

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

CRA-S-3257-SB-2010

Date of decision: 17.10. 2018

Sucha Ram

....Appellant

Versus

State of Punjab

....Respondent

CORAM: HON'BLE MR. JUSTICE RAJ SHEKHAR ATTRI

Present: Mr. N.S. Rapri, Advocate
for the appellant.

Mr. M.S. Naryal, DAG, Punjab.

RAJ SHEKHAR ATTRI, J.

The above named appellant has preferred this appeal against the judgment of conviction and order of sentence dated 28th October, 2010 vide which he was convicted and sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine in the sum of Rs.2,00,000/- or in default of payment of fine, to further undergo rigorous imprisonment for a period of two years under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'the Act').

During trial, the prosecution has examined five witnesses. On appreciation of the evidence, appellant was convicted and sentenced as aforesaid.

In the nutshell, it is the case of the prosecution that on 29.04.2003, Sub Inspector Satnam Singh (PW-4) along with posse of police officials was present at the place of recovery. They spotted the appellant while driving the scooter and having two bags placed thereon

which were tied with a rope. He was apprehended on the basis of suspicion. The investigating officer apprised him with regard to search of the bag as well as his search in the presence of the gazetted officer or the magistrate but the appellant reposed the confidence of the Sub Inspector on the ground that search before a gazetted officer will strengthen the case of the prosecution. As such, search was conducted by the Sub Inspector. On search of the bag, poppy husk was recovered. Two samples each containing 250 grams were separated from each bag and converted into separate parcels. The bulk came to 34.500 kg in each bag. Thus, total 35 kg poppy husk was recovered from each bag. All the parcels and the bulk contained in the bag were sealed with the seal of the investigating officer having impression 'SS'. Seal after use was handed over to Assistant Sub Inspector Surinder Singh. First information (*Ruqa*) was sent to the police station for registration of the FIR. During investigation, two sample parcels were sent to Forensic Science Laboratory, which opined that same contained poppy husk. The appellant was put to trial. He was convicted and sentenced as aforesaid.

I have heard learned counsel for the parties and have gone through the record.

First of all coming to the compliance of Section 52 and 52-A of the Act. Both these provisions are mandatory in nature and the non-compliance thereof itself creates a doubt in the prosecution evidence and accused is entitled to benefit of doubt on this score. Section 52 of the Act reads as under:-

“52. Disposal of persons arrested and articles seized

—(1) Any officer arresting a person under section 41,

section 42, section 43 or section 44 shall, as soon as may be, inform him of the grounds for such arrest. (2) Every person arrested and article seized under warrant issued under sub-section (1) of section 41 shall be forwarded without unnecessary delay to the Magistrate by whom the warrant was issued. (3) Every person arrested and article seized under sub-section (2) of section 41, section 42, section 43 or section 44 shall be forwarded without unnecessary delay to— (a) the officer-in-charge of the nearest police station, or (b) the officer empowered under section 53. (4) The authority or officer to whom any person or article is forwarded under sub-section (2) or sub-section (3) shall, with all convenient despatch, take such measures as may be necessary for the disposal according to law of such person or article.”

A bare perusal of the provisions of Section 52 (*ibid*) makes it clear that article seized shall be forwarded without unnecessary delay to the Magistrate and also forwarded to the officer incharge of the nearest police station.

Sub-section 2 of Section 52-A specifically provides that the entire contraband and entire seized articles be produced before the magistrate along with inventory. This provision is mandatory and its violation vitiates the trial. The Hon'ble Supreme Court in *Union of India Vs. Jarooparam*, 2018(4) SCC 334, has observed as under:-

“10. Omission on the part of the prosecution to produce the bulk quantity of seized opium would create a doubt in the mind of Court on the genuineness of the samples drawn and marked as A, B, C, D, E, F from the allegedly seized contraband. However, the simple argument that the same had

been destroyed, cannot be accepted as it is not clear that on what authority it was done. Law requires that such an authority must flow from an order passed by the Magistrate. On a bare perusal of the record, it is apparent that at no point of time any prayer had been made by the prosecution for destruction of the said opium or disposal thereof otherwise. The only course of action the prosecution should have resorted to is to for its disposal is to obtain an order from the competent Court of Magistrate as envisaged under Section 52A of the Act. It is explicitly made under the Act that as and when such an application is made, the Magistrate may, as soon as may be, allow the application [Noor Aga v. State of Punjab & Anr. (2008) 16 SCC 417].

