

IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH

CRA-D-452-DB-2017
Reserved on : 15.03.2019
Date of decision : 19.03.2019

Gurwinder Singh

... Appellant

Versus

State of Punjab

... Respondent

***CORAM: HON'BLE MR. JUSTICE RAJIV SHARMA
HON'BLE MR.JUSTICE ANIL KSHETARPAL***

Present: Mr.D.N.Ganeriwala, Advocate with
Mr.Sukhveer Singh Killianwali, Advocate
for the appellant.

Mr.S.P.S.Tinna, Addl.A.G. Punjab.

RAJIV SHARMA, J.

This appeal is instituted against the judgment and order dated 24.04.2017 and 25.04.2017 rendered by the learned Judge, Special Court, Bathinda, in Case No.NDPS/419/2014 whereby appellant, who was charged with and tried for offence punishable under Section 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as “NDPS Act”) has been convicted thereunder and sentenced to undergo rigorous imprisonment for a period of 15 years and to pay a fine of Rs.1,50,000/- and in default of payment of fine, to further undergo simple imprisonment for a period of one and half year.

2. The case of the prosecution in a nutshell is that on 16.02.2013, when ASI Piara Singh along with police party was present near the bridge of minor canal in the area of village Natt, they found that one young man

was sitting with two plastic bags. The mouth of one plastic bag was lying open and accused had put his hands inside the other plastic bag. He was apprehended by the I.O. I.O. enquired antecedents of the accused. I.O. gave option to the accused that he had a legal right to get the search of his plastic bags carried by him, conducted in the presence of a Magistrate or a gazetted officer. Accused reposed faith in him. I.O. had prepared his consent memo. I.O. allotted No.1 and 2 to the plastic bags. On checking of plastic bag No.1, 300 vials of Rexcof were recovered and the I.O. separated one vial as sample. On checking of second bag, 100 vials of Rexcof and 1200 strips of Alprazolam tablets, each strip containing 10 tablets, total 12000 tablets and 500 tablets of Carisoma, contained in 50 strips, were recovered. I.O. took one vial of Rexcof, one strip of Alprazolam and one strip of Carisoma as sample. He prepared two sealed parcels of samples. The bulk contraband was sealed. I.O. sent ruqa, on the basis of which FIR was registered. I.O. partly filled up Form No.M-29 at the spot. The entire case property was produced before ASI Avtar Singh, officiating SHO. He verified the same. He put his seal impression AS. The SHO produced the case property before the Area Magistrate. He submitted an application for depositing bulk parcel in NDPS Godown and application for destruction of bulk parcel of case property. As per the order of Court, the bulk parcel of case property was deposited in the NDPS Godown, whereas the sample parcel along with seal impression, Form No.M-29 were got deposited in the office of FSL, Mohali. FSL report was received. The challan was put up after completing all the codal formalities.

3. The prosecution examined as many as 5 witnesses. Statement of appellant was recorded under Section 313 Cr.P.C. Appellant also examined

DW-1 Lakhvir Singh in support of his case. The appellant was convicted and sentenced, as noticed hereinabove. Hence this appeal.

4. Learned counsel appearing on behalf of the appellant has vehemently argued that the prosecution has failed to prove the case against the appellant.

5. Learned counsel appearing on behalf of the State has supported the prosecution case.

6. We have heard learned counsel for the parties and have gone through the judgment and record very carefully.

7. PW-1 ASI Piara Singh testified that on 16.02.2013 he was posted as ASI at Anti Narcotic Cell, Bathinda Range, Bathinda. He along with HC Bikkar Singh and other police officials were going on a private vehicle in connection with patrol duty. When they reached on the bridge of minor canal in the area of Natt, they found accused Gurwinder Singh present in Court, sitting with two plastic bags in his possession. The mouth of one plastic bag was lying open and accused was filling the plastic bag while keeping his hands inside the plastic bag. Accused was apprehended. He enquired whereabouts of accused. He gave him option that he had a legal right to be searched in the presence of a gazetted officer or a Magistrate. However accused reposed faith in him. Consent memo Ex.P1 was prepared. All the codal formalities were completed. Samples were sealed. Parcels of remaining bulk of contraband were also prepared. He put his seal impression 'PS'. Form No.29 was also partly filled by him. Accused along with entire case property was produced before the officiating SHO ASI Avtar Singh. He checked and compared the same. He put his seal impression 'AS'. FSL report is Ex.P12. In his cross-examination, he deposed

that no governmental vehicle was allotted to their cell. He had not produced any document which established that official of Anti Narcotic Cell had power to investigate the case of NDPS Act. Independent witness was coming from Talwandi Sabo side on bicycle. He did not remember in how many cases Vijay Kumar PW was witness with them. Consent memo was prepared after 02.15 P.M. Recovery memo was prepared at 03.00 P.M. Special report was also prepared at the spot at about 05.00 P.M. The place of recovery was at a distance of 3 km. in south from Police Station.

8. PW-2 HC Bikkar Singh has corroborated the statement of PW-1 ASI Piara Singh the manner in which the appellant was apprehended and codal formalities were completed on the spot. In his cross-examination, he deposed that no gazetted officer or Magistrate was called at the spot. Volunteered deposed that accused had reposed faith in I.O. No independent witness was joined from the spot. They remained at the spot for about 5½ hours. Option under Section 50 NDPS Act was given to the accused at 02.10 P.M. Thereafter ruqa was sent.

