

(2015) 07 P&H CK 0163

High Court Of Punjab And Haryana At Chandigarh

Case No: Criminal Appeal-D 212-DB of 2011

Kishan Singh and
Others

APPELLANT

Vs

State of Punjab

RESPONDENT

Date of Decision: July 20, 2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) - Section 173, 313#Evidence Act, 1872 - Section 134#Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 22, 42, 42(1), 42(2), 52A

Citation: (2015) 07 P&H CK 0163

Hon'ble Judges: T.P.S. Mann, J; Mahavir Singh Chauhan, J

Bench: Division Bench

Advocate: Sidakmeet Singh Sandhu, for the Appellant; S.S. Dhaliwal, Additional Advocate General, Advocates for the Respondent

Judgement

Mahavir Singh Chauhan, J

To challenge judgment of conviction and order of sentence dated December 08, 2010 whereby learned Judge,

Special Court, Sahibzada Ajit Singh Nagar (Mohali) (here-in-after referred to as "the trial court") has convicted and sentenced them to rigorous

imprisonment for a term of twelve years and fine amounting to Rs. 1,50,000/- and in default of payment of fine to further rigorous imprisonment for

a term of one year, each, under Section 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (here-in-after referred to as "the Act"),

Kishan Singh and Bhagwan Singh (here-in- after referred to as "the appellants") have brought this appeal.

FACT SITUATION:

2. Conspectus of events leading to the instant appeal, stated in brief, indicates that while present at ITI Chowk, Lalru in connection with patrol

duty, in the company of a police party, including Assistant Sub Inspector Amrik Singh (PW3), at or around 10.00 p.m. on September 04, 2008,

Sub Inspector Sukhwinder Singh (PW6) (here-in-after referred to as "the investigating officer") came across another police contingent headed by

Sub Inspector Sarabjit Singh (PW1), Officer-in-charge, Narcotics Control Cell, Kharar and while conversing with him received a secret

information that the appellants alongwith their accomplice Yogesh Kumar (since acquitted), who were jointly engaged in smuggling of Cocaine,

were in possession of big quantity of Cocaine and were waiting for customers near Narang Hotel in front of Railway Station, Lalru and if

apprehended immediately, huge quantity of Cocaine was likely to be recovered from them and their interrogation was likely to reveal names of

other members of their cartel. Believing the information to be correct and reliable and possession of Cocaine being an offence under Section 22 of

the Act, Investigating Officer telephonically apprised Harinderjit Singh Sidhu, Superintendent of Police (Operations), SAS Nagar (Mohali) (PW5)

of the information; requested him to reach the spot; recorded an intimation slip (commonly called a "Ruqa"), Exhibit PW6/A, and sent it, through

Constable Sukhwinder Singh, to the Police Station whereupon a formal First Information Report (for short, "FIR"), Exhibit PW6/B, was recorded

by Assistant Sub Inspector Narinder Singh at Police Station, Lalru. Wasting no time, investigating officer, accompanied by the police officials,

reached the disclosed place; joined Hazara Singh (given up witness) with the police party; and on reaching the disclosed place apprehended the

appellants. Yogesh Kumar, however, was able to give the police a slip. Appellant Kishan Singh was holding a bag in his right hand. Investigating

Officer told him that the bag in his possession was suspected to carry some intoxicating substance and was liable to be frisked; apprised of his legal

right to have frisking of the bag before a gazetted officer or a Magistrate. Appellant Kishan Singh opted to have the bag frisked before a Gazetted

Officer. Memorandum, Exhibits PA was, accordingly, recorded. In the meantime, SP Harinderjit Singh Sidhu(PW5) reached the spot; and

apprised appellant Kishan Singh of his legal right to have frisking of the bag before him or before some other Gazetted Officer or a Magistrate.

