

(2008) 02 P&H CK 0322

High Court Of Punjab And Haryana At Chandigarh

Case No: Criminal Appeal No. 230-SB of 2006

Ved Parkash

APPELLANT

Vs

State of Punjab

RESPONDENT

Date of Decision: Feb. 25, 2008**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 173, 293, 313
- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 18, 20, 22, 50, 57

Citation: (2008) 02 P&H CK 0322**Hon'ble Judges:** Kanwaljit Singh Ahluwalia, J**Bench:** Single Bench**Advocate:** Sanjay Gupta, for the Appellant; Mehardeep Singh, AAG, Punjab, for the Respondent**Final Decision:** Dismissed

Judgement

Kanwaljit Singh Ahluwalia, J.

The instant appeal has been preferred by Ved Parkash son of Hans Raj Aggarwal, whereby he has assailed his conviction and sentence awarded by learned Judge, Special Court, Sangrur. He stands convicted under Sections 18/20 of the Narcotic Drugs & Psychotropic Substances Act (hereinafter to be referred as "the Act"). He was ordered to undergo RI for ten years and to pay a fine of Rs. one lac, in default of payment of fine, to further undergo RI for a period of one year u/s 20 of the Act for recovery of 1-1/2 kg. of charas, being commercial quantity. He has also been sentenced to undergo RI for two years and to pay a fine of Rs. 10,000/-, in default of payment of fine to further undergo RI for a period of two months u/s 18 of the Act, for having in his possession 500 grams of opium.

2. Both the sentences were ordered to run concurrently.

3. The appellant was sought to be prosecuted in case FIR No. 346 dated 12.9.2004 registered at Police Station Kotwali, Sangrur.

4. The case as set out in the FIR is that SI Jagjit Singh along with his companion police officials was going from Nankiana Chowk towards Haripura in search of suspicious persons. When the police party reached near Rampura gate, Balbir Singh son of Karam Singh, resident of Fatehgarh appeared there. SI was having conversation with him when a person coming on a scooter was sighted, who on seeing the police party speeded up his vehicle but due to overspeed, scooter slipped. The scooter as well as the driver both fell down. The accused tried to run away from the spot, which raised suspicion and he was apprehended. On opening of the glove box of the scooter, two glazed envelopes were found lying therein. From one envelope opium was recovered, out of which two samples of 10 grams each were taken. On weighing the remaining bulk was found to be 480 grams. From the other envelope charas was recovered wrapped in glazed paper, out of which two samples of 10 grams each were taken and the remaining bulk was found to be 1 kg. 480 grams. The investigation culminated into submission of report u/s 173 Cr.P.C. The appellant was charged under Sections 18 & 22 of the Act, to which he pleaded not guilty and claimed trial.

5. It would be pertinent to mention here that at the time of sentencing the appellant, the charge was amended from Section 22 to Section 20 of the Act. Hence, the appellant stands convicted and sentenced under Sections 18 & 20 of the Act, as already described above.

6. In order to substantiate its charge against the appellant, the prosecution examined 6 witnesses in all.

PW. 1 is SI Jagjit Singh, who effected recovery from the appellant and carried out investigation in this case.

PW 2 is ASI Darshan Singh, who was accompanying Jagjit Singh SI and has corroborated his testimony.

PW 3 is Inspector Harjinderpal Singh, who was posted as SHO of the concerned police station at the relevant time. The accused and the case property were produced before him.

PW 4 HC Kashmir Singh tendered his affidavit Ex.P8.

PW 5 Constable Gurjet Singh also tendered his affidavit Ex.P9.

PW 6 Sukhjot Singh Clerk, DTO Office, Sangrur produced original registration certificate to prove that the scooter, which was taken into possession from the spot, was owned by Nitin Garg son of Ved Parkash- appellant.

7. In his statement u/s 313 Cr.P.C., the incriminating evidence was put to the appellant. He has stated that he was falsely involved in this case. The scooter and Rs. 20,000/- were taken by the police from his house.

8. The appellant examined 3 witnesses in his defence.

DW 1 Prinka Garg, who corroborated the stand taken by the appellant in his statement u/s 313 Cr.P.C.

DW 2 Uggar Sain testified that on 12.9.2004 when he was passing in front of the house of the appellant, he saw police officials there and they were forcibly taking his scooter.

