

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

**Criminal Appeal No.S-1997-SB of 2004 (O&M)
Date of Decision: August 03, 2018**

Balbir Singh

.....APPELLANT(s).

VERSUS

State of Punjab

.....RESPONDENT(s).

CORAM:- HON'BLE MR. JUSTICE SURINDER GUPTA

Argued by : Mr. P.S. Punia, Advocate
for the appellant (s).

Mr. Ramandeep S. Sandhu, Sr. DAG Punjab.

SURINDER GUPTA, J.

This is appeal against the judgment of conviction and order of sentence both dated 04.10.2004 passed by Learned Judge, Special Court, Ludhiana, whereby the appellant was convicted for the offence punishable under Section 15 of Narcotic Drugs and Psychotropic Substances Act, 1985 (for short-NDPS Act) and sentenced to undergo rigorous imprisonment for one year and to pay a fine of ₹2000/-. In default of payment of fine, to further undergo rigorous imprisonment for 15 days.

The case of the prosecution, in brief, is that on 31.08.2002, ASI Jaswant Singh along with his police party was going towards village Hissowal. When he reached near drain on the eastern side, the appellant was seen sitting with a gunny bag and another person was sitting near him.

He was apprehended on the basis of suspicion. ASI Jaswant Singh told the

appellant that the bag in his hand, which was smeared with poppy-husk, seems to be containing poppy-husk and apprised him of his right to get conducted his search before a Magistrate or a Gazetted Officer but the appellant reposed confidence in him and agreed for his search to be conducted by the Investigating Officer. On search of gunny bag, poppy-husk was found in it, out of which two samples of 250 grams each were separated and converted into parcels. On weighment, remaining poppy-husk was found to be 24 and half Kgs. It was again transferred in the same gunny bag, which was also converted into a parcel. Both the sample parcels and gunny bag were sealed with the seal impression of 'JS'. After completion of necessary investigation, challan for the offence punishable under Section 15 of NDPS Act was presented against the appellant.

After supplying copies of challan as envisaged under Section 207 Cr.P.C., and on finding a prima facie case, appellant was charge-sheeted for the offence punishable under Section 15 of NDPS Act to which he pleaded not guilty and claimed trial.

In support of its case, prosecution examined SI Hardeep Singh as PW1, Head Constable Jagdish Singh as PW2, ASI Jaswant Singh (investigating officer) as PW3, Head Constable Sukhwinder Singh as PW4, CII Dalbir Singh as PW5 and closed the prosecution evidence.

After conclusion of prosecution evidence, all the incriminating material was put to the accused while recording his statement under Section 313 Cr.P.C., wherein he denied the allegations levelled against him and pleaded his false implication. He stated in his defence as follows:-

“I am innocent. No recovery was effected from me.

Kartar Singh son of Bishan Singh r/o village Pakhowal,

Tehsil Raikot, was murdered and I myself and others were involved in that murder case falsely and thereafter, I alongwith others was acquitted and due to enmity, I have been involved in this case falsely at the instance of Mohinder Singh, real brother of deceased Kartar Singh, Balbir Singh and Kuldip Singh, who are nephews of the deceased.”

In his defence evidence, appellant examined Saggar Singh as DW1 and closed the same.

After hearing learned Public Prosecutor and learned defence counsel, the appellant was convicted and sentenced by learned Judge, Special Court, Ludhiana as detailed in opening para of this judgment.

Learned counsel for the appellant has argued that case of prosecution is based on statements of official witnesses, which find no independent corroboration. Even the Sarpanch to whom the intimation of arrest of appellant was given, was not examined. The Investigating Officer had not complied with the provisions of Section 50 NDPS Act despite the fact that personal search of the appellant after recovery from the bag was also conducted. In support of his contention, he has relied on the observations of Hon'ble Apex Court in case of ***State of Rajasthan Vs. Parmanand and another 2014 (5) SCC 345***. Recovery memo Ex.PC, site plan Ex.PE, memo of personal search Ex.PF, arrest memo Ex.PH, information memo Ex.PH bear FIR number, which shows that either the FIR was ante-dated or memos were tampered as the FIR number could not be recorded in these memos when these were prepared.

Learned State counsel has argued that recovery in this case was not effected from the person of appellant, as such, provisions of Section 50

of NDPS Act are not attracted to this case. While preparing the memo of recovery, arrest memo, site plan etc., the column of 'FIR No.' was kept blank and same was filled later on after the receipt of ruqa along with endorsement of registration of FIR. It was a chance recovery and there was no opportunity with the police party to join the independent witness before apprehending the appellant. Testimony of witnesses examined by the prosecution is reliable and cannot be discarded on the mere fact that independent witness was not joined by the police party.

