
(2018) 10 P&H CK 0277

High Court Of Punjab And Haryana At Chandigarh

Case No: Criminal Appeal (S) No. No.2406SB Of 2004 (O&M)

Suresh

APPELLANT

Vs

State Of Haryana

RESPONDENT

Date of Decision: Oct. 10, 2018

Acts Referred:

- Narcotic Drug and Psychotropic Substances Act, 1985 - Section 15, 15(c), 50, 54
- Code of Criminal Procedure, 1973 - Section 173, 313

Citation: (2019) 1 RCR(Cri) 60 : (2019) 1 CriCC 854

Hon'ble Judges: Arvind Singh Sangwan, J

Bench: Single Bench

Advocate: Swati Batra, Ramesh Kumar Ambavta

Final Decision: Allowed

Judgement

Challenge in this appeal is to the judgment of conviction dated 05.12.2003 vide which the appellant was held guilty for offence punishable under

Section 15(c) of the Narcotic Drug and Psychotropic Substances Act, 1985 (in short 'NDPS Act') along with the co-accused "Virender Kumar and

the order dated 09.12.2003 vide which the appellant and his co-accused "Virender Kumar were sentenced to undergo rigorous imprisonment for a

period of 10 years and to pay a fine of Rs.1 lac and in default of payment of fine to further undergo rigorous imprisonment for a period of 02 years.

The present appeal was filed in the year 2004 and thereafter, the sentence of the appellant was suspended on 14.03.2007 considering the long custody

of the appellant.

As per the Custody Certificate dated 09.10.2018 filed in the Court today, the appellant has undergone 06 years, 02 months and 05 days of total

sentence including the remissions till 20.03.2007 when he was released from judicial custody. It is stated by counsel for the State that the appellant

was not found involved in any other case prior to registration of the present FIR and even subsequent thereto and thus, after releasing the appellant on

bail in the year 2007, in the intervening period of 11 years, the appellant has not misused the concession of suspension of sentence.

At the very outset, it may be noticed that the co-accused of the appellant namely Virender Kumar had filed separate appeal i.e.

Criminal Appeal No.2369-SB of 2003 and considering the fact that he has also undergone the substantive sentence, his appeal was heard on merits

and the same was also allowed. The operative part of the judgment dated 25.08.2009 passed in Criminal Appeal No.2369-SB of 2003, reads as under:-

“This appeal is directed against judgment dated 5.12.2003 and order dated 9.12.2003 passed by the Additional Sessions Judge Fatehabad

(hereinafter described as 'the trial Court') whereby the appellant along with his co-accused, Suresh Kumar has been convicted and sentenced under

Section 15(c) of the Narcotic Drugs and Substances Act, 1985 (for short 'the Act'), to undergo rigorous imprisonment for ten years and to pay a fine

of Rs.one lac and in default of payment of fine to undergo further rigorous imprisonment for two years.

The appellant, his co-accused were sent up to face trial by the Station House Officer, Police Station, Ratia for the offence punishable under Section

15 of the Act. The case of the prosecution, in brief, is that on 7.10.2000 when Charan Singh, A.S.I. of Police Station, Ratia along with police party

was present in the police station, he received a secret information that both the appellant and his co-accused were indulging in smuggling of poppy

husk in a canter (Tata-407) bearing registration No.HR-39-1678 and used to transport the same to Punjab through Lalwas-Kalotha road and on that

day also, they would bring the same and if a nakabandi was laid at Bus stand, Khairpur, they could be apprehended. On receipt of the information,

Charan Singh, A.S.I. Tried to associate in the nakabandi a Gazetted Officer posted there, i.e., Tehsildar or Naib Tehsildar on telephone, but none of

them was available. Thereafter, he flashed a wireless message and requested Avtar Singh, D.S.P., Tohana to reach at Bus Stand, Khairpur while

explaining the facts to him. He reached the Bus Stand, Khairpur and laid a nakabandi. After sometime, the canter in question was seen coming from

the side of village Lalwas. During this time, one Mehtab Singh resident of Kalotha also met the police party by chance and he was joined in the raiding

party. The canter was signaled to stop and accordingly, its driver stopped the same at a distance of 15-20 paces from the police party. Both the

appellant and his co-accused present in the canter were apprehended. The appellant was driving the canter, whereas his co-accused was sitting by his

side in the front cabin. Suspecting that some contraband was in the canter, Charan Singh, A.S.I. Served a notice upon both the appellant and his co-

accused to the effect that as he suspects some contraband in the canter and he wanted to search the same and if they so desire, the search can be

conducted in the presence of a Gazetted Officer or a Magistrate. The contents of the notice were read over and explained to both of them, who

signed the same in token of its acknowledgement in the presence of H.C. Niranjan Singh and Mehtab Singh. In the meanwhile, Avtar Singh, D.S.P.

