

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

**CRA-S No.3338-SB of 2014 (O&M)
Decided on: 01.03.2019**

Makhan Singh

... Appellant

Versus

State of Punjab

... Respondent

CORAM: HON'BLE MR JUSTICE ARVIND SINGH SANGWAN

Present : Mr. Jagdish Rai, Advocate (Legal Aid Counsel)
for the appellant.

Mr. Surinderpal Singh, Addl.A.G., Punjab.

ARVIND SINGH SANGWAN, J.

Prayer in this appeal is for setting-aside the judgment dated 05.06.2014 passed by the Judge Special Court, Mansa vide which the appellant was held guilty for offence punishable under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short 'the NDPS Act') and the order of sentence dated 05.06.2014 vide which he was sentenced to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs.1,00,000/- and in default of payment of fine to further undergo rigorous imprisonment for a period of 01 year.

This case is taken up in the category of special cases which are listed on Saturdays, being filed by the legal aid counsel and the accused persons are in custody.

As per the custody certificate dated 07.07.2018, the appellant has undergone 02 years and 11 days of actual sentence in the present FIR and at present he is undergoing sentence in another FIR in which he has

been sentenced to undergo rigorous imprisonment for a period of 12 years vide judgment dated 27.10.2012 passed by Judge Special Court, Mansa.

Brief facts of the case are that on 21.05.2012, ASI Jagdev Singh, along with his co-police officials was on patrol duty and met one Kala Singh son of Malkiat Singh, who was joined with the police party. When they reached one kilometer ahead of a canal minor, a Sikh person was found sitting under a tree and two plastic bags (gattas i.e. cardboard) of white colour were lying in front of him. The mouth of the bags were open and the said person was stirring his hand in the material lying in the bags. On seeing the police party, he became perturbed. On suspicion, the police party apprehended him. He disclosed his name as Makhan Singh. On checking the plastic bags, whose mouth were open, poppy husk was recovered and 100 grams of poppy husk was taken from each bag as was converted into sample parcels. The remainder in the bulk parcel was also sealed and both the sample parcels were marked as A and A1 whereas the bulk parcels were marked as B and B1. On weighment the bulk parcel came out to be 30 kgs each. Thereafter, the same were sealed and a sample chit was prepared. The seal was handed over to Head Constable Mewa Singh and the case property was taken in possession vide separate recovery memo attested by the witnesses. Thereafter, the investigating officer sent a ruqa for registration of the case upon which ASI Balwinder Singh registered a formal FIR. The police party returned to the police station and the case property was produced before ASI Balwinder Singh who put his own seal impression BS and kept the same in his safe custody.

Thereafter on 22.05.2012, the IO produced the appellant along with the case property before the Chief Judicial Magistrate, Mansa and as

per his direction, the bulk parcel was deposited in judicial Malkhana and on 23.05.2012, the sample parcel was sent to the office of FSL. On receiving the FSL report and completion of investigation, report under Section 173 of the Code of Criminal Procedure (in short 'Cr.P.C.') was prepared and presented before the trial Court. The trial Court framed charge under Section 15 of the NDPS Act, to which the appellant did not plead guilty and claimed trial.

In prosecution evidence, PW1 HC Babu Singh appeared and proved on record his affidavit Ex.PA and stated that he has handed over the samples in the office of Chemical Examiner, Kharar, after receiving from MHC.

Thereafter, PW2 HC Mewa Singh deposed on the same line as per the version of the prosecution in the FIR and stated that the appellant was found sitting under a kikkar tree with two plastic bags and was apprehended by the police party and thereafter the recovery was effected and a ruqa was sent to the police station for registration of the FIR. In cross-examination, this witness stated that the accused was apprehended at about 4.00 p.m. and the case property was not produced when this witness was examined. This witness denied a suggestion that Kala Singh was not the member of the police party and also denied that the accused was taken away from the residence of Sukhwinder Singh Sarpanch of village Dhani Shahpur at Longowal.

