

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

CRA-S-2073-SB-2018 (O&M)

Date of decision : 30.10.2019

Dharam Pal @ Bobby and another

...Appellants

Versus

State of Punjab

...Respondent

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL.

Present: Mr. Agam Kumar Jund, Advocate for the appellants.

Mr. Bhupender Beniwal, AAG, Punjab.

ANIL KSHETARPAL, J.

Appellants have filed this appeal assailing correctness of the judgment of conviction and order of sentence of 10 years (rigorous imprisonment) with fine of ₹1,00,000/- passed by Special Court, Jalandhar under Section 15(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter to be referred as “the Act of 1985”).

Gist of the case of the prosecution is that on 04.05.2014, Inspector Shiv Kumar alongwith ASI Surinder Singh, ASI Pankaj Kumar and other police officials had laid a barrier at the Canal Bridge, Village Tehang in connection with checking of bad elements. A secret informer informed the Investigating Officer that appellants who are in the business of selling poppy husk in large scale are going from Saiffabad towards Tehang for supply in their vehicle Safari, bearing No.PB-08-AM-2821 and if

vehicle is apprehended, large recovery can be made. Finding the information reliable, the Investigating Officer scribed a communication and forwarded to the Police Station Phillaur through Constable Nirbhai Singh for registration of the FIR. After sometime, a vehicle referred to above was seen coming towards them and when it was signaled to stop by the Investigating officer, the driver of the said vehicle tried to turn the vehicle however, Investigating Officer with the help of police officials, apprehended the vehicle and its occupants. On checking the vehicle, the appellants were found occupying the aforesaid vehicle. The Investigating Officer disclosed them that he had received a secret information regarding narcotics. On being asked, the appellants disclosed their names. Investigating Officer also disclosed his name, rank, post and apprise them of about their legal right to opt for the search conducted from a Magistrate or a Gazetted Officer. Both the appellants expressed their desire to get conducted search in the presence of Gazetted Officer. On preparation of non-consent memo signed by both the appellants separately, the Investigating Officer requested Deputy Superintendent of Police(D) through telephone apprising him about the secret information and apprehension of the vehicle, requesting him to come to the place of occurrence. After sometime, Deputy Superintendent of Police(D) came on the spot and apprised both the appellants that he is a Gazetted Officer and wants to conduct their personal search as well as their vehicle and apprised both the appellants that if they want to get their search conducted from any other Gazetted Officer or Magistrate. However, both the appellants reposed faith in the Deputy Superintendent of Police(D) and accordingly, separate

consent memos were prepared. On the instructions of Deputy Superintendent of Police(D), Investigating Officer conducted the search of the vehicle and on opening the back door of the vehicle, a tarpulin was found under which on being removed, 10 plastic bags were found stacked. Bags on being unloaded, were opened and poppy-husk was found. All the 10 plastic bags were emptied on the tarpulin and mixed so as to make it homogeneous. On the instructions of Deputy Superintendent of Police(D), Investigating Officer took out two samples of 250 grams each and converted them into sample parcels. Then, remaining poppy husk again put into the plastic bags and on weighment, 9 plastic bags were found weighing 20 kg each whereas one plastic bag was found weighing 19 Kg 500 grams. Deputy Superintendent of Police(D) affixed his seal bearing impression "AK" on all the parcels whereas Investigating Officer also affixed his seal bearing impression "SK" on all the parcels. Form M-29 was filled at the spot and sample seal impression was prepared. Deputy Superintendent of Police(D) retained his seal whereas Investigating Officer handed over his seal to ASI Surinder Singh. After preparation of rough site plan, took recovered poppy husk and the vehicle in possession. The statements of the witnesses were recorded and the appellants were formally arrested.

During investigation in the presence of Deputy Superintendent of Police(D), appellants suffered disclosure statement and got recovered eight other bags of poppy husk kept in the room of their house. Again all the bags were emptied on the tarpulin and mixed so as to make the recovered material homogeneous. Thereafter, on the instructions of Deputy Superintendent of Police(D), Investigating Officer drew two samples of 250

grams each and converted into sample parcels. Remaining poppy husk was again put into the plastic bags. On weighment of all the plastic bags, 7 plastic bags were found weighing 20 kg each containing poppy husk and remaining one plastic bag was found weighing 19 Kg 500 grams and all the bags were converted into bulk parcel. Deputy Superintendent of Police(D) put his seal impression "AK" on all the parcels whereas Investigating Officer took back his seal from ASI Surinder Singh and affixed his seal impression "SK" on all the parcels. Another Form M29 was prepared. Deputy Superintendent of Police(D) retained his seal whereas Investigating Officer once again handed over his seal to ASI Surinder Singh. After preparation of the rough site plan and taking in possession the poppy husk, statements of the witnesses were recorded. On receipt of the report of the Chemical Examiner and completion of remaining investigation, police report against the appellants was presented.

