

In the High Court of Punjab and Haryana at Chandigarh

CRA-S-5108-SB-2015 (O&M)

Date of Decision: 01.03.2018

Balwinder Singh

.....Appellant

Versus

State of Punjab

.....Respondent

CORAM: HON'BLE MRS. JUSTICE ANITA CHAUDHRY

Present: Mr. Mohan Lal Singla, Advocate for
Ms., Veerpal Kaur, Advocate
for the appellant.

Mr. Rahul Rathore, DAG, Punjab.

ANITA CHAUDHRY, J

The appeal is directed against the judgment dated 15.09.2015 passed by the Special Judge, Fatehgarh Sahib who convicted and sentenced the appellant to 5 years rigorous imprisonment along with fine of Rs.50,000/- under Section 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the 'Act').

Brief facts in nutshell are as follows.

A police party headed by ASI Amar Singh was present near main gate of Maharaja Aggrain Park on 21.12.2012 in the area of Mandi Gobindgarh for patrol duty. They saw a person coming on foot from the side of main GT Road. On seeing the police party, he tried to turn but was apprehended. On inquiry he revealed his name as Balwinder Singh. The police party suspected the accused to carry some contraband and apprised him of his right to be searched by a Gazetted Officer or a Magistrate. The

accused reposed confidence in the police officer and gave his consent. The police made efforts to join independent witness but no one obliged them. The accused gave his consent and reposed confidence in the Investigating Officer. The accused was searched which led to recovery of intoxicant from the transparent bag in the right pocket of the pant worn by the accused. Two samples of 10 gms each of intoxicant powder were separated. On weighing, the recovery was found to be 240 gms of intoxicant powder. The samples and the remaining bulk were sealed by ASI Amar Singh with his seal of 'AS'. The seal after used was handed over to HC Shamsher Singh. Thereafter ruqa was sent to the police Station.

On completion of investigation challan was presented. Charge was framed and the prosecution examined 5 witnesses.

The trial Court on examination of the evidence recorded conviction against which the petitioner has filed this appeal.

The foremost contention raised on behalf of the appellant is that the case could not have been investigated by the complainant and it was a case of recovery from the personal search and compliance of Section 50 had not been made. It was urged that the accused had been arrested only 100 mtrs away from the police station and the police party remained on the spot for 8 hours and there is no shop or any other place to sit nearby and all the documents had been prepared while sitting in the police station. It was urged that the recovery is doubtful as no independent witness was joined. It was urged that morphine is written in the FIR and the police officials could not have known contents of the article recovered from the accused. Reliance was placed upon '*Megha Singh Vs. State of Haryana (SC) 1997(2) R.C.R. (Criminal)*', '*State by Inspector of Police, Narcotic Intelligence Bureau,*

Madurai, Tamil Nadu Vs. Rajangam 2010(15) SCC 369', 'Gannu and another Vs. State of Punjab 2017(3) R.C.R. (Criminal) 566', 'State of Himachal Pradesh Vs. Atul Sharma and others 2015 Latesh HLJ (H.P.) 331', 'Amandeep Singh Vs. State of Punjab 2014(4) AICLR 537', 'Didar Singh @ Dara Vs. The State of Punjab 2010(4) AICLR 382', 'Gurjant Singh @ Janta Vs. State of Punjab 2013(4) R.C.R. (Criminal) 874' and 'State of Rajasthan Vs. Parmanand and another 2014(85) ACrC 662'.

On the other hand, the State counsel has supported the judgment and placed reliance upon ***'Surender @ Kala Vs. State of Haryana'***

I have given my thoughtful consideration to the submission made by the respective party and have gone through the evidence led by the prosecution with their assistance.

It has to be seen whether the mandatory provisions of law relating to search and seizure had been followed in this case and for that we have to carefully scrutinize the evidence.

ASI Amar Singh had deposed that they were present near the main gate of Maharaja Aggrain Park when they saw the accused turning back and on suspicion he was apprehended by the police officials. He stated that the suspected accused was carrying some contraband and he apprised him of his right to be searched by some Gazetted Officer or Magistrate and he reposed confidence in him and the consent memo was signed by the accused. He stated that he had made efforts to join witnesses but no one was willing.

Regarding applicability of Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 regarding search of an accused in person in the presence of a Magistrate or a Gazetted Officer duly authorized under the provisions of Sub Section 1 of Section 42 of the Narcotic Drugs and Psychotropic Substances Act, 1985, the main provision is Section 50 has to be seen and is quoted below:-

50. Conditions 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."

The requirement of the rule is that the police officer concerned has to inform the person about the existence of his right to be searched before a Gazetted Officer or a Magistrate. It has also been held that if a bag is carried and is searched without their being any search of his person then Section 50 will have no application.