Appellant Kishan opted to get the bag frisked in his presence. Memorandum, Exhibit PB, was recorded in this regard. Under the instructions of SP

Harinderjit Singh Sidhu(PW5), Investigating Officer frisked the bag held by appellant Kishan Singh, in the presence of witnesses. In the bag there

was a red-coloured rexine envelope having a paper sticker carrying inscription ""TIGER/ SSS.M. Date 10.9.2007/Exp. Date 10.10.2010/

Thailand". From inside this envelope, Cocaine wrapped in a polythene paper was recovered. From the recovered Cocaine, Investigating Officer

separated two samples of ten grams each; and put the samples so separated in parcels. Remainder weighed 880 grams and after putting it back in

the polythene paper and the red-coloured rexine envelope, it was put into a plastic container. Investigating officer sealed the parcels containing

samples and the remainder, with his seal bearing impression ""SS"". SP Harinderjit Singh Sidhu also affixed his own seal bearing impression ""HS"" on

sample parcels and the parcel containing the remainder. Sample seals were separately prepared. Investigating Officer handed over seal after use to

Hazara Singh (PW) while SP Harinderjit Singh Sidhu retained his seal with himself. Investigating officer took in police possession the sealed sample

parcels, Exhibits P1 and P2 to P16, and sealed parcel of remainder, Exhibit P3, vide memorandum, Exhibit PC; arrested the appellants vide

memoranda, Exhibits PD and PW3/A; frisked their persons vide memoranda, Exhibits PW3/C and PW3/B, respectively; recorded statements of

witnesses; prepared rough site plan, Exhibit PW6/C, of the place of recovery; and on return to the police station produced the appellants and the

case property with MMHC Sohan Singh (PW2). On September 05, 2008, Investigating Officer withdrew the case property from Police

Malkahana and the appellants from police lock up and produced the appellants and the case property, alongwith an inventory, Exhibit PW6/D,

prepared in terms of Section 52A of the Act, before learned Sub Divisional Judicial Magistrate, Dera Bassi who caused a representative sample

weighing ten grams to be taken from the parcel of remainder and sealing thereof as also resealing of parcel of remainder by the Investigating Officer

with his seal bearing impression ""SS""; got the process photographed; and on police request/Inventory, Exhibit PW6/D, passed order Exhibit

PW6/E. Yogesh Kumar was arrested on September 07, 2008 vide memorandum, Exhibit PW3/E. One of sample parcels was sent to Chemical

Examiner through Constable Varinder Singh (PW4) and a report, Exhibit PW6/F, confirming that the contents of sample parcel were Cocaine,

was received from the Chemical Examiner. On conclusion of investigation, a report in terms of sub-section (2) of Section 173 of the Code of

Criminal Procedure, 1973 (here-in-after referred to as "the Code") was presented before the learned trial court.

PROCEEDINGS BEFORE THE TRIAL COURT:

3. After hearing the prosecutor and the defence, learned trial court found a prima facie case triable under Section 22 of the Act to be made out and

charged the accused accordingly. Appellants pleaded not guilty to the charge and claimed to be tried.

4. To prove the charge against the appellants, prosecution examined Investigating Officer, SI Sukhwinder Singh as PW6, SP Harinderjit Singh

Sidhu as PW5, SI Sarabjit Singh and ASI Amrik Singh, witnesses of recovery, as PW1 and PW3, respectively, HC Sohan Ram, who kept the

case property in safe custody and also handed over one set of sample parcel to Constable Varinder Singh, as PW2 and Constable Varinder Singh,

who took the sample parcels to the office of Chemical Examiner, as PW4.

5. All the incriminating circumstances appearing in the prosecution evidence when put to the accused in their examination under Section 313 of the

Code were denied as incorrect and plea of innocence and false implication was reiterated by them.

6. Accused examined Om Parkash (DW1) as a witness in their defence to bring on record that the appellants were picked up by the police from

their village on the pretext that the police wanted to elicit some information from them.

7. On appreciation of evidence in the light of submissions made at the bar, learned trial court found that complicity of Yogesh Kumar in the

commission of the crime could not be established but the prosecution was able to prove appellants' guilt beyond reasonable doubt and,

accordingly, while acquitting Yogesh Kumar, convicted and sentenced the appellants as here-in-before stated.

APPEAL:

8. We have heard learned counsel for the parties and, with their able assistance, have also appraised the record.

ROLE OF BHAGWAN SINGH:

9. It has been argued by learned counsel for the appellants at the very outset that appellant Bhagwan Singh has been convicted only because he

happens to be a co-villager of appellant Kishan Singh and was found standing by his side when police party reached the place of recovery,

otherwise, no incriminating substance is shown to have been recovered from him nor is he shown to be aware of the contents of, or to have any

dominion over, the bag which appellant Kishan Singh was carrying.

