

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

CRA-S-1109-SB-2005 (O&M)

Date of decision: 01.02.2019

Kashmira Singh

...Appellant

Versus

State of Punjab

...Respondent

CORAM: HON'BLE MR. JUSTICE ARVIND SINGH SANGWAN

Present:- Ms. Swati Batra, Advocate (Legal Aid Counsel)
for the appellant.

Mr. Joginder Pal Ratra, DAG, Punjab.

ARVIND SINGH SANGWAN, J.

1. This appeal has been directed against the judgment of conviction dated 31.03.2005 and order of sentence of the even date, vide which, appellant Kashmira Singh was held guilty for commission of offence punishable under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 and was sentenced to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs. 1,00,000/-; in default of payment of fine, to further undergo rigorous imprisonment for a period of 01 year.

2. Considering the fact that appellant had undergone a period of 08 years, 03 months and 12 days before his sentence having been suspended on 01.07.2007, as per custody certificate dated 03.05.2018, and since learned counsel for the appellant was not appearing, a Legal Aid Counsel was appointed on 10.05.2018 to assist the Court on behalf of the appellant.

3. Brief facts of the case, as per prosecution, are that on

25.08.2000, when Inspector Joginder Singh along with other police officials were on routine duty and were going from the side of village Bhudan towards village Kuthala, one persons came from the side of village Kuthala on an ox-cart, on which, HC Surinder Singh told Inspector Joginder Singh that this person had absconded in some other cases and he was apprehended. The Inspector told him that he suspected some contraband in his bags, lying on the ox cart and wanted to conduct his search. The Inspector apprised the accused of his right to be searched either in the presence of a Magistrate or a Gazetted Officer, to which, accused consented to be searched in the presence of a Gazetted Officer. Consent memo of the accused was recorded which was thumb marked by the accused and the witnesses attested the same and through a wireless message, DSP Surinder Singh was called upon at the spot and within a few minutes he reached there along with his staff. He also asked the accused if he wanted his bags to be searched in the presence of a Magistrate or before some Gazetted Officer, on which, the accused reposed faith in the DSP and offered his bags to be searched in his presence. Another consent statement of accused was prepared at the instance of DSP, which was thumb marked by the accused and attested by the witnesses. Thereafter, under the supervision and in the presence of DSP, the search of the bags of accused was conducted and the same were found containing poppy husk which were 11 in numbers. Two samples, each weighing 250 Grams, were separated from each of the bag and made into parcels and the remaining poppy husk which weighed 34.5 KG in each bag, was again put in the same bags and made into parcels. The sample parcels as well as the bags containing

remaining poppy husk were sealed by the investigating officer with his seal bearing impression 'JS' and the DSP also put his seal bearing impression 'SS'. The case property was taken into possession vide a recovery memo which was attested by the witnesses. A seal sample was also prepared. Statements of witnesses were recorded and site plan was prepared. Thereafter, the accused was arrested at the spot. *Ruqa* was sent to the police station for registration of the FIR. On personal search of the accused, currency notes of Rs. 150/- were recovered which were taken into possession and a memo in this regard was prepared which was also attested by the witnesses and on return to the police station, the case property was deposited intact. In due course, the sample parcels were sent for chemical analysis and on receipt of the report, challan was presented against the accused.

4. Finding a prima facie case against the accused, charge under Section 15 of the NDPS Act was framed against him, to which, he pleaded not guilty and claimed trial.

