

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH.**

**Criminal Appeal No.S-1874-SB of 2003 (O&M)
Date of Decision: August 09, 2018**

Lachhman Dass

.....APPELLANT(s).

VERSUS

State of Punjab

.....RESPONDENT(s).

CORAM:- HON'BLE MR. JUSTICE SURINDER GUPTA

Present: Mr. A.K. Khunger, Advocate
for the appellant (s).

Mr. Sandeep Kumar, DAG Punjab.

SURINDER GUPTA, J.

This is appeal against the judgment of conviction dated 02.09.2003 and order of sentence date 04.09.2018 passed by Special Judge, Ferozepur, whereby the appellant has been convicted for the offence punishable under Section 15 of Narcotic Drugs and Psychotropic Substances Act, 1985(for short-NDPS Act) and sentenced to undergo rigorous imprisonment for four years and to pay a fine of 2000/- and in default of payment of fine to further undergo rigorous imprisonment for three months.

As per case of the prosecution, the police party headed by ASI Karnail Singh of Police Station Kui Khera, Sadar Fazilka was going for patrolling towards village Sajrana and on the way from bridge canal Kamalwala towards village Sajrana on *kacha* path, appellant was seen

coming with a bag on his head. On seeing the police party, he felt perplexed and turned towards field having cotton crop and was apprehended on the basis of suspicion. He was asked to place the bag he was carrying on his head on the ground and Constable Balwinder Singh was sent to the village to call an independent witness. He brought Mahaja Ram Chowkidar, resident of village Kamalke, who was joined in the police party. The investigating officer apprised him about his suspicion that the bag carried by him contain some intoxicant and gave him option to get his search conducted before a Gazetted Officer, Illaqa Magistrate or from him(ASI Karnail Singh). Appellant opted to get his search conducted from Investigating Officer and his consent memo to this effect was prepared. On search, the bag was found containing poppy-husk, out of which two samples of 250 grams each were separated and remaining poppy-husk on weighment came to be 34 kg 500 grams. A separate parcel of remaining poppy-husk was also prepared. Ruqa was sent to the police station on the basis of which formal FIR No.222 dated 24.10.1997 was registered at Police Station Sadar Fazilka.

On presentation of challan, learned trial Court found a prima facie case against the appellant for the offence punishable under Section 15 of NDPS Act and he was charge-sheeted accordingly to which the appellant pleaded not guilty and claimed trial.

In support of its case, prosecution examined Constable Kulwant Singh as PW1, SI Harmel Singh as PW2, Head Constable Gurdial Singh as PW3 and Investigating Officer ASI Karnail Singh as PW4. After tendering report of Chemical Examiner, learned Addl. Public Prosecutor closed the

prosecution evidence.

All the incriminating evidence was put to the appellant while recording his statement under Section 313 Code of Criminal Procedure which he denied and pleaded his false implication. He stated in his defence that no recovery was effected from him and he had been falsely implicated in this case.

Learned trial Court found the testimony of prosecution witnesses worthy of reliance, convicted and sentenced the appellant as detailed in opening para of this judgment.

Learned counsel for the appellant has argued that it is a case where the basic documents i.e. ruqa and FIR have not been proved. The investigating officer has nowhere stated that he sent the ruqa to the police station for registration of FIR. The most strange factor of this case is that the police even before searching the bag carried by the appellant and recording his consent memo, was aware that recovery of poppy-husk will be effected from the appellant and he will be booked for the offence punishable under Section 15 NDPS Act. This is clear on the perusal of the consent memo and other documents allegedly prepared at the spot which bears at the top the inscription in running hand that all the memos have been prepared for the offence punishable under Section 15 NDPS Act. FIR number also find mention in the memos, and the same could be explained by the prosecution by taking the plea that FIR No. had been received at the spot, as such, it was incorporated in memos in blank space left for recording FIR number but it has no explanation as to why all the memos including the consent memo have the mention of Section 15 NDPS Act at the top. This

reflects that these documents were prepared after the recovery had been effected. Statement of investigating officer that independent witness was called and option was given to the appellant to get himself searched before the Gazetted Officer or Illaqa Magistrate are false. He has further argued that even offer of search before a Gazetted Officer or Illaqa Magistrate is not in accordance with the provisions of Section 50, which do not permit the investigating officer to give offer to the accused to get himself searched by him.

Learned State counsel has argued that though the ruqa on the basis of which FIR was registered and FIR is not proved but the prosecution has examined the investigating officer who has deposed regarding the recovery from the petitioner. It appears that the public prosecutor while examining the investigating officer committed lapse in getting these two vital documents exhibited. However, non-exhibiting these documents, in no manner, affect the case of the prosecution. So far as the incorporation of the FIR number in the documents at the spot is concerned, the same is always written after the FIR number is received at the spot. The appellant could seek explanation from the investigating officer about the incorporation of offence under Section 15 NDPS Act in the memos but he has avoided to do so. The case of the prosecution is duly proved and the Trial Court has committed no error while convicting and sentencing the appellant.