On examination of the police file, after supply of copies of documents as is mandatory under Section 207 Cr.P.C. and hearing learned counsel for the parties, appellants were charge sheeted to which they pleaded not guilty and claimed trial.

Prosecution in order to prove its case has examined Raman Kataria (Sample Carrier), as PW1, Charanjit Kaur, Junior Assistant, DTO office, Jalandhar as PW2, Head Constable Parminder Singh (the then Mohrir Head Constable) as PW3, Inspector Shiv Kumar (Investigating Officer) as PW4 (although wrongly numbered as PW3), Sub Inspector Surinder Singh (witness of recovery) as PW5 (although wrongly numbered as PW4) and Deputy Superintendent of Police Ashwani Kumar as PW6

(although wrongly numbered as PW5). On closure of the prosecution evidence, statements of the appellants under section 313 Cr.P.C. were recorded, in which all the incriminating material which had been produced by the prosecution was put to them, however, they denied the allegations and pleaded innocence. Appellants took a plea that they are innocent and due to the ill-will with the Sarpanch of their village, they have been falsely implicated. In defence, they examined Darshan Ram as DW1.

This Court has heard learned counsel for the parties at length and with their able assistance gone through the record as well as judgment passed by learned Special Court.

Learned counsel for the appellants submitted that learned Special Court in the impugned judgment itself has found the case of the prosecution not believable with respect to recovery from the house i.e. 8 bags of poppy husk total weighing 160 kg. Hence, he contended that once the case of the prosecution was found doubtful with respect to a part, the Court committed manifest error in convicting the appellants with respect to recovery made from their vehicle. He further submitted that there is non-compliance of Section 42 of the Act of 1985 as the secret information received was not reduced into writing and immediately forwarded to the superior official. He further submitted that Deputy Superintendent of Police (D) associated by the prosecution was not regular, holding a current duty charge. It was brought to the notice of the court that substantive rank of Deputy Superintendent of Police (D) who was on current duty charge, is Inspector, not a Gazetted Officer, therefore, Section 50 of the Act of 1985 has been violated. He further submitted that on the reading of the oral

evidence led by the prosecution, it is established that prosecution has failed to prove the guilt of the appellants. He further submitted that link evidence is missing as the alleged vehicle taken in possession at the time of occurrence has not been connected by the prosecution with the appellants.

On the other hand, learned State Counsel has supported the judgment passed by the learned Special Court and contended that in this case, there is huge recovery of narcotics weighing 200 Kg.

On careful perusal of the record, this Court has come to a conclusion that there is no substance in the arguments of learned counsel for the appellants for following reasons:-

- i) No doubt, learned Special Court has held that occurrence with regard to recovery of 160 kg of poppy husk from the house of the appellants is not proved beyond reasonable doubt, however, that ipso facto does not result in acquittal of the appellants with regard to recovery of 200 kg of poppy husk. Recovery from the appellants is huge. The recovery of the narcotics has been proved by the prosecution in accordance with law. The recovered material alongwith sample parcels, bulk parcels and appellants were produced before the Sub Divisional Judicial Magistrate on 05.05.2014. Learned Sub Divisional Judicial Magistrate, after examining and verifying the facts passed the order, which is extracted as under:-

“A sealed parcel containing case property i.e. 16 bags, each bag contained 20 KG i.e. in total 320 KG and another two bags, each bag contained 19-1/2 kg i.e. in total 39 kg, allegedly containing poppy husk have been produced before me and each of them sealed with the seals bearing

seal impressions SK, AK and PSS. Seals upon parcel containing case property as well as the sample parcels are found intact and were seen and sealed by the undersigned on the request of the I.O. Inventory report is also seen and the same is found correct. Thereafter seal of parcel containing case property was broken and four representative sample of 250 grams of alleged poppy husk was taken out and four representative sample were prepared. Then the parcel containing the case property as well as representative sample were sealed by undersigned with seal bearing seal impressions PS. Parcel containing case property and four representative samples were handed over to the I.O. to be kept in safe custody for want of judicial Malkhana at Phillaur”

