

(2005) 10 P&H CK 0093

High Court Of Punjab And Haryana At Chandigarh

Case No: Criminal Appeal No. 250-SB of 2003

Ram Sarup

APPELLANT

Vs

State of Haryana

RESPONDENT

Date of Decision: Oct. 3, 2005

Acts Referred:

- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 18

Citation: (2005) 15 CriminalCC 1080

Hon'ble Judges: Uma Nath Singh, J

Bench: Single Bench

Advocate: Kiran Bala Jain With Mr. Amrinder Singh, for the Appellant; Parduman Yadav, DAG, Haryana, for the Respondent

Final Decision: Allowed

Judgement

Uma Nath Singh, J.

This Criminal Appeal arises out of a judgment dated 24.12.2002 passed in Sessions Case No.15/NDPS of 23.10.2002/2.7.2001 holding the appellant-accused guilty of offence u/s 18 of the Narcotic Drugs Psychotropic Substances Act, 1985 (hereinafter referred to as the "NDPS Act"), for having been found in conscious possession of 3 kgs. opium without a licence or permit.

2. The prosecution case, as set out in paragraphs 2 and 3 of the impugned judgment, on reproduction reads as under:-

that on 23.3.2001 S.I.Darshan Pal Singh (PW-5) accompanied by Head Constable Dayal Singh (PW-4), Head Constable Randhir Singh; Constable Baljit Singh and Raghbir Singh, was present on Ambala Jagadhri road near Kardhan turning, in connection with patrol and crime detection, when a secret information was received that the accused indulged in trading of opium and would be coming from the side of village Kardhan with the contraband. On this information a "Naka" was laid and SHO, Police Station, Mahesh Nagar and Deputy Superintendent of Police Deep Ram

were informed about this secret information through V.T.Message. Later secret information was reduced into writing as Ex.PH and submitted to the authorities. Pursuance to the said Naka, accused was spotted coming with a bag in his hand from the side of village Kardhan. Seeing Police party accused changed his direction and was apprehended on the basis of suspicion, when his identity was enquired into. Suspecting the accused carrying some contraband notice Ex.PD was given to the accused, informing of his right to be searched before a gazetted officer or a magistrate. Vide option Ex.PD/1, accused opted to be searched before some gazetted officer or a magistrate. Upon reaching of DSP Deep Ram (since deceased) accused along with the bag were produced before him (DSP Deep Ram), who made enquiries from the accused and directed S.I.Darshan Pal (PW-5) to carry out the search. On search of the bag, which accused was carrying, opium was found wrapped in polythene, which on weighment came to 3 Kgs. Two representative samples of 50 grams each were taken out and put in plastic container, while remainder was put in the same bag and converted into sealed parcels with the seals of DSP and DR. Contraband along with samples were taken into possession vide recovery memo Ex.PE which was attested by witnesses. Accused could not produce any licence or permit. Ruka Ex.PC was sent to Police Station through Constable Raghbir Singh, on the basis of which formal F.I.R. Ex.PC/1 was recorded by ASI Ram Phal (PW-3). Investigating Officer handed over his seal after use to HC Dayal Singh (PW-4, while Deputy Superintendent of Police retained his seal with him. Accused was got medico-legally examined and brought to Police Station Mahesh Nagar, where he was produced before S.I. Jai Pal Singh (PW-6), Officer-Incharge of Police Station, Mahesh Nagar. Investigating Officer also prepared report. Ex.PG u/s 55 of the Act and submitted the same before SHO. Investigating Officer had also prepared rough site plan Ex.PF of the place of recovery, PW-6 S.I.Jai Pal Singh SHO, after verifying the facts from the accused and witnesses affixed his seal of JP on all the parcels and made endorsement Ex.PG/1 on the report Ex.PG. Case property Ex.P-3 was deposited with Moharrir Head Constable and accused was put in the lock up. S.I.Jai Pal Singh (PW-6) submitted report u/s 57 of the Act, Ex.PJ to Superintendent of Police Ambala. Sample on being sent to Forensic Science Laboratory, on analysis was found to be opium vide report Ex.PK. Upon completion of investigation report u/s 173 Cr.P.C. was prepared by S.I.Jai Pal Singh, Officer incharge, Police Station, Mahesh Nagar. On finding a prima facie case against the accused, charge u/s 18 of the N.D.P.S.Act was framed, to which accused pleaded not guilty and claimed trial Heard learned counsel for the parties and perused the record.

