398 IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRA-S-1155-SB of 2005
Date of decision: March 01, 2019

Prem Singh

....Appellant

Versus

Inspector Customs Preventive Station

....Respondent

CORAM: HON'BLE MR. JUSTICE ARVIND SINGH SANGWAN

Present: Mr. B.S. Bhalla, Advocate
for the appellant.

Mr. Anshuman Chopra, Senior Standing Counsel
for the respondent.

ARVIND SINGH SANGWAN, J.

Prayer in the instant appeal is for setting aside the judgment of conviction dated 9.5.2005 vide which the appellant was held guilty for the offence punishable under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'NDPS Act') and the order of sentence dated 9.5.2005 vide which he was sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.1.00 lac and in default of payment of fine, to further undergo rigorous imprisonment for a period of one year.

It is worth noticing here that the sentence of the appellant was suspended after he had undergone four years of substantive sentence vide order dated 20.3.2008 in the light of the Division Bench judgment passed in **Daler Singh Vs. State of Punjab,** 2007(1) Recent Criminal Reports (Criminal), 316.

Brief facts of the case are that the Inspector Customs, Preventive Station, Attari, on receiving a secret information which was reduced into writing and sent to the superior officer, laid a naka/barrier at Railway Crossing near Attari Railway Station on Attari-Rajatal Road on 25.8.2003 and intercepted a scooter bearing registration No.PB-03-K-3628. On enquiry, the appellant was found to be driving the scooter and one Manjit Singh was sitting on the pillion seat. Thereafter, two independent witnesses, namely, Swarn Singh and Joginder Singh were joined and in their presence, the Customs Officers consisting of Inspector Supinder Singh, Superintendent Ashwani Kumar disclosed their identity and informed them about their right to be searched before a Gazetted Officer or a Magistrate as they apprehended that the accused were carrying some narcotics. In reply to the notice, accused opted to be searched before a Gazetted Officer and the notice and consent memo were recorded in writing and the personal search was also conducted but nothing was found in personal search. Thereafter, the search of the scooter was conducted and from the dicky, brown colour cloth bag containing eight polythene packets of blackish semi-solid resinous material, i.e. opium was found and on weighment, it was found to be 4.10 kgs.(gross) and 4.00 kgs. net. With his drug testing kit, it was found to be opium and thereafter, samples of 25 grams each were drawn by making it a homogenous and were packed and sealed with seal No.114 of the Customs Division, Amritsar under the signatures of accused Prem Singh and the same was witnessed by Inspector Supinder Singh. The remaining opium of 3.95 kgs. was packed in the polythene pouch, and thereafter, the same was put in tin box and wrapped and sealed with seal No.114 under the signatures of the

Investigating Officer. Thereafter, the test memo was also prepared and handed over the competent authority and the scooter and other articles were taken in possession and the statement of the accused under Section 57 of the Act was recorded regarding the recovery of opium. He stated that he came in contact with one Jagtar Singh, resident of village Jandwala and he had been purchasing opium from him. Jagtar Singh gave an offer to him to give Rs.1,000/- per kg. As commission for the delivery of opium to some person and he was going to deliver the consignment to one Khan when he was intercepted by the Custom Officials and it was further stated that Manjit Singh do not know about the concealment of the opium in the dicky. In his separate statement, Manjit Singh stated that he was innocent had no knowledge about the same and, therefore, he was not arrested.

Thereafter, the challan was presented on the completion of the investigation and charges were framed under Section 18 of the NDPS Act, to which he did not plead guilty and claimed trial.

