
(2010) 04 P&H CK 0436
In the Punjab And Haryana At Chandigarh

Harbhajan Singh and Others

APPELLANT

Vs

The State of Punjab

RESPONDENT

Date of Decision : 21-04-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 173, 313

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21, 29, 42, 50

Citation : (2010) 04 P&H CK 0436

Hon'ble Judges : Jaswant Singh, J; Hemant Gupta, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Hemant Gupta, J.—The present appeal is by Harbhajan Singh, Lal Singh @ Lali and Balbir Singh against the judgment of conviction dated 27.9.2007 and order of sentence dated 01.10.2007 passed by the Special Court, Amritsar, whereby all the appellants were convicted for an offence punishable u/s 21 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter called as "the Act") and sentenced for varying terms i.e. appellants Harbhajan Singh and Balbir Singh are sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs. 1 lac each whereas, appellant Lal Singh is sentenced to undergo rigorous imprisonment for 12 years and to pay a fine of Rs. 1 lac. In the event of default of payment of fine, the defaulters were to further undergo rigorous imprisonment for a period of 1 ? years.

2. The prosecution case was set in motion on the basis of secret information received by Inspector Sangram Singh, Incharge CIA Staff, Amritsar on 8.3.2005 at about 6.15 AM, when he alongwith other police officials was present at Khandwala Chowk, Amritsar. The information was that Dilbagh Singh resident of Khalsa, Gurnam Singh son of Jagtar Singh resident of Kakka Kandiala and his brother Surjit Singh @ Lali and Jiwan Lata resident of Urban Estate, Jalandhar are dealing in brown sugar and heroin in large consignment from Pakistan and

Afganistan and sell the same at higher rates to the wholesale customers in big cities. These persons are wondering in Chheharta area in a car for selling brown sugar or heroin to the customers namely Balkar Singh resident of New Tehsilpura, Amritsar, Harbhajan Singh and Lal Singh @ Lali residents of Kartar Nagar, Avtar Singh resident of Mohali and Balbir Singh resident of Dalip Avenue, Amritsar. It is further informed that if raided huge quantity of heroin or brown sugar can be recovered. On receipt of such information, ruqa Ex.PC was sent to the Police Station for registration of a case and for issuance of special report to the higher officers. On the basis of such statement, FIR bearing No.53 dated 8.3.2005 (Ex.PC/1) was lodged at 6.30 AM. Thereafter, Inspector Sangram Singh, Incharge CIA Staff, Amritsar, alongwith co-officials proceeded towards Chheharata area in connection with search of above named persons. After some time, Shri Ashwani Kapoor, DSP (D), Amritsar arrived at Ghanupur Kale Ke, where the naka was held by the police party. The DSP (D) constituted two separate police parties for holding nakabandi i.e. one police party headed by Inspector Sangram Singh, CIA Staff, Amritsar and another by SI Sohan Singh. When Inspector Sangram Singh alongwith other police officials was proceeding towards Chheharta bye-pass from Baba Deep Singh Colony on the link road, he found two cars parked near an orchard. One car was facing Baba Deep Singh colony and the other car was facing Chheharta bye-pass. One lady and three persons were standing near the car, which was facing Chheharta bye-pass. They were handing over some packets to the occupants of other car. On reaching near the cars, three persons namely Gurnam Singh, Dilbagh Singh and Surjit Singh and a lady namely Jiwan Lata managed to escape in the car, which was facing Chheharta bye-pass, whereas the other car facing Baba Deep Singh colony was rounded up. One person, who came out from the driver's door tried to run away, but he was over powered. He disclosed his identity as Balkar Singh. Balkar Singh was informed that it is suspected that he is carrying some narcotics substance and his search is to be conducted and whether he wants to get himself searched in the presence of a Gazetted Officer or a Magistrate. Balkar Singh opted to be searched in the presence of a Gazetted Officer. Similarly Lal Singh, Harbhajan Singh, Balbir Singh and Avtar Singh were given options to be searched in the presence of a Gazetted Officer or a Magistrate. On the basis of their options to be searched by a Gazetted Officer, non-consent memo Ex.PD was prepared. Ashwani Kapoor, DSP (D), Amritsar arrived at the spot on being requisitioned. Two public witnesses namely Chanan Singh and Avtar Singh were also joined in the police party. Ashwani Kapoor, DSP (D), Amritsar informed Balkar Singh, Harbhajan Singh, Lal Singh, Balbir Singh and Avar Singh that he is a Gazetted Officer of the police and it is suspected that they are carrying some narcotic substance. He informed the above-named persons about their legal right to be searched before a Gazetted Officer or a Magistrate. They reposed their confidence upon him (Ashwani Kapoor) and consent memos Exs. PA, PA/1, PA/2, PA/3 and PA/4 were prepared, which were thumb marked and signed by the respective accused, witnesses and the DSP himself. The search of the accused was conducted by Inspector Sangram Singh, in the presence and in the supervision of Shri Ashwani