DW 3 is Balvir Singh, who is none else but the independent witness, who was present when the recovery was effected by the Investigating Agency. He has denied that in his presence any recovery was effected. He has also denied the factum of his signatures having been taken on the documents, during recovery and investigation.

The appellant had been found to be in conscious possession of 500 grams of opium 1-1/2 kgs. of charas.

9. I have heard Mr. Sanjay Gupta, learned counsel for the appellant and Mr. Mehardeep Singh, Assistant Advocate General, Punjab for the State and have perused the record with their assistance. Learned counsel for the appellant has also submitted written arguments. The judgment of the trial court is assailed on the following grounds.

10. It is contended that the Investigating Officer Jagjit Singh PW1 had not prepared the CFSL form at the spot nor the same was deposited with the Moharrir Head Constable. He further stated that this is fortified from the testimony of Inspector Harjinder Pal Singh, SHO PW3 who has also stated in evidence that CFSL form was not deposited with the Moharrir Head Constable. Similar is the stand of HC Kashmir Singh PW4. The learned counsel relied upon the judgments rendered by this Court in Bhola Singh v. State of Punjab, 2005 (2) RCR (Cri) 520 and Gurjant Singh v. State of Punjab, 2007 (4) RCR (Cri) 227 and stated that this being the material omission, the appellant is entitled to acquittal.

11. The second submission of learned counsel for the appellant is that PW1- Jagjit Singh, Investigating Officer has not handed over the seal to the independent witness Balbir Singh and the seal after being use was handed over by SI Jagjit Singh to ASI Darshan Singh and the same was returned on the next day by ASI Darshan Singh to the Investigating Officer Jagjit Singh. It is, thus, contended that ASI Darshan Singh was none else but was a subordinate of Jagjit Singh. It has further been urged that on the next day i.e. 13.9.2004, SI Jagjit Singh took the case property from the Moharrir Head Constable and as per the counsel, the case property and seal remained with the Investigating Officer and the possibility of the sample being tampered with cannot be ruled out. He placed reliance upon the judgments of this Court in Dayal Singh and another v. State of Punjab, 2007 (2) RCR (Cri) 596 and State of Punjab v. Nachhatar Singh @ Bania 2007

(3) RCR (Cri) 1040. It has further been contended that neither PW-1 Jagjit Singh, Investigating Officer nor PW4 HC Kashmir Singh has stated that the specimen seal was handed over by I.O. to Moharrir Head Constable, PW-4. Accordingly, omission in the affidavit of MHC Kashmir Singh that the specimen seal was handed over to him by the Investigating officer, is fatal, as prosecution failed to establish link evidence. Besides, the above said contentions raised, some inconsequential submissions have been made by the learned counsel for the appellant. It has been stated that the provisions of Section 50 of the Act were not followed (Section 50 of NDPS Act is inapplicable in the present case). As no information was sent to the senior officers, there is non-compliance of Section 57 of the Act. Balbir Singh who attested the recovery memo, had not been examined and furthermore, the samples had not been drawn in consonance of Para 1.6 of the Standing Instruction No. 1 of 1988. It has further been stated that the chemical examiner has not specifically mentioned about the nature of scientific test conducted and, therefore, the report of the chemical examiner cannot be accepted by virtue of Section 293 Cr.P.C.

12. On the other hand, learned State counsel has contended that the preparation of CFSL form and deposit of the seal are not the mandatory provisions and, therefore, the appellant is not entitled to acquittal.

The question raised in the present appeal is that whether non-preparation of CFSL form at the spot and not handing over the seal to the independent witness will ipso facto entitle the appellant to acquittal or not ?

13. From the judgments of the Hon"ble Apex Court, it is evident that various provisions regarding the search and seizure of the contraband which provide safeguard have been divided into two categories. Certain provisions have been held to be mandatory in nature. The non-observation of these mandatory provisions straightway entitle the accused to acquittal but certain provisions have been held to be directory in nature. In case of not following the directory provisions, the accused has to make out a case of prejudice or to urge that due to not adhering to the directory provisions, the testimonies of the witnesses ought not to be relied upon. Therefore, the appellate court or the trial court will first analyze the evidence. In case the testimony of the official witnesses inspire confidence and is free from any blemish, non- following of directory provisions can be over looked but where the Court comes to the conclusion that there are many loopholes and the official witnesses lack credibility, the Court will view non-following of directory provisions as fatal to the prosecution case.

