

(2006) 05 P&H CK 0243

High Court Of Punjab And Haryana At Chandigarh

Case No: Criminal Appeal No. 2080-SB of 2003

Pehalwan Singh

APPELLANT

Vs

State of Punjab

RESPONDENT

Date of Decision: May 22, 2006

Acts Referred:

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

Citation: (2006) 3 RCR(Criminal) 755

Hon'ble Judges: Virender Singh, J

Bench: Single Bench

Advocate: A.S. Jattana, for the Appellant; Ramandeep Sandhu, D.A.G., for the Respondent

Final Decision: Allowed

Judgement

Virender Singh, J.

Appellant-Pehalwan Singh has suffered conviction vide impugned judgment of learned Special Court, Ludhiana dated 29.7.2003 u/s 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short the 'Act'). He has been sentenced 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 one year.

2. While declining the prayer for suspension of sentence at the time of admission, the appeal was ordered to be heard on a particular date. It could not, however, be heard for a considerably long time. The applicant moved another application for suspension of sentence. Since, the appeal was already on the regular board for final hearing, the said prayer was again declined yet, keeping in view the fact that the applicant is of the age of 76 years, the appeal was ordered to be heard at an early date.

3. In brief the case of the prosecution is that on 25.9.1997, SI/SHO Balwinder Singh received a secret information that the appellant has been in possession of a huge quantity of poppy husk and if timely raid is conducted the same could be recovered.

On the basis of the said information, a formal FIR Ex. PA was recorded in the Police Station. Information in this regard was also sent to DSP Ashok Puri. A raiding party consisting of ASI Teja Singh PW3, ASI Surjit Singh and other police officials was organised. PW Wazir Singh (independent witness given up as having been won over during the trial) was also joined. The house of the appellant was raided in the area of village Bhundri. The appellant was found present in his house. He was arrested and while in police custody he suffered disclosure statement Ex. PB to the effect that he kept concealed 30 bags of poppy husk near the bank of Sutlej river in a pit underneath grass about which he alone knew and could get the same recovered. The aforesaid disclosure statement was thumb marked by the appellant and attested by the official witnesses and aforesaid Wazir Singh. The appellant then led the police party to the place of recovery and got recovered 30 bags of poppy husk from the disclosed place, out of each bag, two samples of 250 grams were separated and converted into separate parcels. On weighment the remaining poppy husk from each bag turned out to be 34 kgs 500 grams. All the sample parcels and the bags containing the remainder were sealed by SI Balwinder Singh, the Investigating Officer with his own seal bearing impression BS and of DSP Ashok Puri bearing impression 'AP'. The sample seal chit was also prepared separately and the seal after use was handed over to ASI Surjit Singh. The entire case property was then taken into possession vide recovery memo Ex. PE, attested by the aforesaid PWs including DSP Ashok Puri. A rough site plan of the place of recovery Ex. PH was also prepared at the spot. On return to the Police Station, SI Balwinder Singh produced the case property before ASI Harbans Singh PW1 who verified the facts and further sealed the case property with his own seal bearing impression 'HS'. Thereafter the case property was deposited with MHC Janak Raj PW23. After the receipt of the report Ex. PJ from the Forensic Science Laboratory (FSL), the appellant was challaned to face trial. He was charged u/s 15 of the Act and as stated above, he has been convicted and sentenced.

4. The case of the prosecution hinges upon the evidence of PW1 ASI Harbans Singh who has complied with the provisions of Section 55 of the Act, MHC Janak Raj PW2 has tendered his affidavit Ex. PA to prove the link evidence, ASI Teja Singh PW3 is a witness to the recovery, Constable Lakhbir Singh PW4 has also tendered his affidavit Ex. PJ with regard to the link evidence. SI Balwinder Singh PW5 is the Investigating Officer of the case. His evidence has already been detailed in the preceding paras. DSP Ashok Puri PW6 has again been a witness to the recovery. ASI Surjit Singh has been given up as unnecessary whereas PW Wazir Singh, the independent witness has also been left out by the prosecution as having been won over by the accused. The other witnesses being formal in character were also given up as unnecessary. The report of the FSL has been tendered as Ex. PJ.