10. Contention of the learned counsel is found to carry substance. No doubt as per "Ruqa", Exhibit PW6/A, the Investigating Officer is shown to

have received a secret information that both the accused and their accomplice Yogesh Kumar were indulging in smuggling of narcotics and were

present near Narang Hotel having in their possession huge quantity of Cocaine. However, the incriminating bag was recovered from appellant

Kishan Singh and not from appellant Bhagwan Singh. He did not even try to run away from the spot. As recorded in memorandum, Exhibit

PW3/B, only currency notes worth Rs. 60/- were recovered from him. Beyond this nothing is shown to be recovered from him. It is also not the

case of the prosecution that he was holding the incriminating bag jointly with the other appellant or was soliciting customers for the contraband or

had assisted appellant Kishan Singh in the matter in any manner.

11. Learned trial court has convicted appellant Bhagwan Singh saying that he was arrested from the spot alongwith appellant Kishan Singh; is a

co-villager of Kishan Singh; and has failed to show what was he doing on the spot at the relevant time. Presence of Bhagwan Singh by the side of

Kishan Singh at the time of the recovery and factum of both the appellants being co-villagers cannot be used to infer his complicity or culpability in

the absence of definite positive evidence, which, as afore-said, is conspicuously missing. His failure to explain purpose of his presence on the spot

also cannot be used against him because it was for the prosecution to prove his guilt and he was not obliged to prove his innocence.

12. In view of the above, conviction and sentence of appellant Bhagwan Singh cannot be sustained.

ROLE OF KISHAN SINGH:

Compliance of Section 42 of the Act:

13. As regards Kishan Singh, learned counsel for the appellants has argued, in the first instance, that the entire proceedings are vitiated as

mandatory provisions of Section 42 of the Act have not been complied with in so far as the Investigating Officer did not reduce the secret

information into writing and did not send such information to his immediate superior as mandated by Section 42 of the Act even though he had

sufficient time to do so between receipt of secret information at 10.00 p.m. on September 04, 2008 and recovery of the contraband at 01.00 a.m.

on September 05, 2008.

14. Contention of the learned counsel is contrary to the record. A perusal of "Ruqa", Exhibit PW6/A, and deposition of SI Sukhwinder Singh

(PW6) reveals that the Investigating Officer received the secret information at or around 10.00 p.m. on September 04, 2008 while patrolling (and

was not present in the Police Station). Still, he reduced the factum of receipt of secret information into writing, Exhibit PW6/A and immediately

despatched it to the Police Station through Constable Sukhwinder Singh, besides informing SP Harinderjit Singh Sidhu(PW5) on phone. On the

basis of "Ruqa", Exhibit PW6/A, a formal FIR, Exhibit PW6/B, was recorded at 11.00 p.m. on September 04, 2008 and Special Report reached

the learned Jurisdictional Magistrate at 12.30 a.m. on September 05, 2008. This, in our considered view, is sufficient compliance of the provisions

of Section 42 of the Act.

15. Even otherwise, in enacting Section 42 of the Act intention of the legislature, no doubt, was to provide for procedural safeguards against false

implication but, at the same time, it never intended the provision to be literally interpreted to mean that the information received by the investigating

officer must be taken down in writing and transmitted to the superior official even though it may allow the culprit to escape and the contraband and

evidence being destroyed or removed and thereby forfeit the very purpose of bringing the Act on the statute book. Compliance with the

requirements of sub-sections (1) and (2) Sections 42 of the Act as regards taking down the information received in writing and sending a copy

thereof to the official superior, should normally precede the entry, search and seizure by the empowered officer but in special circumstances

involving emergency situations, recording of the information in writing and sending a copy thereof to the official superior may be postponed by a

reasonable period, that is, after the search, entry and seizure. The question is one of urgency and expediency. However, total non-compliance with

requirements of sub-sections (1) and (2) of Section 42 of the Act is impermissible, while delayed compliance with satisfactory explanation about

the delay may be acceptable compliance thereof.