11. There is no denial of the fact that the prosecution has not filed any such application for disposal/destruction of the allegedly seized bulk quantity of contraband material nor any such order was passed by the Magistrate. Even no notice has been given to the accused before such alleged destruction/disposal. It is also pertinent here to mention that the trial Court appears to have believed the prosecution story in a haste and awarded conviction to the respondent without warranting the production of bulk quantity of contraband. But, the High Court committed no error in dealing with this aspect of the case and disbelieving the prosecution story by arriving at the conclusion that at the trial, the bulk quantities of contraband were not exhibited to the witnesses at the time of adducing evidence”.

Now advertng to the facts of the case in hand. PW2 SI Surinder Mohan was posted as the SHO of the police station and case property was produced before him. PW-ASI Surinder Singh has nowhere stated if the case property was produced before the SHO. However, SI Surinder Mohan, who was acting as the SHO, has been produced as PW-2 who has stated that the case property was produced before him by the investigating officer and he has affixed the seal bearing impression 'SM'

on the sample parcels and the case property. But he failed to give the details of the case property. He did not say how many sample parcels and how many bags containing bulk were produced before him. This part of the statement contains uncertainty and thus, creates a doubt with regard to the production of all the seized articles before him. Prosecution can very well prove this fact by producing the entries from roznamcha but nothing has been produced. To the mind of this court this fact itself creates a doubt and appellant is entitled to the benefit of doubt.

The evidence produced by the prosecution is discrepant with regard to preparation of Form No.29 at the spot or its production before the SHO. PW-2 SI Surinder Mohan has nowhere stated if Form No.29 was produced before him. His evidence is further supported by PW-3 ASI Surinder Singh who has categorically stated that Form No.29 was not filled at the spot. Thus, from the evidence of PW-2 and PW-3 makes it abundantly clear that Form No.29 was not prepared at the spot. PW-SI Satnam Singh made a feeble endeavour to fill up the lacunae by saying that Form No.29 was prepared at the spot. In the cross-examination, he has stated that Form No.29 was prepared at the spot but completed in the police station and further stated that the SHO did not sign Form No.29 and this form was deposited with the MHC. But all these facts found to be false. Form No.29 is placed on record as Ex.PR. It shows that the same was prepared on 30.04.2003 and was signed by SHO Surinder Mohan. As stated earlier, Surinder Mohan PW-2 nowhere stated if this form was produced before him or he signed the same but one fact is clear that the same was not prepared at the spot rather was prepared on 30.04.2003.

This fact also creates a doubt in the prosecution story.

Surprisingly, MHC Surinder Kumar in his affidavit Ex.PA has simply stated that the case property along with four sample parcels each containing 250 gms of poppy husk were produced before him by SI Satnam Singh. Although he used the words 'the case property' but he did not state if the bags containing bulk poppy husk and Form No.29 was deposited with him. The affidavit has been prepared in a clandestine manner and it appears to be a chicanery. The incharge of the malkhana has to give full details of each article deposited with him. By merely saying that the 'case property' was deposited by him is not sufficient and such evidence is not worth credence and should be discarded.

The production of case property before the magistrate within 24 hours has also not been established. The prosecution has placed on record an application Ex.PM which is dated 30.04.2003 for the purpose of obtaining the police remand. In this application, it is submitted that two bags each containing 35 kg poppy husk were recovered from the appellant. But nothing is mentioned if samples were drawn from those bags. It is not clear that the weight of the poppy husk as shown in Ex.PM is of the bulk or of the entire recovery. Nothing is mentioned if the case property was produced before the SHO. This is the first application submitted before the magistrate after the arrest of the accused/appellant and also after recovery of the contraband. It was the duty of the investigating officer to narrate all the facts and the investigation conducted uptill that time. But nothing is mentioned in the said application Ex.PM regarding investigation and other material facts. This

fact also creates a doubt in the prosecution story.