PW3 ASI Jagdev Singh, the Investigating Officer also deposed on the same line and stated that after the recovery was effected, the case property was taken into police possession vide memo Ex.PB and then ruqa Ex.PE was sent to police station through Constable Amandeep Singh on

which formal FIR Ex.PF was recorded by ASI Balwinder Singh. It is further stated that in the personal search of the accused conducted vide memo Ex.PC, attested by the witnesses and signed by the accused nothing was recovered and the accused was arrested vide memo Ex.PD. The sample parcels were sealed with seal JS and the case property and accused was produced before officiating SHO ASI Balwinder Singh. He also appended his seal impression BS on the case property and the sample chit and further took the case property in his possession vide memo Ex.PH. The special report Ex.PK was sent to the DSP and the bulk parcels are MO-1 and MO-2. In cross-examination this witness has admitted that both plastic bags were having holes and volunteered that these are due to rat bites. He further stated that on one of the bag, there is only one seal of JS and on the other bag there is no seal. When the accused was apprehended, there was no means of measurement or weightment with him. This witness stated that the ruqa was sent at about 6.15 p.m.

PW4 ASI Balwinder Singh also deposed on the same line and stated that the bulk parcel was deposited in the judicial Malkhana and sample parcels were kept in his safe custody which were handed over to HC Babu Singh on 25.05.2012 along with Form No.29 to deposit the same in the office of Chemical Examiner, Kharar. On receiving the report of Chemical Examiner Ex.PO, the challan was presented by Inspector Harpal Singh.

In cross-examination this witness stated that he had inquired from the accused about origin of the contraband. However, no signature of independent witness was obtained on the handing over memo.

Thereafter, the prosecution closed his evidence. In the

statement of the appellant recorded under Section 313 Cr.P.C. all the incriminating evidence was put to him which was denied by him and it was stated that he was not apprehended from the spot and was picked up from a village Longowal, District Sangrur from the house of Sarpanch Sukhwinder Singh. However, no defence evidence was led.

Thereafter, the trial Court convicted the appellant and sentenced him to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs.1 lac.

Learned counsel for the appellant has argued that from the statement of the prosecution witnesses, it is apparent that there is a clear violation of Section 52A of the NDPS Act. It is submitted that the Investigating Officer has failed to brought two samples each from two bags as per the guidelines of the Central Government and has relied upon the judgment of Supreme Court in **Union Of India Vs. Mohan Lal and others, 2016(1) RCR (Criminal) 858**, wherein the Hon'ble Supreme Court has held that upon seizure of any narcotic drug, the same shall be forwarded to the officer In-charge to the police station or to an officer empowered under Section 53 of the Act, who shall approach the Magistrate for taking the sample under the supervision of the Magistrate and no such procedure was followed.

Counsel for the appellant has thus argued that no second/representative sample was drawn before the Magistrate in view of **Union Of India Vs. Mohan Lal and others' judgement.**

Counsel for the appellant has next argued that as per the version of the prosecution, the conscious possession of the appellant is not proved as no notice under Section 50 of the NDPS Act was given to the

appellant despite the fact that his personal search was conducted vide memo Ex.PC as admitted by the Investigating Officer/IO PW3 ASI Jagdev Singh. Counsel for the appellant has relied upon **State of Rajasthan v. Parmanand and another, 2014(2) RCR (Criminal) 40** wherein it is held as under :-

“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.”

It is, thus, argued that despite the fact that the personal search of the appellant was conducted, no notice under Section 50 of the NDPS Act was given and therefore, the recovery of the contraband from the appellant is not legally proved.

The counsel for the appellant has further argued that it has come in the cross-examination of the IO/ASI Jagdev Singh who appeared as PW3 that both the plastic bags are having hole and on one bag there is only one seal of “JS” and there is no seal of “BS” as stated by PW4 ASI Balwinder Singh that he had put his seal when the case property was produced before him. It is further stated that on the second bag there is no seal and therefore, it is argued that the prosecution has failed to prove that the bags which were produced before the trial Court were the same which

were recovered from the appellant, in the absence of proper identification and seal on the same and therefore, the identity of the case property is not proved.

