

MAKHAN SINGH

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v.

STATE OF HARYANA

(Criminal Appeal No. 682 of 2015)

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APRIL 21, 2015

[T.S. THAKUR AND R. BANUMATHI, JJ.]

Narcotic Drugs and Psychotropic Substances Act, 1985: ss. 15 – Recovery of contraband from the vehicle driven by the accused – Conviction by courts below – On appeal, held: The independent witnesses have not supported the prosecution case and recovery of the contraband not satisfactorily proved – The conviction solely based on official witnesses cannot be sustained – Accused liable to be acquitted.

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s. 50 – Scope of – Conviction u/s. 15 of the NDPS Act – Reliance on compliance of s.50 – Held: Mere compliance with s. 50 by itself would not be sufficient to establish the guilt of the accused – s.50 comes into play only in the case of personal search of the accused – In the present case s.50 was not applicable as the recovery was not from the person of the accused but from the vehicle driven by him.

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Evidence:

Official witnesses – Evidentiary value – Held: Conviction can be based solely on the testimony of official witnesses, only if evidence of such witnesses inspire confidence and not by overlooking evidence of independent witnesses.

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Proof – Standard of – Held: The more stringent the punishment is, the more heavy is the burden on the prosecution – In the cases of NDPS Act, the punishment is

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A *severe, hence strict proof is required for proving the search, seizure and the recovery – Narcotic Drugs and Psychotropic Substances Act, 1985 – Criminal Jurisprudence.*

Allowing the appeal, the Court

B **HELD: 1.1. For recording the conviction, the courts below mainly relied on the testimony of official witnesses and found them sufficiently strengthening the recovery of the possession from the appellant. The manner in which the alleged recovery has been made, does not inspire confidence and undue credence has been given to the testimony of official witnesses, who are generally interested in securing the conviction. In peculiar circumstances of the case, it may not be possible to find out independent witnesses at all places at all times. Independent witnesses who live in the same village or nearby villages of the accused are at times afraid to come and depose in favour of the prosecution. Though it is well-settled that a conviction can be based solely on the testimony of official witnesses, condition precedent is that the evidence of such official witnesses must inspire confidence. In the present case, it is not as if independent witnesses were not available. Independent witnesses PW1 and another independent witness examined as DW2 has spoken in one voice that the accused person was taken from his residence. In such circumstances, the High Court ought not to have overlooked the testimony of independent witnesses, especially when it casts doubt on the recovery and the genuineness of the prosecution version. [Para 10] [795-E-H; 796-A-C]**

State of Punjab v. Baldev Singh (1999) 6 SCC 172 – followed.

H **1.2. The High Court discarded the evidence of PW1**

and DW2 observing that these independent witnesses hail from the same village to which accused belongs and the accused might have approached the witnesses through respectables of the village to resile from his statement. That apart, the High Court also observed that both the independent witnesses did not explain the circumstances or compulsions in which they had to sign the blank papers. The reasoning of the High Court is based more on assumptions than on acceptable basis. When PW1 and DW2 have asserted that they have signed only the blank papers, the courts below ought to have considered them in proper perspective. [Para 9] [795-B-D]

2.1. Compliance with Section 50 of the NDPS Act will come into play only in the case of personal search of the accused and not of some baggage like a bag, article or container, etc. which the accused may be carrying ought to be searched [Para 15] [798-C]

State of H.P. v. Pawan Kumar (2005) 4 SCC 350; *Ajmer Singh v. State of Haryana*, (2010) 3 SCC 746 – relied on.

2.2. In the present case, since the vehicle was searched and the contraband was seized from the vehicle, compliance with Section 50 of the NDPS Act was not required. In the absence of independent evidence, connecting the appellant with the vehicle, mere compliance with Section 50 of the NDPS Act by itself would not be sufficient to establish the guilt of the appellant. [Para 16] [799-B]

3. It is a well-settled principle of the criminal jurisprudence that more stringent the punishment, the more heavy is the burden upon the prosecution to prove

A the offence. When the independent witnesses PW1 and
DW2 have not supported the prosecution case and the
recovery of the contraband has not been satisfactorily
proved, the conviction of the appellants under Section
15 of the NDPS Act cannot be sustained. Since in the
B cases of NDPS Act the punishment is severe, therefore
strict proof is required for proving the search, seizure
and the recovery. [Paras 16, 17] [799-C-D, E]

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal
C No. 682 of 2015.

