

IN THE HIGH COURT OF PUNJAB & HARYANA, CHANDIGARH

Criminal Appeal No.S-1504-SB of 2016 (O & M)

Date of Decision: February 17, 2018

Amitpreet Singh

..... APPELLANT

VERSUS

State of Punjab

..... RESPONDENT

. . .

CORAM: HON'BLE MR. JUSTICE JASPAL SINGH

. . .

PRESENT: - Dr. Anju Sharma, Advocate, for the appellant.

Mr. Kuldeep Singh, Senior Deputy Advocate General,
Punjab.

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Jaspal Singh, J

Dis-heartened by judgment of conviction and order of sentence dated May 04, 2015 passed by the Judge, Special Court, Patiala, in case bearing FIR No.107 dated November 04, 2013, under Sections 21 & 22 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (for short, 'Act'), Police Station, Bhadson, District Patiala, appellant – accused Amitpreet Singh has preferred the instant appeal.

In a nut shell, case of the prosecution is that on November 04, 2013, police party headed by ASI Lakhvir Singh was present at Bus Stand, village Dittupur in connection with patrolling. A person came from the side of village Dittupur who was apprehended on suspicion. On enquiry,

he disclosed his name as Amitpreet Singh son of Gurmeet Singh. The Investigating Officer disclosed his identity to the accused and told him that he had suspicion that some intoxicant substance is lying in his possession and he wanted to conduct his search. He apprised him of his legal right to be searched in the presence of a Gazetted Officer or a Magistrate. Accused reposed confidence in him, upon which, his consent memo Ex.PA was prepared. After conducting search of accused, a contraband of 44 grams of smack wrapped in a packet of glazed paper was recovered from him, out of which, two samples of 1 gram each were separated. Remaining contraband was converted into a bulk parcel and sealed with his seal bearing impression 'LS'. Besides this, 20 pouches of intoxicant tablets, each containing 100 tablets, were also recovered from the right pocket of his trouser, out of which, two pouches were separated as sample and remaining contraband was converted into a bulk parcel and sealed with his seal bearing impression 'LS'. Seal after use was handed over to ASI Nazar Singh. Currency notes of ₹ 40/- and a mobile phone were also recovered from him.

After completion of other necessary formalities and on receipt of report of Chemical Examiner, final report under Section 173(2) Cr.P.C. was presented in the court. Copies of documents as required under Section 207 Cr.P.C. were supplied to accused, free of costs. Finding a prima facie case, accused was chargesheeted under Sections 21 & 22 of the Act, to which, accused did not plead guilty, rather opted to contest the case. Accordingly, prosecution was asked to adduce its evidence to substantiate the charge.

In order to bring home the guilt of accused, prosecution examined as many as five witnesses. In addition to it, prosecution has also

placed on record various documents i.e. consent memo Ex.PA, sample seal Ex.P1, sample parcel of smack Ex.MO1, bulk parcel Ex.MO2, sample parcel of tablets Ex.MO3, bulk parcel Ex.MO4 etc.

When incriminating circumstances appearing in prosecution evidence were put to accused for eliciting his explanation as required under Section 313 Cr.P.C., he denied all the allegations and pleaded false implication in the instant case at the instance of Gaggi son of Pappu Libra, resident of village Dittupur. He examined two witnesses in his defence.

On the strength of evidence and after hearing learned counsel for the parties, prosecution was held to be successful and accused was held guilty, convicted and sentenced under Sections 21 & 22 of the Act to undergo RI for a period of 10 years alongwith fine to the tune of ₹ 1 lac and in default of payment of fine, to further undergo RI for a period of one year.

Aggrieved against his conviction and sentence vide aforesaid judgment/order of sentence, appellant – accused has preferred the instant appeal.

While assailing the impugned conviction and sentence imposed upon the appellant – accused, learned counsel for the appellant has ebulliently argued that he has been falsely implicated in the instant case at the instance of one Gaggi. No effort was made by Investigating Officer to join any independent witness prior to conducting search of the appellant, who is alleged to have been apprehended at Bus Stand, village Dittupur. Learned counsel for the appellant has further attacked the judgment/order of sentence on the ground of non-compliance of ingredients of Section 50 of the Act; non-sending of samples to the Chemical Examiner within the

prescribed period of 72 hours and commission of inordinate & unexplained delay therein; non-filling of Form No.29 of the Act at the spot; non-compliance of provisions of Section 50, 52, 55 & 57 of the Act as in the instant case, alleged recovery is from the personal search of the appellant; non-handing over the seal after its use to any independent witness; material infirmities & contradictions. Besides this, learned counsel for the appellant has submitted that appellant – accused has also successfully established the probable defence of false implication by the Investigating Officer at the instance of one Gaggi, a police tout.

