

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

Criminal Appeal S-881-SB of 2005
Date of decision: February 14, 2019

Pargat Singh

....Appellant

Versus

State of Haryana

....Respondent

CORAM: HON'BLE MR. JUSTICE ARVIND SINGH SANGWAN

Present: Mr. Yashjot S. Dhaliwal, Advocate for
Mr. K.S. Dhaliwal, Advocate
for the appellant.

Mr. Naveen Sheoran, DAG, Haryana.

ARVIND SINGH SANGWAN J.

The present has been filed for setting aside the judgment of conviction dated 28.4.2005 passed by the trial Court convicting the appellant under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as '**the NDPS Act**') and the order of sentence dated 29.4.2005 vide which the appellant was sentenced to undergo rigorous imprisonment for a period of 22 months and to pay a fine of Rs.22,000/- and in default of payment of fine, to further undergo rigorous imprisonment for a period of 09 months.

It is worthwhile noticing that the sentence of the appellant was suspended vide order dated 13.5.2005 as the appellant has undergone 02 months and 25 days of sentence.

The case set up by the prosecution is that on 27.3.2002, ASI Gurnaib Singh, the Investigating Officer, alongwith ASI Agya Ram and

some other police officials were going from Bus Stand, Shahabad towards the Tehsil Complex, Shahabad when they noticed the appellant/accused carrying a bag on his left shoulder and another bag on his right shoulder. On seeing the police party, he turned back and tried to walk perplexedly and on suspicion, he was apprehended. Having suspicion that he was carrying narcotics, he was served with a notice under Section 50 of the NDPS Act and in response to the notice, the accused opted to be searched before a Gazetted Police Officer. Thereafter, the Investigating Officer took the accused alongwith the two bags to the residence of Anil Kumar Dhawan, DSP, (Headquarters), Kurukshetra and after apprising him of the facts, on the directions of DSP, the two bags carried by the accused were searched, which led to recovery of poppy husk. Two samples of 250 grams each were drawn from both the bags. On weighment, the remaining contraband in one bag was found to be 14.500 kgs. and the other bag to be 6.500 kgs. Thereafter, the sample parcel of the bulk parcel were sealed separately with the seal 'GS' of the Investigating Officer and 'AKD' of the DSP. Thereafter, the four parcels were taken into possession vide recovery memo which was signed by the witnesses and attested by the DSP. Thereafter, the Investigating Officer has sent a ruqa through Constable Rajpal Singh for registration of the FIR and then ASI Gurnaib Singh returned back to the place of occurrence, prepared rough site plan, recorded the statements of the witnesses under Section 161 Cr.P.C. and arrested the accused vide arrest memo. Thereafter, Constable Rajpal Singh, upon registration of the FIR, reached back at the spot and the relatives of the accused were informed vide a separate memo. Thereafter, the Investigating Officer prepared a report under Section 57 of the NDPS Act and submitted it before the SI/SHO Paras

Kumar to verify the fact and put his seal 'PK' on the sample parcels and directed the Investigating Officer to deposit the case property with the MHC of the Police Station. Later on, the sample parcels were sent to the FSL and as per the report, the same were found containing poppy husk (choora-post) i.e. papaver somiferum. After completion of investigation challan was presented and charge under Section 15 of the NDPS Act was framed against the appellant.

The prosecution in its evidence examined PW1 Head Constable Amar Singh, who deposed about the depositing the case property with the SHO. PW2 Satpal Singh stated that on receiving ruqa Ex.PB, he recorded formal FIR Ex.PB/1 and made an endorsement Ex.PB/2. In cross-examination, he stated that Gurnaib Singh ASI came back to the Police Station at 11.00 a.m.

PW3 HC Mange Ram stated that he received the report under Section 57 of the NDPS Act, Ex.PC from the Police Station through Om Parkash, UGC and a copy of the report is Ex.PC/1, in which he made an endorsement Ex.PC/2 and the same was put up before the DSP (Headquarters) who had seen the same vide Ex.PC and it was received on 28.3.2003 vide entry at serial No.19 in the register.

PW4 SI Paras Kumar stated that ASI Gurnaib Singh produced before him, the case property and the accused and on verification of the facts from the witnesses, he fixed the seal impression 'PK' on the case property and also received report under Section 57 of the NDPS Act Ex.PD on which he made his endorsement as Ex.PD/1. In cross-examination this witness

stated that the accused was produced before him at 8.15 p.m. and Investigating Officer ASI Gurnaib Singh did not disclose to him from where the accused was apprehended.

