

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

Date of decision: 03.12.2021

1. CRA-D-100-2020 (O&M)

Balwinder Singh alias Billa Sarpanch alias Chairman Appellant

Versus

State of Punjab ... Respondent

2. CRA-D-493-DB-2018

Gurjinder Singh @ Kala Appellant

Versus

State of Punjab ... Respondent

CORAM: HON'BLE MR. JUSTICE AJAY TEWARI
HON'BLE MR. JUSTICE PANKAJ JAIN

Present: Mr. Vijay K. Jindal, Advocate
for the appellant(s).

Mr. Sandeep Vermani, Addl. A.G., Punjab
for the respondent.

PANKAJ JAIN, J.

By way of present judgment we intend to dispose of two appeals arising out of the judgments dated 20.12.2019 and 22.02.2018 passed by Judge, Special Court, Amritsar arising out of the same FIR No.231 dated 22.10.2013, registered under Sections 379/411/472 of IPC and 21/29 of NDPS Act.

The appellants hereinabove have been convicted and sentenced for the offences punishable under Sections 21/22 of the NDPS Act and under Sections 411 and 482 of IPC. The details are as follows:-

Sections 21/22 of NDPS Act	To undergo rigorous imprisonment for a period of fourteen years and to pay a fine of Rs.1,50,000/- and in default of payment of fine, he shall further undergo imprisonment for 2 years.
----------------------------	--

Section 411 of IPC	To undergo rigorous imprisonment for a period of three years and to pay a fine of Rs.2,000/- and in default of payment of fine, he shall further undergo imprisonment for 5 months.
Section 482 of IPC	To undergo rigorous imprisonment for a period of three years and to pay a fine of Rs.1,000/- and in default of payment of fine, he shall further undergo imprisonment for one month.

As per prosecution, on 22.10.2013 SHO Inspector Vavinder Kumar along other police personnels was present at Chowk Near Milk Plant Verka in connection with patrolling and search of bad elements. He received a secret information that Balwinder Singh @ Billa Sarpanch and Gurjinder Singh @ Kala residents of village Hawelian are notorious International Herion smugglers and both supply heroin into different parts of Punjab and Delhi after receiving the same from Pakistan. They also supply intoxicant chemical powder along with Heroin and both are coming from the side of Gumtala bye pass and going to Mehta road on a black Hero Honda Motor Cycle bearing No.PB02-BK-3989 for supplying the intoxicant chemical and can be apprehended along with intoxicant chemical. At this, Vavinder Kumar, Inspector informed office of ADCP City II through HC Karam Singh in writing. He along with other police officials reached gate of Silver Estate, briefed the other officials and laid secret nakabandi. After some time, two persons whose physical appearance matched with the information were seen coming from the side of Majitha road bye pass on a motor cycle. They were apprehended. On inquiry, driver of the motor cycle disclosed his name as Balwinder Singh @ Billa and Pillion rider of the motor cycle disclosed his name as Gurjinder Singh @ Kala. IO disclosed his identity and intimated them that he suspected some intoxicant substance in their possession or in their motor cycle.

They and their motor cycle need to be searched. He apprised them about their

legal right to get themselves searched before Gazetted officer or a Magistrate and both the accused intimated that they want to get themselves and their motor-cycle searched in the presence of Gazetted officer. At this, IO informed Sh. Balkar Singh PPS ACP North Amritsar and briefed him. He requested him to reach at the spot. Efforts were made to join someone from public as witness. One Prem Pal joined in the police party as independent witness.

The samples out of the recovered contraband were sent to forensic lab. Upon receiving the reports of chemical examiner, report under Section 173 was presented against both the accused before Special Court, Amritsar.

The prosecution in order to prove its case examined ASI Sarabjit Singh, Sawinder Kaur, Clerk, DTO office, Amritsar, Inspector Vavinder Kumar (Investigating Officer/SHO), HC Manjeet Singh (Carrier), Charan Singh, HC Jaspal Singh (Carrier), ASI Charanjit Singh (recovery witness), HC Karam Singh, ACP Balkar Singh, Navjot Singh and ASI Jang Bahadur.

