

(1996) 08 P&H CK 0012

High Court Of Punjab And Haryana At Chandigarh

Case No: Criminal Appeal No. 130/SB of 1996

Dud Nath

APPELLANT

Vs

The State of (Union Territory)

RESPONDENT

Date of Decision: Aug. 7, 1996

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 20, 50

Citation: (1997) CriLJ 2050 : (1996) 3 RCR(Criminal) 455 : (1996) 3 RCR(Criminal) 498

Hon'ble Judges: P.K. Jain, J

Bench: Single Bench

Advocate: Naveen Malik, for the Appellant; R.S. Rai and Gautam Dutt, for the Respondent

Final Decision: Allowed

Judgement

P.K. Jain, J.

This appeal is directed against the judgment/order dated 19-12-1995, passed by the Additional Sessions Judge, Chandigarh, whereby the appellant has been convicted u/s 20 of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as "the Act") and sentenced to undergo rigorous imprisonment for a period of ten 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 2 years.

2. The facts leading to this appeal are that on 1-1-1994, A.S.I. Rajinder Pal of C.I.A. Chandigarh, along with his associates held a nakabandi near tubewell of Sector 25. Per chance one Banwari Lal son of Raghu Nath met him with whom he was talking. In the meanwhile, at about 11.30 a.m. the appellant having a bag in his right hand was sighted coming on foot-from the side of the University. On seeing the police party, he tried to retreat. Suspicion having arisen, he. was apprehended. ASI Rajinder Pal asked the appellant to give his search but he refused to do so and said that he would offer his search before a Gazetted Officer or a Magistrate. On a

wireless message, DSP Devinder Singh reached the spot and disclosed his identity to the appellant. On a direction given by the said D.S.P., ASI Rajinder Pal conducted the search of the bag of the appellant which was found to contain charas weighing 1 kg. 200 gms. A sample weighing 100 gms. was separated. The sample charas and the remaining charas were converted into two separate parcels with the seal of "RP" Sample seal was prepared and the seal after use was handed over to Banwari Lal. Ruqa-Exhibit PB was sent to the Police Station, on the basis of which a case u/s 20 of the Act was registered against the appellant/vide F.I.R., copy of which is Exhibit PB/1. Sealed sample parcel was sent to the office of Forensic Science Laboratory. On the receipt of the report of the Chemical Examiner and after completion of the investigation, a charge-sheet was filed in the Court.

3. A charge u/s 20 of the Act was framed against the appellant, to which he pleaded not guilty and claimed trial.

4. In support of its case, the prosecution examined 8 witnesses. Jaswant Singh (PW 1) is a Draftsman who had prepared the site plan Exhibit PA, on 22-1-1994 on the instructions of ASI Rajinder Pal. S.I. Darshan Kumar (PW2) had recorded the first information report, copy of which is Exhibit PB/1, on the basis of ruqa-Exhibited PB on 1-1-1994. H.C. Rajpal Singh (PW 3) was the Moharrir Malkhana with whom the two sealed parcels having the seals of "RP" and "JS" were deposited on 1-1-1994. On 21-1-1994, he had sent the sealed sample parcel to the Forensic Science Laboratory through H.C. Mohan Singh. According to his testimony, the sample parcel was not tampered with by anybody till it remained under his care and custody. H.C. Mohan Singh (PW4) had taken the sealed sample parcel from the Moharrir Malkhana on 21-1-1994 and had deposited the same in the Laboratory on the same day in Sector 18, Chandigarh, and had re-delivered the road certificate to the Moharrir Malkhana. Inspector Jagbir Singh (PW 5) was the S.H.O. of Police Station Sector 11, Chandigarh, on 1-1-1994. A.S.I. Rajinder Pal produced the appellant along with two sealed parcels i.e. the sample and the case property. He affixed his own seal of "JS" on both the parcels and deposited the case property in the Malkhana. DSP Devinder Singh (PW 6) reached the spot of occurrence on a wireless message received from ASI Rajinder Pal and the bag of the appellant was searched in his presence and charas weighing 1.200 kg. was recovered. Sample was separated, and the sample charas and the remaining charas were put into two separate sealed parcels and taken into possession vide memo Exhibit PC, attested by him. Banwari Lal (PW7) is a labourer who had come from village Dhanas to Chandigarh for daily labour, but finding no work, was going back, when he met ASI Rajinder Pal on his way to his village. The bag of the appellant was searched in his presence and the charas was recovered. The sealed parcels were also prepared in his presence and the seal after use was handed over to him. He had returned the seal to ASI Rajinder Pal on the third day as per instructions. ASI Rajinder Pal (PW 8) is the Investigating Officer. He had conducted the search of the bag of the appellant and had recovered charas weighing 1 kg. 200 gms. He had separated the sample and 1 had converted the

