

IN THE HIGH COURT OF PUNJAB & HARYANA, CHANDIGARH

CRA-S-3950 -SB of 2015

Date of Decision: August 28, 2017

Kulwant Singh

.....Appellant

Versus

State of Punjab

.....Respondent

Coram: Hon'ble Mr. Justice Arvind Singh Sangwan

Present: Mr.Amit Dhawan, Advocate for
Mr.Veneet Sharma, Advocate
for the appellant

Mr.Randeep Singh Khaira, Assistant Advocate
General, Haryana

Arvind Singh Sangwan, J.

Appellant was tried qua commission of offence punishable under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short the 'Act') in FIR No.95 dated 4.10.2012 registered at Police Station Kathunangal, Amritsar. The trial Court, vide its judgment and order dated 14.7.2015, convicted and sentenced the appellant under Section 15 read with Sections 8 and 29 of the Act. Hence, the present appeal.

The prosecution story, in brief, is that on 04.10.2012, a Police party headed by Assistant Sub Inspector-Dhanwinder Singh was on petrol duty and, when they reached near bridge canal Babowal, one motor cycle came from the side of village Bhilowal. Two persons were riding the motor-cycle and, on seeing the Police Party, they tried to turn back but were apprehended by the Police. Before conducting the search, efforts were made to join the independent witness but no one was willing and, on asking, the motor-cycle rider disclosed his name as Kulwant Singh, son of Gurmej Singh and the person sitting behind disclosed his name as Sarwan Singh, son of Wadhawa Singh . On checking the polythene bag kept by accused-Kulwant Singh, poppy husk was recovered, out of which, two samples of 250 grams each were separated and remaining one and a half kilogram was put into a plastic bag and the parcels were prepared and sealed by the Investigating Officer. Similarly, on checking the polythene bag of Sarwan Singh, poppy husk was recovered, out of which two samples of 250 grams, each were drawn and separated and remaining one and a half kilogram was kept in a plastic container and sealed by the Investigating Officer. Thereafter, the other formalities of investigation were completed and the case property was produced before Station House Officer of Police station, who also put his seal, and kept the same in his double lock. The sample parcels were sent to the Office of the Chemical Examiner .

After completion of investigation and necessary formalities, challan was presented against the appellant. Thereafter, the appellant-accused was charge-sheeted under Section 15 read with Sections 8 and 29 of the Act.

Prosecution, in order to prove its case, examined PW1 Assistant Sub Inspector-Harjit Singh, who stated that on 4.10.2012, he was present in the Police Station when Assistant Sub Inspector Dhanwinder Singh produced six parcels having seal impressions 'DS' along with Form M-29 and also produced the accused persons. He checked all the parcels and affixed his seal bearing impression 'HS'. He further deposed that he handed over the case property and accused to Assistant Sub Inspector-Dhanwinder Singh, who produced the same before the Illaqa Magistrate. He also produced an application Exhibit PW1/C submitted before the Illaqa Magistrate for sending the case property and the order Exhibit PW1/D passed by the Illaqa Magistrate on that application. Thereafter, Assistant Sub Inspector-Dhanwinder Singh handed over the case property to him and he kept the same in his double lock. Later on, he handed over the charge of the double lock to Station House Officer and, during the investigating period, there was no tampering with the case property.

PW2, Head Constable-Sukhwinder Singh deposed that Assistant Sub Inspector-Lakhwinder Singh handed over the special report to him to deliver the same to the Illaqa Magistrate and proved the special report as Exhibit PW2/A. This witness further stated that Station House Officer handed over to him two sealed sample parcels with seal 'DS' and 'HS' along with a docket and he deposited the sample parcels to the Chemical Examiner Kharar and handed over the receipt of the same to Station House Officer-Preetinder Singh.

PW3 Inspector Preetinder Singh stated that on 6.10.2012, he was on leave and charge of double lock of Malkhana of Police Station

Kathunangal was with Assistant Sub Inspector-Harjit Singh and on joining his duty, Assistant Sub Inspector-Harjit Singh handed over to him the case property which was deposited in Judicial Malkhana. He proved the Form M-29 as Exhibits PW1/A and PW1/A1 and reports of the Chemical Examiner as Exhibits PX and PY.