5. The stand taken up by the appellant as emerges from his statement recorded u/s 313 of the Code of Criminal Procedure is of false implication. In defence, the appellant produced one Wazir Singh DW1 (who was given up by the prosecution as

having been won over) states that no recovery was effected from the appellant in his presence by SI Balwinder Singh and he was asked by Balwinder Singh to be witness in the recovery but it was not told to him as to whether he was to be cited as a witness in an excise case or narcotic case. In order to show that the aforesaid Wazir Singh had already appeared in certain cases of the prosecution, the appellant had produced the photostat copies of the original FIRs D1 to D9.

6. After appreciating the entire evidence on record, the learned trial Court has convicted and sentenced the appellant as indicated above. Hence, this appeal.

7. I have heard Mr. A.S. Janatta, learned counsel for the appellant and Mr. Ramandeep Sandhu, DAG Punjab. With their assistance, I have also gone through the entire records very minutely.

8. To start with Mr. Jattana submits that the so called disclosure statement Ex. PB loses its legal force for the reason that the appellant was arrested prior to the alleged recovery and therefore, legally the appellant cannot be said to be an accused of a particular offence. The disclosure statement allegedly recorded during the interrogation, therefore, cannot be, thus, legally taken into account. According to Mr. Jattana, may be after seeing the police party, he made an attempt to run away still legally he cannot be presumed to be an accused for the purpose of recording a disclosure statement. The recovery pursuant to the same is again of no effect and the case of the prosecution fails on this very weakness alone.

9. Mr. Jattana then contends that the very case of the prosecution hinges upon the disclosure statement suffered by the appellant in his house which led to the recovery of the contraband and it is the bounden duty of the prosecution to prove that the said disclosure statement is absolutely free from any doubt. Once this Court finds that there are certain flaws in it, the case has to be thrown out. The learned counsel contends that the prosecution in order to lend support to its case had joined one Wazir Singh as an independent witness who was ultimately dropped, may be having been won over by the appellant. Said Wazir Singh not only dislodged the case of the prosecution when he appeared as defence witness but he being a convenient witness to the prosecution cannot be said to be an independent witness. In order to strengthen his arguments, Mr. Jattana submits that when SI Balwinder Singh stepped into witness box, he showed his ignorance with regard to the fact as to whether aforesaid Wazir Singh had appeared in other cases of the same Police Station, yet the FIRs exhibited as Ex. D1 to D9 (inclusive of the instant FIR also) indicate that aforesaid Wazir Singh has appeared in as many as eight cases relating to the same Police Station (Police Station Sidhwan Bet) and out of these eight cases except one which is u/s 379 IPC (theft case) all cases are under the NDPS Act. According to the learned counsel, this very fact creates doubt about the effectiveness of the disclosure statement allegedly recorded.

10. Mr. Jattana further submits that there is another material flaw in the case of the prosecution as the seal after the alleged recovery was not handed over to aforesaid so-called independent witness Wazir Singh and was instead given to ASI Surjit Singh and he has not been brought into witness box being dropped by the prosecution as unnecessary. According to the learned counsel, the reason for not handing over the seal to Wazir Singh is very obvious as the Investigating Officer knew the fact that he is a convenient witness of the police and the case of the prosecution can be doubted on this count alone. This weakness also dents the case of the prosecution.

11. The learned counsel goes on to submit that even the case property has not been produced at the time of the trial as is clear from the statement of Balwinder Singh, the Investigating Officer. This lacuna is also fatal to the prosecution.

