

(2006) 05 P&H CK 0198

High Court Of Punjab And Haryana At Chandigarh**Case No:** Criminal Appeal No. 304-SB of 1991

Tarlok Singh

APPELLANT

Vs

State of Punjab

RESPONDENT

Date of Decision: May 30, 2006**Acts Referred:**

- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 15

Citation: (2006) 18 CriminalCC 523**Hon'ble Judges:** Virender Singh, J**Bench:** Single Bench**Advocate:** J.S. Chahal, for the Appellant; Ramandeep Sandhu, DAG, for the Respondent

Judgement

Virender Singh, J.

Tarlok Singh appellant has suffered conviction u/s 15 of Narcotic Drugs and Psychotropic Substances Act, 1985 (for short the 'Act') vide impugned judgment of learned Additional Sessions Judge, Ludhiana dated 10.7.1991 and has been sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs. one lac, in default thereof to suffer further RI for two years.

2. The case of the prosecution in brief is that on 16.10.1987 at about 9.00/9.15 p.m., Inspector Dalip Singh (PW-2) was present along with other police officials, including ASI Gurmukh Singh (PW-1) at the crossing of Jagraon near Bus Stand Jagraon, when he received a secret information to the effect that the present appellant and one Binder Singh, resident of Ghalib Kalan were selling poppy near seepage of drain near Kotha Hari Singh in the area of Kothe Hari Singh. A ruqqa (Ex. PC) was sent to the police station Jagraon, on the basis of which formal FIR (Ex. PC/1) was recorded. ASI Narinder Pal Singh was sent to bring some independent witnesses, but no one expressed his willingness to join the policy party. Thereafter Inspector Dalip Singh proceeded towards the aforesaid place. The appellant was found sitting on the gunny bags lying in a stack in the drain. He was apprehended. He was asked

whether he wanted to get the search of those bags to be conducted before some gazetted officer, upon which he reposed his confidence in Inspector Dalip Singh. Accordingly, the search of the bags was conducted. The total number of the bags was 100. Each bag was found to contain 40 kgs. of poppy husk. The appellant could not produce any licence or permit to possess the same. Inspector Dalip Singh extracted 250 grams of poppy husk as sample from each of the bags. The samples and the remaining bags (Ex. P1 to P100) were separately sealed with the seal of Narinder Pal Singh ASI bearing inscription 'NP'. The same were taken into possession vide memo. Ex. PA, attested by ASI Gurmukh Singh (PW-1) and ASI Narinder Pal Singh. Personal search memo. (Ex. PB) of the appellant was prepared. The same was handed over to ASI Gurmukh Singh. Rough site-plan (Ex. PD) was prepared at the spot. After recording the statements of the witnesses, Inspector Dalip Singh deposited the case property with AMHC Harsukhdevpal Singh. After receipt of the report of the Chemical examiner (Exhibits PE & PE/1) challan was presented against the appellant. He was consequently charged u/s 15 of the Act.

3. In order to substantiate its charge against the appellant, the prosecution examined ASI Gurmukh Singh (PW-1) and Inspector Dalip Singh, the Investigating Officer (PW-2). Both of them are witnesses to recovery. Affidavits of HC Harsukhdevpal Singh and Constable Manjit Singh (Exhibits PF and PG) were tendered into evidence. However, both of them were not cross-examined by the learned defence counsel. ASI Narinder Pal Singh was given up as unnecessary.

4. The defence set up by the appellant, as emerges from his statement recorded u/s 313 of the Code of Criminal Procedure is of false implication, stating that he was a daily wager and has been made a scape goat by the prosecution agency, whereas Binder Singh alias Balwinder Singh of his village, who is a smuggler, had been let off by the police for consideration.

5. In his defence, the appellant has tendered copies of the First Information Reports Exhibits DX, DY and judgment DZ, showing that aforesaid Binder Singh alias Balwinder Singh of village Galib Kalan was booked in cases of Narcotic Drugs and Psychotropic Substances Act. Besides this, the appellant produced Jagir Singh (PW-1), Darshan Singh (PW-2), Constable Kapur Singh (DW-3) and Constable Suresh Singh (DW-4).