sample charas and the remaining charas into two separate sealed parcels with his own seal. Thereafter he had produced the appellant as well as the case property before the S.H.O. who had put his own seal, and then he had deposited the sealed parcels along with the specimen impression seal with the Moharrir Head Constable Raj Pal Singh. Report Exhibit PF of the Forensic Science Laboratory was tendered in evidence.

5. In his examination u/s 313 of the Code of Criminal Procedure, the appellant denied all the allegations of the prosecution and pleaded false implication. He did not produce any evidence in his defence.

6. On an appraisal of the evidence, the Additional Sessions Judge found the appellant to be guilty u/s 20 of the Act, and convicted and sentenced him as stated above. Hence this appeal.

7. I have heard the learned counsel for the parties and have gone through the record of the trial Court.

8. Mrs. Naveen Malik, Advocate, learned counsel for the appellant, has assailed the order of conviction mainly on two grounds i.e. that the provisions of Section 50 of the Act have not been complied with and the story put forward by the prosecution is highly improbable in its nature, and secondly, that the possibility of tampering with the sealed sample parcel till it reached the hands of the Chemical Examiner has not been ruled out in this case.

9. On the other hand, Shri R. S. Rai, Advocate, learned counsel for the respondent, has argued that the provisions of Section 50 of the Act were duly complied with inasmuch as requisite offer was given and the appellant had exercised his option. It has been further argued that the seal after use was handed over to an independent public person and the same was returned after the case property was deposited in the Makhana. It is, thus, urged that the question of tampering with the sample parcel before it reached the Chemical Examiner does not arise.

10. I have considered the respective arguments carefully. It is not disputed at the Bar that the provisions of Section 50 of the Act are mandatory in nature and violation thereof is fatal to the prosecution. This section is not a ritual or an idle formality to be performed. Reading the section as a whole along with other provisions of the Act pertaining to search, seizure and arrest, what emerges is that it is the duty of the authorised officer to inform a person about to be searched of his lawful right. It is only on being so informed by the authorised officer that the question of exercising an option would arise. What is important is the compliance in this regard must be in substance and not merely in form. After the pronouncement of the Apex Court in State of Punjab Vs. Balbir Singh, there does not, remain any doubt that if the provisions of this section have not been complied with, the omission shall strike at, the root of the prosecution case.

11. In the present case, the story put forward in the ruqa-Exhibit PB is that Banwari Lal son of Raghu Nath, a labourer, met the police party by chance and immediately thereafter the appellant was sighted while coming having a bag in his right hand. On suspicion, he was detained and ASI Rajinder Pal expressed his intention to conduct the search of the said bag. But the appellant told that he wanted to give his search in the presence of a Gazetted Officer or a Magistrate. This is something a reversal story to the provisions of Section 50 of the Act as to show that the appellant was already in the know of his rights contained in the said section. However, when ASI Rajinder Pal came into the witness-box as PW 8 he has stated that he doubted that contraband was contained in the jhola carried by the appellant and he expressed his desire to search the jhola, whereupon the appellant stated that he would offer his search only in the presence of some Gazetted Officer. He has not stated anywhere that the appellant had expressed his desire to be searched either before a Gazetted Officer or a Magistrate as contained in the ruqa or the F.I.R. Similar is the statement of Banwari Lal (PW 7), the so-called independent public person./

