

CASE NO.:
Appeal (crl.) 1143-1144 of 2003

PETITIONER:
DURGO BAI & ANR.

RESPONDENT:
STATE OF PUNJAB

DATE OF JUDGMENT: 10/08/2004

BENCH:
P. VENKATARAMA REDDI & B.P. SINGH.

JUDGMENT:
J U D G M E N T

P. VENKATARAMA REDDI, J.

The appellants herein were convicted under Section 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the Act') and sentenced to undergo imprisonment for ten years and to pay a fine of Rs.1 lakh. The appellant in Criminal Appeal No. 1144 of 2003, namely, Phuman Singh was also convicted under Section 307 IPC for firing a shot from his pistol at the police party and on that count, sentenced to undergo imprisonment for four years and to pay a fine of Rs.2,000. The sentences were ordered to run concurrently. The trial Court however acquitted Phuman Singh for the charge under Sections 25 and 27 of the Arms Act on the ground that the sanction of the District Magistrate has not been duly proved by the prosecution. Aggrieved by the same, the appellants preferred appeals in the High Court of Punjab & Haryana. The appeals were dismissed by the impugned judgment which is somewhat cryptic.

The prosecution case is as follows:

During the early hours of 2nd August, 1987, Inspector Sukhdev Singh (PW1)\027Station House Officer, Jalalabad P.S. received a telephonic message from the Commandant, BSF, Jalalabad that a special nakabandi (patrolling) has to be organized. He, along with the other police personnel went to the BSF Headquarters and after reaching there the Commandant deputed two Inspectors including Inspector Shivpal Singh (PW2) and three more BSF personnel to accompany PW1 for the patrolling. The Commandant instructed them to hold the naka at the canal bridge in the vicinity of Machhiwara village as he had some information about smuggling. At 3.30 a.m. the patrolling party noticed two persons coming from the direction of the village Tahliwala. When they were challenged, there was a firing from the opposite direction aimed at the patrolling party. In self-defence, the Inspectors (PWs 1 & 2) fired one shot each. Another Inspector also fired a light pistol. It was then noticed that a man with a pistol and a woman were the persons coming towards them. The patrolling party confronted them and made the man concerned dislodge his pistol. The naka party then apprehended both of them. First they searched Phuman Singh and found five cartridges in the left fold of his chadar. Then one empty and four live cartridges were also found in the chamber of the revolver thrown on the ground. Ten packets of 'brown sugar' / heroin

were found in the bag which was slung on the left arm of Phuman Singh. On search of the jhola (hand baggage), the other appellant Durgo Bai was carrying ten packets of 'brown sugar' were recovered. The packets weighed one kilogram each. The ten packets recovered from each were made into separate parcels and the seal of PW1 was affixed thereon. A recovery memo was prepared and a ruccha was also recorded. The revolver and the cartridges were also seized. FIR was recorded on the basis of the ruccha. The seized parcels and the revolver were deposited by PW1 with the property room of which a Head Constable was in-charge. He sent information to the Customs Officers. Thereupon, Inspector-Customs (PW3) came to the police station on 3.8.1987 and took possession of 20 kgs. of heroin contained in two bags which were handed over to him by PW1. The seals were found to be in-tact. After weighing the packets, he took out four samples of five grams from each packet on which the seals of PW3, BSF and police were affixed. After leaving some of the samples with the BSF and police, PW3 sent 20 samples to the Chemical Examiner for analysis and report. Necessary documentation, such as inventory of the goods seized, was done. The remaining heroin was kept in the packets and sealed and thereafter, the packets were put in a trunk on which PW3's seal was affixed and it was deposited in the police malkhana (property room). On 12.8.1987, PW3 recorded the statements of the witnesses and the accused were interrogated and they gave statements confessing to the commission of crime. The Chemical Examiner, by his report dated 18.8.1987 (Ex.PN) noted that the 'brown powder' sent in each sample contained 'di-acetyl morphine'. It appears that the Chemical Examiner's report was actually received much later i.e. on 6.10.1987 as stated by PW3. The complaint was filed by Assistant Collector of Customs, Amritsar on 19.10.1987 in the Court of the Chief Judicial Magistrate, Ferozepur together with various documents. After committal by the Judicial Magistrate, Ferozepur, the Additional Sessions Judge, Ferozepur framed charges and proceeded with the trial.

