further contended that the Investigating Officer has made the efforts to join the independent witness, but none of them came-forward. He further contended that the accused-appellants have not alleged any animosity against the official witnesses. The version of the prosecution is also corroborated from the statement of DSP Randhir Singh (PW-8) a gazetted police officer. Learned counsel for the appellants has not been able to find out any material contradictions in their statements. So, there is no reason to disbelieve their testimonies. Thus, he contended

that the conviction of the appellants does not suffer from any legal infirmity.

22. We have duly considered the aforesaid contentions.

23. The plea raised by learned counsel for the appellants that the mandatory provisions of Section 42 of the NDPS Act have been violated carries no substance. From the statement of PW-7-Inspector Jagdeep Singh, the Investigating Officer of the case, it comes out that immediately on receiving the secret information he reduced into writing the said secret information in the shape of the D.D.R. no. 6 dated 07.01.2009 (Copy Ex.PW6/A). Copy of the said D.D.R. was duly forwarded to PW-8-DSP Randhir Singh, his immediate official superior through EHC Raj Kumar. This fact is also corroborated from the testimony of PW-6- Inspector Vijay Singh . PW-8- DSP Randhir Singh has also categorically deposed that he came to know about the secret information at 05.30.p.m. through Constable Raj Kumar. Thus, from the aforesaid evidence the compliance of the provisions of Section 42 (2) of the NDPS Act is fully established.

24. The notification issued by the State of Haryana designating the empowered officers under the provisions of Section 41 (2) of the NDPS Act reads as under:-

HARYANA

Published in the Haryana Gazette, (Extra)
Legislative Supplement, Part III, dated November 29, 1986

Excise and Taxation Department

December 29, 1986

No. S.O. 104/C.A.61/85/S.41/86- In exercise of the powers conferred by sub-section (2) of Section 41 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985), the Governor of Haryana hereby empowers the officers, of and above the rank of Assistant Excise and Taxation Officer in the Excise and Taxation department; of and above the rank of Teshildars in the Revenue

Department and of and above the rank of Deputy Superintendent of Police in Police Department, to exercise the powers specified in sub-section(2) of that section within the area of their respective jurisdiction.

As per the aforesaid notification, the Deputy Superintendent of Police is an empowered officer under the provisions of Section 41 (2) of the NDPS Act. The empowered officer under Section 41 (2) of the NDPS Act is competent to authorize any officers subordinate to him, but superior in the rank to a peon, sepoy or constable to arrest a person who has committed the offence under the Act or for the search of a building, conveyance or a place whether by day or by night. PW-8-DSP Randhir Singh has categorically deposed that he had given a written direction Ex.PW6/D to Inspector Jagdeep Singh to take the search of the containers kept in the Qualis vehicle which were in the possession of the accused. PW-7-Inspector Jagdeep Singh has also stated that the DSP had given a written direction Ex.PW6/D to him to take the search of the plastic jars lying in the qualis vehicle in possession of the accused. Thereafter, he conducted the search of the jars. PW-8-DSP Randhir Singh being the empowered officer under Section 41 (2) of the NDPS Act was competent to authorize PW-7-Inspector Jagdeep Singh to carried out the search even during night. So, there is no violation of proviso to Section 42 (1) of the NDPS Act. Case **State of Rajasthan Vs. Jag Raj Singh @ Hansa (supra)** relied upon by learned counsel for the appellants is quite distinguishable on facts. In that case, there was difference of the secret information recorded in the Rojnamcha and the information sent to the Circle Officer. Whereas, in this case no such difference could be pointed out by learned counsel for the appellants in the secret information recorded in the DDR Ex.PW6/A and the information sent to PW-8-DSP

Randhir Singh as the copy of the same DDR has been forwarded to PW-8-DSP Randhir Singh. In case **State of Rajasthan Vs. Jag Raj Singh @ Hansa (supra)**, the search was carried out by the Investigating Officer himself without seeking any search/ authorization and without procuring the presence of any empowered officer at the spot. Whereas, in this case the Investigating Officer was duly authorized vide written authorization Ex.PW6/D by PW-8-DSP Randhir Singh to carry out the search. Moreover, he himself has supervised the operation of the search. Thus, the provisions of Section 42 of the NDPS Act have been duly complied with in the present case.