The prosecution thereafter forwarded two sample parcels representing separate recoveries to the Forensic Science Laboratory for examination of the alleged narcotics recovered for opinion of the Chemical Examiner. As per the report, it was found that the recovered material is poppy husk. The seals on the sample parcels were found intact, matched/tallied with the specimen seal impression as had been placed on Form M29. It may be noted here that when the recovered material was produced alongwith the appellants before the concerned SHO of the Police Station, the SHO after verification had also put his own seal i.e. “PSS” on all the sample parcels and bulk parcels. No doubt, in oral evidence, police officials have tried to give some advantage and scope for raising arguments to the appellants, however, on perusal of overwhelming evidence, this Court does not find substance in the first argument of the learned counsel.

- ii) Next argument of the learned counsel is with regard to non-compliance of Section 42 of the Act of 1985. It may be noted that the secret information was received by the Investigating Officer when he was on the road discharging his duties. The Investigating Officer, after finding the information reliable, reduced the same into writing and forwarded it to the concerned Police Station for registration of the FIR. Thereafter, once the appellants expressed their intention to get themselves searched from a Gazetted Officer, the Deputy Superintendent of Police(D) was called on telephone and apprised of the development. In these circumstances, question is “whether there is sufficient compliance of Section 42 of the Act of 1985 or not?”.

At this stage, it will be relevant to note that a Constitution Bench of Hon'ble Supreme Court in the case of **Karnail Singh Vs. State of Haryana, (2009) 8 SCC 539**, has examined the requirement of compliance under Section 42 of the Act of 1985 and has held as under:-

“17. In conclusion, what is to be noticed is Abdul Rashid did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham hold that the requirements of Sections 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows :

(a) The officer on receiving the information (of the nature referred to in Sub-section (1) of section 42) from any person had to record it in writing in the concerned Register and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of Section 42(1).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior .

(c) In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance of requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing

the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001.”

On careful examination thereof, it is apparent that the Investigating Officer had complied with requirement of Section 42 of the Act of 1985 in substance and since the information was received by the Investigating Officer when he was not in the Police Station but was on move, it was not necessary for the Investigating Officer to immediately reduce the information into writing and pass it on to the immediate official superior. In fact, the Investigating Officer on receipt of information had informed the Police Station by sending a communication. Thereafter, Deputy Superintendent of Police was also informed on telephone and requested to reach at the place of recovery. Thus, there is substantive compliance of Section 42 of the Act of 1985.

- iii) Next argument of learned counsel with regard to Deputy Superintendent of Police, only holding current duty charge and, therefore, the search being invalid also does not have substance because Section 50 of the Act of 1985 requires that the personal search cannot be carried out if accused opts for search before a

Gazetted Officer or Magistrate. In the present case, Section 50 of the Act of 1985 has no applicability because the vehicle in question i.e. Safari was searched and recovery was made. Learned counsel for the appellants tried to submit that after search of the vehicle and recovery of narcotics, personal search was also conducted as would be clear from the memo. Hence, the search was in violation of mandatory provisions of the Act of 1985.

Recently, Hon'ble the Supreme Court has in three Judge Bench judgment while deciding **Criminal Appeal No.1565-66 of 2019 in the case of State of Punjab Vs. Baljinder Singh and others, decided on 15.10.2019**, have held that search of a vehicle or a bag held in the hand and recovery of narcotics therefrom, followed by a personal search is to be treated as two separate independent steps and, therefore, once from personal search, no narcotics have been recovered whereas from the vehicle or from the bag, the narcotics have been recovered, the entire search does not stand vitiated. Hence, the contention of learned counsel that Deputy Superintendent of Police was not holding a substantive rank, being on a current duty charge, a non-Gazetted Officer, hence, the search was in violation of Section 50 of the Act of 1985 cannot be accepted. Once, this Court has found that Section 50 of the Act of 1985 was not applicable, the argument of learned counsel does not have force.

- iv) Next argument of learned counsel is with reference to oral evidence which shall be taken up at the end.
- v) Next argument of learned counsel is with reference to absence of link

evidence to implicate appellants with the vehicle. It may be noted here that the vehicle was found in possession of the appellants and they were found in occupation thereof. No doubt, the vehicle was initially registered in the name of M/s Plasma Records Entertainment, however, thereafter the vehicle was transferred in the name of Boota Singh son of Avtar Singh.