also reached at the spot and he was apprised of the facts by Charan Singh, A.S.I. In their written replies which were signed by them and attested by

the aforesaid two persons, i.e. D. Niranjan Singh and Mehtab Singh, the appellant and his co-accused desired that their search may be conducted in

the presence of a Gazetted Officer. The replies were also attested by the D.S.P. on whose directions, the search of the canter was conducted after

removing the tarpaulin. Forty bags containing poppy husk concealed in a special chamber made for that purpose were recovered from the canter.

They were weighed and each of them was found containing 10 Kgs. of poppy husk. Samples of 100 grams were separated from each of the bags.

The samples and the bags were separately sealed with the seals of 'CS' and 'AS'. The seal 'CS', after use, was handed over to

H.C. Niranjana Singh, whereas the seal 'AS' was retained by the D.S.P. The sealed samples and the bags were taken into possession along with the

canter and its registration certificate & tarpaulin vide separate recovery memos which were attested by the witnesses and Avtar Singh, D.S.P. An

intimation was sent to the Police Station through Constable Ram Sarup for registration of a case, on the basis of which formal F.I.R. was recorded. A

site plan was also prepared of place of recovery. The investigating officer formally arrested the appellant and his co-accused and recorded the

statements of the witnesses. The case property and the appellant and his co-accused were produced before the Station House Officer, who, after

verification, also put his seal on the samples and the bags. The investigating officer was directed to deposit the case property with the M.H.C., and the

appellant and his co-accused were put in the lock-up.

The samples were sent for chemical analysis and after receipt of the necessary report and completion of investigation, a report under Section 173 of

the Cr.P.C. was prepared and submitted to the Illaqa Magistrate, who committed the case to the trial Court.

The appellant and his co-accused were charge sheeted for an offence under Section 15 of the Act to which they pleaded not guilty and claimed trial.

In order to establish its case, the prosecution examined as many as seven witnesses and tendered the report of the Forensic Sciences

Laboratory in evidence. Mehtab Singh-witness was given up by the Public Prosecutor.

In their statements recorded under Section 313 of the Cr.P.C., the appellant and his co-accused denied the allegations against them and pleaded

innocence. In defence, Mehtab Singh was examined as DW2. The appellant and his co-accused also produced DW1-Hardev Singh and DW3-

Shamsher Singh Malik, Finger Prints & Handwriting Expert, Hisar and tendered documents exhibits D1 to D3.

After appraisal of the entire evidence on record, the trial Court convicted and sentenced the appellant and his co-accused in the manner indicated

hereinabove.

Aggrieved by his conviction and sentence, the appellant has filed the instant appeal.

Learned counsel for the appellant has contended that the independent witness, namely, Mehtab Singh, was not examined by the prosecution and this

casts a serious aspersion on its case. He further contended that the case was set up on the basis of a secret information, but there is no material on

record that after receipt of such information, the same was ever reduced into writing and the higher authorities were informed about it. Besides this, it

is in evidence that the information regarding raid was sent to Avtar Singh, D.S.P. by wireless after the investigating officer failed to contact Tehsildar

and Naib Tehsildar, but PW6-H.C. Niranjana Singh has stated that the D.S.P. had reached the spot after the search had been carried out. Learned

counsel for the appellant has submitted that only one sample from each of the bags was taken, whereas the requirement of the law is that at least two

samples should have been drawn. He further submitted that, according to the evidence on record, the ruqa was prepared on the spot on the basis of

which the F.I.R. was recorded subsequently in the police station after the receipt thereof. But, it has also come on record that the ruqa and the F.I.R.

are in the same hand implying thereby that the prosecution story is false and this fact only suggests that the recovery and the entire incident is stage-

managed. For this, he referred to the testimony of DW3-Shamsher Singh Malik, Finger Prints and Handwriting Expert, Hisar, who, after examination

of the writings of the ruqa and F.I.R., had opined that the same are in one hand. Lastly, learned counsel for the appellant argued that there is serious

discrepancy in the statements of the official witnesses because PW6-H.C. Niranjana Singh has stated that only twenty bags were recovered, whereas

PW3-Avtar Singh. D.S.P. and PW7-Charan Singh, A.S.I. have deposed that forty bags were recovered.

