

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

SR. No.317

CRA-S-828-SB-2004 (O&M)

Reserved on:11.01.2023

Pronounced on:28.03.2023

Megha Singh

...Appellant

Versus

State of Haryana

...Respondent

CORAM: HON'BLE MR. JUSTICE N.S. SHEKHAWAT

Present: Mr. Atul Lakhanpal, Senior Advocate with
Mr. Arvindpal Singh, Advocate and
Mr. J.S. Mehndiratta, Advocate as Amicus Curiae
for the appellant.

Ms. Sheenu Sura, DAG, Haryana.

N.S. SHEKHAWAT, J.

The present appeal is directed against the judgment of conviction and order of sentence dated 08.12.2003 passed by the learned Additional Sessions Judge, Fatehabad, whereby the appellant was convicted for the offence punishable under Section 15(c) of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as 'the Act') and sentenced to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs.1,00,000/- with default stipulation.

The story of the prosecution in short is that SI Parkash Chander, posted as In charge, CIA Staff, Fatehabad, was present along with other police officials in a private jeep for patrolling on 26.09.1999 and in the meantime, he received a secret information that Megha Singh son of Labh Singh, resident of Dhani Nagar, was loading the churapost packed in the

bags in his trolley and wanted to sell the same and if a raid was conducted, he could be apprehended and poppy husk could be recovered from the possession of the accused/appellant. A raiding team was prepared and they reached in the Dhani of accused-appellant. A trolley was parked in front of Dhani and a person was seen arranging the bags in the trolley. On interrogation, he disclosed his name and identity. A notice under Section 50 of the Act was served on the accused-appellant and was informed about suspicion of the police that there was some contraband in the bags and he could get his search conducted in the presence of a gazetted officer or a Magistrate. The notice was read over and explained to the accused, who had put his thumb impressions on the same. The accused/appellant desired to get his search conducted in the presence of a gazetted officer. Rajesh Kumar, Naib Tehsildar, Ratia, was called at the spot and he directed the I.O. to conduct the search of the bags. On his directions, I.O. conducted the search and poppy husk was found in 17 bags, which were kept in the trolley. 100 grams poppy husk was separated from each bag as sample and weight of the remainder quantity of the poppy husk was found to be 39.900 kgs in each bag. 17 parcels containing the sample poppy husk were prepared and sealed with the seal "PC" and were taken into possession vide separate recovery memos. The seal after use was handed over to Rajesh Kumar, Naib Tehsildar. A ruqa was sent to the police station by the IO for registration of the FIR and on the basis of the same, formal FIR was registered in the police station. The I.O. conducted the initial investigation at the spot and formally arrested the accused-appellant. After completing

the necessary investigation at the spot, the police team reached the police station. The I.O. produced the accused-appellant, witnesses and the case property before Som Raj, SI/SHO, who verified the facts from the accused and the witnesses and after verification, he affixed his own seal “SR” on the samples as well as remainder quantity of poppy husk and directed the I.O. to deposit the case property with MHC of the police station and to put the accused in the police lock up. The sample was sent to the chemical examiner for analysis and the same was found containing poppy husk.

Finding a prima case against the accused, he was charge sheeted for the offence punishable under Section 15 of the Act for keeping in his possession 680 kgs of poppy husk without any permit or licence and the charge was ordered to be framed against him, to which, he pleaded not guilty and claimed trial.

In order to prove the charge against the appellant, the prosecution examined as many as eight witnesses and thereafter closed the prosecution evidence. The prosecution examined PW-1 HC Tarsem Singh, who tendered his affidavit Ex.PA in evidence. Similarly, PW-2 C.Jaibir tendered his affidavit Ex.PB in evidence. PW-3 Inspector Mahender Singh completed the investigation and prepared a final report under Section 173 Cr.P.C. PW-4 C. Om Parkash deposed that on 27.09.1999, he was posted as Reader to DSP, Fatehabad and received a report Ex.PC. DSP Charanjit Singh made his endorsement at point A of Ex.PC/1 and he proved the signatures of DSP. PW-5 SI Guria Ram recorded the statements of MHC Tarsem Singh and C. Jaivir Singh under section 161 Cr.P.C. Rajesh Kumar,