Still further, as per the Act of 1985, reverse onus is placed on the accused to prove that they are innocent. The principle of reverse onus is now well established/recognized. The Rule of reverse onus mandates that the onus is placed on the accused to prove their innocence. Statutes itself provide for a statutory presumption in favour of case of the prosecution. To similar effect are the amendments which were brought in dowry death cases where death is within a period of seven years, dishonour of cheques under Negotiable Instruments Act. Section 54 of the Act of 1985 also statutorily provides that there shall be presumption of guilt from the possession of illicit articles. Section 54 of the Act of 1985 is extracted as under:-

“54. Presumption from possession of illicit articles.—In trials under this Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under this Act in respect of—

(a) any narcotic drug or psychotropic substance or controlled substance;

(b) any opium poppy, cannabis plant or coca plant growing on any land which he has cultivated;

(c) any apparatus specially designed or any group of

utensils specially adopted for the manufacture of any narcotic drug or psychotropic substance or controlled substance; or

(d) any materials which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance or controlled substance, or any residue left of the materials from which any narcotic drug or psychotropic substance or controlled substance has been manufactured, for the possession of which he fails to account satisfactorily].”

Thus, onus was on the appellants.

Now, let us deal with the argument of learned counsel with reference to oral evidence. As regards oral evidence, first witness which has been examined by the prosecution is PW1 Constable Raman Kataria. Relevant part of cross-examination of the aforesaid witness is extracted as under:-

“I have seen my statement under section 161 Cr.Pc recorded by the IO which is Ex. D-1, which is not correct in respect of the date of deposit of the sample to the Chemical Examiner and remaining portion is correct. I had prepared this affidavit after consulting with the MHC Vijay Kumar. It is not consulted from MHC Parminder Singh posted at PS Phillaur. I did not notice or verify the facts from the register no.19 and roznamcha of the police station. MHC Vijay Kumar had told me the facts after seeing the record. It is correct that in my affidavit Ex. PW-1/A I have not mentioned in the verification clause that MHC Vijay Kumar had apprised me about the facts disclosed by me in the affidavit.

The sample seal impression was on piece of cloth and not on piece of paper. The form no. M 29 deposited by me to the Chemical Examiner was also bearing signatures of the

Magistrate. It is correct that form no. M 29 Ex. DB does not bears the signatures of Magistrate nor does it bear any seal impression prepared on a cloth.”

From the reading of the aforesaid deposition, this Court is of the prima facie opinion that the police official has tried to help the accused. The witness has disputed the correctness of statement recorded under Section 161 Cr.P.C. He states that he has got prepared his affidavit which was tendered in lieu of examination-in-chief after consultation with MHC Vijay Kumar without verifying the facts from the record. He has also tried to help the accused by taking a stand that sample seal impression was on a piece of cloth which is against the record. He has also deposed against the record that Form M29 was signed by the Magistrate. The order passed by the Sub Divisional Judicial Magistrate, extracted above, clearly establishes that the Magistrate did not sign the Forms M29.

Next witness produced by the prosecution is Charanjit Kaur, Junior Assistant, Office of District Transport Officer. Next witness is Head Constable Parminder Singh, who was working as Mohrir Head Constable at that point of time. Relevant part of his cross-examination is extracted as under:-

“I do not remember if on 23.9.2014 my statement was recorded by ASI Labh Singh. I recognized signatures of Labh Singh on mark A. Mark A is not my statement. Only IO can explain about mark A as the content are not correct as per my version. I do not remember if Ex. D-1 was recorded by the IO on the same day when my statement was recorded. I have seen judicial file, the statement under section 161 Cr.P.C. which was recorded by me. Only IO can explain