Kapoor, DSP (D), Amritsar. Balkar Singh was holding a cloth packet in a polythene packet in his right hand. On opening, it was found to be containing heroin. Two samples of 10 grams each were drawn and on weighing the remaining heroin, it turned out to be 980 grams. Separate parcels of both the samples and the residue bulk were prepared and sealed with seals bearing impressions 'SS' belonging to Inspector Sangram Singh and 'AK' belonging to Ashwani Kapoor, DSP (D), Amritsar. All the incriminating articles were taken into possession vide recovery memo Ex.PB. Similar search operations were carried out in respect of Harbhajan Singh, Lal Singh, Balbir Singh and Avtar Singh. From Harbhajan Singh two packets each containing 1 kg. heroin; from Lal Singh three packets each containing 1 kg. heroin; from Balbir Singh two packets one of cloth and one of polythene containing 1 kg. 450 grams heroin; and from Avtar Singh one packet containing 1 kg. heroin were recovered. Rough site plan Ex.PE was prepared by Inspector Sangram Singh. The seals bearing impressions 'SS' and 'AK' after use were retained by Inspector Sangram Singh and Ashwani Kapoor, DSP (D), Amritsar respectively. All the five persons were arrested vide separate arrest memos Exs.PF/1 to PF/5. The Zen car bearing registration No.PB-02-8095 was also taken into possession vide recovery memo Ex.PH.

3. On completion of proceedings at the spot, above-named five accused alongwith respective case property were produced before SI Harjinder Singh, SHO P.S. Chheharta. After verifying the facts, he put his counter seal bearing impression 'HS' on all the parcels and retained the case property in the double lock.

4. Nine samples were sent for chemical examination by SI Harjinder Singh, SHO P.S. Chheharta through Constable Kulwant Rai on 17.3.2005. As per report Ex.PL dated 31.3.2005, the Forensic Science Laboratory received nine parcels each sealed with three seals one each of 'SS', 'AK' and 'HS'. It has been found that the contents of the parcels have been identified as Diacetylmorphine. The percentage of Diacetylmorphine was found to be 70% in parcel Nos. 1, 4, 5, 6 & 9; 30% in parcel Nos.2 and 7; 20% in parcel No. 8; and 18% in parcel No. 3.

5. After completion of investigation, report u/s 173 of the Cr.P.C. was finalized and the appellants alongwith Balkar Singh, Avtar Singh, Dilbagh Singh and Gurnam Singh were made to stand trial for an offence punishable under the Act. The learned Special Judge charged the appellants for the offence u/s 21 and 29 of the Act.

6. After going through the evidence on record, the learned trial Court granted benefit of doubt to Dilbagh Singh and Gurnam Singh, inter alia, for the reason that no recovery of contraband was affected from them. Balkar Singh and Avtar Singh were convicted and sentenced for a period of 2 years and to pay a fine of Rs. 20,000/- for the reason that the recovery of heroin effected from them was of a non-commercial category, keeping in view extent of narcotics in the samples recovered. However, the appellants were convicted and sentenced for possessing the commercial quantity of narcotics in the manner as mentioned above.

Aggrieved against the judgment of conviction and order of sentence, the appellants are in appeal before this Court.

