

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

**CRA-S No.1303-SB of 2016 (O&M)
Decided on: 08.02.2018**

Rakesh Kumar

....Appellant

Versus

State of Punjab

....Respondent

CORAM: HON'BLE MR JUSTICE ARVIND SINGH SANGWAN

Present : Ms. Kamaldeep Kaur, Advocate
and Ms. Deepshikha Chauhan, Advocate
(Legal Aid Counsels) for the appellant.

Mr. Karanbir Singh, AAG, Punjab.

ARVIND SINGH SANGWAN, J.

Challenge in this appeal is to the order dated 04.02.2016 passed by the Special Judge, Fatehgarh Sahib, convicting the appellant under Section 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short 'the NDPS Act') and sentencing him to undergo rigorous imprisonment for a period of 04 years and to pay a fine of Rs.50,000/- and in default of payment of fine to further undergo rigorous imprisonment for a period of 06 months.

This appeal is being pursued by the High Court Legal Services Authority. As per the custody certificate dated 03.02.2018, filed in the Court today, the appellant/accused has undergone 11 months and 29 days of actual sentence out of 04 years rigorous imprisonment awarded by the trial Court and he is not involved in any other case.

Brief facts of the case are that FIR No.101 dated 20.09.2012 was registered against the appellant – Rakesh Kumar. As

per the allegation in the FIR, the police party headed by ASI Deep Singh, on 20.09.2012 was present at a bridge of a canal in the area of Grain Market, Amlloh in connection with patrolling and checking of the anti-social elements. The accused was seeing coming from the side of village Haripur on the road along the small canal at about 07:30 pm on foot. On seeing the police party, he became perturbed and tried to return but was apprehended by him along with his co-officials. On enquiry, he disclosed his name as Rakesh Kumar and ASI Deep Singh also disclosed his identity and informed him that he has suspicion that the accused is having some narcotic contraband in his possession and the police want to conduct personal search of the accused. The accused was also informed about his legal right that he can be searched either in presence of a Magistrate or a Gazetted Officer and if, accused so desire, the Magistrate or the Gazetted Officer can be called at the spot. On this, the accused reposed his confidence in ASI Deep Singh and then, he conducted search of the accused which led to recovery of a polythene bag from his right pocket of the pant and 240 gms of intoxicated powder was recovered and out of the same, 02 samples of 10 gms each were taken and separated and sealed and the left-over powder was found to be 220 gms on weighing and a separate bulk parcel was also prepared. All the 03 parcels were sealed by ASI Deep Singh with a seal 'DS' and sample of the parcel was also prepared and the same was taken in possession by preparing separate memos.

Thereafter, a ruqa (written complaint) was sent to Police Station for registration of the FIR through Constable Amritpal Singh and after registration of the FIR, further investigation was carried out

and during course of the same, a rough site plan of the place of recovery was prepared with marginal notes and statement of witnesses were recorded. Later on, on receiving the report from the Forensic Science Laboratory, the challan under Section 173 of the Code of Criminal Procedure (in short 'Cr.P.C.') was submitted.

The trial Court framed charge under Section 22 of the NDPS Act vide order dated 16.07.2013.

Thereafter, the prosecution examined PW1 – HC Shashwant Kumar, tendered his affidavit Ex.PA regarding deposit of case property by SI Darshan Singh with him which were later handed over to Constable Simranjit Singh for depositing the same in FSL.

PW2 – SI Darshan Singh officiating S.H.O. stated that on receiving a ruqa Ex.PB sent by ASI Deep Singh through Constable Amritpal Singh, he registered an FIR (Ex.PC) and a copy of FIR along with ruqa was sent back to the place of recovery through Constable Amritpal Singh. Later on, the case property along with the accused, witnesses and sample chit Ex.PD were produced before him. He verified the fact and sealed the case property parcels and sample chits with his seal 'DS' and deposited the case property intact with MHC and put the accused in judicial custody. In cross-examination, this witness stated that he kept the seal with him and did not handed over the same to any other official. He further stated that he did not take the seal of the IO for comparison with the impression of seal on the parcels of the case property. It is further stated that he received the ruqa through Constable Amritpal Singh at 10.05 pm and sent back the FIR along with ruqa to the IO at the place of recovery at 11:00 pm.

