

(2009) 04 P&H CK 0381

High Court Of Punjab And Haryana At Chandigarh

Case No: Criminal Appeal No. 731-SB of 2004 (O and M)

Satish Kumar alias
Rishi

APPELLANT

Vs

State of Haryana

RESPONDENT

Date of Decision: April 15, 2009

Acts Referred:

- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 17

Citation: (2009) 30 CriminalCC 503 : (2009) 3 RCR(Criminal) 266

Hon'ble Judges: Harbans Lal, J

Bench: Single Bench

Advocate: Vivek Goel, for the Appellant; Tarunveer Vashist, AAG, Haryana, for the Respondent

Final Decision: Dismissed

Judgement

Harbans Lal, J.

This appeal is directed against the judgment dated 04.03.2004 order of sentence dated 09.03.2004 passed by the Court of learned Additional Sessions Judge, Jind, whereby he convicted and sentenced the accused Satish Kumar alias Rishi to undergo rigorous imprisonment/for a period often years and to pay a fine of Rs. 1 lakh u/s 17 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for brevity, "the Act") and further sentenced him to undergo rigorous imprisonment for an identical period and to pay a fine of Rs. 1 lakh u/s 18 of the Act and also sentenced him to undergo rigorous imprisonment for 10 years and to pay a fine of Rs. 1 lakh u/s 20 of the Act and in default of payment of the same, to further undergo rigorous imprisonment for 3 years, with a further direction that all the substantive sentences shall run concurrently.

2. As set up by the prosecution, on 06.05.1998, Raghbir Singh, Inspector/SHO of Police Station City, Jind among other police officials happened to be present at Rani Talab, Jind in Government Jeep bearing registration No. HR-31A-0281 being driven by Hari Chand

Constable. The in-charge of that PCR was Balwant Singh Assistant Sub Inspector. They were chattering with each other. Meanwhile, Raghbir Singh (sic.) received a secret information to the effect that Satish Kumar alias Rishi son of Raja Ram, Caste Punjabi, resident of Vishwakarma Colony, Jind, near Hansi branch deals in the sale of contraband in his house and if the raid is conducted, huge quantity of the same could be recovered from him. The information being reliable, the police officials were divided into parties and conducted raid on the house of the accused, who on catching sight of the police parties made an attempt to escape, but he was intercepted. He was offered to have the search of his house in the presence of a Gazetted Officer or an Executive Officer by serving a notice. He opted to have the same in the presence of some Executive Magistrate or a Gazetted Officer. Raghbir Singh (sic) informed Deputy Superintendent of Police, Jind on V.T. and requested him to reach the spot along with an Executive Magistrate. After a short while, Ganga Ram, DSP accompanied by D. Suresh IAS, Sub Divisional Magistrate, Jind came at the spot. During search of the house carried out in the presence of these officers, no incriminating article was recovered. On interrogation, the accused disclosed to have kept concealed opium and charas in the kitchen as well as in a room in the Cabinets specifically got manufactured by him and that the same being in his exclusive knowledge, can be got recovered by him. A photographer was called to the spot. Pursuant to his disclosure statement, he got recovered some bags of charas, opium milk and opium after removing the sunmica from his room as well as kitchen. These were got photographed. When weighed the contents of six polythene packets came to 4 kilograms 900 grams of opium. The charas when weighed was found to be 84 kilograms 350 grams. On Weighment, the opium milk was found to be 2 kilograms 550 grams. One sample of 50 grams was drawn from the contents of opium. 15 samples, each weighing 10 grams were taken from the packets of charas. All these samples and the remainders were converted into parcels which were sealed with seals bearing impressions RS and GR and seized vide recovery memo. The ruqa was sent to the Police Station where on its basis, formal FIR was recorded. The accused was arrested. After completion of investigation, the charge-sheet was laid in the Court for trial of the accused.