PW5 ASI Agya Ram also deposed on the line of the version in FIR. This witness further stated that accused was served a notice Ex.PA to give him option to be searched before a Gazetted Officer or a Magistrate or before the Investigating Officer and accused gave his option to be searched before a Gazetted Officer vide reply Ex.PF. Thereafter, the accused was taken to the residence of DSP, Headquarters, Kurukshetra and in the presence of the DSP, recovery was effected and thereafter, ruqa was sent for registration of the case. In cross-examination, this witness stated that they have left the Police Station at 4.15 p.m. and reached the place of recovery near Bus Stand and further stated that in notice under Section 50 of the NDPS Act, the option given was to be searched before Gazetted Officer or Magistrate or before the Investigating Officer. When confronted with the reply Ex.PF, this witness admitted that the accused gave option to be searched before a Police Gazetted Officer and not before a Magistrate. This witness, further stated that the accused was apprehended at 4.30/4.35 p.m. and they started for DSP residence in bus and they reached there at 5.10 p.m. and they did not join any independent witnesses. This witness stated that they remained at the residence of the DSP till 6.30 p.m. when the ruqa was prepared and then they reached at the spot at 7.00 p.m. and he did not prepare any document and site plan was prepared by ASI Gurnaib Singh.

PW6 Constable Gurdial Singh stated that he received sample parcel on 7.4.2003 from the MHC which were duly sealed and the same

were deposited with FSL, Madhuban. This witness proved his affidavit Ex.PJ. In cross-examination, this witness admitted that there is a cutting in the affidavit as the word "*chura post*" is deleted and the word "Bhuki" was entered.

PW7 DSP Anil Kumar Dhawan stated that ASI Gurnaib Singh produced the accused at his residence and had shown him the notice under Section 50 of the NDPS Act and its reply and further stated that notice under Section 42 of the NDPS Act Ex.PK was also handed over to him and, then he directed ASI Gurnaib to search the two bags and, thereafter, the details of the recovery as stated by ASI Gurnaib Singh was reiterated. This PW further proved that the case property is Ex.P1 and in cross-examination this witness stated that the place of recovery is near the Police Station, Shahabad and pleaded ignorance mentioning of FIR number on the notice under Section 42 of the Act. This witness further stated that recovery memo was prepared at about 6.15 p.m. and the FIR number was not known to the police party at that time and the FIR number was not mentioned in the recovery memo. When shown the case property, this witness volunteered that there are holes in the bags due to rat bites and the weight of the two bags is approximately 5 to 10 kgs. The Investigating Officer ASI Gurnaib Singh appeared as PW8 and proved all the documents prepared at the spot. This witness also stated that after taking option from the accused he was taken to the residence of the DSP at Kurukshetra where the search was conducted and, later on, the sample parcels were drawn and sealed and accused was arrested. This witness further stated that he deposited the case property with MHC Police Station Shahabad and submitted report Ex.PD and PC before

Paras Kumar, the then SI/SHO. In cross-examination, this witness stated that in the reply it is mentioned that the accused wanted to search before a Police Gazetted Officer and not by the Magistrate. This witness also admitted that they left for DSP residence at 4.40 p.m. in a bus and the case property remained with accused till arrival at the residence of DSP. This witness further stated that he had not called any independent witness at the residence of DSP though his residence is situated on a busy road. This witness further admitted that there are holes in the bulk parcels Ex.P1 and P2 and the weight of Ex.P1 was approximately 4 kgs and Ex.P2 was approximately 7/8 kgs. This witness denied suggestion that on account of not maintaining good relations with Sarpanch Sukhdev Singh as accused had opposed him in the Panchayat election, he was falsely implicated in this case.

Thereafter, the statement of the accused was recorded under Section 313 Cr.P.C. and all the incriminating evidence was put to him, which he denied and pleaded innocence. In reply to question No.14, the accused stated that he was falsely implicated by ASI Gurnaib Singh, Investigating Officer on account of enmity with Sukhdev Singh, Sarpanch of his village who is related to Gurnaib Singh, Investigating Officer. However, no witness has been cross-examined. Thereafter the trial Court convicted the appellant and sentenced him to undergo 10 years rigorous imprisonment.

