
(2016) 09 MP CK 0021

In the Madhya Pradesh High Court

Case No : Criminal Appellant No.16 of 2009.

**Ghanshyam S/o Laxminarayan Patidar and another - Appellants @HASH
State of M.P.**

Date of Decision : 20-09-2016

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 18(b),
Section 50, Section 52A, Section 55, Section 8

Citation : (2016) CriLJ 4937 : (2017) 1 RCRCriminal 779

Hon'ble Judges : Shri Ved Prakash Sharma, J.

Bench : Single Bench

**Advocate : Shri Vikas Jain, learned counsel, for the Appellants; Shri C.S.
Ujjainiya, learned Public Prosecutor, for the Respondent**

Final Decision : Disposed Off

Judgement

Shri Ved Prakash Sharma, J. - This appeal under Section 374 of the Code of Criminal Procedure, 1973, (for short "the Code"), had been preferred against the judgment and order dated 15/12/2008 rendered by Special Judge (Narcotics), Mandsaur in Special Case No. 62/2000, whereby and where under the appellants have been held guilty for the offence under Section 8/18(b) of the Narcotics and Psychotropic Substances, Act, 1985 (for short "the Act") and each had been convicted to undergo 10 years RI and to pay a fine of Rs.1 Lac with default clause.

2. The prosecution case, briefly stated, is that on 09/05/2000, M.P. Singh Parihar (P.W. 5), the then ASI, Police Post Datauda, Police Station Bhavgarh, District Mandsaur, received a secret information that two persons namely - Ghanshyam Patidar (Appellant No.1) and Poonam Chand (Appellant No.2) are going from village Pareliya Lalmuha to village Riccha Lalmuha on a Motorcycle bearing registration No. MP-14-F-4801 to deliver the opium to some person. The information was recorded in the daily diary and a memorandum (Ex.P/6) was prepared in this regard. M.P. Singh Parihar (P.W.5), in view of the paucity of time, without obtaining search warrant, decided to lay a trap to caught hold the named

persons. Memorandum Ex.P/7 was prepared in this regard and the copy of the both memorandums was sent to Additional S.P., Mandsaur. Thereafter, Shri Parihar (P.W.5) along with other Police Officials and panch witnesses namely - Rajendra Singh (P.W.8) and Pawan Singh (P.W.7), arranged a trap.

3. Allegedly, after about half an hour, Police Party found a motorcycle approaching towards them. The same was intercepted by the police party. Ghashyam Patidar (Appellant No.1) was riding the motorcycle while Poonam Chand (Appellant No.2) was sitting as pillion rider. M.P. Singh Parihar (P.W.5) informed both of them, vide Ex.P/9 and P/10 in writing, about their right to be searched before Magistrate or Gazetted Officer and on their willingness to be searched by the Police party, search was carried out. Nothing offending was found in the personal search, however, on search of the motorcycle, 6.150 Kgs. Opium, was found in a polythene bag lying inside the dikki of the motorcycle, M.P. Singh Parihar (P.W.5) seized the same on the spot in presence of panch witnesses after complying with necessary formalities. Two samples, each weighing 30 gm. were drawn from the substance, sealed and marked as article "A-1" and "A-2". Remaining contraband substance was also separately sealed. The motorcycle as well as its registration papers were also seized. The appellants were arrested. Same day a report (Ex.P/5) regarding their arrest and seizure was sent to Additional S.P., Mandsaur. Next day i.e. On 10/05/2000 one sample of the contraband article was sent for Forensic Laboratory, Indore, vide (Ex.P/28), the chemical Examiner, vide (Ex.P/29), opined that the substance was coagulated juice of opium poppy having 3.56% morphin.

4. After usual investigation, appellants were charge sheeted for the offence under Section 8/18(b) of "the Act". The appellants abjured the guilt and claim to be tried. In their examination under Section 313 of "the Code", the appellants pleaded total innocence and claimed false implication.

5. The learned trial Court Judge, on appreciation of oral and documentary evidence, vide the impugned judgment, convicted and sentenced the appellants as stated here-in-above.

6. The conviction and sentence had been challenged on the ground that the seized contraband was not produced before the Court, therefore, the recovery of alleged opium becomes seriously doubtful. It is further contended by the learned counsel for the appellants that sections 42, 50, 52, 52-A and 57 of "the Act" were not complied with in letter and spirit. It is also submitted that the independent witnesses had not supported the prosecution case, therefore, learned Special Judge has seriously erred in recording conviction on the basis of evidence of Police Officers, who are interested witnesses. Thus, it is contended that conviction and sentence awarded against the appellants, is contrary to law and evidence hence, liable to be set-aside.