The accused when confronted with the incriminating evidence. In their statements u/s 313 Cr.P.C., they denied all the incriminating evidence and pleaded innocence and false implication by the police. As per them, they alongwith Gurdeep Singh son of Hari Singh, Talwinder Singh @ Chandbir Singh, Prabhjot Singh @ Jota, Jagjit Singh @ Jagga, Rubal son of Lakhbir Singh and Mukhtiar Singh were present in the house of Balwinder Singh at Preet Vihar Airport Road, Amritsar on 20.10.2013 and they all were illegally picked by the officials of P.S. Sadar, Amritsar in the evening about 6:30 p.m. On next day i.e. 21.10.2013, various representations through registered letters were sent by Jaspinder Kaur wife of Balwinder Singh apprising the fact of their illegal detention to Hon'ble Chief Justice of this Court, Human Right Commission Punjab and other higher police officials. Representation sent to Hon'ble Chief Justice of this Court

was treated to be a writ of Habeas Corpus. Nothing incriminating was recovered from their possession. The motor-cycle in question was already in possession of police authorities. They did not gave any voluntary statement to the police officials. No recovery of heroin was effected at their instance during the remand period. False case of recovery of heroin was planted upon Chandbir Singh @ Talwinder. False recovery of 500 grms heroin each was shown to be effected from them as they were taken to Rajpura by the officials of P.S. City Rajpura and later on, they were acquitted of the charges levelled against them and case was found to be false one. The police officials planted this false case against them at the directions of Amarjit Singh Bajwa, the then AIG Counter Intelligence Unit Jalandhar as Gurjinder Singh had grudge against Talwinder Singh @ Chandbir Singh and his family members. Talwinder Singh @ Chandbir Singh is son-in-law of Balwinder Singh @ Sarpanch. Nothing incriminating was recovered from their possession and a false case was planted upon them. They were made to sign a number of blank papers during their illegal custody by the police officials in P.S.Sadar.

The trial Court after analyzing the evidence on record found that prosecution has proved its case beyond doubt and accordingly convicted Balwinder Singh alias Billa Sarpanch alias Chairman under Sections 21/22 of NDPS Act and under Sections 411/482 of IPC vide judgment dated 20.12.2019.

Similarly, Gurjinder Singh @ Kala was also held guilty and convicted for offences punishable under Section 21/22 of NDPS Act and under Sections 411/482 of IPC vide judgment dated 22.02.2018.

Learned counsel for the appellants has argued that the first recovery of 500 gms of intoxicating powder alleged to have been made on 22.10.2013 from both the appellants is in violation of Section 50 of the NDPS Act. He further

argued that the second recovery, i.e. in pursuant to recovery memos Ex. P-18 and P-19 is also not sustainable in the eyes of law as the recovery memos do not bear signatures of any of the accused. He further states that there are major contradictions between the statements made by the official witnesses. The said contradictions between the statements of the witnesses in fact put whole of the recovery in doubt.

We have heard learned counsel for the parties and with their able assistance have gone through the records.

Ruqa Ex.P-9 has been proved by PW-3 Vavinder Kumar. As per the same when the accused were apprehended, Vavinder Kumar, in compliance of Section 50 of the NDPS Act apprised the accused of their legal rights and offered them that they can get themselves and their motorcycles searched from him or from Magistrate or from gazetted officer.

Learned counsel for the appellants has argued that I.O. was required to give only two options to the appellants i.e. that of Magistrate or gazetted officer. He could not have asked for third option. The moment he offered the appellants to be searched by him, he acted in breach of Section 50 of the NDPS Act and thus the first recovery is vitiated for the said reason.

He further contends that perusal of Ex.P-5 to P-8 shall reveal that the particulars of the FIR also stand recorded on the said memos despite the fact that the said memos were prepared before sending the ruqa. He further claims that even though an independent witness, namely, Prem Pal is alleged to have been associated, but the seals were never handed over to the said independent witness. Thus, the very purpose of associating the independent witness got defeated and this raises serious doubts about the alleged recovery made from the appellants.