12. Mr. Jattana then contends that the place from where the recovery was effected is an open space which was accessible to all and sundry and, therefore, it cannot be held that it was the appellant only who had concealed the contraband. In support of his contention, the learned counsel relies upon the judgment of the Hon"ble the Supreme Court rendered in Krishan Mohar Singh Dugal v. State of Goa, 1994 (4) RCR(Cri) 619 and Division Bench of this Court rendered in Ranjit Singh alias Jita v. State of Punjab, 2003 (2) RCR (Cri) 280.

13. Pointing out certain discrepancies in the statement of the official witnesses with regard to recovery effected at the spot, the counsel states that according to SI Balwinder Singh Investigating Officer, DSP Ashok Puri had recorded his statement Ex. PD after giving an offer with regard to the compliance of Section 50 and thereafter on his direction (DSP), the appellant pointed out the place as per his disclosure statement and got recovered 30 bags of poppy husk. On the other hand Ashok Puri DSP states that when he reached the spot (place of recovery), he found the appellant in custody of SI Balwinder Singh. 30 bags of poppy husk were already lying there. This shows that the recovery was already effected before DSP Ashok Puri had reached the spot and all the paper formalities, to which Ashok Puri is also signatory, were done subsequently in order to make a show. According to the learned counsel, the prosecution cannot wriggle out of this flaw which creates all the doubts about the recovery.

14. The counsel submits that if one reads the statement of ASI Teja Singh who also remained present throughout with the Investigating Officer, DSP had reached the place of recovery at 10.30 p.m. and the recovery of bags was effected before 12.00 night and recovery memo was prepared after 12 night. This shows that the recovery was effected in presence of the DSP Ashok Puri. This witness otherwise states that he does not know as to when intimation was sent to DSP regarding his arrival at the spot. The other discrepancy in the statement of ASI Teja Singh PW3 and SI Balwinder Singh PW5 with regard to the place of alleged recovery disclosed by the appellant was also pointed out by the learned counsel. ASI Teja Singh states that it was disclosed by the appellant on his interrogation that he had kept concealed 30 bags

of poppy husk under Sarkanda in a pool near Sutlej river whereas according to SI Balwinder Singh, the appellant had disclosed that he had kept the contraband in the sand near Sutlej river. This discrepancy also creates doubt about the place of the recovery.

15. The learned counsel then points out another discrepancy about the other part of the investigation. According to the statement of Ashok Puri, writing work was done partly by SI Balwinder Singh Investigating Officer and partly by ASI Teja Singh and others. Some of the writing work was done while sitting on the vehicle and some was done under the head lights of the vehicle. Balwinder Singh, the Investigating Officer states otherwise. He states that the entire work was done by ASI Teja Singh at the spot in the candle light as well as torch light and the vehicles were parked by the side of the canal. According to the learned counsel, may be this discrepancy cannot be said to be vital in its nature but once it is appreciated with other aforesaid flaws, it does create doubt in the mind of a Court about the search and therefore, the same is not to be ignored.

16. Mr. Jattana then contends that the case put up to the appellant u/s 313 of the Code of Criminal Procedure is altogether different. While reading out the statement of the accused, the learned counsel contends that first question put to him is that on 25.6.1997, before SI Balwinder Singh, he had suffered a disclosure statement whereas the prosecution case was registered on 25.9.1997. He then states that in one of the questions, which is put to the appellant is that two samples of 250 grams were separated from each bag and the remainder was containing 34.400 kgs. According to the learned counsel, the total quantity thus comes to 34.900 kgs whereas as per the prosecution case, 30 bags each containing 35 kgs of poppy husk were recovered. There is a difference of 100 grams with regard to each bag. All the aforesaid discrepancies cause prejudice to the case of the appellant and are worth consideration.

17. On the basis of the aforesaid submissions, the learned counsel submits that the prosecution has not been able to prove its case beyond any shadow of reasonable doubt and as such the appellant deserves acquittal.