On the basis of the above contentions submissions/arguments, learned counsel for the appellant contended that the impugned judgment is liable to be

set aside. He placed reliance on the judgments of this Court in Chhabil Das Versus State of Haryana, 1998) R.C.R. (Criminal) 133 (P&H); Mangal

Singh Versus Punjab State, 1999(3) R.C.R. (Criminal) 373 (P&H); State of Punjab Versus Jagit Singh, 2002(4) R.C.R. (Criminal) 442 (P&H) Hawa

Singh Versus State of Haryana, 2005 (4)

R.C.R. (Criminal) 292 (P&H) and Gurcharan Singh Versus State of Punjab, 2005(4) R.C.R. (Criminal) 681 (P&H).

To the contrary, learned counsel for respondent-State contended that there is ample evidence on record to sustain the conviction and sentence of the

appellant and that the canter which was seized was having a concealed chamber, especially made for the purpose and, therefore, the appellant cannot

be considered to be innocent by any stretch of imagination.

I have thoughtfully considered the rival contentions and have perused the impugned judgment, as also the record.

There appears to be serious infirmity in the case of the prosecution. The whole case set up by it is that a secret information was received on the basis

of which the police acted and apprehended the canter in which the contraband was discovered. It is also the case of the prosecution that attempts

were made to associate a gazetted officer, but not finding the Tehsildar and Naib Tehsildar, a wireless message was flashed asking the D.S.P. to

come present at the spot. The secret information so received was required to be reduced into writing, but there is no evidence to suggest that such an

exercise was undertaken by the investigating officer, who had received the same. It is the further case of the prosecution that the investigating officer

had sent a wireless message to the D.S.P., but there is no material on record indicating this fact. That apart, it has been established by way of

evidence on record that the F.I.R. and the ruqa are in one hand. This seems highly improbable. If the ruqa was recorded by the A.S.I. on 7.10.2000

which purportedly he did after conducting the search, then it is not conceivable how the F.I.R. which was registered on the basis of such ruqa, was

recorded in the same hand. DW3, the handwriting expert, who was produced in defence, has categorically opined that he had compared the disputed

writing in ruqa, Exhibit P1 with the writing in F.I.R., Exhibit P2, and found that both the writings were identical and were written by one person, but not

written by the A.S.I., and M.Đ■.Đj. of Police Station. This casts a serious dent in the prosecution case. If the ruqa was not written by the A.S.I., and

the F.I.R. by the Đœ.Đ■.Đj., then both documents were written by some one else implying thereby that the prosecution story suffers from serious

blemish and falsifies the whole story of the receipt of secret information and the consequent search was merely fictional.

That apart, there are reasons which strengthen the suspicion of the Court as PW6-H.C. Niranjn Singh, who was a member of the raiding party, has

stated that there were twenty bags which were recovered, whereas the entire prosecution story is that there were forty bags which were seized. In

this cross-examination, PW6 has denied that he had ever stated before the investigating officer that forty bags which contained 10 Kgs. of poppy husk

each, were taken into possession. This witness, in his examination-in-chief was more categorical that there were twenty bags. He further stated that the

search had already been conducted before the D.S.P. had arrived at the spot. This is a serious contradiction as whole case of the prosecution that the

DS.P was present at the time of search. The prosecution has set up the case that the appellant and his co-accused had consented to their search

being conducted in the presence of a gazetted officer, but if the testimony of PW6-Đ■.Đj.Nranjan Singh is believed, then the search was over when the

DSP had come. There is, thus, violation of Section 50 of the Act.

In State of Punjab Versus Baldev Singh, 1993(3) R.C.R. (Crl.) 533 (S.C.), their Lordships of the Supreme Court observed in paragraphs 24 and 25 of

the judgment as under:-

24. To be searched before a Gazetted Officer or a Magistrate, if the suspect so requires, is an extremely valuable right which the legislature has

given to the concerned person having regard to the grave consequences that may entail the possession of illicit articles under the NDPS Act. It

appears to have been incorporated in the Act keeping in view the severity of the punishment. The rationale behind the provision is even otherwise

manifest. The search before a Gazetted Officer or a Magistrate would impart much more authenticity and creditworthiness to the search and seizure

proceeding. It would also verily strengthen the prosecution case. There is, thus, no justification for the empowered officer, who goes to search the

person, on prior information, to effect the search, of not informing the concerned person of the existence of his right to have his searched conducted

before a Gazetted Officer or a Magistrate, so as to enable him to avail of that right. It is, however, not necessary to give the information to the person

to be searched about his right in writing. It is sufficient if such information is communicated to the concerned person orally and as far as possible in the

presence of some independent and respectable persons witnessing the arrest and search. The prosecution must, however, at the trial, establish that the

empowered officer had conveyed the information to the concerned person of his right of being searched in the presence of the Magistrate or a

