

Before Jitendra Chauhan, J.

NAFE SINGH—Appellant

versus

STATE OF HARYANA—Respondent

CRA No.293 SB of 2001

September 6, 2012

Code of Criminal Procedure, 1973 - S. 313 - Narcotic Drugs and Psychotropic Substances Act, 1985 - Ss. 20, 42, 50, 55 & 57 - Appellant tried for possession of 1 kg. 500 grams of chars - Convicted - Appeal filed - Information not reduced into writing while investigation - Independent witness did not support prosecution's version - Seals not handed over to independent witness

- Appeal allowed - Held, information not reduced in writing - Section 42(2) violated - Seals remained with police officials - Possibility of tampering cannot be ruled out - Gazetted Officer not called at spot - Appellant taken to DSP - Recovery doubtful - Appellant acquitted.

Held, that Assistant Sub Inspector Phool Kumar PW6, Investigator has nowhere stated that in compliance with the provisions of Section 42(2) of the Act, the secret information was reduced into writing and forwarded the same to the immediate superior officials within the stipulated period. ASI Phool Kumar PW6 in his cross-examination has deposed that "I received secret information at about 4/4.15 P.M. I did not record the secret information in writing." It is further deposed that "I did not send report under Section 57 to SIO. The secret information was not regarding the name of the accused." Thus, the mandatory provisions of the aforesaid Section have been violated.

(Para 16)

Further held, that the seal bearing impression 'AS' was kept by the DSP himself and the seal 'PK' was handed over to HC Sube Singh. It imports that both the seals remained with the police officials. The non-handing over of the seal after use to this witness also raises dimensions of doubt. Therefore, the possibility of the contents of the sample or the bag being tampered with before despatch of the sample to the FSL cannot be ruled out. Seals were not handed over to Gaze Singh. These circumstances when taken up together, the possibility of seal being tampered with, substance being changed and the containers being resealed, cannot be ruled out.

(Para 17)

Further held, that the recovery of Charas from the appellant is highly doubtful for another reason. As per the prosecution story, the appellant was apprehended in front of the school on the basis of secret information. The appellant opted to be searched before a Gazetted Officer, ASI Phool Kumar PW6, Investigating Officer took the appellant alongwith the case property to Police Station Rajound and produced before DSP. After search and other formalities, the appellant alongwith case property was taken to the spot again without informing the SHO, who was present in the police station. In these circumstances, the Investigator should have informed the

concerned SHO and to send for a Gazetted Officer on the spot, same was not done. He took the appellant, PWs and case property to produce them before the DSP. Therefore, the recovery of Charas from the accused is highly doubtful.

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(Para 19)

BS Virk, Advocate, *for the appellant.*

Rudraneel Bhardwaj, Assistant Advocate General, Haryana

JITENDRA CHAUHAN, J.

(1) The present appeal has been filed against the judgment/order of sentence dated 22.1.2001, passed by the Court of the Judge, Special Court, Kaithal, whereby the appellant was convicted and sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs. 1,00,000/-; in default of payment of fine, he shall further undergo rigorous imprisonment for one year under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for brevity, 'the Act').

(2) The facts necessary for adjudication of the matter as narrated in para nos. 2 to 4 of the impugned judgement are as under:-

"On 4.12.1999, Assistant Sub Inspector Phool Kumar of Police Station Rajond along with Head Constable Sube Singh and other police officials was present at bus stand Kichhana Kui (Well) in connection with patrol duty and detection of crime. A secret information was received against the accused that he was standing in front of the school and was possessing Charas. The police party left for the disclosed place. On the way, one public witness Gaze Singh son of Molu Ram, resident of Kichhana was joined. They found the accused present at the disclosed place, who was apprehended. Since some narcotic substance was suspected in his possession, he was asked, per memo. Ex. PB, for his search either before a Gazetted Officer or a Magistrate or before him. The accused consented to be searched before a Gazetted Officer per same memo. He came to know that Deputy Superintendent of Police Amir Singh was present in the police station Rajond.