From the Judgment and Order dated 10.12.2007 of the
High Court of Punjab and Haryana at Chandigarh in Criminal
Appeal No. 777-SB of 1996.

D Chanchal Kumar Ganguli, Naramada for the Appellant.
Rahul Verma, AAG, Vishwa Pal Singh for the Respondent.

The Judgment of the Court was delivered by

E **R. BANUMATHI, J.** 1. Delay condoned. Leave granted.

2. This appeal arises out of the judgment dated
10.12.2007 passed by the High Court of Punjab and Haryana
at Chandigarh in Criminal Appeal No.777-SB of 1996,
F whereby the High Court affirmed the conviction of the appellant
under Section 15 of the Narcotic Drugs and Psychotropic
Substances Act, 1985 (for short 'the NDPS Act') and also the
sentence of imprisonment of ten years along with a fine of
G Rs.1,00,000/- imposed on the appellant.

3. Briefly stated case of prosecution is that on
27.07.1994, the police officials during patrolling, when talking
with one Manjeet Singh-PW1 and Gamdur Singh-DW2, saw
the suspicious '*fitter-rehra*' (a vehicle) driven by the appellant.
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Police intercepted the vehicle and questioned the appellant about his whereabouts, and found some dubious bags lying in the vehicle. Before searching the bags, police intimated to the appellant that instead of being searched by police whether he wishes to be searched by a Gazetted Officer or a Magistrate and the appellant declined to be searched by them and a consent memo (Ext.PA) was drawn. Then, the police in the presence of independent witnesses, i.e. Manjeet Singh and Gamdur Singh, conducted the search and during the search, three bags containing commercial quantity of poppy husk (120 kgs.) were recovered from the appellant's vehicle. Police seized the bags, took sample of 200 grams from each of the bag and sealed them separately, and then sealed the remaining quantity in separate parcels and deposited the same with MHC. The sealed samples were sent to Chemical Examiner, who *vide* his report (Ext. PK) found the samples to be 'Powdered Poppy Husk'. On completion of investigation, police laid the chargesheet against the appellant under Section 15 of NDPS Act.

4. Prosecution to prove their case examined as many as six witnesses. Out of two independent witnesses in the case, Manjeet Singh-PW1 turned hostile and Gamdur Singh was won over by the defence and had been examined as defence witness DW2. Defence examined one more witness, viz. Jaswant Singh-DW1.

5. The Sessions Court, after considering the evidence held that the prosecution proved the guilt of the accused beyond all reasonable doubt and thereby convicted the appellant under Section 15 of the NDPS Act and sentenced him to undergo rigorous imprisonment for ten years and to pay a fine of Rs. 1,00,000/- and in default, to undergo rigorous imprisonment for two years. Appellant, being aggrieved, filed the appeal challenging the conviction and sentence of

A imprisonment before the High Court. The High Court held that the evidence of PW6-Inspector Raghbir Singh and PW2-H.C.Suraj Mal is unimpeachable and *vide* impugned judgment dated 10.12.2007 confirmed the conviction of the appellant and dismissed the appeal.

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6. Challenging his conviction, the appellant has approached this Court with a contention that he has been falsely implicated in the case and that he was brought from his house and was put behind the bars. Learned counsel for the appellant

C contended that the case of the prosecution is based solely on the testimony of official witnesses PW2 and PW6 and much weightage ought not to have been attached to their testimony, especially by discarding the testimony of both the defence witnesses. It was submitted that since both the independent

D witnesses did not support the prosecution story, the prosecution has not proved its case beyond reasonable doubt and this material aspect has been ignored by the courts below. Appellant also alleges that non-compliance of mandatory

E provisions under Sections 50 and 52 of the NDPS Act vitiates the alleged recovery of contraband.

