A STATE OF PUNJAB

v.

SAWARAN SINGH

JULY 25, 2005

B [K.G. BALAKRISHNAN AND B.N. SRIKRISHNA, JJ.]

Code of Criminal Procedure, 1973—Section 313—Purpose of—Held: The provision is meant to give opportunity to accused to explain the evidence against him—But when during trial, he does not seriously deny the allegations, then any omission during statement under Section 313 is not fatal to the prosecution's case.

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According to the Prosecution, on 17.5.1992 the accused was apprehended and on his search a bag was found suspected to contain opium and a sample was taken. The sample and remaining content of the recovered substance was sealed and taken into possession by the IO. The two sealed packets were handed over to PW-1 and kept by him in Malkhana. On 9.6.1992, PW-1 handed over the property to PW-4. During this period, there was no tampering with the seal of the packets.

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E **The Sessions Judge found him guilty for offence punishable under Section 18 of the NDPS Act. The High Court acquitted him on the ground that the evidence of PW-1 and PW-4 were not put to the accused while he was examined under Section 313 CrPC and as such these items could not be used against the accused. Hence the present appeal.**

F **Disposing of the appeal, the Court**

HELD: 1. When PW-1 and PW-4 were examined as witnesses, the accused did not seriously dispute their evidence. The evidence of PW 1 and PW 4 was not challenged in the cross-examination except for a general suggestion that they had been deposing falsely. The accused had no case that the seal was ever tampered with by any person nor that there was any case of mistaken identity as regards the sample and that the report of the Chemical Analyst was not of the same sample taken from the accused. Except making a general suggestion, the accused had completely admitted the evidence of PW-1 and PW-4 as regards the receipt of the sample, sealing of the same

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and sending it to the Chemical Analyst. This was pointed out only to show that the accused was not in any way prejudiced by the fact of not having been questioned by making a specific reference to the evidence of PW-1 and PW-4. [790-E, F, G] A

2. The questioning of the accused under Section 313 is done to enable him to give an opportunity to explain any circumstances which have come out in the evidence against him. The entire evidence is recorded in his presence and he is given a full opportunity to cross-examine each and every witness examined on the prosecution side. He is given copies of all documents which are sought to be relied on by the prosecution. Apart from all these, as part of fair trial the accused is given the opportunity to give his explanation regarding the evidence adduced by the prosecution. However, it is not necessary that the entire prosecution evidence need be put to him and answers elicited from the accused. If there were circumstances in the evidence which are adverse to the accused and his explanation would help the court evaluating the evidence properly, the court should bring the same to the notice of the accused to enable him to give any explanation or answers for such adverse circumstance in the evidence. Generally composite questions shall not be asked to the accused bundling many facts together. Questions must be such that any reasonable person in the position of the accused should be in a position to give a rational explanation to the questions as asked. There shall not be failure of justice on account of an unfair trial. [791-E, F, G, H; 792-A] B C D E

State (Delhi Admn.) v. *Dharampal*, [2001] 10 SCC 372; *Jai Dev* v. *State of Punjab*, AIR (1963) SC 612; *Bakhshish Singh* v. *State of Punjab*, AIR (1967) SC 752 and *Shivaji Sahabrao Bobade* v. *State of Maharashtra*, [1973] 2 SCC 793, referred to.

3. In the instant case, the accused was not in any way prejudiced by not giving him an opportunity to answer specifically regarding the evidence of PW-1 and PW 4. If at all, the evidence of PW-1 and PW-4 was recorded in his presence, he had the opportunity to cross-examine the witnesses but despite this he did not specifically cross-examine these two witnesses in respect of the facts deposed by them. The Single Judge seriously erred in holding that the evidence of PW-1 and PW-4 could not have been used against the accused. The acquittal of the accused was improper as the evidence in this case clearly established that the accused was in possession of 5 Kg of opium and thereby committed the offence under Section 18 of the NDPS Act. [793-D, E, F] F G

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 763 of H

A 1997.

From the Judgment and Order dated 13.2.97 of the Punjab and Haryana High Court in Crl.A.No. 282-SB of 1995.

Arun K. Sinha, Rakesh Singh and Bimal Roy Jad, for the Appellant.

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Ms. Sudesh Kumari and Dinesh Verma for R.D. Upadhyay for the Respondent.

The Judgment of the Court was delivered by

C **K.G. BALAKRISHNAN, J.** This is an appeal preferred by the State of Punjab against the decision of the Division Bench of the Punjab & Haryana High Court in Criminal Appeal No. 282-SB of 1995. By the impugned Judgment, the learned Single Judge acquitted the respondent for the offence under Section 18 of the NDPS Act, 1985.