3. The accused, the witnesses and the case property were taken to the police station Rajond and produced before Amir Singh, Deputy Superintendent of Police, Kaithal, who was present in the courtyard

of police station. He verified the facts and under his direction the accused was searched. One Kothali (piece of cloth) was tied around the waist of the accused which was found containing Charas. Out of the bulk 100 gram was separated as a sample and the residue on weighing was found to be 1 Kg. 400 grams. The sample and the residue were made into separate sealed parcels by using the seal of 'PK' of the Assistant Sub Inspector Phool Kumar and 'AS' of Deputy Superintendent of Police Amir Singh. The sample seal impressions were also prepared. The sealed parcels were taken into possession vide memo. Ex.PC. Ruqa Ex.PE was sent to the police station, where formal first information report Ex.PI/1 was recorded.

4. During investigation the police party along with the accused and the case property returned to the spot where the accused apprehended, site plan Ex.PI was prepared with correct marginal notes, statements of the witnesses were recorded. The accused was arrested permemo. Ex.PD. On return to the police station, the accused, case property, sealed parcels and the witnesses were produced before Sub Inspector Sumer Chand, Station House Office of Police Station Rajond, who after verification resealed the parcels with his own seal 'SC'. Under his direction the case property was deposited in the Malkhana and the accused was sent to the lock up. A report under Section 57 of the Act was prepared and sent to the higher authority. The sample was sent to the Forensic Science Laboratory, Madhuban for analysis. After necessary investigations were over, the case was sent up for trial of the accused.

(3) The accused was charged under Section 20 of the Act, to which he did not plead guilty and claimed trial.

(4) In order to substantiate the charge, the prosecution has examined Constable Ram Kishan PW1, who sent the special report to Duty Magistrate, Kaithal, Constable Singh Ram PW2, who delivered the samples to FSI., Madhuban, MHC Ram Phal PW3, with whom the case property was deposited, SI Sumer Chand PW4, the then SHO of PS Rajound, who verified the case property, HC Sube Singh PW5, member of the police team, ASI Phool Kumar PW6, Investigating Officer, DSP Amir Singh PW7, in whose presence the search was conducted and by tendering the documents

Exs.PA Report of FSL, Ex.PB Consent Memo, Ex.PC Recovery memo of charas, Ex.PD Memo of arrest, Ex.PE Ruqqa, PE/1 Copy of FIR, Ex.PF Site Plan, Ex.PG Report u/s 57 of NDPS Act, Ex.P-1 case property, Ex.DA statement u/s 161 Cr.P.C. of MHC Ram Phal, Ex.DB copy of statement u/s 161 Cr.P.C. of SI Sumer Chand, Ex.DC copy of statement u/s 161 Cr.P.C. HC Sube Singh, Ex.DD copy of statement u/s 161 Cr.P.C. DSP Amir Singh, closed its evidence.

(5) When examined under Section 313 of the Code of Criminal Procedure, the accused-appellant denied all the incriminating circumstances appearing in the prosecution evidence against him and pleaded false implication. In defence, he examined Gaze Singh as DW1.

(6) Before the learned trial Court, the main arguments raised by the defence counsel were that the provisions of Sections 42, 50, 55 and 57 of the Act were not complied with; the link evidence was missing and the only public witness, Gaje Singh he was not examined.

(7) The learned trial Court rejected all the arguments raised by the defence counsel by holding that there was no violation of provisions of Sections 42, 50, 55 and 57 of the Act; the seals were intact and tallied with the specimen seals, therefore, the link evidence is established and Gaje Singh, the independent witness, being the resident of the same village, had been won over by the accused.

(8) After analysing the entire evidence and hearing the learned counsel for the parties, the learned Trial Court convicted and sentenced the accused as noticed at the outset.

(9) Aggrieved against the judgment and order, the accused appellant preferred this appeal, which was admitted on 28.5.2011. Vide order dated 7.8.2003, the sentence of the appellant was suspended.

(10) Learned counsel for the appellant contends that as alleged by the prosecution, the recovery was effected in pursuance of secret information, but to the utter dismay of the prosecution, the Investigator is absolutely silent about his having reduced such information into writing and forward the same to the immediate superior officials and thus, it necessarily follows that the

provisions of Section 42 of the Act have been flagrantly violated. He has placed reliance upon the judgment rendered in *Karnail Singh versus State of Haryana (1)*.