16. Hon"ble Supreme Court of Karnail Singh Vs. State of Haryana, (2009) 108 CLT 681 : (2009) CriLJ 4299 : (2009) 10 JT 360 : (2009) 10

SCALE 255 : (2009) 8 SCC 539 : (2009) 11 SCR 470 , while laying down the principles about compliance of sub-sections (1) and (2) of

Section 42 of the Act, held as under:

35. In conclusion, what is to be noticed is that Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat, AIR 2000 SC 821 : (2000) CriLJ 1384 :

(2000) 68 ECC 16 : (2000) 1 JT 471 : (2000) 1 SCALE 361 : (2000) 2 SCC 513 : (2000) 1 SCR 542 : (2000) 1 UJ 587 : (2000) AIRSCW

4802 : (2000) AIRSCW 375 : (2000) 1 Supreme 363 : (2000) 5 Supreme 415 : Sajan Abraham Vs. State of Kerala, AIR 2001 SC 3190 :

(2001) CriLJ 4002 : (2001) 3 Crimes 377 : (2001) 77 ECC 469 : (2002) 139 ELT 241 : (2001) 6 JT 178 : (2001) 5 SCALE 91 : (2001) 6

SCC 692 : (2001) 2 UJ 1502 : (2001) AIRSCW 2970 : (2001) 5 Supreme 789 hold that the requirements of Section 42(1) and 42(2) need not

be fulfilled at all. The effect of the two decisions was as follows:

(a) The officer on receiving the information of the nature referred to in sub-section (1) of Section 42. from any person had to record it in writing in

the register concerned and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d)

of Section 42(1).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or

otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods

or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a

situation, he could take action as per clauses (a) to (d) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing

and forthwith inform the same to the official superior.

(c) In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and

sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances

involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a

reasonable period, that is, after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance with requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory

explanation about the delay will be acceptable compliance with Section 42. To illustrate, if any delay may result in the accused escaping or the

goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending of a copy

of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the

police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received,

or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act.

Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear

violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in

each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001.

17. Investigating Officer, Inspector Sukhwinder Singh, while appearing as PW6 has revealed that when he received the secret information at or

around 10.00 p.m. on September 04, 2008, he was not present in the police station and, instead, was present at ITI Chowk, Lalru for patrolling

and was told by the informer that the accused were present near Narang Hotel, in front of Railway Station, Lalru carrying huge quantity of Cocaine

and could be apprehended and huge quantity of the contraband could be recovered if the disclosed place was forthwith raided. Immediately on

receipt of the secret information he informed SP Harinderjit Singh Sidhu (PW5); sent "Ruqa", Exhibit PW6/A, to the Police Station; and

proceeded for the disclosed place. The circumstances enumerated by the investigating officer are such that literal compliance with Section 42 of the

Act, viz., reducing the secret information into writing and despatching it to the superior officer(s) was bound to result in escape of the accused and

disappearance and/or destruction of the contraband and the evidence. Thus, in our considered opinion, Section 42 of the Act was sufficiently

complied with by recording the secret information in the form of Ruqa, Exhibit PW6/A, and sending it to the quarters concerned immediately after

receipt of secret information, besides informing SP Harinderjit Singh Sidhu(PW5).

Delay in sending the sample parcels for chemical examination:

18. It has further been contended on behalf of the appellants that the contraband is shown to have been recovered on September 05, 2008 but as

stated by Constable Varinder Singh (PW4) in his affidavit, Exhibit PW4/A, sample parcel was handed over to him for being taken to office of the

Chemical Examiner on September 08, 2008 and the delay in despatch of the sample parcel is fatal to the case of the prosecution.