Naib Tehsildar, Jakhal, appeared as PW-6, who clearly stated that the search of trolley was conducted in his presence. Still further, Som Raj, Inspector, CIA Staff, was examined as PW-7, who was posted as SI/SHO on 26.09.1999. The police team headed by SI Parkash Chander had produced the case property along with sample parcels of the case, accused and the witnesses before him. Thereafter, he affixed his seal “SR” on each of the bag and also on 17 samples and made his endorsement Ex.PD/1 and forwarded the same to the superior officer. Parkash Chander, SI, CIA, Jind, was heading the raiding team and was examined as PW-8, who supported the case of the prosecution. In his cross-examination, he admitted that a secret information was received at 02.00 PM at Bus Stand, Nagpur. Dhani Megha was at a distance of about 03 km from village Nagpur and he had not given information to any superior officer regarding the secret information. Village Nagpur was situated in the northern direction of the place, where secret information was received.

After the closure of the prosecution evidence, the statement of the accused-appellant was recorded under Section 313 Cr.P.C. and he pleaded his false implication. He stated that no recovery was effected from him. In defence, no evidence was led by the accused-appellant.

This Court has heard the learned counsel for the parties and perused the case file minutely.

Learned counsel for the appellant vehemently argued that in the instant case, there was violation of Section 42 of the Act. The investigating officer admitted in his cross-examination that he received secret information

at 2.00 PM and the place of recovery was at a distance of about 3 kms from village Nagpur. He did not give any information to any superior officer regarding the said secret information. He was also accompanied by six other police officials. In spite of this, the secret information was neither reduced into writing nor any superior officer was informed about the same. Thus, the appellant is liable to be acquitted on this score alone. The said submissions have been opposed by the learned counsel for the State by submitting that in the instant case, the provisions of Section 43 of the Act would be applicable and not that of Section 42 of the Act. The recovery was effected from an open trolley at a public place.

I have considered the rival submissions made by the learned counsel for the parties.

It is apposite to refer to Sections 42 and 43 of the Act, which are reproduced hereinunder:-

“42. Power of entry, search, seizure and arrest without warrant or authorisation.

(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from persons

knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,

- (a) enter into and search any such building, conveyance or place;*
- (b) in case of resistance, break open any door and remove any obstacle to such entry;*
- (c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and*
- (d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:*

Provided that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape

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of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

- (2) *Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.”*

43 Power of seizure and arrest in public place. Any officer of any of the departments mentioned in section 42 may

- (a) *seize in any public place or in transit, any narcotic drug or psychotropic substance or controlled substance in respect of which he has reason to believe an offence punishable under this Act has been committed, and, along with such drug or substance, any animal or conveyance or article liable to confiscation under this Act, any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under this Act or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act;*

- (b) *detain and search any person whom he has reason to believe to have committed an offence punishable under this Act, and if such person has any narcotic drug or psychotropic substance or controlled substance in his possession and such possession appears to him to be unlawful, arrest him and any other person in his company.*

Explanation. For the purposes of this section, the

expression "public place" includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public."

A perusal of the mandatory provisions of Section 42 would clearly establish that in case of receipt of a secret information by an officer with regard to the presence of contraband in some building, conveyance or enclosed place, the same is required to be taken down in writing by such officer and is to be sent to his immediate superior officer within 72 hours of receiving such information. Still further, in case where warrant is required for effecting search, as would be required for search after sunset, of a building, conveyance or an enclosed place, but the circumstances do not afford spending time for obtaining warrant, lest it could hamper chances of the accused being caught, the police officer concerned is required to take down the reasons for such omission to obtain warrants.

Learned counsel for the appellant had argued that in the instant case, the recovery had taken place from a trolley and the provisions of Section 42 would apply. He also relied upon the law laid down by the Hon'ble Supreme Court in the matter of ***Boota Singh and others Vs. State of Haryana***, 2021 (2) RCR Criminal, 892. However, the said ratio is not applicable to the facts of the instant case. In **Boota Singh's** case (supra), secret information had been received to the effect that the accused were selling "poppy straw" from a vehicle on a katcha path and in case a raid was conducted, they could be apprehended at the spot. Accordingly the raid was conducted and two persons were found sitting on the bags, kept in a Jeep and another person managed to escape. However, it needs to be noticed that