3. Learned counsel for the appellant submitted that Deputy Superintendent of Police, before whom search and seizure were conducted, died during the trial and, therefore, conviction of the appellant is based only on the testimonies of the subordinate police officers which cannot endure. Learned counsel also pointed out certain contradictions in the statements of PW-3, PW-4 and PW-5 and added that

though the seizure was effected in the evening, no public witness was examined. Learned counsel contended that PW-4 had deposed that Panchnamas and writing works were completed in electric light, but according to PW-5, it was done while sitting on a bench. Learned counsel also contended that the seal of the I.O. was handed over to Dayal Singh (PW-4) and not to any independent witness. This is also the case of the appellant that as per deposition of prosecution witnesses, the quantity of sample taken out was 50 grams each, whereas in the F.S.L. report it has been mentioned to be 43.700 grams only. Learned counsel further submitted that the seizure was effected on 23.3.2001, but the sample was sent for chemical examination after a gap of 4 days on 27.3.2001 and the prosecution has not offered an explanation for that. Learned counsel also submitted that Dayal Singh PW-4 had returned the seal on the next date itself.

4. Learned counsel has referred to a judgment of the Rajasthan High Court which is reported in 2004(3) Criminal Court Cases 70 (Rajasthan): 2004 (4) RCR 31 (Bhaiyan @ Shiv Murti v. State of Rajasthan), to contend that the ratio of this judgment is in point as the discrepancy in the weight of sample would prove fatal to the prosecution case.

5. Learned counsel also submitted that the seal was returned the next day to the Investigating Officer and it was not sent to the laboratory for its comparison with the seal appearing on the sample, therefore, there is no evidence to prove that the seal which was found to be intact on the sample had been affixed by the seal of I.O.

6. Learned counsel has cited a judgment of Hon"ble the Apex Court reported in 2005(1) ACJ 468 (S.C.) : 2005(2) Criminal Court Cases 59 (S.C.): 2005(2) RCR 58 (State of Rajasthan v. Gurmail Singh) and a judgment of this Court reported in 2005 (1) RCR 823 (Baldev Singh v. State of Punjab) in support of the above contentions.

7. Learned counsel also submitted that the accused/appellant was a juvenile on the date of offence as per the amended Juvenile Justice Act which, however, came into force after the date of offence, Learned counsel further submitted that, in fact, there were four F.I.Rs. in respect of the appellant, other boys and also their employer, showing four recoveries of one seizure of contraband recovered from their employer by dividing it into four parts. Learned counsel submitted that the appellant was a boy of tender age and he was not even aware of the activities of his employer, thus, it is a case of frame up.

8. On the other hand, learned State counsel supported the impugned judgment by referring to appreciation of evidence by the learned trial Judge, therein.

9. On re-appreciation of evidence on record, it appears that Manoj Kumar (PW-1), in his statement, has tried to fill up the gaps in the prosecution evidence by stating on affidavit (Ex.PA) that the case property, the samples and the seals were handed-over to him on the date of recovery at the Police Station. However, his affidavit and evidence lay stress only on receipt of the samples and the residue and not on

retention of the seals. It also appears that seal of the Investigating Officer Darshan Pal Singh (PW-5) was returned the next day of search and seizure, i.e. on 24.3.2001, as is evident from the testimonies of Dayal Singh (PW-4) and Darshan Pal (Singh (PW-5) themselves. It is also noticed in the evidence of PW-4 and PW-4 that DP Deep Chand continued to retain his seal and did not hand it over to an independent witness or even to a police officer, production of seals by DSP and also by PW-5 cannot be justified by a reasoning that neither PW-5 nor PW-4 was given a suggestion on this point in their cross-examination as to why they retained their seals after search and seizure. This cannot be justified also on the ground that the seals on the samples were found to be intact by the Forensic Science Laboratory. The testimonies of Manoj Kumar (PW-1), Darshan Pal Singh (PW-5) and Charan Dass (PW-2) on this point appear to be specific and clear that search and seizure were conducted on 23.3.2001 whereas, samples were sent to the FSL only on 27.3.2001. Further, there was a delay of 4 days in dispatch of the samples. In this regard, two judgments of this Court reported in (1) 1997(1) RCR(Crl.) 414 (Narain v. State of Haryana); and (ii) 1998(1) RCR (Crl.) 146 (Ramesh v. State of Haryana) (P&H) would be relevant to be referred to. In both the cases, this Court acquitted the accused on the ground of delay in sending the samples to the Forensic Science Laboratory. This defect becomes more serious as according to prosecution, two samples of 50 grams each were taken but in the chemical examined report, they have been found to be 43,700 grams each, therefore, retention of seal by PW-5 and DSP creates a doubt about the credibility of search and seizure. Further, the samples of seals were not sent to the Forensic Science Laboratory for comparison with the seals, which were found to be intact. Hon"ble the Apex Court in a decision reported in 2005(1) Apex Court Judgments 468 (S.C.): 2005(2) Criminal Court Cases 59 (S.C.): 2005(2) RCR(Crl.) 58 (State of Rajasthan v. Gurmail Singh), upheld the judgment of acquittal recorded by the Rajasthan High Court also on the ground that samples of seal was not sent to the laboratory for the purpose of comparison with the seal appearing on the samples bottles. Further a CFSL form was also not prepared on the spot on the date of search and seizure (23.3.2001), nor does it appear to have been deposited at Police Station, Mahesh Nagar. Rather it was prepared only on 27.3.2001. Besides, there is yet another infirmity in the prosecution case inasmuch as, from the evidence of Dayal Singh (PW-4), it appears that the appellant was only given a partial offer as to whether he wanted to be searched before a Gazetted Officer (not before a Magistrate), whereas, the law provides so far as is presently relevant that it should be before "a Gazetted Officer or a Magistrate". Moreover, the memo of offer and the consent of the accused thereon was prepared in the handwriting of Dayal Singh (PW-4) and, therefore, his evidence carries more (sic) credence. This infirmity would, thus, not be replenished by the evidence of PW-5. Secondly, in terms of mandatory provisions of Section 50 of the Act, the accused-appellant had a legal right of being informed to be searched in presence of a Gazetted Officer or a Magistrate. In a judgment of five-Judge Bench of Hon"ble the Apex Court report in 1999 (2) Apex Court Journal 261 (S.C.): 1999(3) RCR(Crl.) 533 (paras 24 and 25) (State of Punjab v.