(11) He further submits that the prosecution has not apportioned any reason for entrusting the seal after use to Sube Singh IIC instead of Gaze Singh an independent witness. He further submits that Sube Singh being a police official, the seal could be taken back from him at any moment before despatch of the sample to the Chemical Examiner for tempering with the contents of the sample and thus, there could be every possibility that the contents of the sample were tampered with.

(12) It is further submitted that Gaze Singh, prosecution witness when examined in defence as DW1, demolished the prosecution case by stating in categorical terms that no recovery was effected from possession of the accused. Gaze Singh, in whose presence the recovery was allegedly effected, has been given up on the pretext of his having been won over by the accused. When he was examined by the accused, he denied the alleged recovery in his presence. He further submits that the seals after use was not handed over to the independent witnesses. He further submits that there are material contradiction in the statements of the PWs and therefore, it creates a doubt about the recovery of the contraband from the appellant.

(13) Per contra, Mr. Bhardwaj has contended that if the Investigator had indulged in reducing the information in to writing and sending the same to the immediate superior officers, meanwhile, the appellant/accused might have escaped. He further submits that the prosecution case is fully proved and therefore, the learned trial Court has rightly convicted and sentenced the appellant.

(14) I have heard the learned counsel for the parties and perused the record carefully.

(15) Assistant Sub Inspector Phool Kumar PW6, Investigator has nowhere stated that in compliance with the provisions of Section 42(2) of the Act, the secret information was reduced into writing and forwarded the same to the immediate superior officials within the stipulated period. ASI

Phool Kumar PW6 in his cross-examination has deposed that "I received secret information at about 4/4.15 P.M. I did not record the secret information in writing." It is further deposed that "I did not send report under Section 57 to SIO. The secret information was not regarding the name of the accused." Thus, the mandatory provisions of the aforesaid Section have been violated.

(16) The seal bearing impression 'AS' was kept by the DSP himself and the seal 'PK' was handed over to HC Sube Singh. It imports that both the seals remained with the police officials. The non-handing over of the seal after use to this witness also raises dimensions of doubt. Therefore, the possibility of the contents of the sample or the bag being tampered with before despatch of the sample to the FSL cannot be ruled out. To buttress this stance, the abundant reliance upon the observations made in re: *State of Punjab versus Nachhattar Singh @ Bania (2)*, the seal was handed over to a police official after use instead of the independent witness, who was present at the spot. The Division Bench of this Court held that thus where the seal remained with the police after the use, it creates doubt in the mind of the Court of tampering with the sample. There is no gainsaying the fact that as alleged by the prosecution, Gaze Singh an independent witness was in attendance at the time of alleged recovery. Nonetheless the sample seal was entrusted to HC Sube Singh, a police official. Investigator has not apporportioned any reason worth the name for preferentially giving seal to an official witness. It is in the crossexamination of the Investigator that Gaze Singh remained on the spot till the completion of investigation. Seals were not handed over to Gaze Singh. These circumstances when taken up together, the possibility of seal being tampered with, substance being changed and the containers being resealed, cannot be ruled out.

(17) Gaze Singh, DW1, who had joined as an independent witness, has deposed that "No notice was ever served upon the accused by the police before me and no recovery was effected by the police from the accused in my presence. My signatures were obtained by the police on three four blank papers when I alongwith member panchayat visited police station Rajound in connection with supply of benches."

(18) The recovery of Charas from the appellant is highly doubtful for another reason. As per the prosecution story, the appellant was apprehended in front of the school on the basis of secret information. The appellant opted to be searched before a Gazetted Officer, ASI Phool Kumar PW6, Investigating Officer took the appellant alongwith the case property to Police Station Rajound and produced before DSP. After search and other formalities, the appellant alongwith case property was taken to the spot again without informing the SHO, who was present in the police station. In these circumstances, the Investigator should have informed the concerned SIO and to send for a Gazetted Officer on the spot, same was not done. He took the appellant, PWs and case property to produce them before the DSP. Therefore, the recovery of Charas from the accused is highly doubtful.

(19) In view of the foregoing discussion, the present appeal is allowed; setting aside the impugned judgment/order of sentence. The accused-appellant is hereby acquitted of the charged offence.