PW4 Assistant Sub Inspector-Dhanwinder Singh, Investigating Officer of the case proved on record recovery memos Exhibits P1 and P2, arrest-cum-intimation memos Exhibits PD and PE, personal search memos of accused Exhibits PF and PG were prepared at the spot. Thereafter, a ruqa Exhibit PA was sent for the registration of FIR and FIR as Exhibit PW2/A was registered. During investigation, site plan Exhibit PB was prepared and the motor cycle was taken in possession vide memo Exhibit PC and the case property was produced before the Illaqa Magistrate, for seeing the same by moving an application as Exhibit PW1/C on which the Illaqa Magistrate passed an order Exhibit PW1/D. He also produced on record two bulk parcels as Exhibits MO1 and MO2 as well as two sample parcels as Exhibits MO3 and MO4.

PW4 Sawinder Kaur, Junior Asistant DTO Office proved application Exhibit PX regarding verification of motor cycle No. PB02-BF-4183 and report as Exhibit PY. As per the report, motor cycle was in the name of Kulwant Singh, son of Gurmej Singh, the present appellant.

PW5 Harjinder Singh, one of the recovery witness proved on record the recovery memos Exhibits P1 and P2, ruqa as Exhibit PA, formal FIR Exhibit PW2/A and intimation-cum-arrest memos of accused persons as Exhibits PD and PE and personal search memos of accused Exhibits PF and

PG. Thereafter, the evidence of the prosecution was closed .

The appellant, when examined under Section 313 Cr.P.C., after the closure of prosecution evidence, prayed that he was innocent and had been falsely involved in the case and also prayed for leading defence evidence.

In defence evidence, one DW1-Gurnam Singh was examined, who has brought the record of attendance register, Office of Punjab State Electricity Board, Sub Division Udhoke Complex Center Babowal. As per record, on 4.10.2012, he along with Kulwant Singh and Gurmeet Singh was on duty. He has proved on record the entry dated 4.10.2012 as Exhibit DW1/A and deposed that at point `A' of this entry, he has appended his signatures, at point `B' Kulwant Singh, appellant has signed and at Point `C' Gurmeet Singh has signed.

Head Constable-Rajinder Singh appeared as DW2 and has brought on record of FIR No. 95 dated 4.10.2012 and submitted that according to this entry, there is no mention that Form M-29 and sample seal was deposited in Malkhana alongwith the case property and he produced the photocopy of the same as Exhibit DW2. He also submitted that at serial No. 664 dated 5.10.2012, no motor cycle was deposited in the Malkhana and this entry was Exhibited as Exhibit DW3.

DW3 Palwinder Singh, Clerk, Judicial Malkhana has also proved entry No. 20 dated 6.10.2012 pertaining to the deposit of two bulk parcels and two sample parcels bearing seal `DS' and `HS' in the Malkhana. He has also stated that sample seal or Form M-29 was not deposited along with the case property.

After hearing the learned counsel for the parties, the trial Court, vide its judgment of conviction dated 14.7.2015, held the appellant-Kulwant Singh as well as co-accused -Sarwan Singh guilty of commission of offence under Section 15 read with Sections 8 and 29 of the Act and vide order of sentence of even date, sentenced both the accused to undergo for a period of two months each (already undergone by them) from 4.10.2012 to 7.12.2012 with a fine of `3000/- each and in default of payment of fine, to undergo further rigorous imprisonment for two days each.

The present appeal has been filed challenging the aforesaid judgement/order of conviction and sentence.

Learned counsel for the appellant has submitted that the prosecution has failed to join any independent witness which has made the prosecution case doubtful. A reference has been made to the statement of PW4 Assistant Sub Inspector -Dhanwinder Singh where he has stated that nobody come to join the investigation and in cross-examination, this witness has stated that he has not joined any witness. It is also submitted on behalf of the learned counsel for the appellant that the prosecution case is also doubtful as there is no compliance of Section 50 of the Act and, while conducting the personal search of accused persons, the mandatory provisions of Section 50 of the Act were not complied. Learned counsel has referred to the statement of PW4 ASI-Dhanwinder Singh where in the cross-examination, he has deposed as under:-

“I have not prepared any documents under Section 50 of the Act.