18. The learned State counsel on the other hand contends that there is no reason to disbelieve the statement of the official witnesses who had no enmity with the appellant to falsely implicate him in the instant case in which huge quantity of contraband is recovered pursuant to his disclosure statement. He then submits that even if Wazir Singh has not supported the case of the prosecution still certain discrepancies have crept in the statements of the official witnesses, which does not shatter the case of the prosecution if the conscious possession is otherwise and therefore, the conviction as recorded by the learned trial Court deserves to be affirmed.

19. In my view, the investigation in the case in hand has not been conducted in an honest way. The very case set up by the prosecution is that SI Balwinder Singh received secret information to the effect that the appellant was in possession of huge quantity of poppy husk. He along with other police officials including one so-called independent witness Wazir Singh went to the house of the appellant where he was found present. The admitted position is that DSP Ashok Puri had not arrived at the house of the appellant where the disclosure statement Ex. PB was already recorded. He arrived at the place of recovery only. So according to the prosecution case, the basis is the disclosure statement Ex. PB to which certain police officials and Wazir Singh are the witnesses. The point for consideration before me is as to whether the aforesaid disclosure statement suffered by the appellant can be read in evidence or not. The admitted position as emerges from the statement of Balwinder Singh, the Investigating Officer of this case is that after raiding the house of the appellant, he arrested him in this case and then started interrogation. It is not even the case of the prosecution that the house is searched by the police party. It is again not the case of the prosecution that as per the information received by aforesaid Balwinder Singh, the appellant was keeping the poppy husk in his house. It was only to the effect that he had brought poppy husk in huge quantity. In the instant case, the appellant when initially arrested in his house by the police cannot in legal terms be said to be in custody of the police officer and therefore, the disclosure statement loses its legal entity. This controversy came up before this Court in *Pall v. State of Punjab*, 1996 (1) RCR 802. The relevant portion of which reads as under :-

It is relevant to note that SI Nirmal Singh had no reasonable basis in law to arrest the accused at the door of his house prior to conducting of the search of his house as the accused-appellant had by that time not committed any offence. The offence would be committed when he was found in illegal, unauthorised possession of the poppy husk powder. The accused- appellant could not be legally in the custody of the Police Officer at the time when he is said to have suffered the disclosure statement. Section 27 of the Evidence Act lays down two important ingredients for its applicability and these are that the information must be received from a person accused of any offence, in the custody of a Police Officer, and it is thereafter that in consequence of such information when any fact is deposited to as discovered, then so much of such information whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved against such person. The appellant was not accused of any offence at the time when his statement was recorded by SI Nirmal Singh and he could not have been arrested because he had not committed any offence. Therefore, Section 27 of the Indian Evidence Act could not be availed by SI Nirmal Singh and resultantly the alleged discovery, as a consequence of the information received from the appellant could not be made admissible u/s 27 of the Indian Evidence Act. SI Nirmal Singh, thus, could not in law bank upon the disclosure statement and consequential recovery of the four gunny bags containing poppy husk powder.

20. Relying upon the aforesaid judgment, this Court in Sarabjit Singh alias Sarba v. State of Punjab, 1998 (1) RCR (Cri) 348, acquitted the accused appellant where he had suffered the disclosure statement and consequently recovery of eight bags of poppy husk was effected.

21. The learned State counsel is not in a position to controvert the aforesaid legal aspect by showing any judicial precedent contrary to the legal aspect discussed herein above.

22. In my view, although, on account of aforesaid vital infirmity, the case of the prosecution can be said to be on very weak footing, it can be discarded on other flaws as well. Wazir Singh has been projected as an independent witness to the aforesaid disclosure statement Ex. PB and to the recovery as well effected from the disclosed place. As per the exhibited copies of the FIRs, aforesaid Wazir Singh is shown to be cited as a witness in eight cases relating to the same Police Station (Police Station Sidhwan Bet) and out of these cases except one all other cases are of NDPS Act. This fact would certainly create doubt in the mind of the Court about the truthfulness of the disclosure statement allegedly recorded and even the recovery effected thereafter. SI Balwinder Singh when stepped into witness box showed his ignorance with regard to the appearance of the aforesaid Wazir Singh as a prosecution witness. This in my firm view was a clever statement in order to overcome his weakness because he had already given a twist to the case of the prosecution by recording a statement u/s 27 of the Evidence Act to give sanctity to the search. May be that aforesaid Wazir Singh has now been given up as having won over but that fact by itself does not give a clean chit of honest and pure investigation and this flaw coupled with other infirmity does dent the case of the prosecution.