PW3 – ASI Sarabjit Singh stated on the line of the details given in the FIR. This witness has further stated that consent memo Ex.PE of the accused was prepared by him and was signed by the accused and attested by him. Another memo Ex.PF was prepared vide which the accused reposed confidence in him. Despite efforts, no independent witness could be joined and the polythene bag containing intoxicant powder was recovered from the right pocket of the part of accused/appellant. This witness has further proved the sealing of the samples and preparation of the sample chit Ex.PD and the same were taken in possession by the police vide memo Ex.PG. Thereafter, the IO sent a ruqa Ex.PB through Constable Amritpal Singh to the police for registration of the FIR. The accused was arrested and his arrest memo Ex.PH was prepared. The personal belonging of the accused including a mobile phone and Rs.30/- was taken in possession vide recovery memo Ex.PJ. Thereafter, the information was given to mother of the accused about his arrest and on return to the Police Station, he produced the accused, case property, sample chits, the personal search memo before SI Darshan Singh, the then officiating SHO of Police Station Amloh. The SHO attested the same by fixing his seal with impression 'BS'. This witness also proved the second sample as MO1, the bulk parcel as MO2, recovery of currency note of Rs.30/- as MO3, mobile phone as MO4 and the representative sample as MO5.

In cross-examination, this witness stated that the place of recovery was surrounded by the area of Grain Market but the same was not depicted in the site plan. It was also stated that there were number of shops but were not shown in the site plan and those shops were of

commission agents and tea-stallers. He further stated that though some efforts were made to join an independent witness but no person was ready, however, no memo in this respect was prepared. The Constable who carried the ruqa left the place of recovery at about 09:40 pm on foot and returned to the place of recovery at about 11:10 pm on foot. This witness has further stated that the writing work was done while sitting on the edge of a minor canal but the same was not shown in the site plan and no DDR was recorded regarding the narcotic kit/scales available with the police party at the spot. This witness has further stated that he has not disclosed in his statement recorded under Section 161 Cr.P.C. that the weighment of the contraband was done with the help of a computerized scale and the IO can tell whether the said scale was approved by the government or not. No separate memo in this regard was prepared.

PW4 – ASI Deep Singh also stated on the similar line and proved all the documents. This witness has further stated that the site plan Ex.PK was prepared at the spot and after completing the formalities, the accused was produced before the SHO whose statement was recorded. It is further stated that he moved an application Ex.PL before the Illaqa Magistrate for depositing the case property and similar application Ex.PM was filed for preparation of the inventory. The Illaqa Magistrate passed a joint order on both the applications vide Ex.PN and a representative sample was also drawn by the Illaqa Magistrate with his seal and thereafter, he deposited the case property intact with the Judicial Malkhana except one sample parcel, the sample chit and Form No.29 which he redeposited with MHC.

In cross-examination, PW4 has stated that they were on private motorcycle and not on any official vehicle and no DDR was written in this regard. This witness has further stated that SI Darshan Singh did not open the case property parcel. The weighing machine was with him in his investigation bag but the same was not mentioned in any document of the case. He further stated that he do not know whether his weighing machine was passed from the government authority or not and he has not brought the weighing machine in the Court. He further stated that there is a Grain Market near the place of recovery at a distance of 100 yards but the same is not shown in the site plan and there is overwriting in the case number in the sample chit Ex.PD. He further stated that the accused was not taken before the Magistrate or the Gazetted Officer nor the accused was told that he could be taken before the Magistrate or the Gazetted Officer. This witness has further stated that the intoxicating powder was separated with the help of a piece of paper and neither the same was taken in possession nor any memo in this regard was prepared and even no memo regarding use of weighing machine was prepared.

PW5 – Constable Simranjit Singh tendered his affidavit Ex.PP and in cross-examination, he stated that he has gone to deposit the parcel with the Chemical Examiner.