On the other hand, learned counsel for the respondent-State has drawn our attention towards statement of PW-3 wherein the official has specifically stated that in compliance of Section 50 of the NDPS Act, he informed the accused that they have legal right to get searched from a gazetted officer or Magistrate. The appellants exercised their right and opted to be searched in the presence of gazetted officer. Accordingly, they were searched in presence of gazetted officer Shri Balkar Singh, PPS, ACP, North, Amritsar.

Learned State counsel thus submits that arguments raised by the counsel for the appellants sans merit as no prejudice was caused to the appellants, who exercised their right. Moreover, the contents of ruqa have been clearly explained by the official witness in his oral statement.

On giving thoughtful consideration to the arguments raised by both the counsels, we find that the question raised by the counsel for the appellants with respect to compliance of Section 50 of the NDPS Act regarding three fold offer given by I.O. deserves to be rejected. Though at the first blush, the offer made by I.O. seems to be in violation of law laid down by Hon'ble Supreme Court of India in the case of '**State of Rajastand vs. Parmanad and another**' reported as **2014 (5) SCC 345**.

However, on careful consideration, we find that though offer was illegal, the appellants rightly exercised their option. Admittedly, search on them was carried out by ACP Balkar Singh, who was a gazetted officer after the appellants reposed faith in him to conduct the search.

Coming on to the second argument with respect to doubt about the consent memos and recovery memos, we find force in the submissions made by the counsel for the appellants.

Ex. P-5 to P-8 carry the details of the FIR. Admittedly, the same were prepared before sending the ruqa. PW-3 I.O. Vavinder Kumar when confronted with the same stated that-

“Signatures of ACP were obtained on all the memos without mentioning any FIR number. FIR number was mentioned/filled-in on all the memos lateron after departure of ACP. I cannot tell the mode of transportation used by HC Major Singh to go and to return the place of recovery. Attention of witness is drawn towards Ex.P7 in which in the head note, case number 231 dated 22.10.2013 under Section 21/29/61/85 NDPS Act, P.S. Sadar is in same handwriting and same ink in a running manner but as per witness FIR number was filled in later-on. Same is answer regarding Ex.P5, Ex.P8 and Ex.P6.”

Regarding preparation of form M-29, PW-3 I.O. in his testimony states that-

“Names of the accused were filled in form M-29, specimen seals bearing impression VK and BS were affixed. Description of articles, date of sample parcels, FIR number and date alongwith relevant sections of law were filled at the spot. It is correct that on form M-29 Ex.P32, Sections 21/29/61/85 NDPS Act were only written. Form M-29 was prepared in triplicate at the spot.”

On the other hand, PW-7 ASI Charanjit Singh while deposing in support of prosecution stated that-

“Relevant portion of form M-29 was filled at the spot but it was not completed at the spot. Form M-29 was containing three leafs i.e. in triplicate. I cannot tell how much portion of form M-29 as left blank by I.O. at the spot to be filled lateron.”

Similarly, the fact that though the independent witness was joined, but the seals were never handed over to him and the same remained in the possession of the members of the police party raises doubt about the recovery and goes to the root of the case. This is not a case where independent witness was not found and was not associated, here the police was able to find an independent witness who willingly got himself associated, it was the duty of the police party to hand over the seal to him after contraband was sealed.

It is pertinent to mention here that the said independent witness has been given up by the prosecution pleading that he has been one over by the accused and case is solely based on the testimonies of the police party.

Attacking the second recovery of 500 gms of heroin said to have been made pursuant to the disclosure statement suffered by the accused.

Learned counsel for the appellants has taken us to the statements made by PW-3 I.O. and the testimony of PW-9 Balkar Singh:-