Counsel for the appellant has next argued that though the recovery is of 60 kgs of poppy husk from two bags and ASI Balwinder Singh/PW4 in the cross-examination has stated that he has inquired from the accused about origin of the contraband. However, no proper investigation was conducted to found the origin of the contraband and therefore, the investigation has not been conducted properly. It is also stated that none of the prosecution witness has been able to prove that at the time of effecting the recovery or weighment they were carrying any equipment or a weighing kit by which the weighment of the same was done and therefore, in the absence of the same, the Investigating Officer has failed to prove that the alleged contraband recovered from the appellant was in fact measured or weight at the spot.

Counsel for the appellant has further argued that though in the order of the Illaqa Magistrate Ex.PN, it was ordered that the case property was kept in judicial Malkhana. However, without following the said order, PW4 ASI Balwinder Singh has stated that only bulk parcel was deposited in judicial malkhana and sample parcel was kept by him in his own safe custody and therefore, there is no explanation as to why the sample parcel was not kept in judicial Malkhana. Counsel for the appellant has in this regard drawn reference to order of the Magistrate EX.PN which reads as under :-

“Along with the accused, case property and sample allegedly containing poppy husk sealed with seal bearing impression JS/BS. Intact also

produced, which are seen, signed and returned to the IO to deposit the case property in judicial Malkhana as per rules.

CJM/22.05.2012”

It is thus submitted that there is no explanation why the sample parcels were kept by ASI Balwinder Singh with him from 21.05.2012 till were sent to FSL on 23.05.2012 despite there being the order of the Magistrate to deposit in judicial Malkhana. Counsel for the appellant has next argued that the independent witness Kala Singh was never produced before the SHO/PW4 ASI Balwinder Singh and was let out from the spot as per the Investigating Officer which raises a doubt that this witness was ever associated in the investigation specially in view of the fact that this witness was never examined as a prosecution witness. It is further argued that PW3 has stated that the seal was handed over to Head Constable Mewa Singh and if an independent witness was present, the same should have been handed over to him and therefore, it raises a suspicion about the presence of said witness Kala Singh at the spot. It is also argued that the very fact that his signatures of Kala Singh were not obtained in the handing over of the case property to ASI Balwinder Singh/SHO also proved that he was never present at the spot.

It is further argued that the entire investigation was conducted by ASI Jagdev Singh and neither any gazetted officer nor any Magistrate was called at the spot nor any second officer was called. Counsel for the appellant in this regard has relied upon **Gannu and another vs. State of Punjab, 2017(3) RCR (Criminal), 566** wherein a Co-ordinate Bench of this Court has held that where the complainant himself is acting as an Investigating Officer it violates the principles of fair and impartial

investigation. In the said case, this Court has relied upon two other judgments of different High Courts wherein a similar view has been taken. Counsel for the appellant in this regard has also relied upon *Megna Singh vs State of Haryana, (1996) 11 SCC, 709* wherein Hon'ble the Supreme Court has held that where the complainant being a first informant has conducted the investigation, it raises a suspect against fair and impartial investigation and thus, it is submitted that in the absence of following a proper procedure under Section 15 of the NDPS Act, when the entire investigation is conducted by PW3 who is also the complainant and the Investigating Officer, it raises a suspicion over the fair and impartial investigation.

Counsel for the appellant has lastly argued that as per the Chemical Examiner report Ex.PO, it has come that the sample received by the Chemical Examiner contains within "Bhukki" i.e. *Chura* poppy husk and though it is mentioned that Morphine is present, however, its percentage is not given and, therefore, as per Section 2 of the NDPS Act, when in the report of the Chemical examiner, it has not come that the contents of Morphine in the sample was above 0.2 percent, it cannot be held that it was a narcotic substance as per Section 2 of the Act. A perusal of the report Ex.PO show that the Chemical Examiner has mentioned that Morphine is present, however, its percentage is not mentioned.

In reply, learned State counsel has argued that since it was a case of chance recovery, the provisions of Section 50 of the NDPS Act was not required to be complied with.

Counsel for the State has further argued that the argument of the appellant that the investigation was conducted by the same Investigating Officer who himself was a complainant is not tenable in view of the judgment of Hon'ble the Supreme Court in **Surender @ Kala vs. State of Haryana, 2016(2) RCR (Criminal) 10.** It is also argued that it was for the accused to prove that they were not in conscious possession of the same of the recovery effected from them and relies upon **Baldev Singh @ Nikka and another vs. State of Punjab, 2016(3) RCR (Criminal) 47,** a judgment by a co-ordinate Bench of this Court.