5. During trial, in support of its case, the prosecution examined PW-1 Constable Gurjant Singh who tendered his formal affidavit Ex. PA. PW-2 HC Gurdarshan Singh also tendered his formal affidavit Ex. PB, PW-3 DSP Surinder Singh proved the consent memo Ex. PC, wherein the accused consented to be searched in his presence. PW-4 ASI Mahavir Singh, who was the recovery witness, tried to support the prosecution case by identifying the accused and by narrating the detail of the alleged recovery and proved certain documents i.e. consent statement Ex. PC and PH, recovery memos Ex. PD and PE, personal search memo Ex. PF, memo

of arrest Ex. PG. PW-5 Inspector Joginder Singh, Investigating Officer, identified the accused and made a similar statement as made by PW-4 ASI Mahavir Singh and proved certain documents i.e. consent statements Ex. PC and PH, recovery memos Ex. PD and PE, personal search memo Ex. PF, memo of arrest Ex. PG, ruqa Ex. PJ, rough site plan Ex. PK, memo of arrest Ex. PG and Chemical Examiner's report Ex. PL. PW-6 Parkash Chand, Reader posted in the Court of SDJM, Malerkotla, proved the judicial order Ex. PM, showing that the case property and accused were produced before the Illaqua Magistrate after the recovery. PW-7 HC Surinder Singh, another recovery witness, also identified the accused and made a similar statement as made by Inspector Joginder Singh. Thereafter, the prosecution closed its evidence.

6. After taking entire prosecution evidence, statement of accused under Section 313 Cr.P.C. was recorded wherein he denied each prosecution allegation and pleaded his innocence.

7. The trial Court, after hearing both the parties and appreciating all the evidence and material available on record, held the appellant-accused guilty for commission of offence punishable under Section 15 of the NDPS Act and sentenced him as noticed above. Hence, the present appeal.

8. Learned counsel for the appellant has argued that the appellant has falsely been implicated in the present case and in fact, he was taken up by Inspector Joginder Singh from his residence and the arrest was shown in the present case that is proved from various documents led by way of defence evidence.

9. Learned counsel for the appellant further argued that an application was moved by the mother of the appellant against the illegal detention of the appellant by the police before various authorities including Deputy Commissioner, Sangrur, District & Sessions Judge, Sangrur and even before this Court.

10. Learned counsel for the appellant has further submitted that the appellant has examined DW-1 Anju Bala, a Senior Clerk in the office of Deputy Commissioner, Sangrur, who stated that an application No. 22820 dated 25.08.2000 was received as per the complaint register maintained in the office of Deputy Commissioner, Sangrur, vide Ex. D-1 and the same was referred to SSP, Sangrur.

11. It is further submitted that DW-2 Seema Rani, a receipt Clerk in the office of District & Sessions Judge, Sangrur, has also proved receiving of a complaint dated 22.08.2000 in the office of District & Sessions Judge, vide receipt No. 5382 dated 24.08.2000 and the copy of the same was also endorsed and sent to SSP, Sangrur.

12. Learned counsel for the appellant further submitted that DW-3 Constable Ranjit Singh, an employee of Complaint Branch, DPO, Sangrur, also proved receiving of a similar complaint vide receipt No. 9438 dated 25.08.2000 from one Kashmir Singh s/o Naurata Singh and the copy of the complaint was proved as Ex. D-2.

13. It is further submitted that DW-4 Baljinder Singh Teja, a Senior Assistant of Punjab and Haryana High Court, has proved on record the ***Criminal Writ Petition No. 1025 of 2000*** titled as ***Dalbara Singh vs. SHO, Police Station Sadar, Malerkotla***, which was filed through one

Sh. Nawab Singh Virk, Advocate on 25.08.2000, photocopy of the same was exhibited as Ex. D-4 along with Annexures i.e. the complaints given to the police authorities. It was further stated by this witness that a Warrant Officer was appointed on 25.08.2000, in which a report was submitted on 26.08.2000, Ex. D-6.

14. Learned counsel for the appellant further submitted that DW-5 Sh. Nawab Singh Virk, Advocate proved on record the filing of the aforesaid criminal writ petition in which the affidavit was prepared on 25.08.2000, though the petition was drafted on 24.08.2000.

15. It is further submitted that DW-6 Darbara Singh stated that appellant Kashmira Singh is his real brother and he was taken by the police from their house on 23.08.2000 at about 9.30 PM and on the next date, he had gone to the High Court for filing of the petition. It is stated that when the Warrant Officer visited the police station, accused Kashmira Singh was found in the lock up and he had already been falsely implicated in this case and nothing was recovered. In the cross-examination, this witness stated that on 25.08.2000, no poppy was recovered from the appellant.