Per contra, learned counsel for the State, while controverting the various submissions made by learned counsel for the appellant, has argued that same do not carry any legal weight. Infact, learned trial court has rightly come to the conclusion that public witness was not available and as such, he could not be associated at the time of recovery of the intoxicant substance from the appellant – accused and in the said situation, seal also could not be entrusted to independent witness. The seal was entrusted after its use to ASI Nazar Singh which was subsequently returned by him after deposit of the case property with the MHC. Thus, mere fact that Investigating Officer did not associate any independent witness from public or that, seal was not handed over to independent witness, is not fatal to the case of the prosecution. Similarly, search was also conducted as per the procedure prescribed by law. Appellant was made aware of his legal right to get his search conducted in the presence of the Magistrate or Gazetted Officer by ASI Lakhvir Singh but he reposed confidence in him. It was only thereafter, search of the accused was carried out which led to recovery of 44 grams of smack and 2000 tablets of Phenotil. Since, it was a chance

recovery, there is no material irregularity or illegality in the procedure adopted by the Investigating Officer at the time of recovery of the intoxicated substances. The statements of all the witnesses though official do not suffer from any material infirmity or contradiction, rather, they are consistent on material point. Therefore, learned trial court has rightly believed the same and finally convicted & sentenced the appellant. Accordingly, learned counsel for the State prayed for dismissal of the instant appeal.

This Court has weighed the rival contentions of learned counsel for the parties and minutely scanned the evidence and is of the considered view that prosecution has miserably failed to bring home the guilt of the accused beyond all reasonable doubts and the conviction & sentence ordered by the trial court vide impugned judgment/order dated May 04, 2013 are not sustainable.

First of all, it would be pertinent to mention that police party headed by ASI Lakhvir Singh was allegedly present at Bus Stand, village Dittupur, where they spotted the accused and on the basis of suspicion, apprehended him. But here, it would be important to note that prior to the apprehension of accused, there was head injury sustained by the accused-appellant, which was profusely bleeding. A categorical stand has been taken by the appellant – accused under Section 313 Cr.P.C. that said injury was caused to him by one Gaggi of his village, who is a police tout and in connivance with police, particularly, ASI Lakhvir Singh, he was falsely implicated in the instant case. It is very strange that a person who has suffered head injury and is profusely bleeding, was made to sit at Bus Stand of village Dittupur for a period of approximately 5 ½ hours, that too, without

any medical aid. He was only taken to the hospital after 6/7 hours of his alleged apprehension. Moreover, in a situation, when a person is alleging that he was going to the police station for reporting the matter for causing injury on his person, it is highly impossible and improbable that he would carry intoxicants.

Moreover, in the instant case, matter was not immediately reported to any senior officer by ASI Lakhvir Singh. Consent memo Ex.PA is also not beyond suspicion particularly when no effort was made by the Investigating Officer to report the matter either to DSP or any other senior officer. He opted continued to carry out the proceedings allegedly at the spot, that too, for a period of more than 5/6 hours. When the alleged recovery is at bus stop of village Dittupur then there would have been no dearth of the independent witnesses but no effort appears to have been made to join any independent witness during the investigation of this case either from village Dittupur or from the persons who must have passed during the aforesaid 5/6 hours by the side of that bus stand or would have come present at the bus stand. It is not the case of prosecution that despite request, nobody was prepared to join investigation. No doubt, testimony of the official witnesses should not be discarded on account of colour of their status and as has also been observed by learned trial court while placing reliance on the judgment of the Hon'ble Supreme Court in **Jarnail Singh vs. State of Punjab, 2011(1) RCR (Criminal) 925** but the court has to satisfy as to whether non-joining of independent witness in the facts and circumstances of a particular case was necessary and feasible. No straight jacket formula can be laid in this regard. In the instant case, accused was apprehended at Bus Stand, Dittupur. Investigating Officer and other members of police party