6. The learned trial Court after appreciating the entire evidence has convicted and sentenced the appellant for the charge framed against him, as stated above. Hence this appeal.

7. I have heard Mr. J.S. Chahal, learned counsel appearing for the appellant and Mr. Ramandeep Sandhu, learned Deputy Advocate General, Punjab. With their assistance I have gone through the entire record minutely.

8. Mr. Chahal states that besides certain vital infirmities the main weakness in the prosecution case is non-compliance of the provisions of Section 42 of the Act. As the

search, seizure and arrest have been made by a non-gazetted officer, compliance of Section 42 i.e. sending of the information to the immediate superior office was mandatory and non-compliance thereof has vitiated the entire trial.

9. The learned counsel very fairly contends that in the light of the latest judgment rendered by Hon"ble Apex Court in *G. Srinivas Goud v. State of Andhra Pradesh*, 2005 (4) RCR (Cri) 353, if the search, seizure and arrest is made by the gazetted officer without any warrant, it is not necessary for him to comply with the provisions of Section 42 of the Act, but not in other situations. Strengthening his arguments, the learned counsel then contends that the provisions of Section 42 of the Act are mandatory as held in *Abdul Rashid Ibrahim Mansuri v. State of Gujarat*, 2000 (1) RCR (Crl.) 611 (SC), which view is also reiterated in aforesaid Goud's case (supra). The learned counsel in the same breath submits that in Abdul Rashid's case (supra), another judgment of Hon"ble the Apex Court in [Beckodan Abdul Rahiman Vs. State of Kerala](#), was also considered, wherein it has been held that whenever the said provisions are attracted, the compliance is mandatory. According to the learned counsel the appellant deserves acquittal on this score alone.

10. Mr. Chahal then submits that the case of the prosecution is on slippery footing on other aspects as well. He points out that in order to show sanctity to the search, Inspector Dalip Singh states that ASI Narinder Pal Singh was sent to summon the witnesses, but they had refused to join. According to him, the seal affixed on all the samples was also of Narinder Pal Singh. He was, however, been given up as unnecessary. This is fatal to the prosecution. Mr. Chahal then states that there is no dispute about the settled proposition that the prosecution is not supposed to bring the quantity of witnesses before the Court and what is required is the quality. But Narinder Pal Singh being a most important witness to recovery could be brought into the witness box instead of ASI Gurdip Singh (PW-1), who is also a witness to recovery. According to the learned counsel, this flaw coupled with other vital infirmities can certainly create doubt about the case set up by the prosecution against the appellant.

11. Mr. Chahal then submits that the prosecution case falls yet on another important issue as well. Inspector Dalip Singh has not made any attempt to know as to who was the real owner of 100 bags of poppy husk. The secret information received by him was that Binder Singh alias Balwinder Singh and the present appellant were selling poppy husk at a particular place i.e. near seepage of drain in the area of Kothe Hari Singh. The evidence produced before the Court is to the effect that the appellant was found sitting on the said bags. It was incumbent upon Inspector Dalip Singh to have ascertained as to what was the real source and as to whether Binder Singh @ Balwinder Singh had any nexus with the contraband in question or not. The same was not done by him. Dwelling upon his arguments, Mr. Chahal states that a perusal of the three FIRs Exhibit DX, DY and DZ shows that aforesaid Binder Singh is involved in three cases under the Act and it is not possible that the police was not

aware of the antecedents of Binder Singh. From this, the learned counsel wants to develop that the poppy husk, allegedly recovered from the appellant in fact did not belong to him may be that he was found sitting on the bags at the time of alleged recovery. He in fact was not having the possession over the same and, therefore, cannot be said to be in exclusive possession thereof.

