

(2013) 05 P&H CK 0208

High Court Of Punjab And Haryana At Chandigarh

Case No: C.R.A. No. 1587-SB of 2010

Rajender

APPELLANT

Vs

State of Haryana

RESPONDENT

Date of Decision: May 9, 2013**Hon'ble Judges:** Jitendra Chauhan, J**Bench:** Single Bench

Advocate: N.S. Shekhawat in CRA No. 1587-SB of 2010, Mr. S.N. Yadav in CRA No. 1670-SB of 2010 and Mr. J.S. Bedi in CRA No. 1803-SB of 2010, for the Appellant; Ajay Gulati, Deputy Advocate General, Haryana, for the Respondent

Judgement

Jitendra Chauhan, J.

This judgment shall dispose of both the abovementioned appeals. CRA No. 1587-SB of 2010, has been filed by Rajender; CRA No. 1670 SB of 2010, has been filed by Main Pal and CRA No. 1803 SB of 2010, has been filed by Pawan Kumar against the judgment and order dated 19/21.5.2010, whereby all the appellants were convicted and sentenced to undergo rigorous imprisonment for ten years each and to pay a fine off Rs. One lac each; in default of payment of fine, the defaulter to further undergo for two and half years under Sections 20(b)(ii)(c) of the Narcotic Drugs and Psychotropic Substances Act, whereby one Arun Kumar was acquitted by the trial Court by giving benefit of doubt. The facts necessary for adjudication of the matter as narrated in para No. 1 of the impugned judgement are as under:

On 14.1.2009, ASI Vinod Kumar alongwith Head Constable Rakesh Kumar and Constable Sandeep Kumar was present at the crossing of village Dudhola, where he received a secret information that an Indica Car while coloured, bearing its registration No. HR47-T-0371 occupied by Pawan Kumar son of Bhulleram, Rajender son of Nawal Singh, Arun Kumar and a driver Mainpal, having sulphur in the dicky of the car are coming from Gurgaon to Palwal and these persons are dealing in the sale of Sulphur and if a naka is held near petrol pump, they can be apprehended. On this information ASI Vinod Kumar alongwith his official companions held a nakabandi near petrol pump Dhatir. After some

time Indica Car came and was got stopped. On enquiry the driver disclosed his name as Mainpal and the occupants as Pawan, Rajender and Arun. ASI Vinod Kumar asked all the four persons that he has a secret information that they have narcotic substance in the vehicle and are smuggling the same, search of the vehicle is to be taken and also apprised them that they had a right to get the search from any Gazetted Officer and served them a notice u/s 50 of the Narcotic Drugs and Psychotropic Substances Act, 1989 on which they opted to be searched by a Gazetted Officer and then as required u/s 42 of the NDPS Act, DSP Uttawar Sh. Surender Singh was informed on telephone, who reached at the spot after about an hour and was told about the entire episode. DSP Surender Singh then took search of ASI Vinod Kumar and then directed ASI Vinod Kumar to search all the aforesaid persons and the vehicle. ASI Vinod Kumar then searched the vehicle make Indica bearing registration No. HR-47T-0371 and polythene (white coloured plastic bag) having the words FOREVER EXCLUSIVE JACTT was found in the rear dicky of the same and on checking it was found to contain charas/sulpha. On weightment, sulpha was found to be 4 kilogram 500 grams (4.5 Kgs.) out of which two samples of 50 grams were taken. Sample and the residue were converted into separate parcels and sealed with seal "VK" and DSP also affixed his seal "SS" on the same. Accused were asked to produce a licence for keeping the same but they could not produce any and thus a case u/s 20/61/85 of the N.D.P.S. Act was got registered. Recovered charas, samples and the vehicle (Indica) bearing registration No. HR-47T-0371 was taken into police possession.

2. After completion of the investigation, the challan was presented in the Court. The accused were charged u/s 20 of the Act, to which, they did not plead guilty and claimed trial.

3. In order to substantiate the charges, the prosecution has examined the following witnesses:

PW1, Anoj Kumar, Draftsman, proved Ex.PA scaled site plan.

PW2, HC Gajraj Singh, deposed with regard to receipt of the case property and sent the sample parcels and sample seal to FSL, Madhuban through Constable lamed Singh, who after depositing the same, handed over the receipt to him.