14. In the present case, there is recovery of 500 grams of opium and 1500 grams of charas. It has been stated by PW 1 SI Jagjit Singh as under :-

"I produced the case property, witnesses and accused before Harjinderpal Singh SHO who made the verification and affixed his seal bearing impression "HS" on all the parcels and also on sample seal Ex.P2 and P3 and made his attestation. On his direction I deposited the case property with MHC Kashmir Singh. On next day i.e. 13.9.04, I took the

case property from MHC and produced the same before the Illaqa Magistrate/CJM, Sangrur vide my request Ex.P9 who passed the order Ex.P10 in this regard and handed over the case property to MHC Kashmir Singh thereafter."

15. In the cross-examination, PW1 SI Jagjit Singh has stated that he has not handed over the seal to the independent witness after use and it was handed over to ASI Darshan Singh and on the next day, ASI Darshan Singh returned the seal to him. However, he has also stated as under :-

"I do not know to whom SHO Harjinderpal Singh handed over his seal after use.

We remained at the spot for about six hours."

Therefore, not only SI Jagjit Singh has affixed the seal but the seal was also affixed by PW3 Inspector Harjinder Pal Singh. PW3 Inspector Harjinder Pal Singh in his examination-in-chief has stated as under :-

"After my satisfaction I affixed my seal bearing impression HS on all the parcels as well as sample seal chit Ex.P2. The parcels were already sealed with seal JS and the seals were intact."

PW3 Inspector Harjinder Pal Singh even though has stated that no CFSL form was produced before him or deposited with the Moharrir Head Constable by him and his statement was recorded by SI Jagjit Singh. I hold that the non-preparation of CFSL form in each case will not be fatal to the prosecution case. Non-preparation of CFSL form on the facts of each case will make the accused entitle to the benefit of acquittal. In the present case, the testimonies of PW1 SI Jagjit Singh, PW-2 ASI Darshan Singh and PW-3 Inspector Harjinder Pal Singh inspire confidence. Since, the seal prepared by Inspector Harjinder Pal Singh and affixed on the sample was produced in the Court of Illaqa Magistrate/Chief Judicial Magistrate, Sangrur on the next day, the Chief Judicial Magistrate, Sangrur passed the following order :-

"Case property has been produced before me in the court in the form of two tin containers wrapped in cloth parcels bearing seal impressions JS/HS, which have been found to be intact along with four sample parcels, all in small tin containers, wrapped in cloth parcels bearing seal impressions JS/HS. Scooter bearing No. PB-44/5474 marka LML Vespa has been produced. The case property be produced before me has been signed. The samples have also been signed by me. The case property be kept in police malkhana, if no space in judicial malkhana is availing with the directions to be produced in the trial as and when required.

Pronounced.

Sd/-

September 13, 2004

(Harsh Mehta)

Chief Judicial Magistrate,

Sangrur"

16. Credibility of evidence depends on a judicial evaluation of the totality, and not an isolated scrutiny. Proof should be beyond reasonable doubt, but it is not necessary that it should be perfect. Applying these standards for appreciation of evidence, this Court has been of the considered view that non-preparation of CFSL form, non-examination of independent witness or non-adherence to directory provisions of the Act will in itself not entitle accused to acquittal. There may be cases where testimony of police witnesses require that independent witnesses should be examined. Similarly, there may be cases where non-preparation of CFSL form will make testimony of witnesses doubtful or there may be instances where non-observation of directory provisions will be sufficient to hold that witnesses are not reliable. Therefore, submissions made by the counsel in this case are various indicators upon which Court can place reliance where evidence of witnesses is not trustworthy, but where the Court is of the view that evidence is free from any blemish, witnesses have no animus, then the indicators pointed out by the counsel in the present case are to be taken into broad perspective and they in itself will not constitute grounds of acquittal.

17. In view of my discussion above, in the present case, the omissions pointed out by the learned counsel for the appellant will not entitle the appellant to any benefit. As stated earlier, the submissions have to form overall view regarding the testimonies of the witnesses and they themselves cannot be the only ground for acquittal. Accordingly, the present appeal being devoid of any merits is dismissed.