16. Learned counsel for the appellant has, thus, argued that much prior to the registration of the FIR, the appellant and his family members, apprehending that appellant may be involved in a false case, had given various complaints and have also filed aforesaid criminal writ petition before this Court, which demonstrates that appellant has falsely been implicated in the present case and this defence evidence has not been considered by the trial Court.

17. Learned counsel for the appellant has further argued that PW-1

Constable Gurjant Singh, who had taken the sample parcels to the FSL, stated that on 28.08.2000, he started from the police station and in the intervening period of 28.08.2000 to 29.08.2000, he stayed in the Police Line, Patiala without entering rapat in the police line about his stay and then handed over the case property/sample parcels to FSL, Chandigarh on 29.08.2000 and, therefore, there is no proper explanation for delay in sending the samples to FSL.

18. It is further argued that PW-3, DSP Surinder Singh stated that on 25.08.2000, on receiving a wireless message, he reached at the spot and gave an offer to accused whether he wanted to be searched before him or before Illaqua Magistrate and after recording the consent Ex. PC by the Investigating Officer, which was attested by him, Inspector Joginder Singh conducted the search of the appellant and 11 gunny bags which were lying on the ox cart. The gunny bags were marked from 1 to 11. Out of each gunny bag, two samples of 250 Grams were separate and converted into separate parcels and were marked from 1/1 to 11/11. On weighment, the remaining poppy husk from each gunny bag including the bag came to 34.5 KG. The gunny bags containing remaining poppy husk were also converted into separate parcels. All the samples were sealed by Inspector Joginder Singh with his seal bearing impression 'JS' and this witness also put his seal bearing impression 'SS'. The sample seal chit was prepared and the seal was handed over to ASI Mahavir Singh. The ox cart along with the contraband was taken into possession by the Investigating Officer, vide recovery memo Ex. PD and a personal search memo of the accused was also prepared in which Rs. 50/- was recovered. In cross-examination, this

witness stated that he is DSP in ORP rank and drawing the pay of Inspector. He further stated that no special report was sent to the higher officials from the spot and the memo of arrest was prepared in his presence but the copy of the same was not supplied to the accused and denied the suggestion that the entire proceedings were done while sitting in his office.

19. Learned counsel for the appellant has further argued that PW-4 ASI Mahavir Singh has stated that on 25.08.2000, on suspicion, the accused was apprehended by Inspector Joginder Singh/IO and when a notice was given to the accused to be searched either before a Gazetted Officer or before a Magistrate, he opted to be search before a Gazetted Officer and a memo Ex. PH recorded and thereafter, DSP Surinder Singh was called at the spot and the recovery was effected. In cross examination, this witness has stated that appellant was also an accused in FIR No. 171 dated 19.08.2000, registered under Section 15 of the NDPS Act at Police Station Malerkotla and he managed to escape and was not apprehended at the spot and was arrested in the present FIR on 25.08.2000 and in the intervening period, no raid was conducted at the house of the accused. This witness further stated that when the Warrant Officer visited the police station, the case was already registered against the accused. This witness also stated that he never raided the house of the accused before 25.08.2000 and had not seen the accused before that day.

20. Learned counsel for the appellant further submitted that IO/Inspector Joginder Singh, who appeared as PW-5, also deposed on the similar line as that of PW-4 ASI Mahavir Singh. In cross-examination, this witness admitted that FIR No. 171 dated 19.08.2000 was registered against

the present accused and he was the Investigating Officer in the said case. He further stated that he knew the residential address of the accused in the said case. This witness further stated that in routine, when an accused absconds, they conduct a raid at the house of accused but he did not remember if any raid was conducted at the house of accused or not. He further stated that no independent witness was joined at the spot and no special report was sent by him to the higher officials from the spot and there is no record regarding sending of message to DSP in the police station. This witness denied the suggestion that on account of filing of applications before the higher authorities regarding false implication of the accused in the previous case, he has falsely been implicated in the present case.

