

(2012) 10 P&H CK 0124

High Court Of Punjab And Haryana At Chandigarh

Case No: Criminal Appeal No. 682-SB of 2001

Jaswinder Singh and another

APPELLANT

Vs

State of Punjab

RESPONDENT

Date of Decision: Oct. 11, 2012

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 15, 52A(2)

Hon'ble Judges: Jitendra Chauhan, J

Bench: Single Bench

Advocate: R.P. Dhir, for the Appellant; Mehardeep Singh, DAG, Punjab, for the Respondent

Final Decision: Allowed

Judgement

Jitendra Chauhan, J.

The present criminal appeal has been preferred by the appellants challenging the judgment and order dated 20.02.2001, passed by the Special Judge, Hoshiarpur, (hereinafter as "the trial Court"), convicting the accused-appellants for committing offence u/s 15 of the Narcotic Drugs and Psychotropic Substances Act (for short, the "NDPS Act") and sentencing them to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs. 1,00,000/- each and in default of payment of fine, to further undergo rigorous imprisonment for a period of six months each. The brief facts of the case in hand, as recorded by the claimed trial.

2. In order to substantiate the charges against the accused, the prosecution examined five witnesses, viz., PW 1-DSP Ajaib Singh; PW 2-Constable Mehar Singh; PW 3-HC Naresh Kumar; PW 4-MHC Vijay Singh; and PW 5-SI Ravinder Singh.

3. In their statements u/s 313 Cr.P.C., the accused-appellants denied all the allegations of the prosecution case and pleaded false implication by the Police in order to inflate the number of cases under the NDPS Act in the District. However,

they did not lead any evidence in defence.

4. The learned trial Court, after hearing both the parties, convicted the accused-appellants u/s 15 of the NDPS Act, and sentenced them for the term as indicated in Para 1 of this judgment. Hence the present appeal which was admitted by this Court on 19.06.2001.

5. The learned counsel for the appellants contends that in the present case, only one sample was taken from each bag which is in violation of circular dated 1st June, 1989, wherein, it is stated that two samples from the substance shall be drawn at the place of recovery. He further argued that non-examination of independent witness is fatal to the prosecution and that the seal was not handed over to the independent witness, which was stated to be available with the police party. He argued that joint offer was given to both the accused which has caused prejudice to the accused-appellants. Lastly, he argued that the mandatory provisions of the NDPS Act, were not complied with, therefore, the accused-appellants should be given benefit of doubt.

6. On the other hand, the learned State counsel argued that the prosecution has examined DSP Ajaib Singh, PW 1 and SI Ravinder Singh, PW 5, to prove the recovery of 680 kgs. of poppy husk from the conscious possession of the accused-appellants. He argued that this is a case of recovery of heavy quantity and there is no possibility of false implication of the accused-appellants.

7. I have heard the learned counsel for the parties and perused the record with their able assistance.

8. In this case, a joint offer Ex. PC, was given by SI Ravinder Singh, to the accused-appellants, which was signed by Jaswinder Singh and thumb-marked by Makhan, appellants. In *Paramjit Singh v. State of Punjab*, (1997)(1) RCR (Cr.) 293, it was held that the offer has to be given to the accused individually and not jointly. The joint offer has caused prejudice to the defence of the accused appellants or any of them; which is to be seen from the view point of the accused.

9. There is substance in the argument of the learned counsel for the accused-appellants that as per Standing Order No. 1/89 dated 13th June, 1989, issued by Government of India, Ministry of Finance (Department of Revenue), it has been made mandatory that two samples must be drawn from the recovered substance, failing which, the whole recovery procedure will be vitiated. It has been further provided in the circular that the quantity to be drawn in each sample for chemical analysis should not be less than 5 gins. in case of poppy husk. Section II of Standing Order No. 1/89 reads as under:-

Section II

General Procedure for Sampling, Storage, etc.

2.1. Sampling and classification, etc. of drugs.

All drugs shall be properly classified carefully weighed and sampled on the spot of seizure.

2.2. Drawal of samples. All the packages/containers shall be serially numbered and kept in lots for sampling. Samples from the narcotic drugs and psychotropic substances seized, shall be drawn on the spot of recovery, in duplicate, in the presence of search witnesses Panchas and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchnama drawn on the spot.

2.3. Quantity to be drawn for the sampling.-The quantity to be drawn in each sample for chemical test shall not be less than 5 grams in respect of all narcotic drugs and psychotropic substances save in the cases of opium, ganja and charas (hashish) where a quantity of 24 grams in each case is record for chemical test. The same quantities shall be taken for the duplicate sample also. The seized drugs in the packages/containers shall be well mixed to make it homogeneous and representative before the sample (in duplicate) is drawn.

2.4. Method of drawl: (a) Single container/package:-In the case of seizure of a single package/container, one sample in duplicate shall be drawn. Normally, it is advisable to draw one sample (in duplicate) from each package/container in case of seizure of more than package/container.

2.5.(b) Bunch of packages/containers.-However, when the packages/containers seized together are identical size and weight, bearing identical markings and the contents of each package give identical results on colour test by the drug identification kit, conclusively indicating that the packages are identical in all respects, the packages/containers may be carefully bunched in lots of 10 packages/containers except in the case of ganja and hashish (charas), where it may be bunched in lots of 40 such packages/containers. For each such lot of packages/containers, one sample (in duplicate) may be drawn.