7. Per contra, learned Counsel for the respondent/State has submitted that in the instant case Opium was recovered from the dicky of the Motorcycle belonging to

appellant Ghanshyam, and that Poonam Chand was sitting with him on the motor cycle as pillion rider, therefore, Section 50 of "the Act" was not attracted, which is applicable in the cases of personal search.

8. It is further submitted by the learned Counsel for the State that the samples of alleged contraband were duly drawn and sealed on the spot. The same were sent to the Forensic Laboratory and that as per report the Chemical Examiner, the substance recovered from the dicky of the Motorcycle was found to be coagulated juice of Opium poppy. It is further submitted that Section 42, 52 and 57 of "the Act" were scrupulously complied with inasmuch as information with regard to the receipt of secret information was recorded and sent to the Superior Official before laying the trap and that after seizure and arrest again a detailed report was sent to the Additional S.P. It is also submitted that nothing is there to indicate that the concerned Police Officials had any enmity or animosity with the appellants or were interested in falsely implicating, them therefore, the learned Trial Court has rightly relied upon the testimony of Police Officials and that no interference is called for in the impugned judgment.

9. Heard the learned Counsel for the parties and perused the record.

10. In the backdrop of the rival submissions made by the learned Counsel for the parties, following points need to be considered in the instant case:

(i) Whether the learned Trial Judge has erred in relying upon the testimony of Police Officials in absence of corroboration from independent source?

(ii) Whether Section 42, 50, 52, 52-A, 55 and 57 of "the Act" were duly complied by the Police?

Testimony of Police Officials:

11. As regards evidential value of the testimony of police officer(s), though it had been contended by the learned counsel for the appellants that such testimony in absence of corroboration from an independent source cannot be relied upon to record conviction, however, the settled position of law is that conviction can be based on the testimony of a police officer, provided the court is of opinion that the witness is truthful and trustworthy. In this connection the law laid down by Hon^{ble} the apex Court in *Lopchand Naruji Jat & Anr. v. State of Gujarat*, (2004) 7 SCC 566, *Abdul Majid Abdul Hak Ansari v. State of Gujarat*, (2003) 10 SCC 198 and *P.P. Beeran v. State of Kerala*, (2001) 9 SCC 57 can usefully be referred.

12. The evidence of M.P. Singh Parihar (P.W.5) and other police witnesses needs to be examined in the aforesaid legal background. The defence, in a searching cross-examination, has not been able to elicit anything material so as to discredit M.P. Singh Parihar (P.W.5). In para 14 he has admitted that he is under suspension however, this fact by itself, in absence of a serious anomaly or contradiction cannot be a ground to disbelieve him. M.P. Singh Parihar(P.W.5) in his cross-examination has denied the suggestion that motorcycle in question was already lying at the spot (para-14). In fact on a query made from RTO Mandsaur,

vide Ex.P/28 it was found that Motorcycle bearing Registration No. MP-14 F-4801 (Hero Honda) was registered in the name of Ghanshyam Patidar s/o Laxminarayan i.e. appellant No.1. Appellant Ghanshyam, has not stated in his examination under Section 313 of the Code that he had left his motorcycle on the spot. No evidence in support of the plea that motorcycle was already lying at the spot was adduced therefore, the version put forth by Shri M.P. Singh Parihar (P.W.5) that he intercepted the motorcycle being driven by appellant Ghanshyam, on which Pooran Chand was sitting as pillion rider, being free from any serious anomaly, omission or contradiction is found to be trustworthy.

13. It had been strongly contended by learned Counsel for the appellants that panch witnesses Pawan Singh (P.W.7) and Rajendra Singh (P.W.8) have not supported the prosecution version hence, the prosecution case becomes suspicious. In this connection it is noticeable that Pawan Singh (P.W.7) and Rajendra Singh (P.W.8) have not denied their signatures on various document i.e. Ex.P/6 to Ex.P/11. They have not come out with a satisfactory explanation as to why they had put their signatures on a number of documents. It is not their case that they were forced to put their signatures on these papers. Had it been the case they could have complained to the Superior Police Officers but in absence of any such complaint, a bare denial by these witnesses, that nothing happened before them, is not quite trustworthy. It clearly transpires from the conduct of these witnesses that they are not interested in revealing true facts. Both these witnesses have been declared hostile by the prosecution and have been contradicted by their police statement recorded under Section 161 of "the Code" In such premises, simply because panch witnesses have not supported the prosecution case, it cannot be said that the police has concocted various documents and framed a false case to persecute the appellants.