25. There is no dispute with the proposition of law that it is incumbent upon the prosecution to establish that the sample parcels remained intact till it reached in the hands of the Chemical Examiner. It is an admitted case of the prosecution that 50 gms of opium separated as sample was kept in small plastic boxes (dibbis). However, in the report of the FSL (Ex.PX), the sample parcels received with polythene have been mentioned. There is no reference of the plastic container. It appears that the expert in the FSL report has mentioned the weight of the opium along with polythene. The said wording used by the expert does not convey that the samples itself were stored in polythene alone.

26. The prosecution has led the evidence to complete the chain of link evidence. HC Jasmer Singh, the then MHC Police Station, City Panipat with whom the case property was deposited has filed his affidavit Ex.PW1/A, wherein he has categorically deposed that so long the case property and the parcels remained in his custody neither he nor anybody else has tampered with the same. PW-2-C. Gulzar Singh has carried the

sample parcels to FSL, Madhuban. He also deposed in his affidavit Ex.PW2/A that the sample parcels were neither tampered with by him nor by anybody else during the period it remains in his custody. The investigating Officer has also produced the articles of the case property before the learned Chief Judicial Magistrate, Panipat, who gave her certificate Ex.PW7/E that the seals bearing impressions 'SS' 'RS' and 'RK' were visible on all the parcels. Then, there is the report of the FSL (Ex.PX), wherein it is categorically mentioned that the seals were intact and tallied with the specimen seal as per the Forwarding Authority's letter. Thus, there is no material on record to show that the sample parcels were tampered with at any point of time. The omission on the part of the Chemical Examiner to properly describe the container in the FSL report (Ex.PX) is not a ground to conclude that the sample parcels which were sent to the FSL for examination were tampered with.

27. No doubt, there is difference of weight of the sample parcels. As per the prosecution story, four samples of opium weighing 50 gms each were separated. Whereas, in the report of FSL (Ex.PX), the weight of one sample along with polythene has been mentioned as 55.2 gms and the weight of the second sample is mentioned as 64.2 gms with polythene. It is evident that the weight of the sample has been taken by the expert in the FSL along with the polythene. As per the evidence on record, the Investigating Officer has used the pen type scale to weight the samples and residue opium. The samples were weighed in open. The pen type scale cannot be stated to be so accurate and definite, whereas in the FSL the sophisticated digital scales are used in closed premises to weigh the substance. In these circumstances, the variation in the weight of the

sample is natural and it could not establish the tampering with of the samples. The Hon'ble Supreme Court in case **Madan Lal and Anr. Vs. State of Himachal Pradesh 2003 (4) R.C.R. (Criminal) 100** has laid down as under:-

“18. Coming to the plea that there was reduction in weight of the samples sent for analysis and there was tampering, it has to be noted that this aspect has also been considered by the Trial Court which has recorded the reasons for rejecting the same. It has been noted that the seals were intact and there was no tampering. The view has been endorsed by the High Court. On considering the reasoning indicated that there was very minimal and almost ignorable variation in weight, we find no reason to interfere with the findings.”

28. The Division Bench of the Hon'ble Bombay High Court in case **Firdous Ahmed Vs. Union of India 2008 (4) AIR Bom. R 774** has also laid down as under:-

“As far as the difference in weight is concerned, it may be noted that the Complainant's raiding party has used an ordinary balance to weigh the same and it is common knowledge that the experts use more accurate and sophisticated weighing machines. Moreover, the difference in weight is minimal and therefore could be ignored. The Apex Court in the case of *Madan Lal and another V. State of Himachal Pradesh, (2003 Cri LJ. 3868) : (AIR 2003 SC 3642)* has held that when the difference in weight is minimal the same could be ignored.

Thus, in view of the ratio of law laid down above, mere difference of weight of sample which has in-fact occurred due to different type of scales used. Such marginal difference is of no legal consequences to create any dent in the prosecution case particularly where the chain of the link evidence is complete to rule out any tampering with of the sample parcels.

29. The fact that the separate dates have been written on the photographs Ex.PW5/A and Ex.PW5/B is also not such a material

contradiction which can render the recovery doubtful, as it does not go to the root of the case. It appears to be some mistake on the part of the police officials in writing the date over the photographs. These photographs were even produced before the Chief Judicial Magistrate, Panipat, which is evident from her order Ex.PW7/E. Moreover, the contradiction of the date in one document cannot be made the basis to make all the proceedings suspicious.