3. The accused was charged under Sections 17, 18 and 20 of the Act, to which he did not plead guilty and claimed trial. To bring home guilt against the accused, the prosecution examined PW1 Virender Singh ASI, PW2 Maya Singh Constable, PW3 Prem Singh ASI, PW4 Krishan Chander, PW5 Ganga Ram retired DSP, PW6 Parveen Kumar, PW7. D. Suresh Deputy Commissioner, PW8 Raghbir Singh retired Inspector and closed its evidence. ,

4. When examined u/s 313 of Cr.P.C. the accused denied all the incriminating circumstances appearing in the prosecution evidence against him and pleaded innocence as well as false implication. In his defence, he examined DW1 Subhash Chander ASI, DW2 Bhagwant Samp, DW3 Roop Basant Bachan, DW4 Paramjit Singh. After hearing the learned Public Prosecutor for the State, the learned defence counsel and examining the evidence on record, the learned trial Court convicted and sentenced the accused as

noticed at the outset. Feeling aggrieved with his conviction/sentence, he has preferred this appeal.

5. I have heard the learned counsel the parties, besides perusing the record with due care and circumspection.

6. Mr. Vivek Goel, Advocate representing the appellant strenuously urged that as per story proffered by the prosecution, the house of the accused was raided on receipt of a secret information. If it was so, it was obligatory upon the investigator Raghbir Singh to have reduced such information into writing and to convey the same to the immediate superior officers as contemplated by Section 42 of the Act. But as would be apparent on the face of record, these provisions of the Act were not adhered to.

7. To overcome this submission, Mr. Vashist on behalf of the State argued that if the Investigating Officer had indulged in putting such information into black and white, meanwhile, the accused by all probabilities would have escaped from his residential house.

8. I have given a deep and thoughtful consideration to the rival contentions. On reading the testimony of Raghbir Singh (sic), it emanates that he along with other police officials including Balwant Singh ASI were on regular patrol duty, when he received the secret information against the accused. In re : Hamidhbiu Azambhui Malik v. State of Gujarat, 2009 ACJ 572 (S.C): 2009 (3) CCC 135 (S.q) : 2009 (1) RCR (Cri.) 754 : 2009 (1) RAJ 479, the Apex Court has observed as under:

The search was made by the raiding party at about 4.30 P.M. on 15.12.1995. Section 42 will be inviolable only if the search is made by the police officer or the concerned authority, upon the prior information. If such a person has reason to believe from personal knowledge or information given by any person and obliged to take down in writing as such the information about the accused having possessed of and dealing with contraband article like "chaws" came to be appraised of by the concerned PSI Mr. K.D. Pandya, LCB Branch of Bharuch Police Station, in course of his investigation of an offence, registered vide CR No. 11-135 of 1995. Therefore, it is settled proposition of law when such an information or intimation or knowledge comes to the notice of the Investigating officer in course of the regular patrolling or an investigation of some other offence, it is not necessary to follow in all cases the conditions incorporated in Section 42.

9. Thus, in terms of Hamidhbai Azambhai Malik (supra), Rahgbir Singh (sic.) and others being on regular patrolling, it was not necessary for him to follow the conditions as enshrined in Section 42 of the Act, Section 42 of the Act reads as under:

Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall forthwith send a copy therefore to his immediate official superior.

10. It has been manifested in plain words in the language of this Section that the Investigating Officer is obligated to send such information to his immediate official superior only if the same has been taken down in writing. Here, it is not the prosecution case that the stated secret information was reduced into writing. That being so, the Investigating Officer could not be expected to send the same to his immediate official superiors. More to the point, the non-compliance of Section 42 *ibid* by Raghbir Singh (*sic.*) does not *ipso facto* affect the conviction of the appellant unless it is shown that same has caused prejudice to him and resulted in failure of justice. Herein, the accused has not adduced any evidence to the effect that due to such lapse, he has been prejudiced. Consequently, this contention is jettisoned.

11. Mr. Goel further canvassed at the bar that no independent witness was associated from the locality in the house search and that being so, the mandatory provisions of Section 100 of the Code of Criminal Procedure have been violated. This contention merits rejection. In *re: State of Punjab v. Balbir Singh*, 1994 (1) RCR (Cri) 736, it has been ruled that "If a police officer, even if he happens to be an "empowered" officer while effecting an arrest or search during normal investigation into offences purely under the provisions of Cr. P.C. fails to strictly comply with the provisions of Sections 100 and 165 Cr. P.C. including the requirement to record reasons, such failure would only amount to an irregularity," Furthermore, in *re: Karnail Singh v. State of Punjab*, 1983 CLJ 1218, the Division Bench of this Court has ruled that "Breach of sub-Section (4) of Section 100 Cr.P.C. which requires the officer effecting the search to call two or more independent and respectable persons of the locality to witness the search would not render the search defective. Though, the contravention may affect the credibility of the evidence let in, it does not agreed the admissibility of the evidence. Conviction based on such evidence is not liable to be disturbed merely because of noncompliance of the provision. "So, in view of the afore-extracted observations, the conviction cannot be disturbed merely because of non-compliance of the provisions of Section 100(4) *ibid*.