14. Though appellant Ghanshyam, in his cross-examination under Section 313 of "the Code" has taken a plea that his debtors in collusion with police had falsely implicated him. However, no specific suggestion in this regard had been made to M.P. Singh Parihar (P.W.5). This witness in para 11 has admitted that in search of the person of Ghanshyam, Rs.5,500/- were found with Ghanshyam. However, it cannot be said that this money was not accounted for by him because there is specific mention in Ex.P/22 - the arrest memo of Ghanshyam, that cash Rs.5,500/- was found on his person. Had there been any intention on the part of M.P. Singh Parihar (P.W.5) to commit breach of trust with regard to the aforesaid amount, he should not have made an entry in this regard in the arrest memo of Ghanshyam. Thus, the plea of false implication on account of enmity does not carry weight and has rightly been rejected by the learned Trial Court.

Section 42, 50, 52, 52-A, 55 And 57 of "the Act":

15. Section 42 of "the Act" requires that if an authorised Officer has reason to believe from personal knowledge or information received from some source that a person is dealing in narcotic drug or a psychotropic substance, such information should be taken down in writing except in a case of urgency. Section

42(2) of "the Act" further requires that the information so recorded should be forthwith sent to the Superior Officer. The Apex Court in *Karnail Singh v. State of Haryana* (2009) 8 SCC 539 has held that provisions of Section 42(2) of "the Act" are mandatory. Thus, the prosecution is required to prove compliance of Section 42 of "the Act" in letter and spirit. In the instant case, M.P. Singh Parihar (P.W.5) has clearly deposed that the information received by him from secret source was recorded vide Ex.P/6 and as there was paucity of time and that he reasonably felt that if efforts are made to obtain search warrant, the culprits can escape, therefore, memorandum Ex.P/7 was prepared in this behalf and copies of memo Ex. P/6 and P/7 were forthwith sent per special messenger - Constable Ramesh Giri (P.W.3) to Additional S.P. Mandsaur. Ramesh Giri (P.W.3) has corroborated M.P. Singh Parihar (P.W.5) on this point. Further, the evidence of these witnesses in this behalf stands corroborated with the testimony of Shambhu Singh (P.W.2)- the then Reader of Additional S.P. Mandsaur, who has deposed that on 9.5.2000 Constable Ramesh Giri (P.W.3) had come with copy of two memos which were handed over to him and that he endorsed a receipt on Ex.P/3 and P/4 in this behalf. There is nothing to disbelieve the aforesaid testimony of M.P. Singh Parihar (P.W.5), Ramesh Giri (P.W.3) and Shambhu Singh (P.W.2), which further stands corroborated by relevant memorandum Ex.P/3 and P/4 which bear receipt by Reader of SDOP. The defence has not been able to demonstrate that the aforesaid evidence is concocted or suffers from serious anomaly, hence, the same deserves to be accepted. Thus, in the instant case, the compliance of Section 42 of "the Act" is found well proved and, therefore, the finding recorded by the learned Trial Court in this regard cannot be said to be erroneous.

16. Referring to - *Noor Aga v. State of Punjab and another*, (2010) 3 SCC (Cri) 748, *Laxminarayan v. State of M.P.*, 2009 (2) J.L.J. 148, *Ashok alias Dangra Jaiswal v. State of M.P.*, (2011) (2) EFR 1, *Jitendra and another v. State of M.P.*, 2004 SCC (Cri) 2028, *Kanwarlal v. State of M.P.*, through Distt. Magistrate, Mandsaur, 2009 Cr.L.R. (M.P.) 27, *Kailash v. State of M.P.*, through ? P.S. Nahargarh, (2011) (1) EFR 214) and *Dinesh & Jogaram v. State of M.P.*, 2010 Cr.L.R. 9 (M.P.) 711, it had been argued by the learned counsel for the appellant that contraband ? opium, said to have been seized from appellants, was not produced as an article before the Court, therefore, it cannot be said that Section 52-A of "the Act" was duly complied with, hence, the appellant deserves to be acquitted.

17. Per contra, learned counsel for the State has invited attention of this Court to statement of M.P. Singh Parihar (P.W.5), who has deposed that the contraband was disposed of before Judicial Magistrate First Class on 30/06/2001. Further attention is drawn to para 10 of the deposition of M.P. Singh Parihar (P.W.5) wherein he has stated that both the packets of samples were produced before the Court and duly marked as "Article -A" and "Article -B". There is nothing to disbelieve the testimony of M.P. Singh Parihar (P.W.5) on this point which does not suffer from any material contradictions or anomaly. It is not the case of the prosecution that seized substance was changed with some other substance.