A perusal of the judgment of the Hon'ble Supreme Court in **Surender @ Kala's case (supra)** shows that since the recovery was effected before a gazetted officer, therefore, mere fact that the complainant and the Investigating Officer are the same is not a ground to acquit the accused. However, in the instant case, admittedly, neither any notice under Section 50 of the NDPS Act was given nor any gazetted officer was called at the spot.

In **Baldev Singh's case (supra)** this Court has held that where the recovery was effected from a truck and the accused were apprehended while travelling in the truck, it is for the accused to prove that they were not in conscious possession thereof as presumption under Section 35 and 54 of the Act comes into play. However, in the instant case, as per the FIR, the appellant was sitting in an open space and two bags were lying on the ground which were recovered by the Investigating Officer without following the procedure under Section 50

of the Act despite the fact that the personal search of the appellant was conducted.

In reply, counsel for the State has further argued that recovery effected from the appellant is of commercial quantity and the prosecution has failed to link the bulk parcel with the case property recovered from the appellant at the spot. It is also argued that the discrepancy, if any, in the statement of witnesses are minor in nature and has occurred due to lapse of time and prayed for dismissal of the appeal.

After hearing counsel for the parties, I find merit in the present appeal on following grounds:-

a) *It has come in the statement of PW3 ASI Jagdev Singh that while conducting the search no notice under Section 50 of the NDPS Act was given despite the fact that his personal search was conducted vide memo Ex.PC in view of the judgment of the Hon'ble Supreme Court in **Parmanand's case (supra)**.*

*The Hon'ble Supreme Court has reiterated the ratio of law laid down in “**S.K. Raju @ Abdul Haq vs State of West Bengal**”, 2018(9) SCC 708, therefore, in the absence of a notice given under Section 50 of the NDPS Act, the prosecution has failed to prove that the recovery of contraband from the appellant was effected in a legal manner.*

b) *It has also come in the statement of PW3 that both the bulk parcels are having holes and in one parcel, there is one seal of 'JS' and there is no second seal of 'BS' though it was stated by PW4 ASI Balwinder Singh that he has also put his seal. It is further admitted by the*

Investigating Officer that on the second bag, there is no seal or identification mark and, therefore, the prosecution has failed to prove that two parcels produced before the trial Court were the same parcels, which were recovered from the appellant, in the absence of proper identification and seal on the same. From the statement of ASI Balwinder Singh PW4 though it has come that he has tried to enquire from the accused about the person from whom he has acquired the contraband, however, no such proper investigation was conducted to find out the origin of the contraband.

c) Even none of the prosecution witness has been able to prove that at the time of effecting the recovery or weighment, they were carrying instruments, which can weigh upto 60 Kgs of the poppy husk recovered from the appellant and it is not stated that the police party was carrying any such kit.

d) Though in the order Ex.PN, the Illaqa Magistrate has directed that the case property and sample be deposited with the Judicial Malkhana, however, only the bulk parcels were deposited and the sample parcels were kept by the Investigating Officer himself from 21.05.2012 till 23.05.2012 when the same were sent to the FSL and therefore, there is a violation of the direction given by the Chief Judicial Magistrate. It has further come in the statement of PW4 ASI Balwinder Singh that though he has joined independent witness Kala Singh but he was not produced before the Investigating Officer and even the seal was not handed over to him. Moreover, this witness was never examined by the prosecution.

e) It has also come in the statement of ASI Jagdev Singh, that the entire investigation was conducted by the same Investigating Officer and neither any Gazetted Office

*nor any Magistrate was called at the spot and even no second Investigating Officer was called in view of the **Megna Singh's case (supra)**, the entire investigation conducted by the informant raises a suspicion regarding the impartial investigation especially in the absence of following the procedure under Section 50 of the NDPS Act.*

In view of the above, the present appeal is **allowed** and the judgment of conviction and the order of sentence dated 05.06.2014 are set-aside.

Since, the appellant is in judicial custody, he be released forthwith, if not required in any other case.

(ARVIND SINGH SANGWAN)
JUDGE

01.03.2019
yakub

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No