PW3, Surender Singh, owner of the car, who got released the car on superdari and proved Ex.P2, receipt issued to Mono, who was the driver on the said car.

PW4, ACP Surender Singh, in whose presence the search was conducted and recovery was effected. He proved seizure memo Ex.P3 and case property Ex.P4.

PW5, Constable Umed Singh, formal witness, tendered his affidavit Ex.PW5, wherein he has stated that the, he delivered the sample parcels and sample seal to the FSL, Madhuban.

PW6, SI Ram Avtar, formal witnesses, who recorded formal FIR Ex.PW6/A and made endorsement Ex.PW6/B.

PW7, HC Rakesh Kumar, eye witness, who proved Notice Ex.P7, served upon all the accused except Arun.

PW8, ASI Vinod Kumar, Investigating Officer, who investigated the case and proved Ex.P8 site plan, report Ex.P9, endorsement of SHO Ex.P9/A.

PW9, Amarjeet Singh, the then JMIC, Palwal, before whom the accused alongwith the case property were produced after their arrest, who after verifying the case property issued certificate Ex.P10 and affixed the court seal on the packet of the case property.

PW 10, Inspector Narender Kumar, SHO, who prepared the final report u/s 173 Cr.P.C. and presented the case in the Court.

4. When examined u/s 313 of the Code of Criminal Procedure, the accused-appellants denied all the incriminating circumstances appearing in the prosecution evidence against them and pleaded false implication. In defence, they examined Ajay Kumar as DW1 and closed the evidence.

5. The learned trial Court by observing that prosecution has successfully proved that on 14.1.2009, the accused were found in conscious possession of 4.500 grams charas, notice Ex.P7 u/s 50 of the Act was given to the accused and except Arun the remaining three accused namely Pawan, Mainpal and Rjender(the present appellants) opted their search by some Gazetted Officer, and therefore, the accused appellants have been convicted and sentenced as noticed at the outset.

6. Feeling dissatisfied with the same, the accused-appellants preferred appeals indicated in para No. 1.

7. Learned counsel for the appellant (Main Pal) submits that the appellant was the driver of the vehicle, from which the contrabands were recovered. The said taxi was hired by one Rajender Singh from the transport company run by PW3, Surender Singh, under the name and style Dahiya Tourist Taxi Service at Gurgaon. The contrabands were not recovered from the conscious possession of the appellant. It was not in his knowledge that the persons travelling in his taxi were carrying contrabands. He has further submitted that no question was put to the accused-appellant with regard to the conscious possession of the contraband. He further submits that there was delay of 28 days in sending the sample to FSL and the main accused, Arun has been acquitted by the trial Court after giving benefit of doubt.

8. Learned counsel appearing for other appellants Rajender and Pawan Kumar, have submitted that the secret information was not reduced in to writing. It is further contended that the procedure adopted by the police regarding the recovery of contraband is highly

doubtful. There are material contradictions in the statements of the witnesses. No independent witness was joined at the time of alleged search. There is delay of about 28 days in sending the sample to FSL. The Investigating Officer himself is the complainant. The appellants were not in conscious possession of the contraband.

9. On the other hand, the learned State counsel submits that the prosecution case is fully established and therefore, the learned trial Court has rightly convicted and sentenced the accused.

10. I have heard the learned counsel for the parties and perused the record carefully.

11. The relevant cross-examination of PW4 Surender Singh, ACP, City Gurgaon reads as under:-

I received information through mobile phone to my mobile phone. The information was received at about 8.00 PM and I reached the spot around 9.00 P.M." Further "I cannot tell exactly as to how many seals on each parcels were affixed by the investigating officer, but I myself affixed only one seal on each parcel. Samples were separated in plastic container. It is correct that the parcel today produced in the court contained four seals in all out of which my seal is in the middle bearing letters "SS". It is correct that the said parcel is not bearing the particulars of the present case." Further "It is correct that neither on the parcel of the sample produced in Court or even in the parcel of remainder and contraband produced in Court is bearing signatures of accused. It is correct that my signatures are also not contained on these parcels. Volunteered that the parcel pertaining to remainder and contraband bears some signatures but I cannot tell the name of the person who might have signed the same.