12. Mr. Chahal has also pointed out certain infirmities with regard to link evidence, stating that when Inspector Dalip Singh stepped into the witness box, he has categorically deposed in cross-examination that he had pasted the slip on each of the bags. But in the Court, the bags prepared (produced ?) were not having the same. From this, the learned counsel wants to develop that the prosecution is not sure as to whether the samples which were sent for analysis in fact were the representative samples of the bulk produced in the Court or not. In the same breath, Mr. Chahal states that this infirmity may be seen in the light of another flaw i.e. non-compliance of Section 55 of the Act.

13. The learned counsel has then pointed out some infirmities in the statements of the prosecution witnesses and submits that the same are not ignorable when appreciated with flaws referred to hereinabove.

14. On the basis of the aforesaid submissions, Mr. Chahal prays for acquittal of the appellant.

15. Mr. Sandhu, learned State counsel while repudiating the submissions advanced by Mr. Chahal contends that the recovery allegedly effected in this case is very heavy i.e. 100 bags of poppy husk and there cannot be any reason for the prosecution to falsely implicate the appellant. He then submits that may be Binder Singh alias Balwinder Singh has not been apprehended in this case, but the said fact will not demolish the case of the prosecution, which is otherwise proved from the statements of two witnesses to recovery for the reason that secret information simpliciter cannot be made basis of conscious possession of the contraband and in the case in hand the appellant was found sitting on the bags and, therefore, the conscious possession is to be presumed under the Act. The appellant, thus, cannot escape from his liability.

16. After hearing the rival contentions of either side and perusing the entire record, I am of the view that the prosecution has not been able to prove its case against the appellant and as such he deserves acquittal.

17. Admittedly, Inspector Dalip Singh, the Investigating Officer of this case was not a gazetted officer. Under the Act, it was necessary for him to comply with the provisions of Section 42(2) of the Act. In Goud's case (supra) their Lordships of Hon'ble the Supreme Court have observed that non-gazetted officer has to comply with the provisions of Section 42 while making search and seizure. In para 12 of the judgment, their Lordships have observed as under :

12. Lastly, the learned counsel for the appellants sought to reply on [Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat](#), . In this case the search was carried out by a Police Inspector who admitted that he had failed to take down in writing the information as required u/s 42(1) and also he had failed to send a copy of the information to his immediate official superior as required u/s 42(4) of the Act. Therefore, it was necessary for him to comply with the provisions of Section 42. He having failed to do so, the conviction of the accused was set aside by this Court. The facts of the present case are totally different because in the present case the action has been taken by an officer of the gazetted rank.

18. From the aforesaid view, there remains no doubt that provisions of Section 42 of the Act are mandatory in nature wherever they are attracted.

19. Adverting to the facts of the instant case, it can be said that the prosecution has given a complete go bye to the said provisions. Inspector Dalip Singh, who is the IO of this case in his examination-in-chief talks about sending of ruqqa (Ex. PC) to the police station Jagraon for registration of the case against the appellant and Binder Singh @ Balwinder Singh. In cross-examination, he has categorically stated that he had sent one ruqqa only and no other writing was sent. From this, it can be comfortably said that the non-compliance of provisions of Section 42 is writ large. In Beckodan Abdul Rahman's case (supra), which is also considered in a latest judgment rendered in G. Srinivas Goud's case (supra), their Lordships while discussing the provisions of Section 42 of the Act have observed that if there is a total non-compliance of the provisions of the same, it affects the case of the prosecution. It is observed that harsh provisions of the Act cast a duty upon the prosecution to strictly follow the procedure and compliance of the safeguards. In the said judgment along with other infirmities, non-compliance of Section 42(2) of the Act was also considered as fatal to the prosecution and conviction was set-aside.

20. Although the aforesaid vital statutory flaw in the case of the prosecution in my considered view, is enough to discard the case of the prosecution, yet I am taking into consideration other weaknesses also.

