

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

Crl. Appeal No.S-5342-SB of 2015(O&M)

Date of Decision: 06.12.2017

Sukhwinder Singh @ Sukha

.. Appellant

Vs.

State of Punjab

.. Respondent

CORAM: HON'BLE MRS. JUSTICE ANITA CHAUDHRY

**Argued by:- Ms. Aditi Girdhar, Advocate -
Amicus Curiae for the appellant.**

Mr. Bhupender Beniwal, AAG Punjab.

ANITA CHAUDHRY, J.

The appellant has laid challenge to the judgment of conviction and sentence passed by the Special Court, Kapurthala dated 21.09.2015 vide which he was held guilty under Section 21 of the Narcotic Drugs & Psychotropic Substances Act(for brevity, 'the Act') and sentenced to undergo rigorous imprisonment for ten years and pay fine of Rs. One lac. In default of payment of fine, he was sentenced to further undergo rigorous imprisonment for one year

The prosecution case, in nutshell, is that on 22.01.2013 at about 4:00 PM a police party headed by ASI Harjit Singh had reached Tashpur Chowk, village Naseerawal. On suspicion they intercepted a person carrying a plastic bag. The person disclosed his name as Sukhwinder Singh @ Sukha son of Sewa Singh, resident of village Toti Sultanpur Lodhi (appellant). The police party made efforts to join public persons, but were unable to do so.

On search of the bag, intoxicating powder was recovered. Two samples of

05 grams each were separated and converted into parcels. The remainder on weighment was found to be 90 grams. The samples and the remainder powder were sealed with seal "HS" and were taken into possession vide separate recovery memo, attested by HC Gurmej Singh and HC Gurdial Singh. Form-29-M was prepared and seal impression was embossed thereupon. Ruqa was sent to the police, whereupon FIR was registered. Special reports were delivered to the Higher Officers through HC Jaswinder Singh. Rough site plan was prepared. The accused was arrested and produced before ASI Bhupinder Singh, officiating SHO. He verified the facts and put his seal on the samples, parcel containing the remainder and form 29M and kept the parcels in his custody. The case property and representative sample and the accused were produced before the Court and after orders, the case property was deposited in the Malkhana. The samples were handed over to MHC Puran Chand who sent the same through HC Surjit Singh to the Chemical Examiner for analysis. On examination, the samples were found to be of Diphenoxylate. On completion of investigation, final report was laid.

The accused was charged under Section 21 of the Act, to which he pleaded not guilty and claimed trial.

The prosecution produced 6 witnesses, namely, PW1 HC Gurdial Singh, PW2 MHC Puran Chand, PW3 ASI Bhupinder Singh, PW4 HC Surjit Singh, PW5 ASI Harjit Singh and PW6 HC Jaswinder Singh.

In his statement under Section 313 Cr.P.C., the accused denied the prosecution allegations and pleaded that nothing was recovered from him.

No evidence in defence was led.

The trial Court held the appellant guilty under Section 21 of the Act and sentenced him to the imprisonment noticed above. Dis-satisfied with the same, the instant appeal.

I have heard learned counsel for the parties and have gone through the record carefully.

Learned amicus curiae appearing for the appellant urged that there had been non-compliance with the provisions of Section 50 of the Act and the accused had been deprived of his right to be searched before a Gazetted Officer and it had prejudiced him. She had further urged that the prosecution case rested solely on the testimony of official witnesses and no independent witness had been associated in the investigation. According to learned counsel, in absence of any independent corroboration, no reliance could be placed on the testimony of official witnesses whose testimony were discrepant on several facts. She had further urged that on form 29-M there was reference to only one sample, whereas the case of the prosecution was that two samples had been drawn. She had further submitted that the accused was not produced before the SHO for verification of facts and it had prejudiced the accused. She has referred to **Randhir Singh Vs. State of Haryana 2010(2) RCR(Crl.) 388, Karnail Singh Vs. State of Haryana, 2008(3) RCR(Crl.) 543, Sewa Singh Vs. State of Haryana, 2008(2) RCR(Crl.) 520 and State of Himachal Pradesh Vs. Vijay Kumar, 2015(43) RCR(Crl.) 754.**

Learned State counsel had supported the judgment of conviction.

