

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH.**

**Criminal Appeal No.S-865-SB of 2017 (O&M)
Date of Decision: June 02, 2017**

Paramjit Singh

.....APPELLANT(s).

VERSUS

State of Punjab

.....RESPONDENT(s).

CORAM:- HON'BLE MR. JUSTICE SURINDER GUPTA

Argued by: Mr. Parvinder Singh, Advocate
for the appellant (s).

Mr. Jashanpreet Singh, AAG Punjab.

SURINDER GUPTA, J.

This is appeal against the judgment dated 27.01.2017 passed by Judge, Special Court, Shaheed Bhagat Singh Nagar (Nawanshahr) convicting the appellant for offence punishable under Section 18 Narcotic Drugs and Psychotropic Substances Act, 1985(for short-NDPS Act) and sentencing him to undergo rigorous imprisonment for three years and to pay a fine of ₹30,000/- and in default of payment of fine, to further undergo rigorous imprisonment for six months.

Case of the prosecution, in brief, is that on 09.03.2013, ASI Phool Rai of CIA Staff, Nawanshahr (SBS Nagar) was going with his police party from Nawanshahr towards village banga, Gunachaur, Khankhana, Sarhal Kazian, Chak Bilga and Behram. When the police party reached some distance ahead of Railway Crossing, Behram. It was 3.30 P.M. and

the appellant was seen coming from the side of colony of village Behram. On seeing the police party, he felt perplexed and fastened his steps after taking a U-turn. He was apprehended on the basis of suspicion and ASI Phool Rai after giving his introduction apprised of his suspicion that he was carrying some contraband and search was to be conducted. Appellant was made aware that he had right to get his search conducted in the presence of a Gazetted Officer or a Magistrate, at which he preferred to get his search conducted in the presence of Gazette Officer. His dissent statement Ex.PW5/A to this effect was recorded and Deputy Superintendent of Police Bhagat Singh Gill (PW3) was given a wireless message to reach at the spot. He came to the spot at 4.00 P.M. On being informed about facts, he disclosed his identity to the appellant and again apprised him to get his search conducted before some other Gazette Officer or Magistrate. Appellant reposed his confidence in him and his consent memo Ex.PW3/A was prepared, which was signed by appellant and other witnesses present at the spot. On instruction of DSP, ASI Phool Rai conducted search of the appellant and found opium wrapped in glazed paper from right pocket of his pant. Out of which 10 gms was separated as sample and parcel of it was prepared. Remaining opium weighing 1 kg 490 gms was put in a parcel. Both the parcels were sealed with seal of Investigating Officer bearing impression 'PR' and of DSP bearing impression 'BS'. Sample seal sheets bearing impressions of seal of Investigating Officer and DSP Ex.PW3/B and Ex.PW3/C were prepared. Form No.29 (Ex.PW3/D) was partly filled at the spot. The sample, remaining case property and the above referred form were taken into possession vide recovery memo Ex.PW3/E, which were

signed by DSP, Investigating Officer and other police officials present at the spot. Ruqa Ex.PW5/B was sent to the police station, whereupon formal FIR Ex.PW5/C was recorded. Rough site plan Ex.PW5/C of the place of recovery with correct marginal notes was prepared and the appellant was arrested vide arrest memo Ex.PW5/E. During the period, investigation was going on at the spot, the person who had taken the ruqa to the police station returned at the spot with FIR and ruqa. On all the memos prepared at the spot, FIR number was incorporated.

On return to the police station, appellant and the case property was produced before Inspector Surjit Kumar, SHO along with all other memos prepared at the spot. He (SHO) was apprised of all the facts relating to opium from the appellant which were further affirmed by him through inquiry from the appellant. Thereafter, SHO Surjit Kumar put his own seal 'SK' on the sample and the parcel containing remaining opium and prepared his sample seal impression Ex.PW3/C. He also completed form No.29 and handed over the case property, form No.29 and sample seal to Investigating Officer ASI Phool Rai, who deposited the same with MHC vide entrustment memo Ex.PW4/A. Inventory report Ex.PW4/B was also prepared and the case property, sample along with documents were deposited with MHC. On the next day, case property was produced before Chief Judicial Magistrate, SBS Nagar, where a representative sample of 10 gms from the bulk of opium was drawn and sealed with seal bearing impression of 'HA'. Learned Magistrate had also seen and signed the other parcels. Again on return to the police station, parcels, form No.29 and other documents were deposited with MHC, Police Station Behram. Samples were sent to Chemical

Examiner and found to be that of opium and after completion of investigation, challan was presented against the appellant in Court.

On finding a prima facie case, learned trial court framed charge for the offence punishable under Section 18 of NDPS Act, to which he pleaded not guilty and claimed trial.

To support its case, prosecution examined MHC Balwinder Singh as PW1, Constable Jasbir Singh as PW2, DSP Bhagwant Singh Gill as PW3, Sub Inspector Surjit Kumar as PW4, ASI Phool Rai as PW5 and ASI Jasbir Singh as PW6. Thereafter, public prosecutor closed the prosecution evidence.

After completion of prosecution evidence, all the incriminating circumstances appearing against the appellant was put to him while recording his statement under Section 313 Code of Criminal Procedure to which he pleaded his innocence and denied the allegations levelled against him. He stated in his defence that he was picked up by the police from village Bazidowal and a false case was planted upon him by conducting all the proceedings in the police station.

In his defence evidence, appellant examined Head Constable Surjit Singh as DW1 and Ram Lubhaya, Patwari Halqa as DW2.