23. I see the case of the prosecution with an eye of suspicion still from another angle. The disclosed place from where the recovery of contraband was allegedly effected is near Sutlej river. One cannot boldly exclude the possession of others from this property. No doubt the alleged recovery is shown to have been effected in the presence of DSP Ashok Puri yet the same would be of no consequence. Even otherwise, the discrepancies as pointed out by Mr. Jattana in the statements of the witnesses to the recovery are also worth consideration as the same create doubt about the sanctity of the alleged recovery effected at the spot. According to Teja Singh PW-3, DSP Ashok Puri had reached the place of recovery at 10.30 p.m. and the recovery of bags was effected before 12 night whereas DSP Ashok Puri PW-6 in his cross-examination says that when he reached the spot at about 10 p.m., he found that gunny bags were lying on the ground. If one reads the statement of Balwinder Singh, the Investigating Officer, appellant pointed out the place and got recovered 30 bags on the directions of DSP Ashok Puri. The case as per disclosure statement allegedly recorded is that the appellant had buried 30 bags of poppy husk in the sand near Sutlej river. If the appellant had buried the bags, the same could not be found lying at 10 p.m. when DSP Ashok Puri reached the spot. In my considered

view, the prosecution cannot reconcile on this vital issue and this touches the core of the case. Rather in other words it not only uproots the case of the prosecution but creates doubt in the mind of the Court about the sanctity of the so-called disclosure statement Ex. PB which otherwise is held to be not legally upto the mark. Therefore, the recovery allegedly effected comes under very thick clouds of doubt.

24. In Ranjit Singh alias Jita's case (supra), the recovery of contraband was effected on the basis of the disclosure statement. PW to the disclosure statement belonged to another village and the evidence on the record was that he was stock witness. This was considered to be one of the basic lacunae and the appellant-accused was acquitted inter alia, on this ground. In the present case Wazir Singh is also from different village (village Salempura) and as is evident from the record he has already appeared in many cases of NDPS Act for this very Police Station in which the present case is registered. To be fair to Mr. Jattana, the judgment of Hon'ble the Supreme Court rendered in Krishan Mohar's case (supra) upon which he relied heavily is not totally applicable to the case in hand as in the said case the accused had got the recovery of contraband effected about which the police already had the information. The said main weakness was considered against the prosecution. Besides this, the recovery of contraband was effected from the coconut tree which was admittedly standing on an open space accessible to all. In the case in hand, the bags of contraband are shown to have been buried at a particular place.

I do not feel the necessity of discussing other infirmities in the case of the prosecution as I am doubting it on account of aforesaid main flaws.

No doubt the recovery allegedly effected in this case is 30 bags of poppy husk which is certainly a huge quantity and falls under the head "commercial quantity" but the Act provides stringent provisions in which the minimum sentence provided is ten years rigorous imprisonment with minimum fine of Rs. one lac, therefore, before maintaining the conviction of an accused, it is expected of the Court to see that the case of the prosecution does not suffer from any infirmity on any count either on facts or law. The case in hand is not free from doubt.

As a sequel to the aforesaid discussion I hold that the prosecution has not been able to prove the conscious possession of the contraband qua the appellant beyond any shadow of doubt and as such while extending him benefit of doubt, I hereby set aside the impugned judgment of conviction and sentence. He is consequently acquitted of the charge.

The appeal is, consequently, allowed. The appellant is said to be in custody. He shall be released forthwith, if not required in any other case.