12. Mr. Goel further pressed into service that ASI Balwant Singh, who was also cited as an eye witness was intentionally not examined and was given up. He was actually a complainant in a police case registered against the appellant under the Gambling Act and in that case, he was acquitted. In order to avoid cross-examination on this score, this ASI has been withheld. I regret my inability to be one with Mr. Goel for the simple and obvious reason that the prosecution cannot be forced to examine a particular witness. This apart, it is acknowledged principle of law that the evidence is to be weighed and the number of witnesses is not to be counted.

[Masalti Vs. State of U.P.](#), , Hon"ble Supreme Court has ruled as under:-

It is undoubtedly, the duty of the prosecution to lay before the Court all material evidence available to it, which is necessary for unfolding its case, but it would be unsound to lay down it as a general rule that every witness must be examined even though his evidence may not be very material or even, if it is known that he has been won over or terrorised.

The same view was reiterated [Bava Hajee Hamsa and Others Vs. State of Kerala](#), . More to the point, the judgment rendered in the stated gambling case has not been placed on the record.

13. Mr. Goyal had been emphatic in the course of arguments that it is in the cross-examination of Prem Singh ASI PW3 that "There is no entry in register No. 19 regarding handing over of the samples to UGC Krishan Lal on 08.05.1998." This piece of evidence leave no scope for doubt that the samples of this case were never sent for chemical analysis, If the same had been forwarded for such purpose, an entry to that effect would have positively been there in register No. 19. This contention cuts no ice. In his next breath, this witness has testified that "Self stated that this entry is made in the daily diary and road certificate." In view of this reply, this contention pales into insignificance. In his affidavit Ex.PB, this witness has solemnly affirmed that the facts contained in paragraphs No. 1 and 4 are based on his knowledge and belief, whereas the facts enshrined in paragraphs No. 2 and 3 are based on record. Thus this affidavit is in conformity with the provisions of Section 297 of the Code of Criminal Procedure. Ex.PQ is the Forensic Science Laboratory's report. As per the same, 17 sealed/unsealed parcels were received in the Laboratory through UGC Krishan Chander 121. It is further mentioned in this report that the seals on the parcels were found intact and tallied with the specimen seal as per forwarding authority. It has been opined that the exhibits 1 to XV were identified as charas (Cannabis). Ex. XVI was identified as opium and the percentage of morphine was found to be 4.094% w/w. The exhibit XVII was identified as opium and the percentage of morphine was found to be 7.174% W/w. This report coupled with the statement of Prem Singh AS1 PW3 go a long way in proving that the contents of the sample parcels right from the stage of their seizure till their examination by the laboratory remained intact and the same were not tampered with at any stage. Thus, the chain in the link evidence is complete and there is no dent in the prosecution case.

14. Coming to the defence evidence, Subhash Chander ASI DW1 has merely proved the service record of ASI Kishan Lal. Thus, his evidence calls for no discussion. Bhagwat Sarup DW2 has solemnly affirmed as under:

Tara Chand is a vegetable vendor. He used to carry the vegetable in a canter to the villages. Krishan Dahiya, police official and other police persons caught the canter of Tara Chand. The police officials found some pieces under the seat of the driver which was declared to be charas, but Tara Chand gave Rs. 30,000/-, which was kept in the house of Urmila Sharma, M.C. to be allegedly paid to the police officials. Then Tara Chand came to us and then we met the DSP in this regard. DSP after listening our talks suspended Krishan Dahiya. The DSP recorded my statement as well as of Suresh Saini, commission agent of vegetable market, Jind. Urmila Sharma along with Krishan Dahiya and 4/5 persons came to my shop on the next day, where Urmila agreed to return the amount of Rs. 30,000/- to me, but I refused to accept the amount as it was to be paid to Sh. Krishan Dahiya. I have no knowledge, who was found guilty by the DSP during investigation, but Tara Chand was not guilty. Q:- Whether the amount of Rs. 30,000/-, was returned by

Tara Chand ? Question is disallowed, because, it is a leading question.

