

A

MOHINDER SINGH

v.

THE STATE OF PUNJAB

(Criminal Appeal No. 2182 of 2010)

B

AUGUST 14, 2018

**[RANJAN GOGOI, R. BANUMATHI AND
NAVIN SINHA, JJ.]**

C *Narcotic Drugs and Psychotropic Substances Act, 1985: s.50 – Prosecution case was that the appellant was carrying contraband substance in a bag – On search of bag in presence of DSP, the substance in bag was found to be opium of 7.04 kg – Two samples of 20 gms each were taken and sealed – Case property along with two samples deposited in Malkhana and next day produced before the Magistrate – Samples parcels sent to FSL and found to be*

D *opium – Acquittal by trial court for non-compliance of s.50 of the Act and on the ground that the order of the Magistrate did not show that the seal of sample sent to FSL tallied with the seal of the contraband and, thus evidence regarding such production of case property before the Magistrate was not trustworthy – On appeal,*

E *High Court held that recovery of contraband from a bag/attache which the accused was carrying in his hands would not amount to search of person and as such s.50 would not apply and further, the case property parcels of samples and sealed samples were duly produced before Magistrate – Based on the said finding, High Court reversed the order of acquittal and convicted appellant u/s.18 and*

F *sentenced him to undergo ten years imprisonment – On appeal, held: Oral evidence of PW-3 and PW-5 as to the deposit of the contraband seized from the accused with Malkhana is not corroborated by the documentary evidence – In the absence of the order of the Magistrate showing that the contraband seized from the accused*

G *was produced before the Magistrate, the oral evidence adduced that the contraband was produced before the Magistrate cannot form the basis to record the conviction – In an appeal against acquittal, the High Court will not interfere unless there are substantial and compelling reasons to reverse the order of acquittal –*

H *Considering the case in hand, the findings of the trial court cannot be said to be ‘distorted conclusions’ warranting interference – Based*

on the oral evidence of PW-2 and PW-3, the High Court ought not to have interfered with the order of acquittal and the conviction of the appellant under s.18 of the Act was not sustainable. A

Narcotic Drugs and Psychotropic Substances Act, 1985: s.50 – Personal search – Carrying the contraband substance in the scooter/bag cannot be said to be ‘by the person’ necessitating compliance of s.50 of the Act for personal search. B

Allowing the appeal, the Court

HELD: 1. After referring to the oral evidence of PW-2 and PW-3, the trial court in its judgment has recorded the finding that no order of the Magistrate to prove the production of the contraband before the Magistrate was available on the file. After recording such observation, the trial court held that the oral evidence regarding production of the case property before the Magistrate was not trustworthy and not acceptable. For proving the offence under the NDPS Act, it is necessary for the prosecution to establish the quantity of the contraband goods allegedly seized from the possession of the accused and the best evidence would be the court records as to the production of the contraband before the Magistrate and deposit of the same before the Malkhana or the document showing destruction of the contraband. [Paras 11-12] [915-E-F, G-H] C D E

State of H.P. v. Pawan Kumar (2005) 4 SCC 350 : [2005] 3 SCR 417; Vijay Jain v. State of Madhya Pradesh (2013) 14 SCC 527 : [2013] 4 SCR 293 – relied on.

2. In an appeal against acquittal, the High Court will not interfere unless there are substantial and compelling reasons to reverse the order of acquittal. Considering the case in hand, the findings of the trial court cannot be said to be ‘distorted conclusions’ warranting interference. Based on the oral evidence of PW-2 and PW-3, the High Court ought not to have interfered with the order of acquittal and the conviction of the appellant under Section 18 of the NDPS Act cannot be sustained. [Paras 15, 16] [916-H; 917-A; 918-C-D] F G

Chandrappa and Others v. State of Karnataka (2007) 4 SCC 415 : [2007] 2 SCR 630; Jugendra Singh v. State of Uttar Pradesh (2012) 6 SCC 297 : [2012] 6 H

- A **SCR 193**; *State of Uttar Pradesh v. Ram Sajivan and Others (2010) 1 SCC 529* : [2009] 16 SCR 154; *Bhaskar Ramappa Madar and others v. State of Karnataka (2009) 11 SCC 690* : [2009] 5 SCR 256; *Chandrappa and others v. State of Karnataka (2007) 4 SCC 415* : [2007] 2 SCR 630 – relied on.