18. The cases relied upon by the learned counsel for the appellant are very much distinguishable on facts. In Noor Aga's case, AIR 2009 SC (Supp) 582 (supra), even the samples of contraband material, were not produced before the Court (see: para ? 96). In Laxminarayan's case, (supra), also the samples of the seized contraband were not produced before the Court (see: para 23). In Ashok's case, AIR 2011 SC 1335 (supra), no explanation was offered for non-production of the seized substance (see: para 12) However, in the instant case, M.P. Singh Parihar (P.W.5) has clearly deposed that contraband was duly disposed of in presence of Judicial Magistrate First Class Shri Chhaparia. In Jitendra's case, AIR 2003 SC 4236 (supra), the Investigating Officer was not even examined before the Court, thus, creating a serious dent in the prosecution case (para 6), which is not the position in the instant case. Thus, in the facts and circumstances of the case, it cannot be said that Section 52-A of "the Act" was not duly complied with.

19. As regards compliance of Section 50 of "the Act", though contraband was recovered from the Dicky of the motorcycle, and not from the person of the appellants, therefore, strictly speaking Section 50 of "the Act" was not applicable, still it is found from the record that notices Ex.P/9 and Ex.P/10 were given to appellants so as to apprise them about their right to be searched before the Gazetted Officer or nearest available Magistrate and further that they consented for the search being carried out by M.P. Singh Parihar (P.W.5). There is no reason to disbelieve the testimony of M.P. Singh Parihar (P.W.5) on this point which stands corroborated by contemporaneous documents (Ex.P/9 to Ex.P/12). Hence, it cannot be said that Section 50 of "the Act" was not duly complied with.

20. As regards compliance of Section 55 of "the Act", it is found from the evidence available on record that the packets of the samples drawn from the seized contraband and the packet of remaining substance were duly sealed, first by personal seal of M.P. Singh Parihar (P.W.5) and thereafter at Police station by A.S.I. Om Prakash (P.W.6) with the seal of Police Station and were kept in the Malkhana of Police Station, as per Malkhana Register entry (Ex.P/1C). Further, very next day i.e on 10/05/2000, the samples, vide memo Ex.P/28, were sent per messenger to FSL, Indore, where, as per FSL report (Ex.P/29), the seal was found intact and the contraband tested positive for opium, having 3.56% morphine .Thus, it cannot be said that Section 55 of "the Act" was not duly complied with.

21. As regards plea as to non-compliance of section 57 of "the Act", from the testimony of M.P. Singh Parihar (P.W.5) it is found that detailed report (Ex.P/5) with regard to the seizure and arrest was prepared and was sent on the same day to Additional SP, which had been corroborated by Shambhu Singh (P.W.2) - the reader of the Additional SP, Mandsaur, who has deposed in para 2 that copy of Ex.P/5 was received by him on 09/05/2000. Thus, the compliance of the Section 57 of "the Act" is dully proved, as held by the learned trial Court.

22. From the information provided by the RTO, District ? Mandsaur, vide Ex P/28

(dated 26 /05/2000), the motorcycle in question was found to be registered in the name of appellant No.1 ? Ghanshyam. The defence raised by appellant Ghanshyam that his motorcycle was lying in an open place, has not been found plausible and acceptable, therefore, he being the owner of motorcycle, it logically flows that he was in conscious possession of the contraband.

23. However, as regards appellant Puranchand, who was a pillion rider, it cannot be said beyond reasonable doubt that he was also in conscious possession of the alleged contraband because, firstly, he is not the owner of the motorcycle, secondly ? there is no specific evidence to show that he had the knowledge of the contraband being kept in the motorcycle. It is further not clear as to from which place he took lift on the motorcycle. The learned trial Court has not considered these aspects, therefore, the finding regarding culpability of Puranchand, in absence of proof beyond reasonable doubt, with regard to his conscious possession, cannot be sustained and benefit of doubt must be given to him.

24. Accordingly, as regards appellant Ghanshyam, the appeal having no merits, deserves to be and is accordingly, hereby dismissed. As regards Puranchand, the appeal is allowed; the conviction and sentence recorded against him, is hereby set aside and he is acquitted of the charge for offence under Section 8/18(b) of "the Act". If not required in any other case, he should be forthwith set at liberty.