7. Learned Counsel for the appellants has vehemently argued that the entire prosecution story is improbable, full of infirmities and contradictions. Therefore, the same cannot be made basis of sustaining conviction of the present appellants. It is argued that two independent witnesses namely Chanan Singh and Avtar Singh were associated in the process of search and recovery, but such persons have not been examined as witnesses. It is further argued that the seals used for sealing the contraband and samples by Inspector Sangram Singh and Ashwani Kapoor, DSP (D), Amritsar, have not been handed over to the independent witnesses. Therefore, it cannot be said that the seals have been properly applied and that the contents of such parcels were not tampered or substituted remain unsubstantiated. Ashwani Kapoor, DSP (D), Amritsar cannot be treated to be a Gazetted Officer competent to effect search on the persons of the appellants, as he was the person directly engaged in the process of recovery. Such DSP was not in the uniform at the time of search of the appellants and, therefore, the appellants who have refused search at the instance of police officials could not be searched by a higher police official, who is part of the search operation itself. Therefore, there is violation of the provisions of Section 50 of the Act in its letter & spirit and, thus, the prosecution has failed to prove the charges against the appellants. Reliance is placed upon

8. Ajay Malik and Ors. v. State of U.T. Chandigarh 2009 (3) R.C.R. (Criminal) 649, a single Bench judgment of this Court.

9. It is further argued that the samples were sent to the Forensic Science Laboratory only on 17.3.2005 i.e. after 9 days. Such delay in sending the samples is fatal to the prosecution case, as during the interregnum period, the possibility of tampering with the samples cannot be ruled out. Therefore, the entire prosecution case is doubtful.

10. It is further argued that PW-4 SI Harjinder Singh, the then SHO P.S. Chheharta has deposed on oath that he has received only 9 samples, though the prosecution case is of deposit of 18 samples. Since the SHO has contradicted himself in the matter of number of samples preserved for the purpose of test, such testimony renders the prosecution case doubtful. It is further argued that the statements of SI Harjinder Singh and Constable Kulwant Rai regarding handing over of sample parcels for the purposes of test, were recorded on 19.3.2005 i.e. after the samples were handed over. The recording of statements subsequent to sending of samples, renders the entire prosecution case doubtful.

11. It is further argued that in the statements of the appellants recorded u/s 313 Cr.P.C., the prosecution case has not been put up in its entirety. Question No. 1, in fact, is against the prosecution case itself, as the appellants are said to be the purchasers from Gurnam Singh and others, whereas question No. 1 has clubbed the present appellants with the role attributed to Gurnam Singh i.e. absconding

from the place after handing over the narcotics to the other appellants. It is also argued that in the statements recorded u/s 313 Cr.P.C., the appellants were not asked any question about the conscious possession of the narcotics. It is also argued that the appellants have also been charged for the offences punishable under Sections 21 and 29 of the Act i.e. for possessing a manufactured drug or preparation and; for abetment or criminal conspiracy for committing an offence under Chapter IV of the Act respectively, whereas the prosecution has failed to prove its charges against the appellants for the aforesaid offences.

12. The prosecution case is primarily based upon statements of PW-1 Ashwani Kapoor, DSP (D), Amritsar and PW-2 Inspector Sangram Singh, Incharge CIA Staff, Amritsar. PW-3 Constable Kulwant Rai is the witness, who has delivered the sample parcels, obtained from SI Harjinder Singh, SHO, P.S. Chheharta to the Forensic Science Laboratory at Chandigarh. PW-4 is SI Harjinder Singh, the then SHO, P.S.Chheharta, before whom Inspector Sangram Singh produced the accused alongwith 9 bulk parcels and 18 sample parcels sealed with impressions ?SS? and ?AK?. After receipt of such parcels, the SHO has put his seal bearing impression ?HS? on all parcels. Such parcels alongwith the accused were produced before the Duty Magistrate. The case property was handed back to him to produce the same before the Illaqa Magistrate. On return to the Police Station, the case property was kept in a safe custody in double lock. On 10.3.2005, the case property was produced before the Illaqa Magistrate. The bulk parcels were deposited in the judicial malkhana, whereas the sample parcels were retained by him in the double lock. On 17.3.2005, 9 sample parcels were sent to the Forensic Science Laboratory, Chandigarh through Constable Kulwant Rai. He has deposed that the case property was not tampered with during the period the same remained in his custody. In his cross-examination, he denied the knowledge of any news item published on 8.3.2005 and the fact that the recovery was not affected on 7.3.2005. He has admitted that his statement was recorded u/s 161 CPC only on 19.3.2005.