B

Case law reference

- | | | | |
|---|-------------------|-----------|---------|
| | [2005] 3 SCR 417 | relied on | Para 5 |
| | [2013] 4 SCR 293 | relied on | Para 9 |
| C | [2012] 6 SCR 193 | relied on | Para 13 |
| | [2007] 2 SCR 630 | relied on | Para 15 |
| | [2009] 16 SCR 154 | relied on | Para 15 |
| | [2009] 5 SCR 256 | relied on | Para 15 |
| D | [2007] 2 SCR 630 | relied on | Para 15 |

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2182 of 2010

- E From the Judgment and Order dated 30.06.2010 of the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 199-DBA of 2002.

Harkesh Singh, R. K. Talwar, Chander Shekhar Ashri, Advs. for the appellant.

Ms. Ranjeeta Rohatgi, Kuldip Singh, Advs. for the respondent.

- F The Judgment of the Court was delivered by

- G **R. BANUMATHI, J.** 1. This appeal arises out of the judgment dated 30.06.2010 passed by the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No.199-DBA of 2002 in and by which the High Court reversed the judgment of acquittal of the appellant/accused and convicted him under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) and sentenced him to undergo ten years imprisonment.

- H 2. Briefly stated case of the prosecution is that on 30.04.1998, Joginder Singh, SI, Police Station Sadar Ludhiana (PW-2) along with other police officials was checking the vehicles on the bridge of Gill

Canal towards the side of village Gill. Meanwhile, at about 7.00-7.30 pm, appellant Mohinder Singh came on his scooter No.PB-10B-2413. A signal was given to stop the scooter and the appellant/accused stopped his scooter. It was suspected that some contraband substance was being carried in the bag. Appellant/accused was informed of his right of search before a Gazetted Officer or a Magistrate. Joginder Singh (PW-2) called Gurjit Singh, DSP (PW-4) and the bag carried by the appellant/accused was searched in his presence and the substance bag was found to be “*opium*”. On weighment, it was found to be 7 kilos and 40 gms. Two samples from the recovered “*opium*”, each weighing 20 gms were taken and sealed separately having monogram ‘JS’ and ‘GS’ and taken into possession *vide* recovery memo Ext.-PE. Case property along with two samples was deposited with Baldev Singh MHC (PW-5). Next day i.e. on 01.05.1998, the case property as well as the sample parcels were produced before the Area Magistrate who is said to have initialled the case property and the sample parcels. The sample parcels were sent to Forensic Science Laboratory (FSL) and subjected to chemical analysis and the contents were found to be “*opium*” in FSL report *vide* Ext.-P1. After completion of the investigation, charge sheet was filed against appellant under Section 18 of the NDPS Act.

3. To prove the guilt of the accused, the prosecution has examined Constable Hardev Singh (PW-1), SI Joginder Singh (PW-2), ASI Harbhajan Singh (PW-3), DSP Gurjit Singh (PW-4) and Baldev Singh, MHC (PW-5). The appellant was examined under Section 313 Cr.P.C. to explain the incriminating evidence circumstance appearing in the prosecution evidence and he denied all of them.

4. The trial court acquitted the appellant *inter alia* on the ground that there was non-compliance of Section 50 of the NDPS Act. The trial court further held that no order of the Magistrate was proved to show that the case property was produced before the court, was brought in evidence to show that the seal of the sample sent to FSL tallied with the seal of the contraband, and it cannot thus be said that the evidence regarding such production of case property before the Magistrate was trustworthy. Being aggrieved by the acquittal, the State has preferred appeal before the High Court.