“Statement of PW 3 - On 24.10.2013 at about 4:00 AM i.e early in the morning, a disclosure statement of accused was recorded by me. Disclosure was recorded in presence of HC Major Singh, HC Satpal Singh and ASI Charanjit Singh. It is correct that signatures of accused Balwinder Singh could not be obtained on disclosure statement. It is correct that on disclosure statement of accused Gurjinder Singh, his signatures could not be obtained as both the accused refused to sign. At 4:30 AM early morning, I along with police officials namely ASI Charanjit Singh, HC Major Singh, HC Satpal Singh along with other police officials whose names I do not remember left for the place of recovery . We reached officials residence of ACP at about 5:00 AM via SSSS Chowk, Lawrence Chowk etc. We reached the place of recovery at about 5:30 AM. Independent witness perhaps Daljit Kumar, was joined at the place of recovery. I am, not sure about the name of independent witness

who joined at the place of recovery on 24.10.2013. Independent witness was on foot when he was joined. No particulars or identification, documents of said independent witness were taken by me. ACP was accompanied by his driver and gunman. Spot of recovery i.e Preet Vihar was at Gumtala Road in this case. No house number or plot number of the spot of recovery is mentioned. Recovery was effected from a walled plot. No intimation was sent to owner of said plot. The walls were of about 3-4 feet in height. No permission was sought from plot owner before entering in it. I cannot even tell who is owner of said plot. Contraband in question was dugged out from a pit. No message/intimation was sent to any respectable of the locality. Contraband was unearthed from 8-10 inch. A stick was used to unearth the contraband from the pit. I was already having weighing scales/containers/cloth bags with me. The contraband was recovered from polythene bag but I do not remember the colour of polythene bag. The said polythene bag was covered with dust. The said polythene bag was converted into a parcel. This recovery was effected as per disclosure of Balwinder Singh. As it was early in the morning, people were passing through that way. No person was asked to join police party as witness. No gate was fixed to his plot. The said plot was easily accessible. It is correct that said plot in question was not owned by or possessed by accused Balwinder Singh. As it was early in the morning, people were passing through that way. No person was asked to join police party as witness. No gate was fixed to his plot. The said plot was easily excessable. It is correct that said plot in question was not owned by or possessed by accused Balwinder Singh.

It is correct that motorcycle make Splendor whose number I do not remember, is not owned by accused persons. The plot from which recovery was effected was surrounded by vacant plots. Recovery was effected from an empty plot which was walled located near house of accused Gurjinder Singh. The said plot was walled up to 3 feet approx. I did not inquire about

the ownership of the said plot. No permission was taken from owner of said plot. It is correct that this plot was not in exclusive possession of accused Gurjinder Singh. The said plot was easily accessible and any body can enter into the same. I do not know regarding dimensions of said plot which was empty and was surrounded by empty plots from all the four sides. We stayed at the spot upto about 8:30 AM. It is correct that seal was not handed over to independent witness on 24.10.2013. On both the occasions, I handed over the seal to ASI Charanjit Singh who was subordinate official in the same police station. Seal was returned to me on 24.10.2013 in police station.

Statement of PW 9 - On 24.10.2013, I received telephonic call at about 5:00 PM. At that time, after completing my official work I returned to my residence as my office hours were over by that time. Police party along with independent witness met me near Gandhi Ground near my residence. There were 5/6 member of police party at that time. At about 5:15 PM, we reached the spot of recovery. Owner of the plot was not called at the spot. Balwinder Singh was called first. No intimation was sent to any respectable person of locality at that time. The spot of recovery was not walled. A pit was dug to recover the contraband. No Instrument was used to dug the pit at that time. The pit was dug about one feet. The pit was not muddy. There was no particular marking at the polythene bag from which contraband was recovered. The polythene bag was transparent. No separate parcel of Polythene bag was prepared. Dust was there on polythene bag. I remained present at the spot for about three hours i.e till about 8:00 PM. By the time I left the place of recovery, it was dark. There were no houses or any physical structure built near the place of recovery. I cannot tell the dimensions of plot of recovery. Plinths were there in the said plot but I cannot tell the height of said plinths. I do not remember whether the way leading to the spot of recovery from Gurjinder Singh was graveled, bricked or a kacha road. The said plot in question was not walled but plinths were there. There