Counsel for the appellant has argued that the Investigating Officer has not followed the proper procedure under Section 50 of the NDPS Act as in reply to the notice, in the non-consent memo, it is recorded that the accused do not want his search before a Magistrate and wanted it before a

Police Gazetted Officer, whereas requirement of Section 50 is of a Gazetted Officer and by putting a rider Gazetted "Police" Officer, the accused was not given clear option of search. The counsel for the appellant has submitted that as per the site plan Ex.PL, the place of recovery is on a walking distance from the tehsil office of Shahabad, where the tehsildar, who is a Gazetted Officer was available but by recording the non-consent of the appellant he was taken to residence of the Gazetted Police Officer i.e. at the DSP residence at a distance of 20 kms.

Counsel for the appellant has further submitted that the procedure adopted by the Investigating Officer in not calling the Gazetted Officer at the spot, which is the place of apprehending the accused appellant and effecting the recovery from him. Therefore, the place of recovery was never verified by the Gazetted Officer. The learned counsel further argued that the Investigating Officer has rather adopted a strange procedure by taking the appellant in a public transport bus to the residence of the Gazetted Officer at a place of about 20 kms., which vitiate the process of recovery.

The Counsel for the appellant has further argued that even the recovery memo Ex.PG was not prepared in accordance with the procedure, as when the appellant was produced before the DSP, no such consent memo of the appellant was prepared that the DSP has given him an option that he could be searched before a Gazetted Officer other than a Police Gazetted Officer or by Magistrate, as recorded in the non-consent memo Ex.PB by the Investigating Officer and even in the recovery memo, Ex.PJ there is no specific mention that the DSP had authorized the Investigating Officer ASI Gurnaib Singh to conduct the search and, therefore, firstly by not

calling the DSP at the spot and secondly by not recording a separate consent memo before the DSP and further by not mentioning in the recovery memo that the DSP has authorised the ASI to conduct the search, a suspicion is raised about presence of the DSP who has only attested the memo. Ex.PJ.

Counsel for the appellant further submitted that in the notice under Section 50 of the NDPS Act and the non-consent memo which was recorded at the spot in Shahabad find mention the complete details of FIR No.84. The counsel for the appellant submitted that as per the statement IO/PW4 Gurnaib Singh, the appellant was apprehending at about 4.40 p.m. at Shahabad and then produced before DSP and after effecting the recovery, ruqa Ex.PB was sent for registration of the FIR and on this ruqa PW2 ASI Satpal has made an endorsement Ex.PB/2 that DDR No.34 was registered at 7.15 p.m. and FIR No.84 dated 27.3.2007 under Sections 15/61/85 of the NDPS Act was registered. Therefore, it is argued that when the ruqa was received in the Police Station at 7.15 p.m. and the petitioner was apprehended at 4.40 p.m. at a distance of about 20 kms, the police has failed to explain how the FIR number was mentioned in the notice under Section 50 of the Act as well as in its reply which were prepared at 4.40 p.m. The learned counsel further argued that even a perusal of ruqa Ex.PB show that it contained all the information that how the appellant was apprehended at Shahabad and then he was given a notice and after obtaining his non-consent memo he was taken to Kurukshetra before DSP Headquarters in a bus and how the search was conducted and after effecting the recovery and sealing the sample parcels and the bulk parcels, the ruqa was sent to the Police Station and, therefore, the authenticity of the notice under Section 50 of the

NDPS Act and the non-consent memo is doubtful.

The Counsel has further argued that even in the recovery memo which was prepared in the presence of the DSP prior to sending the ruqa before the Police Station again FIR No.84 is mentioned which show that this document was prepared after registration of the FIR. The counsel for the appellant has further argued that when the notice under Section 42 of the NDPS Act Ex.PK was given to DSP Headquarters, Kurukshetra informing him about the facts of the case and the option given by the accused that he wanted to be searched before the police Gazetted Officer and request made that proper action be taken and the DSP has only signed by mentioning 'Seen'. The learned counsel submits that no specific direction was given by the DSP to the Investigating Officer that he may conduct the search as it is not the case of the prosecution that the DSP himself has conducted the search. A perusal of the statements of PW7 Anil Kumar Dhawan, PW DSP and PW8 ASI Gurnaib Singh show that the DSP has asked ASI Gurnaib Singh to conduct the search of the two bags. However, in the notice under Section 42 of the NDPS Act no such written orders were given to the ASI Gurbaib Singh and, therefore, it is argued that the document Ex.PK was prepared later on, and was only seen by the DSP.