Learned counsel for the appellant while referring to consent memo Ex.PW3/A and dissent memo Ex.PW5/A, has argued that both these documents show false implication of the appellant. At the time of recording of dissent memo and consent memo, no recovery of contraband had been effected or there was any reason to infer that FIR will be got registered against the appellant. However, at the top of both of these memos, FIR

number have been recorded which show that both these documents were prepared after the recovery was allegedly effected from the appellant. Log book of the vehicle of DSP Bhagwant Singh Ex.D1 shows that there is tampering of the date and secondly, the DSP had gone to several places before coming to Behram and it was not possible for him to reach at the spot at 4.00 P.M. While referring to akshajra Ex.D2, he has argued that the street from where recovery was alleged to have been effected, is not shown to be in existence in the akshajra. The version of the prosecution finds no independent corroboration despite the fact that village Behram is nearby the place of recovery. The mobile phone of the appellant was also not taken into possession and no explanation has been rendered for not taking mobile phone in possession as it would have given the location of the appellant and hit the prosecution case.

Learned State counsel has argued that ASI Phool Rai while appearing as PW5 has stated that after receipt of FIR, he mentioned FIR number in the memos prepared at the spot and his statement to this effect is unrebutted. As and when the police party prepares any memo, it describes the date of preparation of memo and the name of the police station to which the police party belongs or where the matter is to be reported. It is clear from the statement of ASI Phool Rai, Investigating Officer that he incorporated the number of FIR in the memos later on and no doubt about his statement can be raised on this score. The issue of non-joining of independent witness has been explained by DSP, who came to the spot, as well as by Investigating Officer. Both have stated that nobody was willing to join the police party and this fact is well-known that independent

witnesses avoid to join investigation for obvious reasons. DSP Bhagwan Singh has stated that he received the message for reaching at 3.45 P.M. and proceeded towards the place of recovery and reached there by 4.00 P.M. The log book entry Ex.D1 describes that he had gone to various place and then reached the spot within the area of village Behram and there is nothing on file to draw the impression that testimony of DSP is not reliable.

On giving a careful thought to the submission of learned counsel for the appellant and learned State counsel and on perusal of trial Court's record, I find that so far as the submission of learned counsel for the appellant that no independent witness was joined; mobile phone of the appellant was not taken into possession at the spot; DSP could not reach the spot as per the entry in the log book which has cutting on the date etc., do not create any shadow of doubt about the case of the prosecution. However, I find weight in the submission of learned counsel for the appellant with regard to the preparation of consent memo and dissent memo by ASI Phool Rai. Dissent memo Ex.PW5/A was prepared after ASI Phool Rai who allegedly apprised the appellant of his right to get his search conducted before a Magistrate or Gazetted Officer when he apprehended that the appellant is possessing some contraband. At that time, neither ASI Phool Rai could make out that the appellant was possessing any contraband or if so, which contraband, he was possessing. Very strangely, at the top of the memo, he had mentioned the first two lines as follows:-

“Ist line: Police Station Behram.....District Shaheed Bhagat Singh Nagar

“2nd line: FIR No.13 dated 09.03.2013 under Sections 18/16/85 of N.D.P.S. Act, Police Station Behram”.

Here a question, which arise for consideration is that ASI Phool

Rai could not have remotest idea that contraband will certainly be recovered from the appellant and if so, which type of contraband will be recovered. Section 18 NDPS Act deals with punishment for contravention in relation to opium poppy and opium. ASI Phool Rai has nowhere stated the reason for his mentioning Section 18 NDPS Act at the top of this memo. In similar fashion, consent memo Ex.PW3/A was prepared. This memo was also prepared for offence under Section 18 of NDPS Act. As per the statement of DSP Bhagwant Singh and ASI Phool Rai search of the appellant was conducted after the preparation of memo Ex.PW3/A. Before preparing this memo, neither ASI Phool Rai nor DSP Bhagwant Singh could have remotest idea that the appellant was possessing opium. Though ASI Phool Rai has stated while appearing as PW5 that he has mentioned FIR No. on the memos after receipt of FIR at the spot but it remain a mystery as to how he has mentioned in advance before affecting the recovery that FIR in this case will be registered for offence punishable under Section 18 NDPS Act. This not only supports but fortifies the contention of the learned counsel for the appellant that all these documents were prepared at later stage either in the police station or after the recovery had been affected. Either of this fact, if relied is a pointer to the falsity of the case of the prosecution and also non-compliance of the provisions of Section 50 NDPS Act. It is nowhere case of the investigating officer that entire top line containing FIR number, date, offence for which it was registered, was incorporated after the receipt of the FIR. It otherwise does not appeal to the logic that while preparing dissent memo, investigating officer will incorporate FIR number (even if it is kept blank) and anticipate offence for which it will be registered. There is always

a possibility that the suspicion of the investigating officer may not come true and no recovery of contraband may be effected as per the suspicion of investigating officer.

The punishment prescribed for keeping the contraband is very deterrent type of punishment and the prosecution is required to prove such offence by leading best quality evidence. Such abrasions as have been observed in this case not only reflect on the credibility of the testimony of police officials including one who is a Gazetted Officer but also shatter the confidence of the society.

As a sequel of my above discussion, I find merit in this appeal and the same is accepted. The appellant who is in custody is ordered to be acquitted of the charge for the offence punishable under Section 18 NDPS Act framed against him. He is ordered to be released forthwith, if not required in any other case.

June 02, 2017
Sachin M.

(SURINDER GUPTA)
JUDGE

Whether speaking/reasoned: ***Yes/No***

Whether Reportable: ***Yes/No***