In the prosecution evidence, Supinder Singh, Inspector Customs appeared as PW1 and stated that Superintendent, Custom was a Gazetted Officer and as the accused opted to be searched before a Gazetted Officer, Ashwani Kumar, Superintendent recorded the option Ex.PA, which was thumb-marked by the accused and the consent memo was prepared as PA/1, which was also thumb-marked by the accused and signed by Ashwani Kumar, Superintendent. Two independent witnesses Joginder Singh and Swarn Singh also signed the same. Similarly, the consent memo of Manjit Singh Ex.PB and Ex.PB/1 was recorded, which was also thumb-marked by him and attested by the aforesaid witnesses. In the personal search of both the accused, nothing was recovered and from the dicky of scooter, the recovery of opium was made. Thereafter, a panchnama i.e. memo. Ex.PC was prepared which was signed by accused Manjit Singh, seizure memo Ex.PD was prepared which was also signed by the same set of witnesses, including the independent witnesses. This witness further proved the test memo Ex.PE, arrest memo. Ex.PF, grounds of arrest of the accused as Ex.PG, personal search memo. Ex.PH and the statement of the accused under Section 67 of the NDPS Act was proved as Ex.PJ. This witness further stated that on 4.9.2003, one sealed parcel containing the samples was sent to Central Revenue Control Laboratory, New Delhi through Inspector Joginder Singh and was received in the said office on 5.9.2003. This witness further proved the sealing of sample parcels and the bulk parcels, sending the application Ex.PL to the higher authorities and the other report Ex.PM. Thereafter, the case property was deposited with Sarabjit Singh, Incharge of the Malkhana vide inventory Ex.PO and Ex.PR, the scooter was also deposited in the Malkhana. The report of the Chemical Examiner was received as Ex.P7. The inventory dated 14.11.2003 was attested by the Chief Judicial Magistrate, Amaritsar vide certificate Ex.PV which was done in his presence and the complaint against the accused was submitted as Ex.PW. In cross-examination, this witness has stated that in the information report, name of the secret informant was not given and it was sent to Deputy Commissioner, Kalhon in writing. However, he had not brought the same in the Court. He denied that the independent witnesses were not present and their signatures were obtained later on. He further stated that on enquiry of the registration certificate of the scooter it was found that one Surjit Singh is the owner of the same. He also denied that the scooter and registration certificate were recovered from Surjit Singh and not from the accused.

PW2 Inspector Sarabjit Singh stated that on 26.8.2003 Inspector Sukhjit Singh deposited opium sealed in a tin weighing 3.95 kgs., with seal No.114 of 'D' Division, Amritsar alongwith an inventory Ex.PN and one sample seal was also submitted. On 8.1.2004, the case property was taken from Malkhana for production before the Court.

PW3 Ashwani Kumar, Superintendent Custom Headquarter, Amritsar also stated on the line of the Investigating Officer, that Inspector Supinder Singh gave the intimation-cum-option vide memo Ex.PA and Ex.PB. Both Prem Singh and Manjit Singh were given option and their consent was taken vide PA/1 and PB/2. Thereafter, this witness also gave the details of the recovery effected from the accused Prem Singh and their statement recorded and the further proceedings which were under taken at the spot.

PW4 Inspector Joginder Singh has deposed that he had drawn the sample of 25 grams and sealed with seal 114 of Custom Division, Amritsar along with test memo and authority letter and it was handed over to him by Inspector Supinder Singh on 5.9.2003 and, thereafter, he had taken it to Central Revenue Control Laboratory, New Delhi and deposited it there.

In the statement under Section 313 Cr.P.C., petitioner denied all the incriminating evidence put to him. The petitioner in defence examined one Joginder Singh as DW1, one of the independent witnesses associated by the prosecution who stated that he was called along with Swarn Singh in the office of the Custom and they were made to sign on 5/6 documents and nothing was recovered in his presence.

In cross-examination, he has stated that he has signed the documents on the asking of Swarn Singh and denied that he deposed falsely.

Counsel for the appellant has referred to lower Court record and argued that there are cuttings in the panchnama Ex.PC at various places and the words “contains of 8 plastic bags were mixed homogeneously” is apparently visible to be added later on. It is further argued that signature of Joginder Singh and Swarn Singh are in different pen/ink on first page and second page of this panchnama. It is also submitted that Superintendent/Gazetted Officer Ashwani Kumar has not signed all pages and he has put signatures only on last page which raises a suspicion. It is further argued that no form No.29 was filled at the spot and the same was never sent alongwith the sample parcel before the Central Revenue Control Laboratory, New Delhi. It is further stated that on test memo Ex.PE, there are cuttings at many places and even by using white fluid some entries have been omitted and it is a carbon copy of the original test memo, which is not produced on record and even it is not proved who made cuttings as it is not explained by any prosecution witness. It is also argued that in this memo though weight of sample is given but there is no reference of the balance residue recovered. Counsel for the appellant has further argued that in the arrest memo. Ex.PF and the grounds of arrest Ex.PG it is not mentioned that any of the relative of the appellant is informed and when the appellant will be produced before the Ilaqua Magistrate in compliance of Section 52 and 52-A of the Act.