9. PW-3 ASI Avtar Singh deposed that he was officiating SHO of P.S. Talwandi Sabo. The case property was produced before him. He moved application before the Illaqa Magistrate. Illaqa Magistrate passed orders vide Ex.PW3/D and Ex.PW3/E. Bulk parcel was deposited with Incharge, NDPS Godown, Bathinda. He kept the sample parcel and specimen seal slip in his safe custody. On 04.03.2013 he handed over the sample parcels, specimen seal slip and Form No.29 to HC Kewal Singh. He directed him to get the docket forwarded from the office of the SSP, Bathinda. On his direction, HC Kewal Singh got the docket forwarded from the office of the

SSP, Bathinda on the same day. He deposited the sample parcels in the office of FSL, Mohali in intact condition on 06.03.2013. The report of FSL is Ex.P12. In his cross-examination he admitted that he had not got recorded in his statement Ex.DA that he checked and compared the seals of the parcels with the specimen seal slip and attested and verified the facts from I.O. as well as from the accused. He also admitted that there was overwriting at point A of Ex.DA.

10. PW-4 AMHC Kewal Singh has tendered his evidence by filing his affidavit Ex.PW4/A. It was averred in the affidavit that ASI Avtar Singh had handed over 4 sample parcels to him. He deposited the same in FSL, Mohali, on 06.03.2014.

11. Learned counsel appearing on behalf of the appellant has drawn the attention of the Court towards consent memo Ex.P1. We have gone through the same. PW-1 ASI Piara Singh had told the appellant that he had legal right to get personal search and search of plastic bags conducted by any Magistrate or any gazetted officer and he can be taken to them or he could get his search conducted at the spot by him. I.O. was required to give only two options to the appellant whether he wanted to get his personal search conducted before a Magistrate or a gazetted officer. He could not ask for third option to be searched by him. Section 50 of the NDPS Act is mandatory.

12. Their Lordships of the Hon'ble Supreme Court in *State of Rajasthan v. Parmanand, (2014) 5 SCC 345*, have held that there is a need for individual communication to each accused and individual consent by each accused under Section 50 of the Act. Their Lordships have also held

that Section 50 does not provide for third option. Their Lordships have also held that if a bag carried by the accused is searched and his personal search is also started, Section 50 would be applicable. Their Lordships have held as under:

“15. Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application. In this case, respondent No.1 Parmanand’s bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of respondent No.2 Surajmal was also conducted. Therefore, in light of judgments of this Court mentioned in the preceding paragraphs, Section 50 of the NDPS Act will have application.

16. It is now necessary to examine whether in this case, Section 50 of the NDPS Act is breached or not. The police witnesses have stated that the respondents were informed that they have a right to be searched before a nearest gazetted officer or a nearest Magistrate or before PW-5 J.S. Negi, the Superintendent. They were given a written notice. As stated by the Constitution Bench in Baldev Singh, it is not necessary to inform the accused person, in writing, of his right under Section 50 (1) of the NDPS Act. His right can be orally

communicated to him. But, in this case, there was no individual communication of right. A common notice was given on which only respondent No.2 – Surajmal is stated to have signed for himself and for respondent No.1 – Parmanand. Respondent No.1 Parmanand did not sign.

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19. We also notice that PW-10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate or before a nearest gazetted officer or before PW-5 J.S. Negi, the Superintendent, who was a part of the raiding party. It is the prosecution case that the respondents informed the officers that they would like to be searched before PW-5 J.S. Negi by PW-10 SI Qureshi. This, in our opinion, is again a breach of Section 50(1) of the NDPS Act. The idea behind taking an accused to a nearest Magistrate or a nearest gazetted officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer. Therefore, it was improper for PW-10 SI Qureshi to tell the respondents that a third alternative was available and that they could be searched before PW-5 J.S. Negi, the Superintendent, who was part of the raiding party. PW-5 J.S. Negi cannot be called an independent officer. We are not expressing any opinion on the question whether if the respondents had voluntarily expressed

that they wanted to be searched before PW-5 J.S. Negi, the search would have been vitiated or not. But PW-10 SI Qureshi could not have given a third option to the respondents when Section 50(1) of the NDPS Act does not provide for it and when such option would frustrate the provisions of Section 50(1) of the NDPS Act. On this ground also, in our opinion, the search conducted by PW-10 SI Qureshi is vitiated.

20. We have, therefore, no hesitation in concluding that breach of Section 50(1) of the NDPS Act has vitiated the search. The conviction of the respondents was, therefore, illegal. The respondents have rightly been acquitted by the High Court. It is not possible to hold that the High Court's view is perverse. The appeal is, therefore, dismissed."

13. Accordingly the appeal is allowed and judgment and order dated 24.04.2017 and 25.04.2017 are set aside. The appellant is acquitted. The appellant is in custody. He be released forthwith.

(RAJIV SHARMA)
JUDGE

(ANIL KSHETARPAL)
JUDGE

March 19, 2019.
Davinder Kumar

Whether speaking / reasoned

Yes/No

Whether reportable

Yes/No