Before proceeding further, I take a look at a major discrepancy in statements of Investigating Officer and recovery witness examined by prosecution. ASI Karnail Singh, Investigating Officer, while appearing as PW4, has stated that after sealing the case property, seal used by him was

handed over to the independent witness Mahaja Ram Chowkidar, while HC Gurdial Singh has stated that seal after use was handed over to him and he retained it for a day. Mahaja Ram, independent witness was not examined by the prosecution. Above discrepancy creates doubt and shatters the case of the prosecution. There is no explanation, if statement of Head Constable Gurdial Singh is believed, as to why seal after use was not handed over to independent witness. It also creates doubt, if independent witness was ever joined, as stated by prosecution witnesses.

Investigating Officer has admitted that offence under Section 15/61/85 of NDPS Act find mention in consent memo Ex.P5 and has also stated that before conducting the search, he gave offer to the appellant to get himself searched in the presence of some Magistrate or Gazetted Police Officer but the appellant reposed confidence in him. He prepared consent memo(Ex.P5) to this effect. Perusal of the consent memo shows that investigating officer had given three options to the appellant as follows:-

- (i) He can get the search conducted before a Gazetted Officer; or
- (ii) before Illaqa Magistrate; or
- (iii) from him (investigating officer).

This offer apprising the appellant of his right is not as per provisions of Section 50 NDPS Act which nowhere authorizes the investigating officer to apprise the suspect to get his search conducted by him.

In case of *State of Rajasthan Vs. Parmanand and another* **2014 (5) SCC 345**, two persons in possession of contraband had been arrested and investigating officer had recorded their joint statement

regarding option given to them as per provisions of Section 50 NDPS Act to get them searched before the Magistrate/Gazetted Officer or the officer, who was member of the raiding party. Hon'ble Apex Court has observed in para 14 as follows:-

“14. In our opinion, a joint communication of the right available under [Section 50\(1\)](#) of the NDPS Act to the accused would frustrate the very purport of [Section 50](#). Communication of the said right to the person who is about to be searched is not an empty formality. It has a purpose. Most of the offences under the [NDPS Act](#) carry stringent punishment and, therefore, the prescribed procedure has to be meticulously followed. These are minimum safeguards available to an accused against the possibility of false involvement. The communication of this right has to be clear, unambiguous and individual. The accused must be made aware of the existence of such a right. This right would be of little significance if the beneficiary thereof is not able to exercise it for want of knowledge about its existence. A joint communication of the right may not be clear or unequivocal. It may create confusion. It may result in diluting the right. We are, therefore, of the view that the accused must be individually informed that under [Section 50\(1\)](#) of the NDPS Act, he has a right to be searched before a nearest gazetted officer or before a nearest Magistrate. Similar view taken by the Punjab & Haryana High Court in *Paramjit Singh* and the Bombay High Court in *Dharamveer Lekhram Sharma* meets with our approval.

Therefore, in our opinion, the right has not been properly communicated to the respondents. The search of the bag of respondent No.1 Parnanand and search of person of

the respondents is, therefore, vitiated and resultantly their conviction is also vitiated.”

It is evident from the view expressed by Hon'ble Apex Court that Investigating Officer could not have given a third option to the respondent i.e. to get himself searched before officer of raiding party as Section 50(1) NDPS Act does not provide for it.

The case property i.e. bag containing poppy husk when produced before the Trial Court was not having proper seal which was broken and was in illegible condition. Investigating Officer admitted that the jute thread which was used to tie the bag, could be removed and anything could be taken out or put in the bag. This shows the manner in which the case property was sealed and creates doubt about the authenticity of the case property as well.

This case proves a saying, “*Lifafa Dekh kar Khat Ka Majmoon Bhamp Lete hein*”, (To understand the contents of the letter on a mere look at the envelope), which appears to have come true in this case. As per the investigating officer, he was not aware about the contents of the bag carried by the appellant and had apprised him about his suspicion that his bag contained some intoxicant. This shows that he was not sure as to what were contents of that bag but surprisingly, at the top of the consent memo (Ex.P5), it is mentioned that it was being prepared for the offence punishable under Section 15 NDPS Act. This reflects that this memo was prepared after the recovery has been effected from the appellant. Otherwise, mentioning of offence under Section 15 NDPS Act will amounts to prejudging with surety and confidence, the contents of bag before opening

like recovery memo, personal search memo, arrest memo, rough sketch of the place of recovery, could be well understood as these were prepared after recovery of contraband but this could not have been mentioned on the consent memo before the recovery had been effected. The facts discussed above create doubts about truthfulness of the story as propounded by the prosecution which appears to have escaped the attention of learned trial Court while recording conviction of the appellant. I am of the considered opinion that the prosecution has utterly failed to prove this case against the appellant beyond any shadow of doubt. Consequently, this appeal is allowed and the appellant is acquitted of the charge framed against him.

August 09, 2018
Sachin M.

(SURINDER GUPTA)
JUDGE

Whether speaking/reasoned: ***Yes/No***

Whether Reportable: ***Yes/No***