remained at the spot for more than 5/6 hours. General public was available at the bus stand, village Dittupur was also near that bus stand, yet it is highly strange that Investigating Officer did not opt to join any independent witness and did not make any effort to call any Sarpanch, Member Panchayat, Lambardar, Watchman or any other respectable of the village. Non-joining of independent or public witness in such a situation, in addition to the alleged option reposing confidence in the Investigating Officer, who is a junior most officer also becomes doubtful. Thus, it was obligatory upon Investigating Officer atleast to have informed the DSP of the area or any other senior officer, which would otherwise had explained his presence at the spot for a period more than 5/6 hours and being out of the premises of the police station. Much reliance cannot be placed upon such a consent memo, particularly in the facts & circumstances of the case, referred to above.

Not only this, non-preparation/ filling up of Form No.29 at the spot and non-handing over of samples within the prescribed period of 72 hours, regarding which no explanation is furnished by prosecution, also cause serious dent in its case. The aforesaid Form No.29 was filled in and prepared at a subsequent stage. The seal was also not entrusted to any independent witness and in such a situation, an adverse inference can be drawn against the prosecution that tampering of the case property as well as sample(s) cannot be ruled out. In this context, reliance can be placed upon the judgment of Hon'ble Apex Court in **Avtar Singh vs. State of Punjab, 2002(4) RCR (Criminal) 180** which was subsequently relied upon by this Court in Criminal Appeal No.308-SB of 2005 titled 'Nazar Sigh vs. State of Punjab', decided on January 09, 2014. In the light of aforesaid judgment,

non-sending of the samples within a period of 72 hours as well as non-preparation of Form No.29 at the spot, are material circumstances which are fatal to the case of the prosecution and accused is entitled to the benefit of doubt on the basis thereof, particularly when there is every likelihood and possibility of tampering with the case property including the samples and further, the case solely hinges upon the statements of the official witnesses who are otherwise interested in success of the case.

As far as contention of learned counsel for the appellant regarding non-compliance of mandatory provisions contained in Sections 50, 52, 55, 57 of the Act are concerned, it would not be out of place to mention here that there was no compliance of Section 50 of the Act. In the instant case, recovery is alleged to have been effected from personal search of the appellant i.e. 44 grams of smack from a packet of glazed paper in his possession and 2000 tablets of Phenotil i.e. from the trouser of the appellant – accused. It is not the case of prosecution that recovery was effected from any bag or any other article being carried by the appellant – accused. So, once the recovery is from the person of appellant – accused, it was obligatory upon the Investigating Officer to comply with various mandatory conditions and adopt the procedure prescribed in Section 50 and other provisions of the Act. Non-compliance of aforesaid mandatory provisions clearly demolishes the case set up by the prosecution. Apart from other material circumstances and non-compliance of various mandatory provisions, false implication also surfaces from the fact that no action was taken by the Investigating Officer on account of injury sustained by the appellant – accused at the hands of aforesaid Gaggi, that too, on his head. As has been discussed above, it is the case of the appellant that he was going to

Police Station, Bhadson to report the matter, he was illegally detained by police, particularly by ASI Lakhvir Singh, at the Police Station in connivance of the aforesaid Gaggi, who subsequently implicated him in the present case. The defence set up by appellant – accused appears to be a Genuine one in the facts & circumstances of the case narrated above, particularly, non-reporting of the matter to DSP immediately after the alleged apprehension. In the aforesaid facts & circumstances, non-joining of independent witness also becomes material. Thus, this Court is of the considered view that keeping in view all the factors discussed above, case of the prosecution is not beyond a reasonable shadow of doubt, rather it suffers from material illegalities as well as irregularities & infirmities. Therefore, impugned judgment of conviction and order of sentence are not sustainable in the eyes of law and deserve to be set aside.

As an offshoot of the aforesaid discussion, instant appeal is allowed. Consequently, judgment of conviction and order of sentence dated May 04, 2013 are set aside and appellant – accused stands acquitted of the charge framed against him.

Since, appellant – accused is in custody, he is ordered to be released forthwith, if not required in some other case.

February 17, 2018
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(Jaspal Singh)
Judge

Whether Speaking/ Reasoned:
Whether Reportable:

Yes/ No
Yes/ No