Let us first deal with the submission of non-compliance of Section 50 of the Act. In this case, the police party was patrolling and as

soon as they reached near Tashpur Chowk, they noticed the appellant coming from the side of village Dudwindi who on seeing the police party tried to escape. On suspicion, he was apprehended and on search from the bag which he was carrying, narcotic substance was recovered. Meaning thereby it was a case of chance recovery. Hon'ble Apex Court in the case of **State of H.P. Vs. Sunil Kumar, 2014(2) RCR(Crl.) 139**, while dealing with the case of applicability of Section 50 of the Act in a case of chance recovery held as under:-

“Applicability of Section 50 of the Act

18. *As far as the applicability of Section 50 of the Act in a chance recovery is concerned, the issue is no longer res integra in view of the decision of the Constitution Bench in Baldev Singh.*

19. *It is true that Sunil Kumar behaved in a suspicious manner which resulted in his personal search being conducted after he disembarked from the bus. However, there is no evidence to suggest that before he was asked to alight from the bus, the police officers were aware that he was carrying a narcotic drug, even though the Chamba area may be one where such drugs are easily available. At best, it could be said the police officers suspected Sunil Kumar of carrying drugs and nothing more. Mere suspicion, even if it is 'positive suspicion' or grave suspicion cannot be equated with 'reason to believe', **Joti Parshad v. State of Haryana, 1993(1) RCR(Crl.) 554: 1993 Supp (2) SCC 497** and **Sheo Nath Singh v. Appellate Assistance CIT, (1972) 3 SCC 234**. These are two completely different concepts. It is this positive suspicion, and not any reason to believe, that led to the chance recovery of charas from the person of Sunil Kumar.*

20. *Similarly, the positive suspicion entertained by the police officers cannot be equated with prior information, **Bharatbhai Bhagwanjibhai v. State of Gujarat, 2006(1) Apex***

Criminal 445: (2002) 8 SCC 327. The procedure to be followed when there is prior information of the carrying of contraband drugs is laid down in the Act and it is nobody's case that the procedure was followed, let alone contemplated.

21. *We are not in agreement with the view of the High Court that since the police officers had a positive suspicion that Sunil Kumar was carrying some contraband, therefore, it could be said or assumed that they had reason to believe or prior information that he was carrying charas or some other narcotic substance and so, before his personal or body search was conducted, the provisions of Section 50 of the Act ought to have been complied with. The recovery of charas on the body or personal search of Sunil Kumar was clearly a chance recovery and, in view of Baldev Singh, it was not necessary for the police officers to comply with the provisions of Section 50 of the Act.”*

In the case in hand the contraband was recovered from the bag which the accused was carrying and not from the personal search and in this view of the matter, coupled with the dictum of Hon'ble Apex Court, provisions of Section 50 of the Act are not applicable to the present case and Vijay Kumar's case (supra) is not applicable.

The case of the prosecution rests on the testimonies of official witnesses. The law on this is also settled. In **Rohtash Vs. State of Haryana, 2013(3) RCR(Crl.) 355**, Hon'ble Apex considered the issue at length and after placing reliance upon its earlier judgments came to the conclusion that where all witnesses are from the police department, their depositions must be subject to strict scrutiny. However, the evidence of police officials cannot be discarded merely on the ground that they belong to the police force, and are either interested in the investigating or the

prosecuting agency. However, as far as possible the corroboration of their evidence on material particulars should be sought. It has been held as follows:-

“Thus, a witness is normally considered to be independent, unless he springs from sources, which are likely to be tainted and this usually means that the said witness has cause, to bear such enmity against the accused, so as to implicate him falsely. In view of the above there can be no prohibition to the effect that a policeman cannot be a witness, or that his deposition cannot be relied upon.”

In **State (Govt. of NCT of Delhi) v. Sunil, 2001(1) RCR (Criminal) 56: (2001) 1 SCC 652**, the Hon'ble Apex Court held as follows:-

“We feel that it is an archaic notion that actions of the police officer should be approached with initial distrust. We are aware that such a notion was lavishly entertained during British period and policemen also knew about it. Its hang over persisted during post-independent years but it is time now to start placing at least initial trust on the actions and the documents made by the police. At any rate, the court cannot start with the presumption that the police records are untrustworthy. As a proposition of law the presumption should be the other way around. That official acts of the police have been regularly performed is a wise principle of presumption and recognised even by the legislature. Hence when a police officer gives evidence in court that a certain article was recovered by him on the strength of the statement made by the accused it is open to the court to believe the version to be correct if it is not otherwise shown to be unreliable. It is for the accused, through cross-examination of witnesses or through any other materials, to show that the evidence of the police officer is either unreliable or at least unsafe to be acted upon in a particular case.”