15-16. Under the stress of cross-examination, he stated that "I was not present when the amount of Rs. 30,000/- was paid. I was also not present at the time of recovery of charas. The charas was not recovered from Tara Chand in my presence. I was not present at the spot." This evidence obviously wipes out his examination-in-chief.

17. Roop Basant Bachan DW3 has merely stated that "I am press correspondent of Dainik Bhaskar since 18.10.2000, The news published in the paper Ex.D 11 was issued from our office by other correspondent. We confirm our news from the head of the concerned institution before publishing. The news published in Ex.DI 1 was confirmed from DSP Sh. Nehra, who enquired this matter." Under the stress of cross-examination, he has admitted that this news was not published on his behalf nor he had verified the same from DSP Nehra. He has further admitted that he had not met DSP Nehra in this case. Palpably, his cross-examination too nullifies his statement. DW4 Paramjit Singh has stated in the following terms:

I have seen the photograph Ex. PLI, where I was sitting on point X. At point Y, Mahinder public person is standing and while Dalip Singh a private person is also sitting in the photograph Ex. PLI at point-Z. House of Dalip and Mahinder is adjacent to the house in which I was sitting in the picture. The house of Dalip is one vacant plot away from that house. 1 was working at a saw mill located in front of the 3/4 vacant plots, however, there is a house of two aged persons adjacent to those vacant plots, whose names I cannot tell. The house in which 1 was allegedly shown weighing is owned by those aged persons. I was working on the saw mill since 4-5 months prior to Weighment shown in the picture Ex. PL 1.1 do not know Satish accused now present in the Court.

Q:- Whether have you ever saw Satish visiting this house or not before that date when you were weighing goods shown in Ex. PLI?

Question disallowed, being leading question. I went to the spot shown in Ex.PL 1, when I was summoned by Krishan Lai, ASI Krishan Lai, ASI came to this house in a jeep. Only 3/4 constables accompanied ASI and the accused Satish Kumar. Satish Kumar was brought to this house by the police in the same jeep. This was done at about 9/9.30 A.M. The polythene bags were taken out and one of the constables brought the weighing material. We have taken out the polythene bags from the jeep as per the directions of the police. Satish was also taken out of they jeep. The photographer reached at the spot after 2/25 minutes after arrival of the police party. Polythene bags along with the accused were taken on the first floor by the police, and we were asked to go by the police*. We worked on the saw mill up to 7.00 P.M. No other jeep came to that house after the visit of the first jeep of Krishan Lai, ASI Inspector, DSP and SDM, Jind did not visit this house on that date. 1 know Krishan Lai, ASI when he was a head constable.

18. It follows from his above evidence that he has regretted his inability to disclose the names of the aged persons, whose house is situated adjacent to the vacant plots. If he had been really working on the stated saw mill by all probabilities, he would have been knowing the names of aforementioned aged persons. More to the point, it was not difficult for the accused to procure the services of this witness to depose in his favour. Seemingly he has appeared with an avowed purpose to depose in favour of the accused. To crown it all, such a mind-boggling recovery of contrabands could have not been planted by an officer of the rank of Investigator. Mr. D. Suresh, Deputy Commissioner, Sirsa, PW7 has fully supported the evidence trickled from the mouth of Ganga Ram retired DSP PW5 as well as other recovery witnesses including the investigator.. He being an IAS Officer, by no stretch of speculation could be expected to have become a false witness to such a huge recovery. When these witnesses were subjected to searching and grueling cross-examination, their credibility could not be impeached in any manner. On appraisal of the entire evidence, it emerges out that the recovery in question was got effected by the accused in pursuance of his disclosure statement. Sequel, unhesitatingly this evidence can be relied upon.

19. The learned counsel for the accused-appellant did not agitate or urge any other point.

There being no infirmity in the impugned judgment, no interference is warranted therein. Resultantly, this appeal fails and is dismissed.