Counsel for the appellant has further argued that when the appellant was produced before the Chief Judicial Magistrate neither any permission was taken for keeping the case property in the Malkhana of the Custom Department nor any permission was taken for depositing the same in judicial Malkhana. It is further submitted that the Chief Judicial Magistrate while directing the remand of the appellant in judicial custody did not pass any order for keeping the sample parcel and the bulk parcel in the custody of PW4 Inspector Joginder Singh. The operative part of the order reads as under :-

> "Present : Sh. P.L. Bindra, Advocate
> alongwith Inspector Customs Supinder Singh.
>
> Accused in custody.
>
> Case property i.e. one bulk containing 3.95 kg. Packed and sealed with seal No.114 customs Division, Amritsar along with two representatives samples of 25 grams each. Both sealed with seal No.114, Customs Division, Amritsar stated to be opium. The seals are intact and I have seen the case property and signed the same.
>
> Heard. Accused is remanded to judicial custody till 8.9.2003 and be produced before the learned Special Court on the said date at 10.00 a.m. sharp.
>
> Sd/-
> Harpreet Kaur Randhawa
> CJM/26.8.2003"

It is further submitted that even the Magistrate has not followed the proper procedure under Section 52 of the Act and had not given any direction as to how the case property be kept and as to how the sample parcel be sent to Central Revenue Control Laboratory.

The counsel for the appellant has further argued that in form-'F' regarding seizure of the report of the opium, it is mentioned that the name of the owner of the scooter is Surjit Singh son of Gurcharan Singh. However, neither he was joined in the investigation nor he was cited as a prosecution witness to find out how the scooter owned by him was used by the appellant. It is further argued that the inventory of the recovery Ex.PM, the personal search memo Ex.PL, recovery memo of scooter Ex.PR were never produced before the Chief Judicial Magistrate as is clear from the application Ex.PL and, therefore, the Chief Judicial Magistrate has no occasion to verify the same.

Counsel for the appellant has further referred to the report of the Chemical Examiner, Central Revenue Control Laboratory, New Delhi to submit that in the report it is not mentioned that the sample parcel was received in a sealed condition. Counsel for the appellant has further submitted that after a long delay of more than four months, the case property containing 8 polythene bags of opium were produced before the Chief Judicial Magistrate, Amritsar alongwith the inventory for the purpose of its verification and the same were resealed without taking any sample. The counsel for the appellant submitted that the appellant was not present at the time when it was presented and was got verified. The operative part of the order is reads as under :-

> "Certificate under Section 110(I-B) of the Customs Act, 1962 read with Section 52-A of the NDPS Act, 1985 in case titled "Assistant Commissioner (Customs) Vs. Prem Singh s/o Gurbachan Singh.

It is hereby certified that one package i.e. a tin box duly sealed with seal No.114 of Customs Division, Amritsar, was opened by me today in the premises of Customs House, Amritsar in the presence of Shri T.R. Kaushal, Superintendent (Malkhana) Customs, Shri Sarabjit Singh, Inspector (Malkhana) Customs, Amritsar and Shir Supinder Singh, Inspector Customs (Seizing Officer). The aforesaid package was containing eight polythene packets of opium weighing three kilograms and 950 grams. The articles in the package were duly tallied by me with the articles mentioned in the inventory and the same were found correct. The aforesaid opium was again packed in the same very packets and were again sealed in my presence with seal No.130 of the Customs Division, Amritsar, and were handed over to Shri T.R. Kaushal, Superintendent (Malkhana) Customs, Amritsar for further safe custody and necessary action.

Sd/-
8th January, 2004 Chief Judicial Magistrate
Amritsar"

Counsel for the appellant has further argued that the prosecution has failed to prove on record any evidence to link the disclosure of the appellant recorded under Section 67 of the Act wherein it was allegedly stated that he, on the allurement of Jagtar Singh resident of village Jandawal was going to deliver the same to one Khan when he was intercepted by the Custom officials.

Counsel for the appellant submits that both these persons i.e. Surjit Singh or Jagtar Singh were neither cited as the prosecution witnesses nor they were involved as an accused in the present case and, therefore, no reliance can be placed on the statement of accused which was not followed by arrest of any persons named in the statement.

Counsel for the appellant has further argued that as per the version of the Investigating Officer the seal was handed over to an independent witness, who was never examined before the Court and the prosecution failed to give any explanation for not examining both the independent witnesses, namely, Swarn Singh and Joginder Pal. Counsel for the appellant has relied upon 2008(4) RCR (Criminal) 489 titled as Hakam Singh Vs. State of Punjab, whereas this Court quashed the FIR on the ground that the independent witnesses joined by the police were not examined by the prosecution and similarly, the person to whom the seal was handed over was also not examined.

In reply, learned State counsel has submitted that the prosecution has properly followed the procedure and after giving a notice under Section 50 of the NDPS Act, the recovery was effected in the presence of a Gazetted Officer and, thereafter, an inventory was prepared which was got attested from the Chief Judicial Magistrate on 8.1.2004.