30. No doubt, even though the recovery has been effected on the basis of the secret information and at a public place, but no independent witness has been associated. But, it is not a case where no efforts have been made by the Investigating Officer to associate the independent witness. Even, in the ruqa Ex.PW3/A, it has been mentioned that despite efforts no public witness could be joined. PW-6-Inspector Vijay Singh, the witness of recovery has also stated that after reaching the spot, they tried to join some public persons as witnesses, but they showed their helplessness. Inspector Jagdeep Singh (PW-7), the Investigating Officer of the case has also deposed that he tried to join the public persons in the investigation as witnesses, but they all had shown their inability to join the investigation. PW-8-DSP Randhir Singh has also stated in the cross-examination that he directed the Investigating Officer to join the public persons in the investigation and he tried to join some persons in the investigation, but nobody was ready to join the investigation as told by the Investigating Officer. Thus, the efforts have been made by the Investigating Officer to associate the independent witnesses in the investigation, but they expressed their helplessness/ inability to joint the investigation. So, the investigating Officer was left with no other option,

but to proceed further by joining the police officials. It is well settled by this time that the testimonies of the official witnesses also carries the same evidentiary value and their testimonies cannot be discarded merely on the ground of their official designation. The learned defence counsel has not been able to point out any material contradiction in the statements of the prosecution witnesses. They also have not been able to point out any animus or motive for the false implication of the appellant. (PW-8) DSP-Randhir Singh, a Gazetted Officer has supervised the search and seizure. It is not expected that a senior police officer will become a party to support the false version of his subordinates. The Hon'ble Supreme Court in case **Akmal Ahmed Vs. State of Delhi, 1999(2) RCR (Criminal) 265** has laid down that the evidence of search or seizure made by the police will not become vitiated solely for the reason that same was not supported by any independent witness. The same ratio of law has been laid down by the Hon'ble Apex Court in cases **State of NCT of Delhi Vs. Sunil (2000) 1 Supreme Court cases 748, Rohtash Vs. State of Haryana, 2013(3) RCR (Criminal) 355, M.Prabhulal Vs. Assistant Director, Directorate of Revenue Intelligence, 2004(1) RCR (Criminal) 160 and Ravinderan @ John Vs. Superintendent of Customs, 2007 (3) RCR (Criminal) 80**. Thus, the non-joining of independent witness is also no ground to discredit the prosecution version.

31. Thus, from the evidence brought on record by the prosecution, it is established beyond shadow of reasonable doubt that the accused-appellants were found in conscious possession of total 21 kg 700 gms of opium without any permit.

32. Faced with this situation, learned counsel for the appellants

contended that the appellants are poor persons. They are in custody for the last more than eight years. They have never been convicted for any offence under the NDPS Act prior to this case. So, they deserves the leniency in the matter of sentence.

33. We have duly considered the aforesaid plea.

34. From the statements of the accused-appellants recorded by the learned Judge, Special Court, Panipat on the quantum of sentence, it comes out that all of them have responsibilities towards their family members. The custody certificates produced by the learned State counsel show that none of the appellant was earlier convicted under any of the provisions of the NDPS Act. Accused-appellant Balbir has already undergone the actual sentence of seven years ten months and ten days and after adding remission, he has undergone total sentence for a period of eight years ten months and ten days. Accused-appellant-Tirlok has also remained in custody for actual period of seven years ten months and ten days and after adding remission, he has undergone total sentence of eight years ten months and ten days. Similarly, appellant-Kuldeep has actually undergone seven years ten months and ten days in jail and after adding remission, he has also undergone total sentence of eight years ten months and ten days. Appellant- Wardi Chand has not earned any remission and has undergone total sentence for a period of eight years one month and four days. Thus, all the appellants have already undergone a substantial period in jail. In view of the facts and circumstances of the case, they certainly deserves leniency in the matter of sentence.

35. Thus, keeping in view our aforesaid discussion, we do not find any legal infirmity in the conviction of the appellants recorded by the

learned Judge, Special Court, Panipat. Thus, the conviction of the appellants recorded by the learned Judge, Special Court, Panipat for the offence punishable under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 is upheld and appeal against conviction stands dismissed. However, the order on the quantum of sentence dated 15.01.2011 is hereby modified. Appellants Wardi Chand, Balbir, Tirlok and Kuldeep are sentenced to undergo rigorous imprisonment for a period of ten years and also ordered to pay a fine of ₹ 1 lac each and in default thereof, they will further undergo imprisonment for a period of one year.

(S.S.SARON)
JUDGE

(DARSHAN SINGH)
JUDGE

February 16, 2017

s.khan

Whether speaking/reasoned : Yes/No

Whether Reportable : Yes/No