Adverting to the facts of present case, the prosecution had examined PW1 HC Gurdial Singh. He was one of the witnesses to the recovery. His statement was corroborated with the testimony of PW5 ASI Harjit Singh, the investigating officer of the case. Both of them were specific that on 22.01.2013 the appellant was apprehended by the police party on the basis of suspicion when he tried to conceal himself and from the search of polythene bag carried in his right hand, intoxicant powder was recovered. Testimony of both the witnesses is consistent and corroborative so far as recovery is concerned. The witnesses were subjected to lengthy cross-examination and the testimony remained unshattered. Nothing incriminating could be elicited which would cast doubt on the veracity of their statements. It is not a case where no attempt was made to join independent person. Their testimony suggest that efforts were made to join public persons, but they had refused. It is known fact that public avoids joining the investigations. The learned counsel for the appellant had pointed out variations in the testimonies viz. PW1 had admitted that they had not done any patrolling on that day, while PW5 Harjit Singh ASI had deposed that they were on patrolling at the time of recovery and that PW1 had deposed that the sample was packed in white boxes, but PW MHC Puran Chand had deposed that the samples were sealed in white clothes, does not make any difference. These minor and trivial variations in their statements do not go to the root of the case and may be due to the fact that they were examined after about one year of the recovery. There is no reason to discard the statements. No ill-will or motive had been attributed to them. The testimonies of all these witnesses are consistent so far as recovery is concerned. The accused cannot derive any help from Randhir Singh's case

(supra).

ASI Bhupinder Singh, who was working as SHO on the date of recovery had stepped into the witness-box as PW3. He was specific that two samples were produced before him along with the parcel containing the remainder contraband, upon which he put his seal as well as on Form-29-M. It has come in the statements of prosecution witnesses that regular SHO was on leave on that date and he was discharging his duties as officiating SHO. No prejudice is shown to have been caused to the accused if he was produced before ASI Bhupinder Singh as the SHO was on leave on that date. He got the inventory of the seized articles prepared through ASI Harjit Singh. It has been held in **Jagiro @ Jagir Kaur Vs. State of Punjab 2014 (3) RCR(Crl.) 717** that compliance of Sections 52, 55 and 57 of the Act is directory and not mandatory. The intent of the Legislature in enacting Sections 52 and 55 of the Act was to rule out fair investigation and any falsity in the case. The statements of witnesses are suggestive of the fact that immediately after the recovery, the accused along with the contraband and its samples was produced before ASI Bhupinder Singh, who was discharging his duties on that date as officer-in-charge of the police station. He verified the facts and affixed his seals on the samples and the parcel containing the remainder and form 29-M and kept the sample parcels in the safe custody which were later sent to FSL for analysis. They specifically deposed that the samples were not tampered with till the same reached the FSL. The prompt lodging of FIR, its dispatch to the higher officers and immediate sending of samples to the FSL strengthened the case of the prosecution. It cannot be said that there had been intentional and deliberate breach of provisions of the Act. The interest of the appellant were

safeguarded when he was produced before PW3 ASI Bhupinder Singh, the officiating SHO. The facts of Karnail Singh and Sewa Singh case (supra) are distinguishable from the facts of the case in hand.

The inevitable conclusion of the aforesaid discussion is that the evidence of prosecution witnesses had been correctly appreciated by the trial Court. There is no reason to take a different view.

The appeal is dismissed. The conviction and sentence of the appellant is maintained. His bail bonds and surety bonds stand cancelled. The appellant is directed to surrender before the Court of CJM concerned within two months from today and to undergo the remaining part of the sentence. In case he fails to surrender before the Court within the stipulated time, the CJM concerned would take appropriate steps to procure his presence. A copy of this order be sent to the CJM concerned for compliance.

December 6, 2017
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(ANITA CHAUDHRY)
JUDGE

Whether speaking/ reasoned

Yes/ No

Whether reportable

Yes/ No