The counsel for the appellant has further argued that no Form-29 was prepared at the spot or before the DSP which again raises a suspicion about the recovery effected from the appellant. The counsel for the appellant has referred to the FSL report Ex.PX to submit that while giving the descriptions of the parcels condition of the seals received by FSL, Madhuban there is no mention that Form-29 was received alongwith the

sample parcels.

The counsel for the appellant has further argued that after the arrest of the appellant he was produced before the SI/SHO Paras Kumar and the case property was deposited with the MHC on the same day, i.e. 27.3.2003. There is no order on record seeking permission from the Ilqa Magistrate in compliance of Section 52-A of the NDPS Act regarding the manner in which the case property is to be kept intact and in safe custody. However, the case property was kept in the custody of MHC till 7.4.2003 when it was sent for FSL examination. Counsel further argued that in the absence of any order of the Ilqa/Judicial Magistrate verifying the recovery as well as the seal on the sample parcels and the bulk parcel, there is a gross violation of Section 52 of the NDPS Act. It is further submitted that no such order of the Magistrate was made part of the report under Section 173 Cr.P.C. and is not exhibited on the trial Court record which vitiates the entire case.

Learned counsel further argued that there is unexplained delay of sending the sample parcels to FSL. The samples were sealed on 27.3.2003, whereas it were sent about 11 days later, i.e. on 7.4.2003 and there is nothing on record to prove that same were kept in safe custody and the seal were not tempered with. Affidavits filed by PW1 as Ex.PA, do not meet the requirement of keeping the case property/sample parcels in safe custody in the absence of an order of the Magistrate. Counsel for the appellant has further argued that it has come in the statement of PW7 and PW8 that the bulk parcel produced before the Court was having holes due to rat bites and the actual weight as per the prosecution version was much less

than the weight given in the FIR, which again raises a suspicion about the recovery effected from the appellant. Counsel for the appellant lastly argued that the appellant has been falsely implicated on account of the party faction in the village as the appellant has opposed Sukhdev Singh, Sarpanch in the Panchayat election of the village, who is in relation with Gurnaib Singh, Investigating Officer, therefore, he has been falsely implicated.

Learned State counsel submits that after giving a notice under Section 50 of the NDPS Act in which the petitioner opted to be searched before a Gazetted Officer, his search was conducted in the presence of DSP (Headquarters), Kurukshetra and recovery of 14½ kgs. of poppy husk was recovered from the one bag and 6½ kgs. was recovered from the other.. It is further submitted that the prosecution witnesses duly supported the version and has proved the case and discrepancy in the statement and the witnesses is only on account of lapse of time. It is further submitted that as per the report of the FSL, Madhuban, the contraband recovered from the petitioner proved to be papaver somiferum, therefore, prayed for dismissal of the appeal.

After hearing the counsel for the parties, I find merit in the appeal for the following reasons :-

- (a) In the reply to the notice under Section 50 of the NDPS Act, the option given by Investigating Officer PW8 ASI Gurnaib Singh was that the petitioner wants to be searched before a Gazetted Police Officer whereas there is no such provision under Section 50 of the NDPS Act that the Investigating Officer can restrict the option to give liberty to a Gazetted Officer of a particular department. A perusal of the site plan Ex.PL show that the place of recovery was

outside the Tehsil of Shahabad, where the Executive Magistrate/Tehsildar, who is a Gazetted Officer, was available. However, by recording the non-consent memo, the appellant was taken to the residence of DSP and, thus, the proper procedure was not followed.

- (b) On recording the non-consent memo of the appellant that he want to be searched before a Gazetted Police Officer, the Investigating Officer instead of calling the DSP at the spot, had taken him to his residence which is at a distance of 20 kms. by using a public transport bus, therefore, the very genesis of effecting the recovery at the spot was not maintained by the Investigating Officer as in the ordinary course, the Gazetted Officer was required to come at the spot and verified not only the recovery from the appellant but also at the place of recovery. Therefore, in the absence of DSP present at the spot, it was not verified by him that the recovery was in fact effected at a place shown in the site plan Ex.PL.
- (c) Surprisingly, nothing has come on the record either as a part of report under Section 173 Cr.P.C. or in the evidence as to when the appellant was produced before the Illaqa Magistrate for seeking its judicial remand and in compliance of Sections 52 of the NDPS Act regarding the case property. This evidence is totally missing and as per the statement of PW8 IO/ASI Gurnaib Singh, after the recovery was effected and the parcels were sealed, he handed over the case property to SI/SHO Paras Kumar who deposited the same with MHC on 27.3.2003. Therefore, in the absence of an order by the Illaqa Magistrate to keep the case property in safe custody, either in judicial Malkhana or with the MHC, no proper procedure was followed. Even there is no order by the DSP concerned before whom search was conducted to show that he has directed the Investigating Officer to hand