5. Placing reliance upon *State of Punjab v. Baldev Singh* (1998) 2 SCC 724, the High Court held that recovery of contraband from a bag/attache which the accused was carrying in his hands, would not amount

A to search of person and as such Section 50 of the NDPS Act will not
apply. Based on the evidence of SI Joginder Singh (PW-2) and Harbhajan
Singh (PW-3), the High Court held that the case property parcels of the
samples and the samples having the seals of 'JS' and 'GS' were duly
produced before the Magistrate and on those findings, the High Court
B reversed the order of acquittal and convicted the appellant under
Section 18 of the NDPS Act and sentenced him to undergo ten years
imprisonment. Being aggrieved, the appellant/accused has preferred
this appeal.

6. Mr. Harkesh Singh, learned counsel for the appellant *inter-*
alia submitted that since the contraband alleged to have been seized
C from the accused was not produced before the trial court, conviction of
the appellant cannot be sustained. Learned counsel for the appellant
placed reliance upon *Ashok alias Dangra Jaiswal v. State of Madhya*
Pradesh (2011) 5 SCC 123 to contend that where the narcotic drug or
the psychotropic substance seized from the possession of the accused is
D not produced before the Magistrate and when there is no evidence to
connect the forensic science report with the drug or the substance that
was seized from the possession of the accused in such a case the
conviction of the appellant/accused is not sustainable.

7. Learned counsel for the State has submitted that from the
E oral evidence of SI Joginder Singh (PW-2) and ASI Harbhajan Singh
(PW-3), the production of the contraband seized from the accused before
the court has been proved by the prosecution. It was submitted that the
evidence and materials on record amply proves the production of the
contraband along with the sample packets before the Magistrate. It was
submitted that the trial court was not right in acquitting the accused and
F the High court rightly set aside the acquittal and the impugned judgment
does not warrant any interference.

8. We have considered the submissions and perused the impugned
judgment, evidence and other materials on record. We have also taken
pains to look into the original records that were called for from the trial
G court.

9. On behalf of the appellant, contention was raised as to the
non-compliance of Section 50 of the NDPS Act to submit that the
safeguards stipulated under Section 50 were not complied with. In the
present case, the appellant was carrying the contraband-about seven
H

Kilos of “*opium*” in the bag which he was carrying in the scooter. Carrying the contraband in the scooter/bag cannot be said to be ‘by the person’ necessitating compliance of Section 50 of the NDPS Act for personal search. Reference in this regard can be made to the decision in *State of H.P. v. Pawan Kumar* (2005) 4 SCC 350. A

10. So far as the contention regarding production of the contraband seized from the accused, in his evidence, Harbhajan Singh (PW-3) stated that on 01.05.1998, he produced the sample parcels and the case property parcels with the seal and the sample seals before the Judicial Magistrate, Ludhiana and the Magistrate has recorded the seals tallied with the specimen impression. Harbhajan Singh (PW-3) further stated that after return of the samples and the parcels from the court, the same were lodged by him to the Malkhana on 01.05.1998 itself. Baldev Singh (PW-5) the then Malkhana in charge though orally stated about the deposit of the contraband in the Malkhana, but Baldev Singh (PW-5) has not produced Register No.19 maintained in the Malkhana to show the relevant entry in Register No.19 as to deposit of the case property in the Malkhana. Oral evidence of Harbhajan Singh (PW-3) and Baldev Singh (PW-5) as to the deposit of the contraband seized from the accused with Malkhana is not corroborated by the documentary evidence namely the entry in Register No.19. B C D

11. After referring to the oral evidence of Joginder Singh (PW-2) and Harbhajan Singh (PW-3), the trial court in para (14) of its judgment has recorded the finding that no order of the Magistrate to prove the production of the contraband before the Magistrate was available on the file. After recording such observation, the trial court held that the oral evidence regarding production of the case property before the Magistrate was not trustworthy and not acceptable. In the absence of the order of the Magistrate showing that the contraband seized from the accused was produced before the Magistrate, the oral evidence adduced that the contraband was produced before the Magistrate cannot form the basis to record the conviction. E F