Firstly, I take the citation relied by learned counsel for the appellant. In case of *State of Rajasthan Vs. Parmanand and another (supra)*, two persons in possession of contraband had been arrested. The investigating officer had committed two errors while effecting the recovery, firstly, he had recorded joint statement of both the accused regarding option given to them as per provisions of Section 50 NDPS Act to get them searched before the Magistrate/Gazetted Officer or the officer, who was member of the raiding party; secondly, consent memo was signed by one of the accused for both. Hon'ble Apex Court in these circumstances has observed in para 14 as follows:-

“14. In our opinion, a joint communication of the right available under [Section 50\(1\)](#) of the NDPS Act to the accused would frustrate the very purport of [Section 50](#). Communication of the said right to the person who is about to be searched is not an empty formality. It has a purpose. Most of the offences under the [NDPS Act](#) carry stringent punishment and, therefore, the prescribed procedure has to be meticulously followed. These are minimum safeguards available to an accused against the possibility of false involvement. The communication of

this right has to be clear, unambiguous and individual. The accused must be made aware of the existence of such a right. This right would be of little significance if the beneficiary thereof is not able to exercise it for want of knowledge about its existence. A joint communication of the right may not be clear or unequivocal. It may create confusion. It may result in diluting the right. We are, therefore, of the view that the accused must be individually informed that under [Section 50\(1\)](#) of the NDPS Act, he has a right to be searched before a nearest gazetted officer or before a nearest Magistrate. Similar view taken by the Punjab & Haryana High Court in *Paramjit Singh* and the Bombay High Court in *Dharamveer Lekhram Sharma* meets with our approval. It bears repetition to state that on the written communication of the right available under [Section 50\(1\)](#) of the NDPS Act, respondent No.2 Surajmal has signed for himself and for respondent No.1 Parmanand. Respondent No.1 Parmanand has not signed on it at all. He did not give his independent consent. It is only to be presumed that he had authorized respondent No.2 Surajmal to sign on his behalf and convey his consent. Therefore, in our opinion, the right has not been properly communicated to the respondents. The search of the bag of respondent No.1 Parmanand and search of person of the respondents is, therefore, vitiated and resultantly their conviction is also vitiated.”

Hon'ble Apex Court has also observed that Investigating Officer could not have given a third option to the respondent i.e. to get himself searched before officer of raiding party as Section 50(1) NDPS Act does not provide for it. It appears that person of the accused was also searched but nothing incriminating was found on the person of accused.

After personal search of accused in that case, the bag carried in left hand of accused was searched in which opium was recovered.

In this case, ASI Jaswant Singh had not conducted personal search of the appellant before conducting the search of the bag, which was smeared with poppy-husk. On search of the gunny bag, 25 Kg of poppy-husk was recovered from it. After completing the entire formalities, personal search of the appellant was conducted and ₹45/- were recovered which were taken into possession vide recovery memo Ex.PF.

Provisions of Section 50 NDPS Act are not attracted in this case as firstly, Investigating Officer has apprised the appellant of his right to be searched before the Magistrate or a Gazetted Officer. Secondly, the recovery of contraband was not effected from the personal search of the appellant, as such, the observations in case of *State of Rajasthan Vs. Parmanand and another (supra)*, are not applicable to the facts of the present case.

Much stress has been put by learned counsel for the appellant on non-joining of independent witness and the non-examination of Sarpanch to whom the intimation regarding arrest of the appellant was given. So far as the Sarpanch to whom the intimation of arrest of appellant was given is concerned, he was not eye witness of the occurrence, as such, his examination could not have improved the case of the prosecution in any manner. The police party was on routine patrolling and the appellant encountered it all of a sudden and was apprehended on the basis of suspicion as the bag carried by him was smeared with poppy-husk. It is not supposed that the investigating officer will always join an independent

witness with him while going for patrolling. In this case, Investigating Officer was having no chance to join the independent witness before apprehending the appellant. Even otherwise, ASI Jaswant Singh PW3, Head Constable Sukhwinder Singh PW4 have fully supported the prosecution case and appellant has not alleged any reason, motive or enmity with them for his false implication. He has stated that he was involved in a case of murder of Kartar Singh in which he was acquitted and due to enmity, he was involved in this case. Appellant has also examined Saggar Singh as DW1 in his defence, who has stated that the police has come to the house of appellant but nothing incriminating was recovered on search and Balbir Singh (appellant) was taken by them on 30.08.2002. The testimony of this witness inspires no confidence as after the incident, this witness neither intimated any one in village, Panchayat or higher police officers. He remained silent till his statement was recorded after a period of more than a year in the Court. The testimony of the official witness is without any major discrepancy, as such, trial Court has committed no error while relying on the same.

ASI Jaswant Singh, while appearing as PW3 has stated that column of 'FIR No.' were kept blank in the all the memos and were filled up later on. The Constable, who had taken the ruqa, reached the spot with the endorsement of registration of FIR and the memo Ex.PH, arrest memo were prepared after his arrival at the spot.

Perusal of the recovery memo, site plan, consent memo etc. shows that column of 'FIR No.' was kept blank and was later on filled up. This fact creates no suspicion about the prosecution case and reflects that

'FIR No.' was filled up only after the official, who took ruqa to the police station, reached the spot with endorsement about registration of FIR mentioning the number of FIR therein.

On perusal of the paper book and record of the trial Court with the assistance of learned counsel for the appellant and learned State counsel, I find no legal or factual infirmity in the judgment passed by the Court below, calling for any interference and the same is upheld. The quantum of sentence awarded to the appellant is also not on higher side. Learned trial Court has already taken a lenient view on this score, as such, I find no reason to interfere with the quantum of sentence awarded to the appellant. The same is also upheld.

In view of my above discussion, this appeal has no merits.

Dismissed.

Copy of this judgment be sent to concerned Chief Judicial Magistrate to procure custody of the appellant and to send him to jail to serve the remaining sentence.

August 03, 2018
Sachin M.

(SURINDER GUPTA)
JUDGE

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

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