D The prosecution case was that on 17.5.1992, the Station House Officer of Police Station, Voltoha, accompanied by ASI Nirmal Singh and LC Balwinder Singh were proceeding from Amarkot to Mehmoodpura on patrol duty. When they reached Mehmoodpura, they saw accused Swaran Singh coming from the opposite side. On seeing the police party, the accused sat down by the side of the road as if to answer the call of the nature. Accused Swaran Singh E was apprehended and he was told that he was to be searched and if he so desired the search would be conducted in the presence of a Gazetted Officer or a Magistrate. The accused did not desire to be searched in the presence of a Gazatted Officer or Magistrate.

On being searched, the accused was found carrying a plastic bag and F on further search it was revealed that the bag contained a packet wrapped in a glazed paper. The contents of the bag were suspected to be opium. The substance weighed about 5 kg. out of which a quantity of 10 grams was taken for the purpose of sampling. The sample as well as the remaining quantity of the recovered substance were sealed and taken into possession by the G Investigating Officer. This sample was entrusted to the Police Station Valtoha where the formal First Information Report was registered. The property recovered from the accused along with the samples was kept in the Malkhana. Subsequently the sample was sent for analysis to the Forensic Science Laboratory and the Exhibit PF certificate confirmed the sample to be opium.

H On the side of the prosecution, PW-1 to PW-5 were examined. Before

the Sessions Court, the accused raised several pleas including the violation of Section 50 of NDPS Act. The Sessions Judge held that the recovery of opium was fully proved and the defence version that it was a false case was not correct and that the accused had thus committed the offence punishable under Section 18 of the NDPS Act.

Challenging his conviction, the respondent accused preferred an appeal before the High Court. The learned Counsel for the accused raised a plea that the evidence of PW-1 ASI Harbhajan Singh and the evidence of PW-4 MHC Gulzar Singh and the contents of the affidavit of Constable Anup Singh Exh. PB were not put to the accused while he was examined under Section 313 Cr. PC. Therefore, these items of evidence could not have been used against the accused and based on the decision of the *Punjab & Haryana High Court in Darshan Singh* v. *State of Punjab,* (1995) 3 Recent C.R. 365, the accused was acquitted of all the charges. This is challenged before us.

We heard the learned counsel for the appellant-State and the learned counsel for the respondent.

The evidence of PW-1 was to the effect that on 17.5.1992, Inspector Suba Singh handed over to him two sealed parcels pertaining to this case bearing the impression 'SS' along with one bag and that the property was kept in Malkhana by him. On 9.6.1992, he handed over the property to PW-4 MHC Gulzar Singh. During this period, there was no tampering with the seal of the packets. PW-4 MHC Gulzar Singh deposed that he had taken charge of the property of this case on 9.6.1992 and the property consisted of two parcels bearing the seals 'SS' and that the samples were sealed and he had sent the same for chemical examination on 23.6.1992 through Constable Anup Singh. During this period, the case property remained in his possession and it was not tampered. The accused-respondent was examined under Section 313 Cr. PC and he was put the following questions:-

> Q. It is in evidence against you that on your personal search by Inspector Suba Singh, a plastic bag, Exh. P.2 containing opium wrapped in a glazed paper was recovered, from which 10 gms. opium was taken out as sample and made into a parcel and the remaining opium 4 kgs. 990 gms. was put in a separate dibba parcel, Ex. P.1. The sample and the parcel, Ex. P. 1, were separately sealed with seal 'SS'. The case property was taken into possession vide recovery memo, Ex. PC, attested by the PWs. What you

A have to say?

A. It is incorrect.

He was also asked:

Q. It is in evidence against you that the sample of the opium
B recovered from you was sent to the Chemical Examiner, who vide his report, Ex. PF, opined that it contained having 1% morphine. What you have to say?

A. It is incorrect.

C He was also asked as to why this case was charged against him, why the PWs had deposed against him and to a specific question as to whether he wanted to say anything else, he answered that he was innocent and he had been falsely implicated in this case.

The only reason given by the learned Single Judge of the High Court
D for acquitting the accused is that the evidence of PW 1 and PW 4 was not specifically put to the accused under Section 313 Cr. PC and it was held that in the absence of these facts in the form of questions to the accused, the evidence could not have been used against him. It is also pertinent to note in this regard that when PW-1 and PW-4 were examined as witnesses, the accused did not seriously dispute the evidence of PW-1 or PW-4. The only
E cross examination was that it was incorrect to suggest that the case property was not deposited with him and he had deposed falsely. So also, the evidence of PW-4 was not challenged in the cross-examination except for a general suggestion that he had been deposing falsely and that no case property was handed over to him by PW-1 Harbhajan Singh. Accused had no case that the
F seal was ever tampered with by any person and that there was any case of mistaken identity as regards the sample and that the report of the Chemical Analyst was not of the same sample taken from the accused. Except making a general suggestion, the accused had completely admitted the evidence of PW-1 and PW-4 as regards the receipt of the sample, sealing of the same and sending it to the Chemical Analyst. This was pointed out only to show that
G the accused was not in any way prejudiced by the fact of not having been questioned by making a specific reference to the evidence of PW-1 and PW-4. As regards the questioning of the accused under Section 313 Cr. PC, the relevant provision is as follows:-

"313. *Power to examine the accused.* (1) In every inquiry or trial, for
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the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the court,

(a) may at any stage, without previously warning the accused, put such question to him as the court considers necessary;

(b) shall, after the witnesses for the prosecution have been examined and before he is called on the for his defence, question him generally on the case:

Provided that in a summons case, where the court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b)

(2) No oath shall be administered to the accused when he is examined under sub-section (1)

(3) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.