2.6 Bunching for, (i) Hashish and ganja:-Where after making such lots, in the case of hashish and ganja, less than 20 packages/containers remain, and in the case of other drugs, less than 5 packages/containers remain, no bunching would be necessary and no samples need to be drawn.

2.7 (ii) Other Drugs.-If such remainder is 5 or more in the case of other drugs and substances and 20 or more in the case of ganja and hashish, one more sample (in duplicate) may be drawn for such remainder package/container.

2.8. Drawal of representative samples.- While drawing one sample (in duplicate) from a particular lot, it must be ensured that representative sample in equal quantity is taken from each package/container of that lot and mixed together to make a composite whole from which the samples are drawn for that lot.

2.9. Storage of samples-procedure.-The sample in duplicate should be kept in heat sealed plastic bags as it is convenient and safe. The plastic bag container should be kept in a paper envelope should may be sealed property. Such sealed envelope may be marked as original and duplicate. Both the envelopes should also bear the S. No. of the package(s)/container(s) from which the sample has been drawn. The duplicate envelope containing the sample will also have a reference of the test memo. The seals should be legible. This envelope along with test memos should be kept in another envelope which should also be sealed and marked "secret-drug sample/Test memo", to be sent to the chemical laboratory concerned.

3.0. Despatch of samples for testing-To whom to be sent.-The seizing officers of the Central Governments Departments, viz., Customs, Central Excise, Central Bureau of Narcotics, Narcotics Control Bureau, Directorate of Revenue Intelligence, etc. should despatch samples of the seized drugs to one of the Laboratories of the Central Revenues Control Laboratory nearest to their offices depending upon the availability of test facilities. The other Central Agencies like BSF, CBI and other Central Police Organizations may send such samples to the Director, Central Forensic Laboratory, New Delhi. All State Enforcement Agencies may send samples of seized drugs to the Director/Deputy Director/Assistant Director of their respective State Forensic Science Laboratory.

3.1. Preparation of inventory. After sampling, detailed inventory of such packages/containers shall be prepared for being enclosed to the panchnama. Original wrappers shall also be preserved for evidentiary purposes.

10. Admittedly, one sample drawn from each of the bags vitiates the whole process of drawing the sample.

11. The next point argued by the learned counsel for the accused-appellants is that seal after use was not handed over by DSP Ajaib Singh to Kimati Lal, an independent witness available with the Police. In *Resham Singh v. State of Punjab*, 1996 (3) RCR (Crl.) 629, his Court has held as under:-

6. Assailing the said evidence, it was argued that no public witness had been joined and learned trial court was in error in passing the order of conviction on the testimonies of official witnesses. One has to weigh and scan the evidence in individual cases. Though, it is not mandatory that public witnesses should be joined, an attempt must be made to join the same. If no public witness is joined, even the reason should be forthcoming as to why it was not so done. In the present case, the village is only about 2-3 kms. away. Seemingly no attempt was made to get a witness from the nearby village. It was not known as to who were the other persons who refused to join the police party and witnessed the said raid. In this process the explanation that attempt was made but no public witness was willing to join appears to be unsatisfactory. In these circumstances, it is difficult to act on the testimonies of official witnesses.

7. In addition to that, in the present case, chances of property being tampered cannot be ruled out. As a matter of fair play, it has always been insisted that the property and sample after being sealed should be handed over to a third person. This is to ensure that no tampering is to be done to the said property. In the present case, the evidence shows that seal after use was given to ASI Basant Singh. He was even handed over the said recovered articles and the sample by the Investigating Officer. The very sanctity of handing over the seal to third person in this process was put an end to. The chances of property, thus being tampered, could not be ruled out. In this process the appellant was entitled to the benefit of doubt.

12. In this case, the seal after use was kept by DSP Ajaib Singh, but the case property including the samples, was handed over to SI Ravinder Singh. So there was every possibility of tampering with the samples and the case property as the DSP is the supervisory officer of the concerned police station.

13. The mandatory provisions of Section 52-A (2) of the Act were not complied with. The representative (samples were not drawn in the presence of a Magistrate and certifying the correctness of the samples so drawn, which is fatal to the prosecution case. From the perusal of the charge framed on 10.03.1999, it is found that the word "conscious" is missing. It is only mentioned that "on 20.11.1998, at about 6.00 p.m. in the area of village Bahawal, you both were found in possession of 17 bags each containing 40 kgs. of poppy husk without any permit or licence". Similarly, in the statements of the accused recorded u/s 313 Cr.P.C. the word "conscious" is missing. The prosecution is not only to prove that the accused were in possession of the contraband, but it is the bounden duty of the prosecution to specifically prove that the accused were in "conscious" possession of the contraband. The accused were not put to question as to whether they were "in conscious possession of the poppy husk. This omission has resulted in prejudice to the defence of the accused-appellants.

For the foregoing reasons, the prosecution has failed to prove its case against the accused-appellants beyond reasonable doubt. Accordingly, the present appeal is allowed; the judgment of-conviction and order of sentence dated 20.02.2001, are set aside; and the accused-appellants are acquitted of the charges framed against them.