I have not given any option to any of the accused to be search

before the Gazetted Officer or Magistrate. I have not gone to the

Magistrate for search of the accused as mentioned in Section 50 of the Act. I have not joined any Magistrate in the recovery of NDPS cases which I have investigated”

It is also contended on behalf of the learned counsel for the appellant that the procedure adopted by the Investigating Officer is in violation of the provisions of Section 50 of the Act. It is also submitted that Form M-29 as well as sample seals were never deposited in the Malkhana along with case property which further makes the prosecution case doubtful. Learned counsel has also submitted that this fact is proved from the statements of DW2 HC Rajinder Singh and DW3 Palwinder Singh, Clerk Judicial Malkhana. It is further argued on behalf of the appellant that the appellant was not present at the spot and was on duty as he is working in the Punjab State Electricity Board and it is proved from the statements of DW3-Palwinder Singh and DW1 Gurnam Singh, who has produced the attendance register of the said Board ,Sub Division Udhoke Complex Center Babowal and, as per the same, on 4.10.2012, he along with appellant-Kulwant Singh and Gurmeet Singh was on duty and signed attendance register as Exhibit DW1/1A.

Section 50 of the Act reads as under:-

“50Conditions under which search of persons shall be conducted.

(1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to

the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

[\(2\)](#) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).[\(3\)](#) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.[\(4\)](#) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

[\(6\)](#) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.”

In support of his arguments, learned counsel has relied upon

the judgement of the Hon'ble Supreme Court in State of Rajasthan vs. Parmanand and another 2014(2)RCR(Criminal) 40, wherein it was held as under:-

“Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application. In this case, respondent No.1 Parmanand's bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of respondent No.2 Surajmal was also conducted. Therefore, in the light of judgments of this Court mentioned in the preceding paragraphs, Section 50 of the NDPS Act will have application.”

While deciding this case, Hon'ble the Supreme Court has duly considered the judgement in State of Punjab vs. Baldev Singh 1999(3)RCR (Criminal) 533 relied upon by the trial Court.

Learned State counsel, on the other hand, has submitted that the prosecution had been successful in proving its case and prays for dismissal of the appeal.

After hearing the learned counsel for the parties, I am of the opinion that the instant appeal deserves to be allowed.

In the present case, the Investigating Officer PW4 Assistant Sub Inspector-Dhanwinder Singh has not followed the mandate of Section 50 of the Act while conducting the search of the bag carried by the appellant, no offer was given to him to be searched in the presence of

Magistrate or the Gazetted Officer. Moreover, this witness, in his cross-examination, has also admitted that, in fact, he has not joined any independent witness. The entire search and seizure made by the Officer of the rank of Assistant Sub Inspector is without any independent corroboration. PW3 Inspector Preetinder Singh, Station House Officer has clearly stated that he was on leave and in his absence, Assistant Sub Inspector-Harjit Singh was Incharge and on 6.10.2012, the case property was handed over to him. It was already deposited in the Malkhana. Even if the procedure adopted in depositing the case property in Malkhana is not followed properly as neither Form M-29 nor the seals were deposited along with the case property as it is proved from the statement of DW2 Head Constable- Rajinder Singh and DW3 Palwinder Singh, Clerk, Judicial Malkhana, Amritsar. The evidence led by the appellant regarding his presence in the office of Punjab State Electricity Board where he was working has been totally ignored by the trial Court and, in fact, statement of DW1-Gurnam Singh, who stated that on 4.10.2012, he along with appellant- accused- Kulwant Singh and one other employee was on duty. Gurmeet Singh was on duty is not even discussed while passing the impugned judgement as only two points were framed and decided i.e., firstly that the prosecution has not joined any independent witness and, secondly, there is non-compliance of Section 50 of the Act. The trial Court has not discussed any other point or defence raised by accused-appellant except the discrepancies in the statements of PW4 and PW5 and, thus, the case against the appellant is not proved beyond doubt.

Accordingly, the appeal is allowed. Impugned judgement of

conviction and sentence dated 14.7.2015 are hereby set aside. Appellant is acquitted of the charges under Section 15 read with Sections 8 and 29 of the Act.

(ARVIND SINGH SANGWAN)
JUDGE

August 28, 2017
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Whether speaking/reasoned: Yes/No

Whether Reportable: Yes/No