The trial Court held that the recovery of heroin from the two accused persons was proved beyond reasonable doubt and the presumption under Section 54 of the Act would come into play. The learned trial Judge also held that there was no violation of the mandatory provisions of Sections 41, 42 & 50 of the Act. The evidence of DW2\027the Sarpanch of village Tahlivala, to the effect that the police took Durgo Bai\027the appellant into custody from her house on the 9th of August, 1987, was disbelieved. The learned Additional Sessions Judge convicted and sentenced the accused as per the details already referred to. On appeal, the High Court held that the prosecution case was fully established by PW1 which has been corroborated by the evidence of PW2 and other witnesses and that there was no legal flaw which vitiated the trial. The first contention of the learned counsel for the appellants is that there is any amount of doubt as to recovery of heroin from the accused inasmuch as the same has not been produced before the Court even after granting opportunity to the prosecution before arguments were commenced. It is then contended that no evidence was let in as to how the seized packets, which were deposited in the police property room after the samples were taken by PW3, were transferred to Customs Division, Amritsar as mentioned in the petition dated 18.01.1988 filed in the Court by the prosecution. It is also pointed out that the

identity of the sample packets sent and the packets received by the Chemical Examiner for analysis was not established beyond doubt. Though sample seals were prepared, they were not sent to the Chemical Examiner. There was every possibility of tampering.

It is conceded that none of these points were raised or argued before the trial Court or the High Court. Even in the memorandum of SLP, no ground is taken about non-production of case property or the custody of the goods during the intervening period or the possibility of tampering the seals of sample packets. Not even relevant questions were put in the cross-examination to cover these aspects. We cannot, for the first time, in this appeal under Article 136 of the Constitution, go into these factual aspects especially when there is no clear pointer one way or the other from the recorded evidence.

The next contention raised by the learned counsel for the appellants is about the violation of the mandatory requirements of Sections 42 & 50 of the Act. The learned counsel submits that the information about the commission of the offence which was received by BSF Commandant and conveyed to PW1 was not reduced into writing as required by Section 42(1) of the Act. This argument overlooks the fact that there is nothing in the evidence on record to suggest that prior information as contemplated by Section 42 of the Act was received by the BSF Commandant or the Police Inspectors concerned. PW2 merely stated that "Commandant Sharma had not given the naka party the names of the accused. Information was that something is to be smuggled into India". Thus, check was organized not because the Police or the BSF officials had specific information about the offence in question or even that the heroin will be carried or transported by someone from nearby villages. The general information about the smuggling into India which led the Commandant to organize a nakabandi cannot be equated to the receipt of information within the contemplation of Section 42(1) of the Act. In any case, we need not dilate on this aspect further as it is Section 43 that is attracted in the instant case but not Section 42. It is not a case of entering into or searching any building, conveyance or enclosed place.

The next argument is that Section 50 has been violated inasmuch as search was done without adhering to the conditions laid down in the Section. This is again based on the premise that the police officials concerned must be presumed to have acted on the basis of definite prior information. Once this assumption is held to be wrong, the ratio of the decision in State of Punjab Vs. Balbir Singh [(1994) 3 SCC 299] gets attracted. The legal position has been clarified thus:

"\005But when a police officer carrying on the investigation including search, seizure or arrest empowered under the provisions of the CrPC comes across a person being in possession of the narcotic drugs or psychotropic substances then two aspects will arise. If he happens to be one of those empowered officers under the NDPS Act also then he must follow thereafter the provisions of the NDPS Act and continue the investigation as provided thereunder. If on the other hand, he is not empowered then the obvious thing he should do is that he must inform the empowered officer under the NDPS Act who should thereafter proceed from that stage in accordance with the provisions of the NDPS Act. But at this stage the

question of resorting to Section 50 and informing the accused person that if he so wants, he would be taken to a Gazetted Officer and taking to Gazetted Officer thus would not arise because by then search would have been over. As laid down in Section 50 the steps contemplated thereunder namely informing and taking him to the Gazetted Officer should be done before the search. When the search is already over in the usual course of investigation under the provisions of Cr.P.C then the question of complying with Section 50 would not arise."