over the case property to the MHC. The case property remained in custody of the MHC from 27.3.2003 to 7.4.2003 as is clear from the statement of PW6 Constable Gurdial that he obtained the sample parcel from the MHC on 7.4.2003 and deposited it with the FSL, Madhuban, and, therefore, there is unexplained delay in sending the case property to FSL. Though in the cross-examination, specific question was put to the Investigation Officer for giving the explanation for delay, however, he failed to explain the same.

- (d) A perusal of the recovery memo Ex.PJ reveal that the DSP has not authorised the Investigating Officer in writing to conduct the search in his absence. The manner in which the consent memo was recorded and then the accused was taken to the residence of the DSP in a public transport and no fresh consent memo was recorded by the DSP giving such option to the appellant/accused to be searched before a Gazetted Officer or Magistrate as against “Gazetted Police Officer” recorded in non-consent memo. and then in the report under Section 57 of the NDPS Act by merely writing “Seen” by the DSP/PW7 a suspicion is raised that the recovery was effected in the presence of the DSP.
- (e) A perusal of the ruqa sent to the police for registration of the FIR Ex.PB reveals that it finds mention the complete details of investigation carried out by the Investigating Officer/ASI Gurnaib Singh. This written information was sent to the Police Station after the recovery was effected at about 6.30 p.m. and was received in the Police Station at 7.15 p.m. vide endorsement Ex.PB/2, wherein it is mentioned that DDR No.34 was registered. Meaning thereby, when the information was sent by the Investigating Officer to the Police Station, he had already prepared the notice under Section 50, its reply/non-consent memo and the recovery of the contraband from the

appellant. However, all this three documents Exs. PE, PF and PG find mention the details of FIR No.84 dated 27.3.2003 under Sections 50/61/85 of the NDPS Act, at Police Station, Shahabad. The prosecution has failed to explain as to how the FIR number had come in these documents as these were prepared much prior to sending of the information to the Police Ex.PB wherein there is mention of preparation of all these three documents. As per PW8 Investigating Officer/ASI Gurnaib Singh, the appellant was apprehended at the spot around 4.40 p.m. and after the notice under Section 50 of the NDPS Act was given to the appellant, he gave reply, that he along with other police officials took the appellant to the residence of DSP by using public transport and, therefore, there was no occasion for mentioning the FIR number in these documents as the same was registered at 7.15 p.m. as per endorsement Ex. PB/2. It again raises a suspicion about the manner, the investigation was conducted.

- (f) A perusal of the report under Section 57 of the NDPS Act Ex.PC show that it is mentioned by the Investigating Officer that DSP directed him to take search of the two bags of the accused Pragat Singh whereas no such written order was made as the part of the police challan or was exhibited before the Court.
- (g) From the statement of the prosecution witnesses it is made out that Form-29 was never prepared in this case. It is normally prepared at the spot giving details of the contraband recovered and especially the details of the sample parcel and its sealing by the Investigating Officer or the Gazetted Officer as the case may be. A perusal of the FSL report show that no Form-29 was sent along with the sample parcels which also supports the fact that Form-29 was never prepared. The FSL report Ex.PX only gives

description and condition of the seals without mentioning about Form-29 which otherwise is not part of challan and was not exhibited.

- (g) As per the statement of PW7/DSP and PW8/ Investigating Officer that bulk parcel produced before the Court were having holes due to rat bite and the actual weight was much less than the weight mentioned in the FIR, which again raises suspicion about the recovery effected from the appellant.

In view of the aforementioned reasons and discrepancies in the prosecution version, the defence taken up by the appellant seems probable that he is falsely implicated in the case as he had opposed Sukhdev Singh, Sarpanch of his village in the Panchayat elections and he being in relation with ASI Gurnaib, the Investigating Officer has falsely implicated him in the case.

In view of the above, the present appeal is allowed, the impugned judgment 28.4.2005 and order of sentence dated 29.4.2005 passed by the Additional Sessions Judge (Special Court under NDPS Act), Kurukshetra, is set aside.

(ARVIND SINGH SANGWAN)
JUDGE

February 14, 2019
satish

Whether speaking/reasoned : Yes / No

Whether reportable : Yes / No