12. The aforesaid evidence ought to be appraised keeping in view the fact that Banwari Lal (PW 7) appears to be a got-up witness and his presence at the time of alleged occurrence is highly improbable. The obvious reason for this suspicion is that, this witness is a labourer by profession and was absolutely unknown to the police party as admitted by ASI Rajinder Pal in his cross-examination. He had no reason to be present at the place of occurrence at 11.30 a.m. if he had come from his village seeking daily labour, and further the question of his joining the police party unless he was known to any member of the police party is highly incredible. This Court expresses its strong disapproval with regard to the relatively loose practice that is being adopted of indiscriminately picking up persons of straw and using them as Panchas in important cases like the present one. Feeling the gravity of the offence and the sentence prescribed therefor, it is the bounden duty of "the implementing agency to pick up and utilise persons of some standing in status to be the witnesses to the search and seizure. It is interesting to note that DSP Devinder Singh (PW6) has stated in his cross-examination that the ASI did try to associate some passersby but none was ready to join the investigation. This excuse is now being put forward by the implementing agency almost in every case. It should be remembered that fouler the crime, greater the evidence. A person cannot be convicted for such a heinous offence in view of the quality of evidence produced in the present case which defies human probability and is highly incredible. After carefully perusing the testimony of all these three witnesses, I am constrained to hold that the provisions of Section 50 of the Act were never complied with and the story put forward by ASI Rajinder Pal (PW8) and D.S.P. Devinder Singh (PW 6) is highly improbable. This finding in itself is enough to strike at the root of the prosecution case.

13. Coming to the second contention of the learned counsel for the appellant, it may be noted that the testimony of H.C. Rajpal Singh (PW3), who was the Moharrir Malkhana on that day, does not show that, the specimen form containing the impression of the seals was ever deposited with him along with the case property. His testimony also does not show that any such specimen of the said seals was ever sent by him through H.C. Mohan Singh to the Office of Forensic Science Laboratory. Similarly, H.C. Mohan Singh (PW 4) has nowhere stated that he had taken the specimen of the seals along with the case property and had deposited the same in the office of the Forensic Science Laboratory. It is also important to note that the prosecution has not cared to produce either the entry of the relevant register regarding the deposit and despatch of the sealed sample parcels, nor the road certificate to prove that the specimen of the seals was ever deposited with the Moharrir Malkhana and the same was sent to the Office of the Forensic Science Laboratory. This fact gains importance in view of the testimony of Banwari Lal (PW 7) that he had returned the seal after 3 days of the occurrence, whereas the sealed sample parcel was sent to the office of the Forensic Science Laboratory after 20 days of its recovery. There is no explanation as to why not the sealed sample parcel was sent to the Office of the Forensic Science Laboratory before the seal was returned by Banwari Lal.

14. At the conclusion of the trial, the prosecution can succeed only on discharging the unshifting burden of proving its case against the accused and strongest of suspicion does not constitute the proof required. One of the essential facts to be proved affirmatively by the prosecution is right from the stage of the seizure till it reaches the hands of the Chemical Analyst, there was no possibility to change or tamper with the recovered material.

15. In *Mool Chand v. State* (1993) 2 CCR 964 this question was examined by the Delhi High Court and answered as such: "But in the present case the evidence of the prosecution is lacking to the effect that C.F.S.L. form was neither deposited in the Malkhana along with the case property nor sent to the C.F.S.L. with the sample parcel. The very name given to this form as C.F.S.L. Form suggests the object of its preparation at the time of seizure of a contraband article and separation of its representative sample. The specimen seal impressions used at that time are affixed on it, so that it can be deposited with case property in the Malkhana and forwarded to C.F.S.L. along with the sample parcel so that seal impressions affixed on the sample parcel are duly compared with the seal impressions on the C.F.S.L. Form. The idea behind taking such precautions is to complete a material link in the prosecution evidence by eliminating the possibility of the sample being tampered with. Therefore, the argument of the learned standing counsel that non-deposit of C.F.S.L. form in Malkhana on its being sent to C.F.S.L. was a mere irregularity,; cannot be accepted. It provides a material link in the prosecution evidence and its absence will entitle the appellant to a benefit of; doubt."

Similar view has been expressed by the same High Court in *Safiullah v. State* 1992 (1) Crimes 204. This Court has also expressed identical views in *Paramjit Singh v. State of Punjab* 1996 (1) RCR 267.

16. As already stated, the prosecution is not proved that the specimen of seals was ever deposited along with the sample parcels in the Malkhana, nor there is any evidence to show that any such impression of the seals was sent to the Forensic Science Laboratory. It has already been noted above that the seal alleged to have" been entrusted to Banwari Lal was returned by him on the third day and the sealed sample parcel was sent for chemical analysis after 20 days. In other words, the possibility of tampering with the sealed sample parcel has not been ruled out. This fact will entitle the appellant to a benefit of doubt.

17. For the reasons mentioned above, I accept this appeal. The conviction and sentence of the appellant are hereby set aside and he is acquitted of the charge u/s 20 of the Act. The appellant shall be released forthwith, if not wanted in any other case.