Baldev Singh), provisions of Section 50 of the Act have been dealt with in great detail. The Hon'ble Court has held that the empowered officer taking search on prior information must inform the concerned person of existence of his right to have his search conducted before a Gazetted Officer or a Magistrate so as to enable him to avail of that right. The compliance of that provision of Section 50 of the Act is conspicuous by absence in the evidence of PW-4 and PW-5, PW-4 has only mentioned that the accused was given partial offer to be search before a Magistrate whereas, PW-5 has stated that it was a complete offer but they have not stated that the accused-appellant was informed in advance that he had a legal right of being searched before a Gazetted Officer or a Magistrate. Jai Pal Singh (PW-6) was the SHO of Police Station, Mahesh Nagar, where the accused, the samples and the residue were produced and said to have been handed over to Moharrir HC Manoj Kumar (PW-1). He has stated that he complied with necessary provisions of the Act, like affixing his seal on the contraband and the sample but he also disclosed that on the same date, four other persons were arrested and produced before him in connection with seizure of the same contraband item but in different quantity and from accused-Jaswant Singh, a huge quantity of contraband was recovered. In his statement u/s 313 Cr.P.C, the accused has stated in his defence that he was implicated at the instance of said Jaswant Singh by planting a part of the huge quantity of contraband seized from him. It appears from the statement of PW-6 that all the FIRs were registered at serial numbers running consecutively from 59 to 62, which also included the one involving the present appellant. It further appears from the evidence discussed by learned trial Judge in paras 6 and 16 of the Impugned judgment that in connected cases, Charan Dass (PW-2) has admitted that on 27.3.2001 he had carried only one sample of Shambhu Dayal, one of the accused of the aforesaid FIRs. Thus, in the aforesaid back-ground, the credibility of search and seizure creates further doubt. Besides, in his examination u/s 313 Cr.P.C, the accused-appellant does not seem to have been asked any question on the return of the seal to PW-5 the next day and retention of seal by DSP throughout. Similarly, the accused has not been put any question on prejudice being suffered on retention of seals and samples for 4 days at the Police Station and failure to dispatch the samples of seals to the FSL. Furthermore, DSP Deep Chand, before whom the search was conducted, died during trial, therefore, the only Gazetted Officer associated with search and seizure was not available to be produced by the prosecution, whereas, evidences of Darshan Pal Singh (PW-5) and Dayal Singh (PW-4) appear to be at variance on the question as to whether the accused-appellant was given a partial offer or a complete offer to be searched.

10. Thus, on re-appreciation, the prosecution evidence does not enable me to affirm the impugned judgment. Now, it appears relevantly differently from what the learned trial Judge has appreciated and concluded. Thus, the preceding discussion inevitably inclines in favour of the appellant. Resultantly, the impugned judgment is set aside and the appeal is allowed. The appellant, who is said to be lodged in jail, is

hereby acquitted and is directed to be released forthwith if not wanted in any other case.

The appeal, accordingly, succeeds.