
(2001) 02 P&H CK 0052

In the Punjab And Haryana At Chandigarh

Case No : Criminal Appeal No's. 93-DB and 126-DB of 1999

Amit Kumar

APPELLANT

Vs

State of Punjab
 Motta Singh Vs State of Punjab

RESPONDENT

Date of Decision : 07-02-2001

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 15, 42(2),
50, 55

Citation : (2001) 2 RCR(Criminal) 661

Hon'ble Judges : H.S. Bedi, J;A.S. Garg, J

Bench : Division Bench

Advocate : Mr. Virender Singh, Mr. Puneet Gupta and Mr. Dinesh Arora, for the Appellant; Mr. S.S. Randhawa, D.A.G., for the Respondent

Judgement

H.S. Bedi, J.—The prosecution story is as under :-

On July 10, 1994 a police party headed by PW-4 Inspector Gurmail Singh of CIA Staff, Samana comprising amongst others PW-7 SI Purshottam Singh reached village Murad-pur on the receipt of an information that some terrorists were hiding nearby. While in the village Inspector Gurmail Singh received further information that a truck bearing registration No. UHQ-554 LP loaded with poppy husk in which the four accused were travelling was coming from the side of Patiala towards village Muradpur and in case a nakabandi was held in village Danipur, the four persons alongwith the truck and the poppy husk could be apprehended. Finding that the information was reliable. Inspector Gurmait Singh sent a ruqa (Exh. PD) to the Police Station through Constable Jagjit Singh and on its basis, an F.I.R. was recorded by Sub Inspector Gurmail Singh, the SHO, Police Station Samana. A nakabandi was accordingly arranged and at about 1.30 A.M., the truck in question came from the side of village Khanpur and was stopped. The police party found that the truck was being driven by accused Kashmir Singh whereas the other three accused were sitting in it. Kashmir Singh and Balbur Singh accused, however, managed to escape under the cover of darkness

whereas accused Motta Singh and Amit Kumar, who were sitting on the front seat, were apprehended. Inspector Gurmail Singh thereafter sent a wireless-message on which PW6 DSP Virinder Pal Singh came to the spot. A public witness Labh Singh was also joined in the nakabandi. DSP Virinder Pal Singh gave his personal search to the accused and thereafter searched the truck and 50 bags of poppy husk, each containing about 38 kgs., were recovered. 250 gms. of poppy husk was taken from each of the bags and the rest of the poppy husk was sealed at the spot by the D.S.P. Certain other documents were also taken into possession. Inspector Gurmail Singh also sent a special report (Exh. PL) from the spot. The samples of poppy husk, seized from the truck, were duly sent to the Chemical Examiner, who opined that the incriminating article was poppy husk. Accused Kahsmir Singh and Balbir Singh were arrested on July 26, 1994 and on the completion of the investigation, the accused were charged u/s 15 of the Narcotic Drugs and Psy-chorropic Substances Act, 1985 (hereinafter referred to as the "Act") and as they pleaded not guilty, were brought to trial.

2. In support of its case, the prosecution examined, inter alia, PW-4 Inspector Gurmail Singh, the Investigating Officer who deposed with regard to the seizure; PW-6 DSP Virinder Pal Singh, who stated to the manner in which the recovery had been made; and PW-7 SI Parshottam Singh, who corroborated the version given by Inspector Gurmail Singh (PW-4). Labh Singh aforesaid was however, given up as having been won over. Certain affidavits/documents constituting the link evidence as also the report of the Chemical Examiner were also tendered in evidence.

3. The accused were then examined u/s 313 of the Code of Criminal Procedure and they pleaded innocence and gave their reasons for having been falsely implicated. They also produced two witnesses in defence.

4. The trial Court concluded that though Labh Singh had not been examined, as having been won over by the accused, yet even otherwise, as his name had not found mention in the F.I.R. and the search had been made at a very inconvenient time, his presence was difficult to believe and it appeared that he was a witness at the beck and call of the police. The Court, however, held that notwithstanding the fact that no independent witness had been examined there was no ground to disbelieve the rest of the evidence, though it was based on the testimony of official witnesses. The court also held that as the search had been conducted by DSP Virinder Pal Singh, who was a gazetted officer, it could not be said that there was any violation of the provisions of Sections 42 and 50 of the Act. The Court further found that as Kashmir Singh and Balbir Singh had escaped at the time of nakabandi, their identity had not been proved and having held as above (while acquitting Kashmir Singh and Balbir Singh) convicted accused Amit Kumar and Motta Singh for the offences for which they had been charged and sentenced them to undergo rigorous imprisonment for 12 years and to pay a fine of Rs. 1,00,000/- each and in default thereof to undergo further rigorous imprisonment for two years.

5. Crl. Appeal No. 93-DB of 1999 has been filed by accused Amit Kumar where as Crl. Appeal no. 126-DB of 1999 has been filed by accused Motta Singh. Both these appeals are being disposed of together.