Thereafter, the statement of the accused under Section 313 Cr.P.C. was recorded in which he denied all the incriminating evidence and pleaded that he has been falsely implicated and no recovery was effected.

No defence evidence was led by the accused/appellant.

Counsel for the appellant has submitted that as per the statement of PW3 – ASI Sarabjit Singh and PW4 – ASI Deep Singh who were member of the patrolling party have stated that after the appellant was apprehended, he was given an offer to be searched either before the Magistrate or a Gazetted Officer and vide consent memo Ex.PF, and the accused had reposed confidence with ASI Sarabjit Singh. It is further stated that the same is not a proper communication of the legal right available to the appellant. Counsel for the appellant has relied upon the judgment “*State of Rajasthan vs Parmanand and another*”, 2014(2) RCR (Criminal) 40 to submit that it has been held by the Hon'ble Supreme Court that in view of the stringent provision of punishment provided under the Act, the prescribed procedure has to be meticulously follow as these are the minimum safeguards available to accused persons against a possibility of a false involvement. It is further held that communication of this right has to be clear, unambiguous and the accused must be made aware of existence of such a right. It is further held by the Hon'ble Supreme Court that when the accused person has reposed confidence in a police official, who is part of the investigating team and he himself has conducted the search, is a breach of the provision of Section 50(1) of the NDPS Act as the idea behind taking the accused to near the Magistrate or the Gazetted Officer, if so required is to give a chance of being searched in presence of an independent officer. It is, thus, submitted on behalf of the appellant that the procedure adopted for the consent offer given to the appellant vide memo Ex.PE, then obtaining his consent vide memo Ex.PF in presence of PW3 – ASI Sarabjit Singh and PW4 – ASI Deep Singh, and then the

search conducted by PW3 – ASI Sarabjit Singh himself is not correct as it cannot be said that search was made by an independent officer, as he was part of the police party.

Counsel for the appellant has further argued that as per the statement of PW3 – ASI Sarabjit Singh, after the appellant was arrested and the recovery was effected, sample parcels and bulk parcels were sealed with the seal 'DS' and the sample parcel Ex.PD was prepared, the same were taken in possession by the police vide memo Ex.PG which was attested by the co-officials and thereafter, the site plan Ex.PK was prepared with the marginal notes, a ruqa Ex.PB was sent through Constable Amritpal Singh on the basis of which, the FIR Ex.PC was registered. Counsel for the appellant has further submitted that from the statement of PW3 – ASI Sarabjit Singh as well as PW4 – ASI Deep Singh, the appellant was apprehended at about 07:15 pm to 07:30 pm and in cross-examination of both these witnesses, it has come that the ruqa was sent through Constable Simranjit Singh at about 09:40 pm who went to the Police Station on foot and he returned back along with copy of the FIR and ruqa to the place of recovery at about 11:10 pm on foot and in the meantime, the investigation was carried out, as noticed above. Counsel for the appellant has drawn attention to the documents, sample seal chit Ex.PD, the recovery memo of bulk parcel Ex.PG, arrest memo Ex.PH and the memo Ex.PJ vide which the mobile phone and Rs.30/- were recovered from the appellant as well as the site plan Ex.PK, to show that all these documents bears FIR No.101. It is further submitted on behalf of the appellant that as per the statement of PW3 and PW4, all these documents were prepared prior to sending the

intimation to the Police Station through Constable Amritpal Singh vide ruqa/information Ex.PB at about 09:40 pm and the copy of the FIR was received back at about 11:10 pm, therefore, the mentioning of FIR number on the documents which were prepared at the spot prior to registration of the FIR, makes the case highly doubtful.

In support of her contention, the counsel for the appellant has relied upon the judgment ***“Ajay Malik and others vs State of U.T., Chandigarh”***, 2009(3) RCR (Criminal) 649 wherein it has been held that where the police has prepared the documents at the spot and later on, the FIR was registered, mentioning of FIR number in the documents prepared by the police at the spot prior to registration of the FIR makes the investigation doubtful.