21. In my view, the prosecution has also not been able to establish conscious possession of the contraband qua the appellant. The minimum requisite element, which is to be satisfied by the prosecution is the custody or control over the goods. The same is missing in the instant case despite the fact that the appellant was allegedly found sitting on the bags containing poppy heads. My view is strengthened by a latest Division Bench of this Court tendered in Sukhdev Singh alias Sukha v. State of Punjab, 2006 (1) RCR 4. In the said case also the accused was found sitting over the bags. It was held by this Court that the prosecution has not been able to prove the conscious possession of the bags and the police should have conducted further investigation to prove that the accused was really in possession of those bags. It was further observed that failure to give any explanation by the accused for being present on that place would not prove that he was in possession

of the articles. In the aforesaid judgment the view taken by Hon"ble the Apex Court in State of Punjab v. Balkar Singh and another, 2004 SCC (Cri) 838 was followed.

22. In another judgment rendered by a Single Bench of this Court in Baldev Singh v. State of Punjab, 2005 (1) RCR 823, in almost similar set of circumstances the accused was acquitted relying upon another judgment of Hon"ble the Apex Court rendered in [Saiyad Mohd. Saiyad Umar Saiyad and Others Vs. State of Gujarat](#), wherein it was held as under :

Unlawful possession of the contraband is the sine qua non for conviction under the Act and that fact has to be established by the prosecution beyond reasonable doubt. Though possession has not been defined in the Act but has been judicially construed to be conscious and intelligent possession and not merely the physical presence of the accused in proximity or even in close proximity of the object. There are two essential elements of possession; firstly the corpus - the element of physical control and secondly, the animus or intent with which such control is exercised. It is conscious and intelligent possession of any contraband which attracts penal provision of the Act and it is for the prosecution to establish that the accused was found in conscious and intelligent possession of the contraband.

The case set up by the prosecution is that Binder Singh alias Balwinder Singh and the appellant were selling poppy husk at a particular place. Admittedly, Binder Singh is not arrayed as an accused in this case. In my view, it was incumbent upon Inspector Dalip Singh to know the real source especially when name of Binder Singh had been brought to his notice by the secret informer. Aforesaid Binder Singh @ Balwinder Singh is involved in three cases under the Act. No doubt, those three cases were registered after the registration of the instant case, but that does not make much difference as one fact is very clear that Binder Singh is in the nefarious activity as it cannot be said that the police was not in know of it. In order to show fairness in the investigation, Dalip Singh Inspector when stepped into the witness box, very intelligently stated that he had arrested Binder Singh, interrogated him and after satisfying himself, had allowed the latter to go. This explanation tendered by him is not appealing to the judicial conscience at all. ASI Gurdev Singh (PW-1) in cross-examination has stated that the appellant has no landed property. He has, however, shown ignorance about the allotment of a small piece of land by the Panchayat to the appellant, who had got built his one room for living on it. In order to strengthen his defence, the appellant has produced Jagbir Singh Lamberdar of the village and Darshan Singh Member Panchayat, who have categorically stated on oath that the appellant is a poor person, who works on daily wages. He has six daughters. Some land was donated to him by the Panchayat, on which he has got constructed a room. He has also stated that Binder Singh alias Balwinder Singh indulges in the selling opium and poppy husk. So is the statement of Jagir Singh Lamberdar that Binder Singh alias Balwinder Singh is a poppy husk smuggler. I do not find any reason to disbelieve the testimony of these two witnesses, who are

from the village of the appellant at least to the effect that the appellant is a poor labourer, who has been allotted a small piece of land by the panchayat, on which he has got built a small kotha. If one appreciates the case in hand in the light of the aforesaid facts, it can be safely inferred that the investigation conducted by Inspector Dalip Singh, is not upto the mark.

23. In view of the aforesaid facts and following the ratio of the decisions in the cases of Sukhdev Singh @ Sukha and Baldev Singh (supra), I am of the view that the prosecution has failed to prove the unlawful conscious possession of the contraband qua the appellant.