in the said case, the poppy straw was recovered from a Jeep on an unmetalled path. However, the words “building”, “conveyance” or “enclosed place” in Section 42 of the Act have been used for the specific purpose of protecting the persons, who are living in buildings, conveyance and enclosed place. The Legislature in its wisdom considered proper to draw a demarcating line between building, conveyance and enclosed place on one side and public place on the other side. The words have been specifically mentioned to show the demarcating line between the two otherwise the Legislature could have used any place instead of mentioning the words “building”, “conveyance” or “enclosed place”. Even a private open place does not fall within the purview of Section 42 of the Act, unless it is enclosed. So, a thin line of distinction will have to be kept in mind. In the instant case, the term “conveyance” used in Section 42 of the Act is to be understood as *ejusdem generis* to the terms building or enclosed place. An open trolley parked at a public place in open would not fall within the definition of “conveyance”, as mentioned in Section 42 of the Act and in the instant case, the provisions of Section 43 of the Act would be applicable. The facts of the instant case are entirely different from the facts mentioned in the judgment of **Boota Singh** (supra) and the said judgment is not applicable to the facts of the instant case.

The learned counsel for the appellant next argued that the bags containing the poppy straw were being loaded in a tractor-trolley and the number of the tractor has not been mentioned in any of the documents. Even no evidence was brought on record to connect the appellant with the trolley

and the place from where the recovery was made is stated to be opposite the residence of the appellant. No evidence was led to prove the ownership of the residence and the prosecution failed to connect the appellant with the said trolley. The learned counsel for the respondent opposed the said submissions by contending that the appellant was found to be in conscious possession of the contraband and the recovery was effected in the presence of a Magistrate. Even Rajesh Kumar, Naib Tehsildar, who had gone at the spot to join the recovery proceeding was subjected to lengthy cross-examination and had withstood the test of cross-examination.

I have considered the rival submissions made by learned counsel for the parties and find sufficient force in the submissions made by the learned State Counsel. When the police party reached at the spot, the appellant/accused was found on the trolley, which was parked at a public place and was found arranging the bags in the trolley. Still further the registration number is always assigned to a tractor and not to a trolley, as the trolley is not a conveyance, but is an attachment to a conveyance. Thus, the submissions made by learned counsel for appellant are without any force and are liable to be rejected.

Learned counsel for the appellant also submitted that the recovery was made during the day time and from a village. However, no independent witness was associated by the investigating officer and even a perusal of his testimony reveals that even no efforts were made by him for joining an independent witness. He flouted all the statutory protections, which were available to the appellant. However, the learned State counsel

submitted that the recovery was made by the police officials in the presence of a Magistrate, who was an independent person. Still further, the law is well settled that the accused cannot be granted any benefit for non-joining of independent witness or non-examination of independent witnesses associated during the course of investigation.

I have considered the submissions made by learned counsel for the parties and find that the arguments made by the learned counsel for the appellant carry no weight. It is a matter of common knowledge that independent persons are always reluctant to be a witness or to assist the investigation. Reasons are not far to seek. But the prosecution case cannot be thrown out or doubted on that ground alone. The people normally are insensitive, when a crime is committed even in their presence. They try to keep themselves away from the courts, unless it is inevitable. This kind of apathy of the general public is indeed unfortunate, but it is everywhere whether in a village life, towns or cities. One cannot ignore this handicap with which the investigating agency has to discharge its duties. Consequently, the Courts should not doubt the prosecution case for want of independent witnesses and the testimonies of the official witnesses can always be treated at par of the private witnesses. However, as a rule of caution, such testimonies have to be scrutinized carefully and with circumspection.

No other argument was raised.

In view of the above discussion, I find no merit in the instant appeal and the same is hereby dismissed. Consequently, the impugned

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judgment of conviction and order of sentence dated 08.12.2003 passed by the learned Additional Sessions Judge, Fatehabad are ordered to be upheld and affirmed.

Pending application(s), if any, is also disposed off.

Case property, if any, be dealt with, and, destroyed after the expiry of period of limitation for filing the appeal, in accordance with law. The trial Court record be sent back forthwith.

In the end, I record my appreciation for Mr. J.S. Mehndiratta, learned Amicus Curiae, who had rendered his able assistance to this Court.

(N.S. SHEKHAWAT)
JUDGE

28.03.2023
mks

Whether Speaking/Reasoned: YES / NO

Whether Reportable: YES / NO