F 7. Per contra, learned counsel for the respondent-State has supported the impugned judgment and submitted that the provisions of Section 50 of the NDPS Act has been duly complied with and the concurrent findings of the courts below recording the verdict of conviction cannot be interfered with.

G 8. During the trial, PW1-Manjeet Singh was declared hostile by the prosecution and another independent witness Gamdur Singh was examined as defence witness. Both PW1 and DW2 have deposed that the appellant was not arrested in their presence nor any recovery was made from him. PW1 and DW2 have further deposed that when they went to police

H station for some work, they saw the appellant already in custody of police and that their signatures were obtained on the blank

papers. In his cross-examination, though DW2 has admitted that Ext. PB bears his signature at point 'A', he disowned his statement in Ext.PL recorded under Section 161 of the Criminal Procedure Code. Though PW1 turned hostile, his evidence cannot be discarded as his testimony draws support from the version of DW1 and DW2.

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9. The High Court discarded the evidence of PW1 and DW2 observing that the independent witnesses hail from the same village to which accused belongs and the accused might have approached the witnesses through respectables of the village to resile from his statement. That apart, the High Court also observed that both the independent witnesses did not explain the circumstances or compulsions in which they had to sign the blank papers. The reasoning of the High Court is based more on assumptions than on acceptable basis. When PW1 and DW2 have asserted that they have signed only the blank papers, the courts below ought to have considered them in proper perspective.

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10. For recording the conviction, the Sessions Court as well as the High Court mainly relied on the testimony of official witnesses who made the recovery, i.e. H.C. Suraj Mal-PW2 and Inspector Raghbir Singh-PW6, and found them sufficiently strengthening the recovery of the possession from the appellant. In our considered view, the manner in which the alleged recovery has been made does not inspire confidence and undue credence has been given to the testimony of official witnesses, who are generally interested in securing the conviction. In peculiar circumstances of the case, it may not be possible to find out independent witnesses at all places at all times. Independent witnesses who live in the same village or nearby villages of the accused are at times afraid to come and depose in favour of the prosecution. Though it is well-settled that a conviction can be based solely on the testimony

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A of official witnesses, condition precedent is that the evidence
of such official witnesses must inspire confidence. In the
present case, it is not as if independent witnesses were not
available. Independent witnesses PW1 and another
independent witness examined as DW2 has spoken in one
B voice that the accused person was taken from his residence.
In such circumstances, in our view, the High Court ought not to
have overlooked the testimony of independent witnesses,
especially when it casts doubt on the recovery and the
C genuineness of the prosecution version.

11. It is to be pointed out that the prosecution misdirected
itself by unnecessarily focusing on Section 50 of the NDPS
Act, when the fact is that the recovery has been made not from
the person of the appellant but from the *fitter-rehra* which was
D allegedly driven by the appellant and, thus, Section 50 of the
NDPS Act had no application at all. The prosecution ought to
have endeavoured to prove whether the appellant had some
nexus with the seized *fitter-rehra*. Though the police has seized
the *fitter-rehra* (Ext. PB), the prosecution has not adduced any
E evidence either by examining the neighbours or others to bring
home the point that the appellant was the owner or possessor
of the vehicle. PW6 admitted in his cross-examination that
signature or thumb impression of the appellant was not
F obtained on the recovery memo (Ext. PB). In our opinion, courts
below erred in attributing to the appellant the onus to prove
that wherefrom *fitter-rehra* had come, especially when
ownership/ possession of *fitter-rehra* has not been proved by
the prosecution.

G 12. Jaswant Singh, who is a Sarpanch of the village and
was examined as DW1, has supported the defence version
that the appellant was taken away by the police from his home
and he was falsely implicated. When the defence has taken
the specific stand that the appellant was taken from his house
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by the police and that stand has been corroborated by the testimony of DW1, the prosecution ought to have adduced cogent evidence that the alleged *fitter-rehra* on which the appellant was alleged to be carrying 120 kilograms of poppy husk belongs to the appellant. Failure to adduce the evidence connecting the appellant with the *fitter-rehra* that the ownership/possession of *fitter-rehra* with the appellant is fatal to the prosecution case, benefit of which ought to have been given to the accused.