It was noted in the beginning of the same paragraph that in the cases before the Court, the Police Officers did not proceed to act under the provisions of the NDPS Act after having necessary information or after entertaining reasonable belief as envisaged by Section 42. It was again emphasized in paragraph 25 that if there is a chance recovery of narcotic drug or psychotropic substance during a search in exercise of the power under the provisions of Cr.P.C, the compliance with Section 50 does not arise. However, the empowered officer should, from that stage, proceed to carry out the investigation in accordance with the other provisions of NDPS Act.

The interpretation of Section 50 and the effect of failure to observe the safeguards enshrined in Section 50 came up for consideration before a Constitution Bench of this Court in State of Punjab Vs. Baldev Singh [(1999) 6 SCC 172].

The learned Judges, after referring extensively to the exposition of law in Balbir Singh's case (supra), remarked that none of the decisions of this Court after Balbir Singh have departed from that opinion. Though the question of applicability of Section 50 in the context of chance recovery did not directly fall for consideration in the said case, the legal position in this regard clarified in Balbir Singh's case was reiterated by A.S. Anand, C.J., speaking for the Constitution Bench. The proposition was thus laid down in paragraph 12:

"On its plain reading, Section 50 would come into play only in the case of a search of a person as distinguished from search of any premises etc. However, if the empowered officer, without any prior information as contemplated by Section 42 of the Act makes a search or causes arrest of a person during the normal course of investigation into an offence or suspected offence and on completion of that search, a contraband under the NDPS Act is also recovered, the requirements of Section 50 of the Act are not attracted."

Again, at para 57, while summarizing the conclusions, it was said:

"(1) That when an empowered officer or a duly authorized officer acting on prior information is about to search a person, it is imperative for him to inform the person concerned of his right under sub-Section (1) of Section 50 of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing."

It is significant to notice that the prefatory expression "acting on prior information" has been advisedly used in tune with

the law laid down in Balbir Singh's case.

We therefore find no substance in the contention raised by the learned counsel for appellant in regard to violation of Section 50, even assuming that the search of jhola involved search of person.

The last contention somewhat faintly urged was that the conviction under Section 22 is illegal inasmuch as the article in question is not a psychotropic substance. It is not denied that the seized substance answers the definition of 'manufactured drug' being an opium derivative containing 'di-acetyl morphine' and therefore the appropriate Section providing for punishment is Section 21. The punishments prescribed under Sections 21 & 22 are the same. By reason of citation of wrong Section in the charge, we do not think that the appellants were handicapped from meeting the case against them or otherwise suffered any prejudice. The trial and conviction cannot therefore be set aside on this score.

As regards the charge under Section 307 IPC against the second appellant, the evidence of PWs 1 & 2 appears to be vague and scanty and it is not safe to convict him on the basis of this evidence. Apart from the fact that the lead/ empties were not recovered or attempted to be recovered, there is no definite evidence that the accused targeted the members of the patrolling party. The direction in which the shot from the revolver travelled and the details relating to other logistics are not forthcoming. On the strength of the evidence of PWs 1 & 2 it can only be said that they heard the sound of firing and then they retaliated. There was every possibility of the accused firing a shot aimlessly to scare away those who challenged him from a distance. Hence he is acquitted of the charge under Section 307 IPC. Of course, his acquittal for the offence under Section 307 does not make any difference as regards the sentence which the appellant has been subjected to under the NDPS Act.

Consequently, Criminal Appeal No. 1143 of 2003 is dismissed. Criminal Appeal No. 1144 of 2003 filed by Phuman Singh is allowed to the extent of setting aside the conviction under Section 307 IPC. Further, his conviction under Section 22 of the NDPS Act is altered to one under Section 21 of the Act and the sentence shall remain the same.