Gazetted Officer, at the time of the intended search. Courts have to be satisfied at the trial of the case about due compliance with the requirements

provided in Section 50. No presumption under Section 54 of the Act can be raised against an accused, unless the prosecution establishes it to the

satisfaction of the Court, that the requirements of section 50 were duly complied with.

25. The safeguard or protection to be searched in presence of a Gazetted Officer or a Magistrate has been incorporated in section 50 to ensure that

persons are only searched with a good cause and also with a view to maintain veracity of evidence derived from such search. We have already

noticed that severe punishments have been provided under the Act for mere possession of illicit Drugs and Narcotic Substances. Personal search,

more particularly for offences under the NDPS Act, are critical means of obtaining evidence of possession and it is, therefore, necessary that the

safeguards provided in Section 50 of the Act are observed scrupulously. The duty to inform the suspect of his right to be searched in presence of a

Gazetted Officer or a Magistrate is a necessary sequence for enabling the concerned person to exercise that right under Section 50 because after

Maneka Gandhi v. Union of India, 1978 (1) SCC 248, it is no longer permissible to contend that the right to personal liberty can be curtailed even

temporarily, by a procedure which is not "reasonable, (reasonable?) fair and just" and when a statute itself provides for a 'just procedure', it must be

honoured. Conducting a search under Section 50, without intimating to the suspect that he has a right to be searched before a Gazetted Officer or a

Magistrate, would be violative of the 'reasonable, fair and just procedure' and the safeguards contained in Section 50 would be rendered illusory, otiose

and meaningless. Procedure based on systematic and unconscionable violation of law by the officials responsible for the enforcement of law, cannot

be considered to be fair, just or reasonable procedure. We are not persuaded to agree that reading into Section 50, the existence of a duty on the part

of the empowered officer, to intimate to the suspect, about the existence of his right to be searched in presence of a Gazetted Officer or a Magistrate,

if he so requires, would place any premium on ignorance of law. The argument loses sight of a clear distinction between ignorance of the law and

ignorance of the right to a reasonable, fair and just procedure.Ã¢â€

There is yet another infirmity which is apparent from the perusal of the record, i.e., only one sample was taken from each of the recovered bags,

whereas the law mandates that at least two samples be taken out of the recovered contraband. There is also no explanation as to why independent

witness-Mehtab Singh was given up by the prosecution. He subsequently appeared as a witness for defence and denied the case against the appellant

and his co-accused.

When all the aforesaid factors are considered in their totality, then the prosecution case does not seem to be well founded.

For the reasons and discussions given hereinabove, this appeal is allowed and resultantly, the impugned judgment is set aside and the appellant

Virender Kumar is acquitted of the charge against him.

Counsel for the State has very fairly conceded that no Special Leave Petition was filed before the Hon'ble Supreme Court challenging the aforesaid

judgment dated 25.08.2009 vide which the co-accused of the appellant was acquitted and the same has attained finality.

Counsel for the appellant has argued that the case of the appellant is on identical footing and as per the version in the FIR, it was the co-accused

Virender Kumar, who was driving the canter whereas the appellant Suresh Kumar was sitting in the cabin and, therefore, the entire evidence

against the appellant as well as the co-accused Virender Kumar is same and this Court has already acquitted Virender Kumar and therefore, the

appellant is also entitled to be acquitted in view of the aforesaid judgment.

Counsel for the State has not disputed the aforesaid facts. Accordingly, in view of the above, considering the fact that the appellant has already

undergone 06 years, 02 months and 05 days of total sentence out of 10 years rigorous imprisonment awarded by the trial Court and his co-accused

Virender Kumar also stands acquitted vide judgment dated 25.08.2009 passed in Criminal Appeal No.2369-SB of 2003, the present appeal is allowed,

the judgment of conviction dated 05.12.2003 and order of sentence dated 09.12.2003 are set-aside.