Even on the bare perusal of application Ex.PM and order Ex.PO passed thereon with regard to extending the judicial remand transpires that the case property was not produced before the magistrate upto that stage.

Prosecution has also produced on record another application Ex.PN which is signed by SI Satnam Singh on 30.04.2003 wherein it is submitted that the case property was being produced before the magistrate and it has been requested that the endorsement '**seen**' be made all the seized articles. But no order is made thereon by the magistrate. Nothing is on record if application Ex.PN was produced before the magistrate. It seems that this application has been prepared later on. Surprisingly, nothing is mentioned in Ex.PN if the seized articles have been sealed or not. Thus, on the bare perusal of Ex.PM, Ex.PO and Ex.PN it transpires that the case property was not produced before the Magistrate either on 29/30.04.2003. It is duty of the prosecution to prove that the case property was produced before the Magistrate but in the instant case prosecution is failed to prove this fact. For that purpose they could place on record copy of DDR as well as that of the store room register but they failed to produce the same. Mere production of the application (Ex.PN) written by the SI Satnam Singh does not prove that the case property was produced before the magistrate and there is no such order of the magistrate. Thus, there is violation of Section 52-A of the Act.

PW-2 has stated that SHO submitted the seal to Satnam Singh but Satnam Singh has categorically stated that he did not know to

whom the seal was handed over by the SHO. When the case property remained in the custody of police then it is necessary that seal either be handed to an independent witness or to any other officer of the police who shall keep the seal separate so that the same cannot be reused for tampering with the case property.

In this case, PW-HC Surinder Singh in his affidavit Ex.PA has stated that docket was got prepared from the office of SSP on 02.05.2003, but there is no document on the record if the case property was produced before the SSP on 02.05.2003.

The total recovery effected in this case has also creates doubt. PW4 states that two separate samples each containing poppy husk 250 gms of poppy husk were drawn from each bag and the bulk came to be 34 kg 500 gms in each bag. Same is mentioned in recovery memo Ex.PF. Even Investigating Officer Satnam Singh has stated that bulk poppy husk came to be 34 kg 500 gms in each bag. But when the case property was produced before the Chief Judicial Magistrate on 12.11.2005, it was specifically stated in the application that two bags each containing 34 kg 750 gms were produced before the magistrate and those were duly sealed with the seal of 'SS' and 'SM'.

Learned Chief Judicial Magistrate, Nawanshahr passed the order dated 12.11.2005, which read as under:-

“An application has been moved for making complilance under Section 52-A of NDPS Act in FIR No.91 dated 29.04.2003, under Section 15/61/85 NDPS Act. The details as mentioned on the bag containing the substance in question has been tallied. The seals on the bags are intact. The each article is stated to be 34 kg 750 gms. of poppy husk, out of which 2 representative

sample of 250 gms. has been drawn. The case property has been got photographed from the photographer produced, in a manner so that every detail should come in the picture. Thereafter, the case property and the representative parcel are sealed with the seal of the court, bearing impression 'HB'. Accordingly, the same is certified as per Section 52-A of NDPS At. The case property alongwith representative parcel are handed over to MHC Surinder Kumar, PS City Nawanshahr. Specimen seal impression of the seal of this court, is affixed on the margin of this order. The photograph produced and is accordingly attested. The case property is allowed to be disposed of by the Drugs Disposal Committee, headed by DIG Jalandhar Range.”

The above-said order of the learned Chief Judicial Magistrate transpires that each bag containing 34 kg 750 gms. of poppy husk were produced before him. Till the production of the case property before the police it remained in the custody of the police. The same was produced before the Chief Judicial Magistrate by a different SHO on 12.11.2005 but he has never been examined. No reason was assigned how and in what manner each bag containing 34 kg 750 gms of poppy husk was produced before the learned Chief Judicial Magistrate. This fact also creates a doubt in the prosecution case.

It is evident from the record that the case property always remained with the police in the police station till 12.11.2005 and no record has been produced as to who had handled the same in this interregnum. Surprisingly, the case property was produced before the learned Chief Judicial Magistrate on 12.11.2005 by MHC Surinder Kumar and same was returned to him by learned Chief Judicial Magistrate. Surprisingly, MHC Surinder Kumar in his affidavit Ex.PA has nowhere stated if he produced the case property before the Magistrate

on 12.11.2005. Even thereafter, he has not been examined as a witness. To the mind of this court, link evidence is also missing.