6. Mr. Virinder Pal Singh and Mr. K.S. Dhaliwal, the learned Counsel appearing for accused Amit Kumar and Motta Singh, respectively, have, first and foremost, argued that as the nakabandi leading to the search and seizure had been conducted on prior information with the police, the provisions of Section 42(2) of the Act were applicable and as these provisions had not been followed, the accused were entitled to acquittal on that score. They have also urged that as there had been non-compliance with the provisions of Section 55 of the Act (as the case property had been deposited with the Moharrir Head Constable and not with the S.H.O.) as was required to be done under the said provisions, the accused had been prejudiced on that account and were entitled to an acquittal on this score as well.

7. As against this, Mr. S.S. Randhawa, Deputy Advocate General, Punjab has pointed out that there had been substantial compliance with the provisions of Section 42(2) of the Act as the information had been conveyed vide ruqa (Exh. PD) through Constable Jagjit Singh to SI Gurmail Singh, the S.H.O., Police Station, Samana and that a continuing special report (Exh. PL) had also been conveyed by PW-4 Inspector Gurmail Singh to the concerned officers on July 13, 1994. He has also urged that the case property could not be deposited with the SHO, as was required by the provisions of Section 55 of the Act, as the said officer had not been present in the police station at the relevant time.

8. We have considered the arguments advanced by the learned Counsel for the parties and have gone through the record very carefully.

9. It is the prosecution story that the nakabandi had been held on prior information with the police and that the information had been conveyed by a ruqa to Police Station, Samana at 12.05 a.m. on July 10, 1994 and the formal F.I.R. recorded at 1.00 a.m. The copy of the special report was also received by the Illaqa Magistrate at 9.00 a.m. on that day. In the steps taken by the Police, appended to the F.I.R., it has specifically been mentioned that a copy of the F.I.R. would be sent to the concerned officers. There is, however, no evidence to indicate as to whether PW-4 Inspector Gurmail Singh and for that matter any other police official had sent information to his immediate superior officers as was required u/s 42(2) of the Act.

10. Mr. Randhawa's argument that the information had in fact been conveyed to Sub Inspector Gurmail Singh, the S.H.O., Police Station, Samana, who was a superior police officer, is obviously incorrect as the S.H.O. was the officer-in-charge of the police station but by no means a superior police officer to Inspector Gurmail Singh, who had recorded the ruqa.

11. In State of Punjab v. Balbir Singh 1994(1) RCR 737 it was observed as under :

"Under Section 42(2) such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same affects the prosecution case. To that extent, it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case."

12. This matter was re-examined by the Hon"ble Supreme Court in Abdul Rashtid Ibrahim Mansuri v. State of Gujarat 2000(1) RCR 611 and it was observed as under :-

"If the officer has reason to believe from personal knowledge or prior information received from any person that any Narcotic Drug and Psychotropic Substance (in respect of which an offence has been committed) is kept or concealed in any building, conveyance or enclosed place, it is imperative that the officer should take it down in writing and he shall forthwith send a copy of thereof to his immediate official superior. The action of the officer who claims to have exercised on the strength of such unrecorded information would become suspect, though the trial may not vitiate on that score alone. Nonetheless the resultant position would be one of causing prejudice to the accused."

13. A comparative reading of the two passages quoted above would indicate that in Balbir Singh's case (supra) it was clearly held that a total non-compliance with the provisions of Section 42(2) of the Act would affect the prosecution case and vitiate the trial as this provision was mandatory in nature. However, in Abdul Rashid's case (supra) it was noted that the trial would not be vitiated on this score alone but the presumption would be raised that the accused had suffered prejudice. Be that as it may examining the present case in the light of the aforesaid provisions, it must be presumed that the non-compliance of the provisions of Section 42(2) of the Act would have caused serious prejudice to the accused as a strong check on the veracity of the prosecution case had been avoided by the police. We are of the opinion that this presumption could be rebutted by the prosecution on the production of credible evidence, but in the absence of any independent evidence, the presumption remains unrebutted.

14. Viewed in this light, the fact that there had been non-compliance with the provisions of Section 55 of the Act also becomes significant. Section 55 of the Act reads as under :-

"Section 55. Police to take charge of articles seized and delivered - An officer-in-charge of a Police Station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that Police Station and which may be delivered to him, and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the Police Station."

15. It has undoubtedly been held that this provision was directory in nature but as the other evidence against the accused is extremely shaky, the omission to comply with this provision renders the prosecution story even more suspect. In the case before us today, it is the admitted position that the seized poppy husk had been deposited with the Mo-harrir Head Constable and not with the officer-in-charge of the police station. We do not accept the explanation given by the Police that this had been done as the SHO had not been present in the police station as but for this bald statement, there is no other evidence to this affection record. We are, therefore, of the opinion that the prosecution case suffers from glaring infirmities.

16. We, therefore, allow the appeals and order the acquittal of the two accused appellants.

17. Appeals allowed.