why he has changed my statement thereafter. It is wrong to suggest that as my statement was against the prosecution case, so it was intentionally withheld by the IO. There was marking on the case property. Form M 29 was also given to the IO alongwith case property. Only IO can explain how he managed to extract two samples from 18 bags. It is correct that I have not made an entry while handing over form M 29 alongwith case property to the IO or its production. The bags were in good condition. The bags which were deposited were made of plastic bags and not of jute type. There was only seal affixed on the case property. Volunteered there are total three seals affixed on the case property on one bag. I have not explained any reason for delay in sending the samples. It is also correct that 14 bags which were redeposited with me bears seal impression SK, AK and PSS. It is also correct that two other bags were having the same seals as stated above. It is also correct that only two bags were having the seal of Magistrate when the case property was redeposited with me. I have not sent the sample drawn by the Magistrate to the FSL. I have seen Ex. DB and other form M29 Ex. DC which is forwarded to the FSL Mohali and there is endorsement that sample is to be sent to the FSL Mohali. It is also correct that both of the FSL Mohali and Kharar are two different laboratories. I am not interested to show the private record from which I have prepared my affidavit Ex. PW-3/A. It is further wrong to suggest that no such private record is maintained by me. I am maintaining my private record for the last more than 4 to 5 years. I have not got my private record verified from my superior officer. I have not obtained any permission from my superior officer to maintain private record. I do not remember if any specimen seal impression was deposited which was prepared on piece of cloth or on paper. This fact

is not reflected in my private record. I do not remember if form M 29 was got seen or signed by the Magistrate before depositing with the FSL. The sample was not deposited by Ct Raman Kataria on 27.5.2014. I have sent two samples in the hand of Raman Kataria. I have gone through the contents of Ex. PW-1/A where the fact that only one sample was taken by the carrier of this case. Only Ct. Raman Kataria was tell why he has mentioned wrongly regarding sending of one sample in Ex. PW-1/A. I am not admitting in my statement mark A that I have sent only one sample to the FSL through the carrier.”

It is prima facie established that this official witness also tried to suppress truth and has made an attempt to help the accused. He denies his statement recorded by the Investigating Officer, which is Mark A. He has tried to project that Investigating Officer has changed his statement. He has further stated that Forensic Science Laboratory, Mohali and Kharar are two different laboratories which is factually incorrect. Forensic Science Laboratory at Kharar is in District Mohali, but District Mohali does not have two Forensic Science Laboratories.

Thus, prima facie, this witness has also made an attempt to prima facie mislead the Court. Even, Deputy Superintendent of Police has made a factually incorrect statement. Relevant part of the statement of Deputy Superintendent of Police, is extracted as under:-

“Specimen seal impression was prepared on piece of cloth. Attention of the witness is drawn towards the judicial file, where there is no document containing seal on piece of cloth. I am not aware what was done, with the seal prepared on piece of cloth. I am not aware of preparing any seal other than piece of cloth. No document regarding ownership

was recovered from the said vehicle in order to connect with the accused. The alleged recovery was made from the plastic bag and marking was done upon it. I do not know how the sample were relates with bags alleged recovered from both of recovery. Only IO can tell if he has drawn samples from one bag by mixing the contents both of the recovery.”

No doubt, there is some substance in the argument of learned counsel for the appellants, however, keeping in view the overwhelming evidence which has come on record, this Court does not find that the statutory presumption in favour of the prosecution stands rebutted. Reports of Forensic Science Laboratory are Ex.PY and Ex.D2. Both the reports have stated that the sample narcotic sent is Poppy Husk. Each parcel was having 3 seals “SK”, “AK”, “PSS”. All the seals of the parcels were found intact and tallied with the specimen seal impressions which are Ex.DC and Ex.DB. On careful perusal of Form M29, which bears sample seals “SK”, “AK” and “PSS”, it is apparent that Ex.DB is with reference to bag Nos.1 to 10 i.e. recovery from the vehicle-SUV Safari whereas Ex.DC is with reference to bag Nos.11 to 18 i.e. recovery from the house of the appellants.

Defence has tried to create doubt in the case setup by the prosecution by taking a defence under Section 313 Cr.P.C. that they have been falsely implicated at the behest of the then Sarpanch of the village. Defence has sought to prove that fact by examining subsequent Sarpanch. However, on examination of the aforesaid evidence, this Court finds that defence failed to successfully create a dent in the case setup by the prosecution.

In the present case, there is huge recovery of narcotics.

Therefore, the Investigating Agency is required to be extra vigilant and cautious apart from being meticulous.

This Court has prima facie found that police officials have tried to prima facie mislead the Court and help the appellants. Therefore, let a copy of the judgment be forwarded to the learned Director General of Police, Punjab for information and further action, if found necessary against the concerned police officials.

In view of what has been observed above, the present criminal appeal is dismissed.

All the pending miscellaneous applications, if any, are disposed of, in view of the abovesaid judgment.

30.10.2019

Pawan

**(ANIL KSHETARPAL)
JUDGE**

Whether speaking/reasoned:- Yes/No

Whether reportable:- Yes/No