(4) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

The questioning of the accused is done to enable him to give an opportunity to explain any circumstances which have come out in the evidence against him. It may be noticed that the entire evidence is recorded in his presence and he is given full opportunity to cross examine each and every witness examined on the prosecution side. He is given copies of all documents which are sought to be relied on by the prosecution. Apart from all these, as part of fair trial the accused is given opportunity to give his explanation regarding the evidence adduced by the prosecution. However, it is not necessary that the entire prosecution evidence need be put to him and answers elicited from the accused. If there were circumstances in the evidence which are adverse to the accused and his explanation would help the court evaluating the evidence properly, the court should bring the same to the notice of the accused to enable him to give any explanation or answers for such adverse circumstance in the evidence. Generally. Composite questions shall not be asked to accused bundling so many facts together. Questions must be such that any reasonable person in the position of the accused may

A be in a position to give rational explanation to the questions as had been asked. There shall not be failure of justice on account of an unfair trial.

In *State (Delhi Admn.)* v. *Dharampal,* [2001] 10 SCC 372, it was held as under:

B "That it is to be seen that where an omission, to bring the attention of the accused to an inculpatory material has occurred, that does not *ipso facto* vitiate the proceedings. The accused must show that failure of justice was occasioned by such omission. Further, in the event of an inculpatory material not having been put to the accused, the appellant court can always make good that lapse by calling upon the C counsel for the accused to show what explanation the accused has as regards the circumstances established against the accused but not put to him".

In *Jai Dev* v. *State of Punjab,* AIR (1963) SC 612 it was observed thus:

D "The Ultimate test in determining whether or not the accused has been fairly examined under Section 342 would be to inquire whether, having regard to all the questions put to him, he did get an opportunity to say what he wanted to say in respect of prosecution case against him. If it appears that the examination of the accused person was E defective and thereby a prejudice has been caused to him, that would no doubt be a serious infirmity."

In *Bakhshish Singh* v. *State of Punjab,* AIR (1967) SC 752, a three judge bench of this Court held that:

F ".....It was not all necessary that each separate piece of evidence in support of a circumstance should be put to the accused and he should be questioned in respect of it under that section...."

In *Shivaji Sahabrao Bobade* v. *State of Maharashtra,* [1973] 2 SCC 793 a three judge bench of this Court considering the fallout of omission to put G to the accused a question on a vital circumstance appearing against him in the prosecution evidence, widening the sweep of the provision concerning examination of the accused after closing prosecution evidence made the following observations:

"It is trite law, nevertheless fundamental, that the prisoner's attention H should be drawn to ever inculpatory material so as to enable him to

explain it. This is the basic fairness of a criminal trial and failures in this area may gravely imperil the validity of the trial itself, if consequential miscarriage of justice has flowed. However, where such an omission has occurred it does not ipso facto vitiate the proceedings and prejudice occasioned by such defect must be established by the accused. In the event of evidentiary material not being put to the accused, the court must ordinarily eschew such material form consideration. It is also open to the appellate court to call upon the counsel for the accused to show what explanation the accused has as regards the circumstance established against him not put to him if the accused unable to offer the appellate court any plausible or reasonable explanation of such circumstances, the court may assume that no acceptable answer exists and that even if the accused has been questioned at the proper time in the trial court he would not have been able to furnish any good ground to get out of the circumstances on which the trial court had relied for its conviction."

In the instant case, the accused was not in any way prejudiced by not giving him an opportunity to answer specifically regarding the evidence of PW-1 and PW-4. If at all, the evidence of PW-1 and PW-4 was recorded in his presence, he had the opportunity to cross-examine the witnesses but he did not specifically cross-examine these two witnesses in respect of the facts deposed by them. The learned Single Judge seriously erred in holding that the evidence of PW-1 and PW-4 could not have been used against the accused. The acquittal of the accused was improper as the evidence in this case clearly established that the accused was in possession of 5 Kg of opium and thereby committed the offence under Section 18 of the NDPS Act.

In the result, we set aside the judgment of the learned Single Judge of the High Court of Punjab & Haryana and restore the judgment of the Additional Sessions Judge, Amritsar in Sessions Case No. 28 of 1993. The Sessions Judge is directed to take appropriate action to apprehend the respondent to serve out the remaining period of sentence. Fine, if deposited, shall be refunded to the appellant.

D.G. Appeal disposed of.