This fact can be viewed from another angle. PW Inspector Satnam Singh has deposed that the magistrate before whom the case property was produced on 30.04.2003 had passed order Ex.PO and put initials on the case property but nothing is mentioned in order Ex.PO to this effect. Apart from it, when the case property was again produced before the Chief Judicial Magistrate on 12.11.2005, it is simply mentioned in the application which was submitted before the Chief Judicial Magistrate that both the bags were bearing the seal impressions of 'SS' and 'SM'. It is nowhere mentioned if those were initialed by the magistrate on 30.04.2003. Even in the order Ex.PP (ibid), nothing is mentioned if any article of the case property was bearing initials of learned magistrate. It clearly infers that the case property was never keep intact and the possibility cannot be ruled out of its changing or tampering with.

In this case independent witnesses were very much available but none has been joined in the investigation. PW-4 ASI Surinder Singh conceded that 10-12 persons had passed from the spot but none was joined in this case. In the peculiar circumstances of the case, joining of independent witnesses was necessary to give credence to testimony of official witnesses.

The Act has been enacted to consolidate and amend the law relating to narcotic drugs, to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic

substances (to provide for the forfeiture of property derived from, or used in, illicit traffic in narcotic drugs and psychotropic substances, to implement the provisions of the International Convention on Narcotic Drugs and Psychotropic Substances) and for matters connected therewith.

Thus, the Act is a special law enacted by the Parliament with an object that of controlling and regulating the operations relating to narcotic drugs and psychotropic substances. It is for this that stringent provisions of law have been made. In this scenario, it is the duty of the prosecution to prove each fact by leading cogent and reliable evidence. Any flaw or slightest doubt in the evidence with regard to compliance of the mandatory provisions of the statute provides benefit of doubt to the accused.

The criminal justice delivery system adapted by this country provides three limbs - the investigating agency, the prosecution and the judiciary – all works in their respective spheres in an independent manner. Thus, it requires to the investigating agency to investigate in a sincere and bona fide manner without creating a doubt.

It has been specifically provided under the provisions of Section 50 of the Act that accused must be apprised of his right of search before a Magistrate or a Gazetted Officer. Recording the statement of a suspect or an accused under the custody of police to the effect that the suspect reposed confidence upon the investigation with regard to compliance of Section 50 is itself violates the provisions of this section. In fact Sections 25 and 26 have been inserted in the Evidence Act in order to prevent the practice of torture and putting undue influence on the

suspect or the arrested person.

In the case in hand, the consent memo Ex.PD transpires that the investigating officer had told the accused that he can get the search of the bags in front of the gazetted officer or a magistrate but accused replied that such a search will strengthen the case of the prosecution therefore, he wants to get the search before the investigating officer. This part of the statement i.e. *'search before gazetted officer will strengthen the case of the prosecution'* amounts to the confession before the investigating officer who himself is also the complainant. Recording such a statement of a suspect or an accused is clearly violates the provision of Section 50 which is mandatory one. When a person is under the custody or control of the police, recording of such a statement with regard to conducting search of the suspected material before the same police officer is completely inadmissible in evidence also. This practice should be stopped. This court is of the considered view that Ex.PD is inadmissible and it violates the provision of Section 50 of the Act. Thus, it vitiates search and seizure.

On the independent appraisal of the record, this court is of the view that the prosecution story is doubtful and the same is not acceptable. Learned trial court has failed to appreciate the evidence properly. Therefore, judgment of conviction and sentence order is not sustainable in the eyes of law and are liable to be *set aside*.

As a result, this appeal is accepted and the judgment of conviction and order of sentence are hereby *set aside*. Consequently, appellant-Sucha Ram is acquitted of the charges framed against him.

He be set at liberty forthwith if not required in the case. The amount of fine, if any deposited by him, be refunded to him.

(RAJ SHEKHAR ATTRI)
JUDGE

17th October, 2018
m. sharma

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