13. Both the Sessions Court and the High Court concurrently held that the mandatory provisions of Section 50 of the NDPS Act have been duly complied with. Sessions Court observed that it is not necessary that in each and every case the accused should be produced before the Gazetted Officer or the Magistrate and if the accused so desires, then only he is to be produced before either of them. In Ext.PA/1, Investigating Officer used the word '*Nyayadeesh*' instead of 'Magistrate' does not mean that the Investigating Officer meant something else.

14. A Constitution Bench of this Court in *State of Punjab v. Baldev Singh*, (1999) 6 SCC 172, while dealing with the scope of Section 50 of the NDPS Act, had emphasized upon the aspect of availability of right of an accused to have 'personal search' conducted before a Gazetted Officer or a Magistrate and held as under:

"32...The protection provided in the section to an accused to be intimated that he has the right to have his *personal search* conducted before a Gazetted Officer or a Magistrate, if he so requires, is sacrosanct and indefeasible- it cannot be disregarded by the prosecution except at its own peril.

33. The question whether or not the safeguards provided

A in Section 50 were observed would have, however, to be determined by the court on the basis of the evidence led at the trial and the finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish
B at the trial that the provisions of Section 50, and particularly, the safeguards provided in that section were complied with, it would not be advisable to cut short a criminal trial.”

15. Compliance with Section 50 of the NDPS Act will come
C into play only in the case of personal search of the accused and not of some baggage like a bag, article or container, etc. which the accused may be carrying ought to be searched. In *State of H.P. v. Pawan Kumar*, (2005) 4 SCC 350, this Court in Para (11) has held as under:

D “11. A bag, briefcase or any such article or container, etc. can, under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be
E treated to be part of the body of a human being. Depending upon the physical capacity of a person, he may carry any number of items like a bag, a briefcase, a suitcase, a tin box, a *thaila*, a *jhola*, a *gathri*, a holdall, a carton, etc. of varying size, dimension or weight.
F However, while carrying or moving along with them, some extra effort or energy would be required. They would have to be carried either by the hand or hung on the shoulder or back or placed on the head. In common parlance it would be said that a person is carrying a particular article,
G specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore, it is not possible to include these articles within the ambit of the word “person” occurring in Section 50 of the Act.”

H Same view was reiterated in *Ajmer Singh v. State of*

Haryana, (2010) 3 SCC 746.

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16. In the present case, since the vehicle was searched and the contraband was seized from the vehicle, compliance with Section 50 of the NDPS Act was not required. In the absence of independent evidence connecting the appellant with the *fitter-rehra*, mere compliance with Section 50 of the NDPS Act by itself would not be sufficient to establish the guilt of the appellant. It is a well-settled principle of the criminal jurisprudence that more stringent the punishment, the more heavy is the burden upon the prosecution to prove the offence. When the independent witnesses PW1 and DW2 have not supported the prosecution case and the recovery of the contraband has not been satisfactorily proved, the conviction of the appellant under Section 15 of the NDPS Act cannot be sustained.

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17. Section 15 provides for punishment for contravention in relation to poppy straw. The maximum punishment provided in the section is imprisonment of twenty years and fine of two lakh rupees and minimum sentence of imprisonment of ten years and a fine of one lakh rupee. Since in the cases of NDPS Act the punishment is severe, therefore strict proof is required for proving the search, seizure and the recovery.

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18. The conviction of the appellant and the sentence imposed on him is set aside and this appeal is allowed. Fine amount of Rs.1,00,000/-, if paid, is ordered to be refunded to the appellant. The appellant is ordered to be set at liberty forthwith unless required in any other case.

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Kalpana K. Tripathy

Appeal allowed.

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