were no constructed houses or physical structures bounding the spot of recovery. The contraband recovered was dug from pit by accused himself. The pit was dug for about one feet. No instrument was used to dig the pit. At about 6:30 PM, I reached the spot of recovery along with police officials but it was not dark at that time. It was later in the evening. No respectable person from locality was ever called. I stayed at spot for about 8:00 PM. Two separate forms M-29 were prepared at the spot by Investigating Officer but they were not in triplicate. Independent witness Daljit Kumar, appended his signatures in english and he was about 45 years old. No identification documents of independent witness were prepared at the spot. IO did not handed over his seal to both the Independent witnesses. It is wrong to suggest that these independent witnesses are stock witnesses. Both the plots were situated in Preet Vihar, Airport Road, ASR. I cannot tell if independent witness travelled along with police party only IO can tell about the same. I did not saw the disclosure statements of both the accused but I was told by IO about the same. On 22.10.2013, Commissioner of Police, was not intimated to come to the spot of recovery. I do not remember if I have filed any reply or affidavit in Hon'ble Punjab and Haryana/High Court, in the present matter. I returned to my home at about 8:30 PM at night.”

Relying on the aforesaid statements by the official witnesses, learned counsel for the appellants submits that that the discrepancies in the statements made by the material witnesses completely bely the recoveries and the same cannot be relied upon.

Having given our careful consideration to the statements made by the officials, we find that the discrepancies cannot be ignored. Both the witnesses are the officials, who were spearheading the prosecution. Each one of them is specific in his own version. However, when both the statements are juxtaposed, one belies the other. Oral evidence needs to inspire confidence in the mind of the Court.

Trustworthiness is the test. Contradictory statements made by the prosecution witnesses have caused fatal blow to the case of the prosecution. It in fact discredits the version of the prosecution.

This Court in *Criminal Appeal No.906-DB-2006* titled as '*Didar Singh @ Dara vs. State of Punjab*', held that-

“20. Under the Narcotic Drugs And Psychotropic Substances Act, not only the very possession of the narcotics, drugs and psychotropic substances has been made an offence but severe punishment without exception has also been provided. The Act also provides for presumption of guilt emerging from possession of Narcotics Drugs and Psychotropic Substances. In case of commercial quantity of the narcotics, drugs and psychotropic substances, the minimum sentence of 10 years rigorous imprisonment besides minimum fine of Rs. one lac has been provided. The Hon'ble Supreme Court in *Noor Aga v. State of Punjab*, 2008(4) R.A.J. 381 : 2008(3) RCR (Criminal) 633 has held that under the Narcotic Drugs And Psychotropic Substances Act the extent of burden to prove the foundational facts on the prosecution, i.e., proof beyond all reasonable conduct is more onerous. A heightened scrutiny test would be necessary to be invoked. It is so because whereas, on one hand, the court must strive towards giving effect to the parliamentary object and intent in the light of the international conventions, but on the other hand, it is also necessary to uphold the individual human rights and dignity as provided for under the UN Declaration of Human Rights but insisting upon scrupulous compliance of the provisions of the Act for the purpose of upholding the democratic values, it is necessary for giving effect to the concept of wider civilisation. It is further observed that while deciding such cases, the Courts must always remind itself that it is a well settled principle of criminal jurisprudence that more serious the offence, the stricter is the degree of proof. Therefore, a higher degree of assurance would be necessary to

convict an accused under the Narcotic Drugs And Psychotropic Substances Act.

21. Thus, under the Narcotic Drugs And Psychotropic Substances Act, it is the fundamental duty of the prosecution to prove beyond a shadow of reasonable doubt that the investigation conducted in the case is absolutely flawless specifically with regard to the link evidence which is of most significant aspect. It is incumbent upon the prosecution to prove that from the stage of effecting the recovery till the sample reach the Chemical Examiner, there was no chance of tampering with it. Once the presumption is stumbling, on this vital aspect the benefit is to be extended to the accused.”

In the light of the above discussion, prosecution has failed to establish that the contrabands were really recovered from the possession of the appellants in the manner alleged by the prosecution on the said date and time. Appellants deserve benefit of doubt.

Consequently, the appeals are accepted and the appellants stands acquitted as the recoveries in the present case are found to be doubtful.

Since the main case has been decided, the pending criminal miscellaneous application, if any, also stands disposed off.

(AJAY TEWARI)
JUDGE

(PANKAJ JAIN)
JUDGE

03.12.2021

Dinesh

Whether speaking/reasoned : Yes

Whether Reportable : No