Counsel for the appellant has further submitted that PW3 and PW4 have admitted in their cross-examination that the site plan Ex.PK was prepared at the spot and the place of recovery was adjacent to Grain Market where shops of the commission agent and tea-stallers were there but no such description has been given in the site plan. It is, thus, submitted that it is doubtful that the site plan Ex.PK was prepared at the spot, apart from the fact that it finds mention of FIR No.101 as noticed above and, therefore, this document was prepared later on.

Counsel for the appellant has also drawn attention of the Court to the statements of PW3 and PW4 where they have stated that they were present on the bridge of a canal and were on their private motorcycle. Both these witnesses have stated that they have not made any DDR with regard to their departure from the police station on that day. It is, thus, submitted that since then witnesses were not on an

official vehicle and they have not proved any DDR of their departure as admitted in the cross-examination, their presence at the spot is highly doubtful.

Counsel for the appellant has also argued that PW4 – ASI Deep Singh has admitted in the cross-examination that he has nowhere mention in any of the document of the case that he was carrying a weighing machine in his investigation bag. This witness has further admitted in cross-examination that he do not know whether his weighing machine was approved from the government authority or not.

Counsel for the appellant has also argued that PW4 – ASI Deep Singh in his cross-examination has admitted that CFSL Form was filled partly by him at the spot and the same was not completed at the spot. Counsel for the appellant has drawn attention to the CFSL Form Ex.PD on which, the sample seal is pasted to submit that half of the form is filled as a carbon copy and on the bottom there is an entry with a different ink. It is, thus, submitted that the CFSL Form was not filled at the spot which again raises a suspicion on the investigation. Counsel for the appellant has further submitted that as per the statement of PW4 – ASI Deep Singh, when he moved application Ex.PL and Ex.PM before the Illaqa Magistrate, the Magistrate passed an order regarding taking of one sample of 20 gms, with seal 'PK' and it was directed that case property along with sample mentioned above i.e. with seal 'PK', along with case property will be deposited with the Judicial Malkahana, Amloh. It is further submitted that a perusal of the statement of PW4 – ASI Deep Singh show that he has stated that the seal 'DS' remained with him and the same was not handed over to any other official.

Counsel for the appellant has, thus, argued that the sample which was sent to Chemical Examiner bears the seal 'DS' and the sample which was drawn before the Judicial Magistrate as per the order dated 22.12.2012 with seal 'PK' (by Parminder Kaur, Judicial Magistrate Ist Class, Amloh) was never sent for chemical examination. It is, thus, submitted on behalf of the appellant that the sample which was sent for chemical examination with seal 'DS', original seal was kept by PW4 – ASI Deep Singh himself makes it doubtful that the seal was not tampered in view of the fact that the sample was sent to the Chemical Examiner after a delay of 06 days.

Counsel for the appellant has further submitted that in view of the fact that there are many discrepancies in the prosecution evidence regarding effecting of recovery at the spot and non-examination of an independent witness has made the prosecution case doubtful.

In reply, counsel for the State has stated that it has come in the statement of prosecution witnesses that despite making efforts, no independent witness was joined and the recovery of 260 gms of intoxicant powder, which is of non-commercial quantity is proved to be recovered from the appellant. He has further stated that the investigating officer has given an offer to the appellant/accused to be searched before the Gazetted Officer or the Magistrate but he has reposed confidence in ASI Sarabjit Singh and, thereafter, the recovery was effected and proper procedure has been followed. Counsel for the State has produced on record the custody certificate dated 03.02.2018 and as per this custody certificate, the appellant has undergone 11 months and 29 days of actual sentence i.e. about 01 year out of 04 years

rigorous imprisonment awarded by the trial Court and he is not involved in any other case.