After hearing learned counsel for the parties and on going through the record, I find merit in the present appeal for the following reasons :-

(i) A perusal of the panchnama/memo. Ex.PC show that there are cuttings and additions made in this document which are apparently visible and prosecution witnesses have not explained as to how these additions were made in this memo;

(ii) Even the Gazetted Officer, i.e. PW3-Ashwani Kumar has not attested the cuttings on the documents and he has signed only on the last page of this document, which raises a suspicion whether the additions were made before he had signed this document;

(iii) A perusal of the report of the Central Revenue Control Laboratory, New Delhi-Ex.P7 show that there is no mention that form No.29 was filled at the spot and sample filled chit was prepared or sent along with the sample parcel to the Central Revenue Control Laboratory, New Delhi for its verification;

(iv) Even the test memo Ex.PE show that there are cuttings at many places and by using white fluid, some entries have been omitted. Moreover, this test memo. Ex.PE is a carbon copy of the original test memo and the original has never been produced on record to show that even on the original test memo some cuttings were made and were attested by the persons who prepared it;

(v) A perusal of the order dated 26.8.2003 passed by the Chief Judicial Magistrate show when the case property alongwith the appellant/accused was produced, no direction was issued how to deal with this sample parcel as well as the case property and how to keep it in safe custody. Therefore, apparently, the Illaqua Magistrate has not followed the procedure under Section 52 of the Act. In the absence of any such specific direction, it could not be ascertained whether the sample parcel and residue were kept in seal condition by PW4 Inspector Joginder Singh;

(vi) Even in the report Ex.P7 of the Chemical Examiner, it is not mentioned that the sample parcel was received in a sealed condition;

(vii) The prosecution could not explain as to how after a delay of four months, the case property/residue containing eight polythene packets of opium were produced before the Chief Judicial Magistrate on 8.1.2004 for the purpose of verification of the same. As noticed above, in the first order dated 26.8.2003, the Chief Judicial Magistrate itself, could very well verify the aforementioned fact which was got verified subsequently after eight months on 8.1.2004 and this is a serious lapse on the part of the prosecution;

(viii) Surprisingly, when the case property was produced before the Chief Judicial Magistrate after eight months on 8.1.2004, the appellant/accused was not present and even no opportunity was granted to him to appear before the Chief Judicial Magistrate and, therefore, no proper procedure was followed by the Chief Judicial Magistrate, while verifying the case property after a lapse of eight months and, that too, in the absence of the appellant/accused.;

(ix) As per the prosecution witnesses, in the memo of seizure Ex.PD and inventory Ex.PM, it is stated that the name of the owner of the scooter is one Surjit Singh son of Gurcharan Singh. Since the recovery was effected from the dickey of this scooter, neither this person was cited as a witness nor any effort was made to find out how the scooter of this person was in possession of the appellant;

(x) Though it is mandatory under Section 57 of the Act that the Investigating Officer will prepare the inventory and produce it before the Ilaqa Magistrate. However, a perusal of the inventory Ex.PM, personal search memo Ex.PL, recovery memo Ex.PR show that these were never produced before the Chief Judicial Magistrate as it is clear from the application Ex.PL itself, which was presented on the date of the arrest, i.e. 26.8.2003 and, therefore, the Chief Judicial Magistrate never verified the inventory prepared by the Investigating Officer;

(xi) As per the statement of PW4 Investigating Officer Joginder Singh, the appellant made a disclosure statement that he, on the allurement of one Jagtar Singh, was going to deliver the contraband to one Khan when he was intercepted by the Custom Officer. However, neither the said Jagtar Singh nor the person named Khan was ever arrested or joined in the investigation as prosecution witnesses and, therefore, the prosecution has failed to link the disclosure statement with any other evidence;

(xii) Though as per the Investigating Officer PW4 Joginder Singh, the seal was handed over to two independent witnesses, namely, Swarn Singh and

Joginder Singh. However, these witnesses were never examined by the police. Rather, one of the witnesses Joginder Singh appeared as a defence witness and has stated that he was called by other witness Swarn Singh at the office of the Customs and they were made to sign 5/6 documents and nothing was recovered in his presence. Therefore, there is no corroboration to the evidence of PW4 that after sealing the contraband, the seal was handed over to the independent witnesses; and

(xiii) There is unexplained delay of eight months of presenting the case property before the Chief Judicial Magistrate. As per the FIR, recovery was effected on 26.8.2003, whereas the case property was produced before the Chief Judicial Magistrate on 8.1.2004, needless to say, in the absence of the appellant and there is no evidence that in the intervening period it was kept intact and seals were not tampered.

In view of the above, this Court finds that the prosecution has failed to prove its case beyond reasonable doubt.

Accordingly, the appeal is allowed and the impugned judgment of conviction dated 9.5.2005 and the order of sentence dated 9.5.2005 are set aside and appellant is acquitted of the charge.

(ARVIND SINGH SANGWAN)
March 01, 2019 **JUDGE**
satish

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No