24. The other infirmities pointed out by Mr. Chahal with regard to non-examination of Narinder Pal Singh, in my view, create doubt in the mind of the Court. When the case property was produced before the trial Court, the slips were missing on the bags. The case set up by Inspector Dalip Singh is that on all the samples and the remaining bags, which were separately sealed at the spot, seal of ASI Narinder Pal Singh bearing inscription 'NP' was affixed. Inspector Dalip Singh does not say that he had also affixed his own seal. This shows that the bags were having the seal of one police official only (Constable Narinder Pal Singh) and the said official has not stepped into the witness box. Admitted case is that the seal after use was handed over to ASI Gurmukh Singh, who throughout remained with Inspector Dalip Singh. The case property and the accused were not produced before the Illaqa Magistrate on the next day as is required u/s 55 of the Act. The case relates to police station Jagraon, of which Inspector Dalip Singh himself was SHO. May be that he had thought of depositing the case property with AMHC Harsukhdevpal Singh on the same day, but as per the provisions of Section 55 of the Act, it was his duty to take the samples, case property along with the appellant to the Illaqa Magistrate for necessary orders. Although non-compliance of provisions of Section 55 shall not dent the case of the prosecution in its entirety, yet it has been consistently held that if it causes prejudice to the accused, then it can be taken against the prosecution. In the light of the aforesaid facts, in my view, the said non-compliance does cause prejudice to the appellant and, therefore, this infirmity also turns out to be fatal to the prosecution.

25. I am not entering into discussion with regard to other infirmities pointed out by Mr. Chahal for the reason that I am disbelieving the case of the prosecution on aforesaid flaws, which have already been considered in detail.

26. Harder the punishment, more is the onus on the prosecution. No doubt, the recovery, allegedly effected in this case is quite heavy, but in view of the aforesaid discussion, it could be said that the case of the prosecution as set up against the appellant is flawless so as to prove the charge of conscious possession qua the contraband. In other words, the case of prosecution is not free from doubt for upholding his conviction and sentence as recorded by the learned trial Court. Therefore, while extending benefit of doubt to him, he is acquitted of the charge.

Since the substantive sentence of the appellant was suspended during pendency of the instant appeal, the bail/surety bonds furnished by him stand discharged forthwith.

27. Before parting with the judgment, I must express my displeasure over the investigation conducted in this case. The object and reasons for this legislative enactment were that many deficiencies were noticed in other Acts like the Opium Act, 1857, the Opium Act 1879 and the Dangerous Drugs Act, 1930, which were enacted a long time ago having a very less punishment which was not sufficiently deterrent to meet the challenge of well organized smugglers. With this view, Narcotic Drugs and Psychotropic Substances Act was enacted with certain stringent punishment to have a control over the drug abuse. It has been amended twice, once by Amendment Act 2 of 1989 and for the second time by Amendment Act 9 of 2001, as per certain inadequacies experienced at various levels in its implementation.

28. If one reads the entire Act, very harsh provisions are inserted in it with regard to the sentence. By Act No. 2 of 1989, Section 27-A has been brought in the Statute book wherein punishment of minimum ten years and a fine of Rs. 1 lac is provided if the person indulges in trading directly or indirectly in any of the activities specified in sub-sections (i) to (v) to clause (viia) of Section 2 of the Act. The sentence on these counts can be enhanced also. The punishment is provided for abetment and conspiracy as well as envisaged u/s 29 of the Act. Even preparation is also punishable u/s 30 of the Act. In such a situation, when too harsh punishment is provided, the investigation is expected to be absolutely flawless. What is generally noticed by the Court is that small peddlers are booked in the cases whereas the real persons, who are at the helm of affairs, are either let off or the investigation is not conducted honestly in that direction. This appears to be the reason that acquittal rate is increasing in Narcotic Drugs and Psychotropic Substances Act cases. Since it is a matter of serious concern, a concerted coordinated effort by all wings of State at various levels is being made for which Seminars and Workshops-cum-Training Programms are being organised. One such National Seminar was very recently held in which emphasis was laid on constituting special well trained investigating agencies to avoid procedural defects, which admittedly lead to acquittal. Stress was also laid on appointing special highly trained Public Prosecutors, who shall be dealing exclusively with narcotic cases in the trial Courts. Idea was to make implementation of the Act flawless right from the stage of investigation upto the conclusion of the trial, so that the real offenders, who indulge into it for making easy money do not go scot free and unpunished. Let this be brought home to all quarters concerned.