After hearing counsel for the parties and on perusal of the lower Court record, I find merit in the present appeal for the following reasons:-

*a) The prosecution has failed to explain that when the police during investigation at spot has prepared the documents Ex.PD, the sample seal chit Ex.PG, recovery memo of bulk parcel Ex.PH, arrest memo and Ex.PJ the recovery of mobile phone and Rs.30/- from the appellant and Ex.PK, the site plan and, thereafter, an information was sent to the Police Station for registration of the FIR, how the FIR number is mentioned in these documents. It has been held by this Court in the judgment **Ajay Malik'case (supra)** that when there is no explanation how in the documents which were allegedly prepared at the spot and thereafter, an intimation was sent to the police for registration of the FIR, the FIR number is mentioned in these documents, it makes the prosecution story doubtful that these documents were prepared at the spot.*

b) Secondly, PW3 and PW4 i.e. ASI Sarabjit Singh and ASI Deep Singh have admitted in their cross-examination that the place of recovery is adjacent to the Grain Market where shops of commission agents and tea-stallers are there but in the site plan Ex.PK neither Grain Market nor the shops have been shown and, therefore, this fact also makes the prosecution story doubtful that the site plan was prepared at the spot.

c) As per the deposition of PW3 and PW4, who were member of the police party, it is stated that they were present at the place of recovery and have gone there on their private motorcycles. These witnesses have further stated that no DDR recorded regarding their departure

from the Police Station on their private vehicle, therefore, their presence at the spot is also not trustworthy.

d) *PW4 – ASI Deep Singh has admitted in the cross-examination that in none of the documents, forming part of the 173 Cr.P.C. report, it is mentioned that he was carrying the weighing machine in his investigation bag or that the same was an approved weighing machine by the government authority.*

e) *Even, he has stated that the CFSL Form was not completely filled by him at the spot. A perusal of the CFSL Form No.29 Ex.PD show that half of this form is a carbon copy and on the bottom there is an entry with a different ink.*

f) *It has also come in the statement of PW4 that he moved the application Ex.PL and Ex.PM before the Illaqa Magistrate and the Magistrate has drawn a sample of 20 gms which was sealed with seal 'PK' and it was directed that the bulk parcel along with the sample parcel with seal 'PK' be deposited with the Judicial Malkhana. PW4 has further stated that the sample seal 'DS' with which the sample seal parcel and bulk parcel were sealed, at the spot remained with him throughout and he never handed over the same, to any other officer. A perusal of the Chemical Examiner show that the sample parcel sent for examination was bearing the seal 'DS' and the sample parcel drawn by the Judicial Magistrate as per the order dated 22.12.2012 with seal 'PK' was never sent for chemical examination and, therefore, it is doubtful that the seal on the sample parcel 'DS' remain intact as the same was sent to the Chemical Examiner after a period of 06 days and in between the original seal remained with PW4 – ASI Deep Singh.*

g) *Even, the offer given to the appellant/accused to be searched before the Magistrate or the Gazetted*

*Officer is not in accordance with law as after recording the consent memo Ex.PF, he reposed confidence with ASI Sarabjit Singh to conduct the investigation and thereafter, the search was conducted by the same officer. In view of the judgment of the Hon'ble Supreme Court **State of Rajasthan's case (supra)**, it is held by the Hon'ble Supreme Court that when an accused person repose confidence in a police official who himself is part of the investigating team and has conducted the search, it amounts to breach of the provision of Section 50(1) of the NDPS Act as the idea behind taking the accused to near the Magistrate or the Gazetted Officer, if so required, is to give a chance of being searched in presence of an independent officer.*

***h)** Though, it is well settled principle of law that non-joining of an independent witness is not fatal to a case under the NDPS Act, however, in the peculiar facts and circumstances of this case where the recovery from the accused is doubtful, the benefit can be given to the accused/appellant and non-joining of an independent witness makes the prosecution case further doubtful.*

In view of what has been discussed hereinabove, the present appeal is allowed, the judgment of conviction and the order of sentence dated 04.02.2016 is set-aside. The appellant is on bail, his bail/surety bonds be released.

08.02.2018
yakub

(ARVIND SINGH SANGWAN)
JUDGE

Whether speaking/reasoned	Yes/No
Whether reportable:	Yes/No