21. Learned counsel for the appellant further submitted that PW-7 HC Surinder Singh, a witness to the various documents prepared at the spot, in his cross-examination, admitted that he is also a prosecution witness against the accused in aforesaid FIR No. 171 and knew him since he was posted at Police Station Malerkotla. This witness further stated that while appearing as a witness in the Court in FIR No. 171, in a statement which was proved as Ex. P16, he has stated that his statement under Section 161 Cr.P.C. was not recorded. He has further admitted that he has stated in the said trial that accused was not arrested in his presence.

22. In reply, learned State counsel has argued that recovery was effected in the presence of a Gazetted Officer who reached at the spot on receiving a wireless message and after recording the consent of the appellant, his search was conducted and 11 gunny bags, lying on the ox

cart, were recovered. It is further argued that the trial Court has duly considered the defence set up by the appellant who was arrested in another FIR No. 171 dated 19.08.2000 registered at Police Station Malerkotla and when he managed to escape, he was arrested in the present FIR on 25.08.2000.

23. After hearing learned counsel for the parties, I find merit in the present appeal for the following reasons:

(a) PW-3 Surinder Singh, who was called at the spot being a Gazetted Officer, has admitted in the cross-examination that he was drawing the salary of an Inspector and was DSP in ORP Rank and, therefore, he cannot be termed as a Gazetted Officer as required under the provisions of Section 50 of the NDPS Act. It is held by Hon'ble Supreme Court in ***Gurjant Singh @ Janta vs. State of Punjab, 2013 (4) R.C.R. (Criminal) 874*** that where the Gazetted Officer was a DSP, who was an Inspector functioning as DSP, the search and seizure made before him is invalid and conviction was set aside.

(b) The appellant has led voluminous defence evidence to prove that much prior to his arrest in the present FIR, he had given various representations apprehending his false implication in a case under the NDPS Act. DW-1 Anju Bala, a Clerk in the office of Deputy Commissioner, Sangrur, had proved one of the complaints as Ex. D1, which was received in their office against Diary No. 1042 and similarly DW-2 Seema Rani, a Receipt Clerk in the office of District & Sessions Judge, Sangrur, has also proved receiving of a complaint dated 22.08.2000 on 24.08.2000. DW-3 Constable Ranjit Singh, an employee of Complaint

Branch DPO, Sangrur, has also proved receiving of a complaint Ex. D-2 from Kashmir Singh s/o Naurata Singh in this regard and real brother of the appellant, namely Darbara Singh, has even filed a Habeas Corpus petition bearing CRWP No. 1205 of 2000 on 25.08.2000, which was proved by DW-4 Baljinder Singh Teja, a Senior Assistant of the Punjab and Haryana High Court, and DW-5 Nawab Singh Virk, Advocate, who had filed the said petition had stated the same was drafted on 24.08.2000. Even DW-6 Darbara Singh, real brother of the appellant, has stated that appellant was taken by the police on 23.08.2000 at about 9.30 PM and he had gone to the High Court on the very next date for filing of the aforesaid petition and by the time the Warrant Officer visited the police station, the appellant was already involved in the present FIR and no recovery was effected from him. The trial Court, while convicting the appellant, has not dealt with this aspect of the defence evidence led by the appellant which needs to be scrutinized in the light of the statement of prosecution witnesses and proves that the appellant has led a valid defence evidence that he was not arrested on 25.08.2000.

(c) From the statement of the prosecution witnesses, it comes out that the appellant was firstly involved in FIR No. 171 dated 19.08.2000, registered under Section 15 of the NDPS Act at Police Station Malerkotla, however, he managed to escape from the police lock up on 19.08.2000. In the cross-examination, PW-4 ASI Mahavir Singh has admitted that from 19.08.2000 till 25.08.2000, when the present FIR was registered, in this intervening period, no raid was conducted at the house of the accused/appellant. This fact finds support from the defence set up by the

appellant that brother of the appellant had gone to Chandigarh on 24.08.2000 for filing a Habeas Corpus petition that his brother (appellant) has been picked up by the police on 23.08.2000.