The requirement of the rule is that the accused has to be informed of his right to be searched. The Prosecution had led evidence and had proved the consent memo and according to it the accused was informed of his right but the accused did not choose to have his search before the Gazetted Officer or a Magistrate.

So far as the argument that the complainant and the Investigating Officer were the same, the Division Bench had considered this question in '**Ranjit Singh Vs. State of Punjab 2015(2) PLJ Criminal Page-13**' and had dealt in the following manner:-

38. As per the prosecution case, PW-4 SI Harvinderpal Singh has received the secret information. The raid was arranged by him and investigation was also carried out by him. Learned counsel for the appellants have vehemently contended that PW-4 SI Harvinderpal Singh being the complainant of the case was not legally competent to carry out the further

investigation. They have also relied upon cases State By Inspector of Police, Narcotic Intelligence Bureau, Madurai, Tamil Nadu versus Rajangam (supra) and Karam Singh @ Karma and another versus State of Punjab (supra). Rajangam's case (supra) is based on the case titled as Megha Singh versus State of Haryana (1996) 11 SCC 709. This decision was also referred before the Hon'ble Apex Court in State versus V. Jayapaul, 2004 (2) RCR (Criminal) 317 (SC) and the Hon'ble Supreme Court in that case laid down as under:

We find no principle or binding authority to hold that the moment the competent police officer, on the basis of information received, makes out an FIR incorporating his name as the informant, he forfeits his right to investigate. If at all, such investigation could only be assailed on the ground of bias or real likelihood of bias on the part of the investigating officer. The question of bias would depend on the facts and circumstances of each case and it is not proper to lay down a broad and unqualified proposition, in the manner in which it has been done."

39. In case S. Jeevanantham versus State through Inspector of Police, TN, 2004 (3) RCR (Criminal) 333 also, the officer who has conducted the search and also conducted the investigation, after taking the note of Megha Singh's case (supra) and V. Jayapaul's case (supra), it was laid down as under:

In the instant case, PW-8 conducted the search and recovered the contraband article and registered the case and the article seized from the appellant was narcotic drug and the counsel for the appellant could not point out any circumstances by which the investigation caused prejudice or was biased against the appellant. PW-8 in his official capacity gave the information, registered the case as part of his official duty and later investigated the case and filed charge-sheet. He was not in any way personally interested in the case. We are unable to find any sort of bias in the process of investigation."

40. In case Hardip Singh versus State of Punjab 2008 (4) RCR (Criminal) 97 again, the Hon'ble Apex Court laid down that the investigation carried out by the Inspector, who recovered the opium from the accused, is not illegal. So, it has been

consistently laid down by the Hon'ble Apex Court that mere this fact that the officer who has got the case registered and effected the recovery had carried out the investigation does not render the investigation illegal. Such investigation can only be assailed on the ground of bias or real likelihood of bias on the part of Investigating Officer which resulted into any prejudice to the accused. In the instant case, the appellants have not been able to show as to what prejudice they have suffered on account of investigation being carried out by Sub Inspector Harvinderpal Singh. There is also no material on record to show that Sub Inspector Harvinderpal Singh was in anyway biased against the appellants. So, there is nothing illegal in the investigation being carried out by SI Harvinderpal Singh."

In the instant case, the appellant has not been able to show the prejudice that had been suffered on account of investigation being carried out by the investigating officer. There is no evidence either that the investigating Officer was biased towards him. Therefore, there is no illegality in the investigation carried out by him.

One of the argument made on behalf of the appellant also was that the seal was handed over to the police official and it remained in their custody and it could have been tampered. In the present case, the seal was given to the police official as there was no independent witness. There is no evidence that the sample was tampered with.

There are hardly any discrepancies in the prosecution evidence. The case cannot be rejected because the police took 8 hours to complete the process when they were very close to the police station. So far as the reference to Morphine in the FIR is concerned, the prosecution case cannot be thrown out. The officials deal with numerous such cases and have a long experience to their credit and it could be that by smell or taste they had

come to know the contents of the contraband. No evidence was led by the accused to show that the entire investigating team was biased or that the contraband had been planted upon him.

No other point was urged.

In view of the above discussion, it is held that the judgment of conviction and order of sentence rendered by the trial Court was based upon correct apprehension of evidence and law, and it does not warrant any interference and is upheld.

For the aforesaid reasons, the appeal is dismissed. The judgment of conviction and sentence is upheld. The accused is presently on bail, therefore he is directed to surrender within one month.

Registry to send a copy of the judgment to the Chief Judicial Magistrate concerned. In case of non-surrender the Chief Judicial Magistrate would initiate process to secure his presence and commit him to jail.

(ANITA CHAUDHRY)
JUDGE

March 01, 2018

ps-I

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No