12. For proving the offence under the NDPS Act, it is necessary for the prosecution to establish that the quantity of the contraband goods allegedly seized from the possession of the accused and the best evidence would be the court records as to the production of the contraband before the Magistrate and deposit of the same before the Malkhana or the document showing destruction of the contraband. G H

A 13. In *Vijay Jain v. State of Madhya Pradesh* (2013) 14 SCC
527, this Court reiterated the necessity of production of contraband
substances seized from the accused before the trial court to establish
that the contraband substances seized from the accused tallied with the
samples sent to the FSL. It was held that mere oral evidence to establish
B seizure of contraband substances from the accused is not sufficient. It
was held as under:-

C “10. On the other hand, on a reading of this Court’s judgment in
Jitendra v. State of M.P. (2004) 10 SCC 562, we find that this
Court has taken a view that in the trial for an offence under the
NDPS Act, it was necessary for the prosecution to establish by
D cogent evidence that the alleged quantities of the contraband
goods were seized from the possession of the accused and the
best evidence to prove this fact is to produce during the trial, the
seized materials as material objects and where the contraband
materials alleged to have been seized are not produced and there
E is no explanation for the failure to produce the contraband
materials by the prosecution, mere oral evidence that the materials
were seized from the accused would not be sufficient to make
out an offence under the NDPS Act particularly when the panch
witnesses have turned hostile. Again, in *Ashok v. State of M.P.*
F (2011) 5 SCC 123, this Court found that the alleged narcotic
powder seized from the possession of the accused was not
produced before the trial court as material exhibit and there was
no explanation for its non-production and this Court held that
there was therefore no evidence to connect the forensic report
with the substance that was seized from the possession of the
appellant.”

G 14. The High Court appears to have gone by the oral evidence of
Joginder Singh (PW-2) and Harbhajan Singh (PW-3) that the contraband
allegedly seized from the accused was produced before the Magistrate.
When the trial court which is in possession of the case records recorded
a finding that there is no order of the Magistrate showing the production
of the contraband before the court and acquitted the accused on that
basis, in our view, the High Court ought not to have interfered with the
said order of acquittal.

H 15. In an appeal against acquittal, the High Court will not interfere
unless there are substantial and compelling reasons to reverse the order

of acquittal. The mere fact that on reappreciation of evidence the appellate court is inclined to arrive at a conclusion which is at variance with the trial court, the same cannot be the reason for interference with the order of acquittal. After referring to various judgments in *Chandrappa and others v. State of Karnataka* (2007) 4 SCC 415, this Court summarised the general principles regarding the powers of the appellate court while dealing with an appeal against the order of acquittal and held as under:-

“42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, “substantial and compelling reasons”, “good and sufficient grounds”, “very strong circumstances”, “distorted conclusions”, “glaring mistakes”, etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of “flourishes of language” to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. *Firstly*, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. *Secondly*, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

A
B
C
D
E
F
G
H

- A (5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.”

- The same principles were reiterated in number of judgments viz. **Jugendra Singh v. State of Uttar Pradesh** (2012) 6 SCC 297, **State of Uttar Pradesh v. Ram Sajivan and Others** (2010) 1 SCC 529, **Bhaskar Ramappa Madar and others v. State of Karnataka** (2009) 11 SCC 690, **Chandrappa and others v. State of Karnataka** (2007) 4 SCC 415 and other judgments.

- C 16. Considering the case in hand, the findings of the trial court cannot be said to be ‘distorted conclusions’ warranting interference. Based on the oral evidence of Joginder Singh (PW-2) and Harbhajan Singh (PW-3), the High Court ought not to have interfered with the order of acquittal and the conviction of the appellant under Section 18 of the NDPS Act cannot be sustained.

- D 17. In the result, the conviction of the appellant under Section 18 of the NDPS Act and the sentence of imprisonment imposed on him is set aside and this appeal is allowed and the appellant is acquitted of the charge.

Devika Gujral

Appeal allowed.