13. The primary argument of the learned Counsel for the appellants is that the Gazetted Officer namely Ashwani Kapoor, DSP (D), Amritsar, was a part of the police party engaged in search and seizure operations, therefore, recovery in the presence of such officer, who is not in uniform is to comply with the statutory provisions, but the spirit of provisions that the recovery process should be carried out by independent Gazetted Officer or the Magistrate has not been complied with. Section 50 of the Act contemplates that the Officers before whom the search of any person is carried out are the Gazetted Officer of any of the Department, mentioned in Section 42 or the Magistrate. The departments in relation to the State Government u/s 42 of the Act are departments of revenue, drugs control, excise, police or any other department empowered in this behalf by general or special order of the State Government. Sub-section 1 of Section 50 of the Act contemplates that Gazetted Officer of a Department mentioned in Section 42 i.e. a Gazetted officer of the State Government of the revenue, drugs control, excise, police or any other department empowered by general or special

order, are competent to carry out the search and seizure operations. Therefore, mere fact that Shri Ashwani Kapoor happens to be a Gazetted Officer of the Police Department by itself is not a ground to infer violation of Section 50 of the Act.

14. It is vehemently argued that Shri Ashwani Kapoor, DSP (D), Amritsar, was the senior officer present at the spot coordinating and giving directions in the matter of search and seizure operations, as it is he who constituted two separate police parties, one to be headed by Inspector Sangram Singh, the Investigating Officer in the present case and another by SI Sohan Singh. Therefore, Ashwani Kapoor was an officer not only present at the spot, but was coordinating in leading the search operations, thus, not an independent witness, as is intended u/s 50 of the Act.

15. We do not find any merit in the said argument. The police party has organized nakabandi at Khandwala Chowk, Amritsar. Secret information was received by the police officials engaged in nakabandi that certain persons are dealing with the trade of contraband. If, during the nakabandi operations, a senior Gazetted Officer is present at the spot, does not make him as unreliable witness. Section 50 of the Act does not say that the Gazetted Officer has to be called from another department. A Gazetted Officer from the Police Department would not be unreliable and untrustworthy witness only for the reason that he is an officer of the Police Department. The Court may examine the statement of such witness with more care and caution. The testimony of Ashwani Kapoor read with caution does not lead us to believe that such witness is not reliable. Therefore, mere fact that Shri Ashwani Kapoor was leading a police party contingent for the purposes of nakabandi, does not disentitle him to be associated in search and seizure operations.

16. In Ajay Malik's case (supra), the Court found that offer to search in terms of Section 50 of the Act was not in proper format, as the accused was not offered that "you have a right to be searched by a Magistrate or a Gazetted Officer". However, in the present case, the memo of consent of personal search, inter alia, states that "you have legal right that you can get yourself searched personally from him or some other Gazetted Officer or some Magistrate". The accused were also made aware of the fact that the Gazetted Officer is a DSP (D) and posted at Amritsar. The requirement of Section 50 as is found in Ajay Malik's case has been satisfied by the prosecution in the present case. The mere fact that Ashwani Kapoor is a police officer, does not render the prosecution case as doubtful.

17. It was sought to argue from the testimony of PW-1 Ashwani Kapoor, DSP (D), Amritsar, that he is not aware of the manner of recovery and it appears that the entire paper work was not completed at the spot, but at the police station. However, a reading of the statement of PW-1 Ashwani Kapoor shows that in his cross-examination, he has deposed that it was 7.00 AM, when he received the information about an FIR. He reached Ghanupur Chowk at about 7.30 AM. He

has further deposed that he was at the spot for about 4-5 hours. Though he has not noted the factum of receipt of the secret information or maintained a separate case diary, but that will not render the testimony of this witness as that of an untruthful witness. It is not the requirement or expectation that a Senior Police Officer is to maintain separate diary. He has denied the suggestion that Balkar Singh was lifted from his house alongwith his car on 8.3.2005 at 6.00 AM. He has also denied that SSP, Amritsar held a press conference on 7.3.2005 and informed that detail of huge quantity of recovery of narcotics will be told on 9.3.2005. In his cross-examination conducted on behalf of accused Balbir Singh, he has deposed that the copy of the FIR was received during the period, he was at the spot. We do not find any grain of untruthfulness in his testimony, which can lead to an inference that the witness is not truthful.