12. The cross-examination of PW 8 ASI Vinod Kumar, Investigating Officer reads as under:

We reached at Dhudra Maur at 8.00 P.M. I received secret information after half and an hour. The informer was on feet. The police post is at a distance of 7 Kms from Dhudra Maur. The petrol pump is between police post and Dhudra maur. ASI Manohar was posted in police post Dhatir. I have not recorded the facts narrated by the informer nor sent it to any officer with regard to the car, name of occupants and case property. I had also not mentioned this fact in my zimni. The car came at the spot after about 45 minutes from the information.

13. In examination in chief of HC Rakesh Kumar has stated as under:

The case was seen coming at 8.05 P.M. Nobody took search at the time when the car stopped by us. Recovery memo was attested by DSP. I do not know whether DSP had signed on any other paper or not.

14. In [The State of West Bengal and Others Vs. Babu Chakraborty](#), the Hon'ble Supreme Court has held as under:-

22. Great significance has been attached to the mandatory nature of the provisions, keeping in mind the stringent punishment prescribed in the Act. This Court has attached great importance to the recording of the information and the ground of belief since that would be the earliest version that will be available to a Court of law and the accused while defending his prosecution. This Court also held that failure to comply with Section 42(1), proviso to Section 42(1) and Section 42(2) would render the entire prosecution case suspect and cause prejudice to the accused.

23. In the cases of [Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat](#), [Koluttumottil Razak Vs. State of Kerala](#), [Beckodan Abdul Rahiman Vs. State of Kerala](#), and in the case of Chhunna alias Mehtab v. State of M.P., (2002) 9 SCC 363, this Court has held that the non-compliance of the provisions of the proviso to Section 42 of the Act which is mandatory, the action was held illegal and the conviction of the accused was set aside. This Court also held that the onus to prove compliance lies on the prosecution and in the absence of any prosecution evidence about the compliance with the mandatory procedure, the presumption would be that the procedure was not complied with.

23. In the case of [Saiyad Mohd. Saiyad Umar Saiyad and Others Vs. State of Gujarat](#), this Court held that the prosecution is obliged to give evidence of the search and all that transpired in its connection. It is very relevant that the prosecution witnesses speak about the compliance about the mandatory procedure and if under the evidence to this effect is not given, the Court must assume that the person to be searched was not informed of the protection. The Court must find that the possession of illicit articles under the Act was not established. It has been held that when the officer has not deposed that he had followed the procedure mandated, the Court is duty bound to conclude that the accused had not had the benefit of the protection that the Act affords; that therefore, his possession of articles under Act is not established and that the pre-condition for his having satisfactorily accounted for such possession had not been met; and to acquit the accused.

24. The above statement of law has been affirmed in the Constitution Bench judgment of this Court in the case of State of Punjab v. Baldev Singh (supra).

25. Though these observations were made in a case to which Section 50 applies, in view of the pronouncement of the judgment of three Judges of this Court in Abdul Rashid Ibrahim Mansuri v. State of Gujarat (supra), the approach by the Court in interpreting the law for the non-compliance of Section 42 and Section 50 must remain the same. In this case, PW-2 and PW-4 and any other prosecution witness do not speak about the compliance with the mandatory provisions of Section 42(1), proviso to Section 42(1) and Section 42(2).

26. It has been held that in any case where mandatory provisions are not complied with and where independent mahazar witnesses are not examined, the accused would be entitled to be acquitted and that any seizure in violation of the mandatory provisions would be inadmissible since these provisions are in the nature of statutory safeguards.

15. The FSL Form 29 shall be prepared at the place where the recovery is made. The same shall be kept alongwith the sample meant for dispatch to the Forensic Science Laboratory. But, in this case, no witness has deposed with regard to the preparation of Form 29 at the place of recovery. The Forensic Science Laboratory's report also does not reflect that Form 29 was received for the purpose of verification. Such a lapse also strengthens the doubt created in the mind of the Court as to the actual recovery made by VW PW8.

16. The prosecution story is further weakened by the fact that one of the accused Arun Kumar has been acquitted by the trial Court on the ground that no valid notice was given to the accused Arun Kumar u/s 50 of the Act.

17. Keeping in view all the circumstances, this Court comes to the conclusion that the prosecution has failed to prove its case against the accused beyond reasonable doubt. In view of the above discussion, all the appeals are allowed; setting aside the impugned judgment/order of conviction and sentence. The accused-appellants are hereby acquitted of the charged offence.