19. The submission, in our well thought opinion, lacks substance because Cocaine has no shelf life and is not such a substance as would deteriorate

or get contaminated or decomposed or lose or weaken its character and nature with the passage of time. Chemical Examiner"s Report, Exhibit

PW6/F, is conspicuous by absence of an observation that the contents of the sample parcel sent for chemical examination had worn out or

deteriorated so as to render impossible the necessary test(s) to ascertain what the contents of sample parcel sent for examination were. Even

otherwise, no prejudice is shown to have been caused to the defence by delay in despatch of the sample parcels for chemical examination. It also

deserves mention here that on behalf of the defence, SI Sukhwinder Singh (PW6), the Investigating Officer of the case, has not been confronted

with a suggestion that Cocaine was not recovered from possession of appellant Kishan Singh. Rather, to the contrary, he has been confronted with

a suggestion that two samples of ten grams each and remainder weighing 880 grams were produced before the learned Jurisdictional Magistrate

and out of the remainder, a representative sample weighing ten grams was separated by the said Magistrate. This, in a way, amounts to admission

of the defence that the contraband recovered from Kishan Singh's possession was Cocaine.

20. Even otherwise, the inventory, Exhibit PW6/D, list of sample(s) drawn under sub-section (2) of Section 52A of the Act, as certified by the

learned Jurisdictional Magistrate vide order, Exhibit PW6/E, are primary evidence in respect of the offence under adjudication in terms of sub-

section (2) of Section 52A of the Act.

Independent witness given up:

21. It is next contended on behalf of the appellants that according to the investigating officer, Hazara Singh (PW) was joined with the investigation

but for reasons best known to the prosecution he has been given up as won over by the accused without indicating any basis for such an inference.

It is further contended that all the witnesses examined by the prosecution in proof of its case are police officials who are highly interested in the

success of the prosecution case.

22. The contention, however, must fail because no adverse inference can be drawn against the case of the prosecution only because the public

witness, Hazara Singh has been given up. The witnesses being human beings are quite exposed and vulnerable to human weakness of yielding,

browbeating, threats and inducements. It is also not unknown that where serious offences like the present are committed, attempts are made either

to terrorize or to win over prosecution witnesses, and if the prosecutor honestly and bona fide believes that some of the witnesses have been won

over, it would be unreasonable to insist that he must tender such witnesses before the Court. No materials have been brought forth to show that

statement of learned Public Prosecutor to give up Hazara Singh (PW) was not bona fide and honest. Even otherwise, if appellant Kishan Singh

was so confident that Hazara Singh (PW) was the only person having regard for the truth and his appearance before the court was bound to

demolish case of the prosecution, he should have examined him as a witness in defence. However, he has not been audacious enough to do so.

Therefore, giving up of Hazara Singh (PW), as won over, was fully justified more so because case of the prosecution has been proved to the hilt in

the evidence of Sub Inspector Sukhwinder Singh (PW6), SP Harinderjit Singh Sidhu(PW5) and ASI Amrik Singh (PW3). Section 134 of the

Indian Evidence Act, 1872, provides that it is not necessary to examine a particular number of witnesses in proof of a particular fact.

23. No doubt case of the prosecution is based on the evidence of police witnesses but there can be no legal proposition that evidence of police

personnel, unless supported by independent witnesses, is unworthy of acceptance. Rather, testimony of police personnel should be treated in the

same manner as testimony of any other witness. The presumption that a person acts honestly applies as much in favour of police personnel as of

other persons. We cannot assume that statement of every police personnel is necessarily false. In the present case, there is nothing to show that the

police witnesses made false statements before the learned trial court. They had no enmity with the accused. Also, there is no material available on

record to indicate that by implication of the appellant Kishan Singh the police witnesses have derived any benefit for themselves or for anyone else

they may be interested in. Further, the witnesses have been able to stand the arduous test of cross examination successfully.

Quantum of sentence:

24. Left with no other option, learned counsel for the appellants has submitted that the appellant Kishan Singh being the sole bread winner for his

family and there being no criminal history before and after the instant case, deserves leniency in the matter of sentence.

25. Nothing more has been urged.

CONCLUSION:

26. In the consequence, we accept the appeal of Bhagwan Singh; set aside his conviction and sentence; acquit him of the offence of which he has

been charged and convicted; and direct that if not wanted in any other case he be set at liberty forthwith. As regards appellant Kishan Singh, while

maintaining the judgment of conviction, substantive sentence awarded to him is reduced to rigorous imprisonment for ten years. Sentence of fine

and default clause are, however, maintained. With above modification in the order on quantum of sentence, the appeal qua Kishan Singh fails and

is dismissed.