18. Learned Counsel for the appellants has relied upon Reliance is placed upon Union of India v. Shah Alam and Anr. 2009 (3) R.C.R. (Criminal) 158, to contend that it was obligatory for the prosecution to comply with the provisions of Section 50 of the Act before conducting personal search even though it did not result into recovery of contraband. The said argument is not available to the appellants as before affecting search of the person or of the hand-bag carried by the accused, a notice as contemplated u/s 50 of the Act, was served upon the accused. Therefore, the argument that provisions of Section 50 of the Act have not been complied with, is not sustainable in law.

19. The argument that samples were sent to the Forensic Science Laboratory after delay is again not tenable. The samples were, in fact, initially produced before the Duty Magistrate on 9.3.2005 and before the Illaqa Magistrate on 10.3.2005. Learned Counsel for the appellants could not point out any provision of statute, rule or instructions contemplating any particular time period during which the samples have to be sent for chemical examination. In the absence of any statutory limit, it will be the facts of each case, whether the samples have been sent after gross delay or latches and that such gross delay or latches has prejudiced the accused in any manner or not. We find that sending of samples on 17.3.2005 by itself is not a ground to raise a doubt on the prosecution case set up. When the samples were received by the Forensic Science Laboratory it had three seals i.e. one belonging to the Investigating Officer, second belonging to the DSP (D), Amritsar, a Gazetted Officer and third belonging to the SHO. Receipt of samples in such sealed condition ensures that the contents of the samples were in safe condition. There is no allegation that the contents of the samples have been tinkered with in any manner. Therefore, the argument raised that the prosecution case is doubtful for the reason that the samples were sent after a delay of 9 days cannot be accepted.

20. The argument that PW-4 SI Harjinder Singh has deposed that he has received only 9 samples though the prosecution case is of deposit of 18 samples and thus, the prosecution case is of doubtful nature, is again devoid of merits. In fact, what PW-4 SI Harjinder Singh has deposed is that he has received 9 bulk

parcels and 18 sample parcels and that on 17.3.2005, he has sent 9 sample parcels to the Forensic Science Laboratory through Constable Kulwant Rai. The statement of PW-4 SI Harjinder Singh does not show any contradiction in the prosecution case and in the testimony of the witnesses.

21. The argument that the prosecution has not put the entire incriminating circumstances appearing in the prosecution evidence against the appellants in their statements recorded u/s 313 Cr.P.C. is again not meritorious. The appellants have been convicted for an offence punishable u/s 21 of the Act. Though question No. 1 can be said to be improper, but the fact remains that question No.4 in the statement of accused Harjinder Singh is that "your search was conducted by SI Sangram Singh under the supervision of DSP Ashwani Kapoor and you were holding a cloth packet in a polythene bag in your right hand. On its opening, it was found to contain heroin". The said question shows incriminating circumstances of possession of heroin by the accused at the time of search have been put to the accused. Therefore, it cannot be said that the appellants have suffered any prejudice only for the reason that question No. 1 was not properly framed.

22. The argument of learned Counsel for the appellants that in the statements recorded u/s 313 Cr.P.C., no question about the conscious possession has been put to the accused, is again misconceived. Reliance is placed upon Full Bench judgment of this Court in *Kashmir Singh v. State of Punjab* 2006(2) R.C.R. (Criminal) 477. The question No.4, referred to above, clearly shows the possession of heroin in the hands of accused. Mere fact that the word ?conscious? is not used in the question, is not material, as the conscious possession is a matter of inference from the facts on record. Therefore, mere omission of word ?conscious? in a question u/s 313 Cr.P.C. is not sufficient to create a doubt on the prosecution story set up.

23. The argument raised by the learned Counsel for the appellants that the prosecution has failed to prove the offence u/s 21 of the Act, is misconceived. The appellants have been found to be in possession of contraband. Such possession has been stand proved on the basis of testimony of PW-1 Ashwani Kapoor, DSP (D), Amritsar and PW-2 Inspector Sangram Singh, the Investigating Officer. Since the appellants were in possession of commercial quantity of heroin, they have been rightly convicted for the offence punishable u/s 21 of the Act.

24. In view of the above, we do not find any illegality and irregularity in the findings recorded by the learned trial Court, which may warrant any interference in the present appeal.

Dismissed.