(d) It has also come in the statement of PW-5, IO/Inspector Joginder Singh, when he admits in cross-examination, that the aforesaid FIR No. 171 was registered against the present appellant and he was the Investigating Officer in the said FIR also and knew the residential address of the appellant but no efforts were made to arrest him from his residence as claimed in the defence that the appellant was picked up from his residence on 23.08.2000 and in this regard, applications/representations were given to various authorities apprehending his false implication in the case under the NDPS Act.

(e) It has come in the statement of PW-7 HC Surinder Singh, who is a witness to some of the documents prepared at the spot, that when he appeared as a witness in FIR No. 171, he has stated that in the present FIR, his statement under Section 161 Cr.P.C. was not recorded which shows that recording of the evidence in the present FIR was made subsequently. This witness was confronted, during his cross-examination, with the statement Ex. P16 which was recorded in the trial of FIR No. 171 and it raises suspicion about the investigation in the present FIR.

(f) It has come in the statement of PW-1 Gurjant Singh that he had taken the sample parcels from the MHC on 28.08.2000 and on the intervening nights of 28/29.08.2000, he had stayed in the Police Lines, Patiala without entering any rapat in the police line about his stay and handed over the case property/sample parcels to FSL, Chandigarh on

29.08.2000. This statement if read with the statement of PW-4 Mahavir Singh, in cross-examination, this witness had admitted that he had seen the case property in the Court and on 2/3 bags, there were only three seals and on other 2/3 bags, there were 4 or 5 seals and on the other bags, there were 6 seals. Therefore, it raises suspicion about the manner in which the investigation was conducted. This witness has further admitted in cross-examination that on 26.08.2000, MHC Gurdarshan Singh handed over the case property to him for production before the SDJM and, therefore, the case property remained in custody of MHC for one day without their being any explanation as to why the same was not produced before the Magistrate immediately when the accused was arrested. Even the order dated 26.02.2000 Ex. PM, passed by the SDJM, is silent about sealing or resealing of the case property as per provisions of Section 52 of the NDPS Act and there is no direction that it should be kept in the safe custody in judicial Malkhana or MHC. The order reads as under:

“Heard. There are sufficient grounds for remanding the accused in police custody. So accused is ordered to be remanded to police custody till 28.08.2000. Zimnis perused & signed. Case property produced and signed.

**Sd/-
SDJM, 26.08.2000”**

Therefore, there is no plausible explanation either for not keeping the case property in safe custody or for delay in sending the sample to FSL or that the sample parcels were whether tampered with, when it remained in the custody of PW-1 Gurjant Singh who had stayed overnight in the Police Lines, Patiala without there being any entry in the record.

(g) In the statement of Inspector/IO Joginder Singh, it is nowhere

proved that he has prepared a memo informing the accused about the grounds of arrest or sent a report to the higher officials, as required under Section 57 of the NDPS Act, as it was not proved on record. Rather, this witness in the cross-examination has admitted that no such report was sent by him to the higher police officials and no copy of such report is on judicial file.

(h) As per the custody certificate dated 03.05.2018, filed in Court, the appellant has already undergone 08 years, 03 months and 12 days of total sentence including remissions out of 10 years of rigorous imprisonment awarded by the trial Court. His sentence was suspended on 01.02.2007 and thereafter, he has not repeated the crime as per the custody certificate dated 03.05.2018.

Therefore, in view of the above discussion, finding merit in this appeal, the same is allowed and the judgment of conviction dated 31.03.2005 and order of sentence of the even date, passed by the trial Court, are set aside. Accused-appellant Kashmira Singh is acquitted of the charge for which he faced trial. His bail/surety bonds be discharged accordingly.

February 01, 2019

Waseem Ansari

**(ARVIND SINGH SANGWAN)
JUDGE**

Whether speaking/reasoned

Yes/No

Whether reportable

Yes/No