

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

**CRA-S-2497-SB-2016 (O&M)
Date of Order: 21.07.2018**

Prithi Raj (Pirthi Raj) and another

..Appellants

Versus

State of Punjab

..Respondent

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Jatinder Pal Singh, Advocate, for
Ms. Sandeep Kaur, Advocate (Legal Aid Counsel)
for the appellants.

Mr. Mehardeep Singh, Addl. A.G., Punjab

ANIL KSHETARPAL, J.

Two appellants Pirthi Raj and Jai Parkash have filed this appeal through legal aid against the judgment of conviction and order of sentence in FIR No.18, dated 09.02.2014, registered under Section 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985, registered at Police Station City II, Abohar.

The prosecution story as noticed by the learned trial Judge is as under:-

2. Briefly stated, facts of the present case as enumerated in the report under Section 173 Cr.P.C are that on 09.02.2014 ASI Gurdeep Singh along with other police officials were present for patrolling and check post duty in a private jeep and when police party was going from Azimgarh to Hanumagarh Road bye-pass, Abohar through Nai Abadi area and reached near T.V. Tower, two young persons coming on foot were seen. On seeing

the police party those persons suddenly turned back. ASI Gurdeep Singh stopped the jeep and apprehended both persons i.e. accused. Name and addresses of the accused persons were enquired. Thereafter ASI Gurdeep Singh disclosed his identity to the accused and further expressed his suspicion of some intoxicant with accused and his intention to conduct the search. Accused were apprised about their legal right to get the search conducted in the presence of Gazetted Officer or Magistrate. However, accused reposed faith upon ASI Gurdeep Singh and offered themselves for search. Upon this consent memo was prepared, which was signed by the accused-Pirthi Raj in English and Jai Parkash signed in Hindi and was also attested by witnesses. Before conducting search, efforts were made to join independent witness from the public, but none was available. Thereafter ASI Gurdeep Singh conducted personal search of accused Pirthi Raj and from the left side pocket of the pant some intoxicant powder wrapped in a polythene bag was recovered. Thereafter personal search of accused Jai Parkash was conducted and from out of right side pocket of his pant some intoxicant powder wrapped in polythene bag was recovered. ASI Gurdeep Singh arranged computerized weighing scale and from out of the intoxicant powder recovered from accused Pirthi Raj two samples of 5 Gram each were drawn. The remaining intoxicant powder was put in the same polythene bag and on weighing came out to be 190 Grams. Similarly from the intoxicant powder recovered from accused Jai Parkash two samples 5 Gram each were drawn and packed into sample parcels and remaining on weighing came out to be 170 Grams and bulk parcel thereof was prepared. All the sample parcels and bulk parcels were sealed by ASI Gurdeep Singh with his seal bearing impression 'GS'. Specimen seal impression was prepared

on Form M-29 at the spot. Seal after use was handed over to Head Constable Lal Chand. On personal search of accused Pirthi Raj currency notes of Rs.65/- and on personal search of accused Jai Parkash currency notes of Rs.70/- were recovered, which were taken into police possession vide separate recovery memo signed by accused and attested by witnesses. The accused Pirthi Raj and Jai Parkash by possessing 200 Grams and 180 Grams intoxicant powder respectively committed an offence punishable under Section 22 of Narcotic Drugs and Psychotropic Substances Act, 1985. Accordingly a ruqa was sent through PHG Brij Mohan and formal FIR was registered at the Police Station City-II Abohar. ASI Gurdeep Singh prepared site plan of the place of recovery. Accused were arrested. Statements of the witnesses were recorded. On return to the police station ASI Gurdeep Singh produced case property along with accused before the Station House Officer ASI Prem Chand, who after verifying the facts found the same to be correct and lodged accused in police lock up. He further compared seals on the case property and also affixed his seal bearing impression 'PC' thereon as well as on Form M-29. Personal search memos were also attested by ASI Prem Chand and case property was taken into possession vide separate recovery memo. On 11.02.2014 ASI Prem Chand sent sample parcels for analysis to the Chemical Examiner through Constable Sangat Ram and samples were deposited on 12.02.2014. After completion of the investigation and other formalities the challan was presented in the Court by the Station House Officer, Police Station City-II Abohar.”

After completion of the investigation, police presented a report under Section 173 of the Code of Criminal Procedure along with the documents attached.

In order to prove charges against the appellants, prosecution examined the following witnesses:-

PW1 ASI Prem Chand

PW2 Constable Sangat Ram,

PW3 ASI Gurdeep Singh-Investigating Officer

PW4 Head Constable Lal Chand.

Statements of the appellants were recorded and incriminating evidence appearing was put to them under Section 313 of the Code of Criminal Procedure. The appellants, although, afforded opportunity, did not lead evidence in defence.

Learned Special Judge found that the prosecution was successful in bringing home the guilt of the accused-appellants and therefore, were convicted under Section 22(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985. The appellants were sentenced to undergo rigorous imprisonment for a period of 10 years each and to pay fine of Rs.1,00,000/- each and in default of payment of fine each convict to further undergo rigorous imprisonment for a period of one year.

This court has heard learned counsel for the appellants as well as learned Additional Advocate General, Punjab.

Learned counsel for the appellants has submitted that in the first information report the powder recovered is alleged to be mentioned as amphetamine, whereas as per the report of Forensic Science Laboratory, sample sent was of alprazolam. He has further submitted that as per the prosecution evidence, the narcotic drug was recovered in the form of powder which was of brown colour. Whereas as per the report of Forensic Science Laboratory, blue coloured powder with peach colour particles were sent for examination and examined by the Forensic Science Laboratory.

Learned counsel for the appellants has further submitted that no independent witness has been examined, although Raj Kumar, the driver of the private vehicle (jeep) was available with the police party as it is alleged that they travelled from Police Station to the place of incident in the aforesaid private vehicle being driven by Raj Kumar. He pointed out that Raj Kumar has not been associated by the Investigating Agency. He has further submitted that no independent witness has been associated which creates strong suspicion with regard to genuineness of the case set up by the prosecution. He further while drawing attention of the Court to the statements of Investigating Officer and Head Constable Lal Chand submitted that the Investigating Officer has stated that computer scale for weighing the alleged narcotic drug recovered was brought by constable Manjit Singh. However, constable Manjit Singh was given up by the prosecution agency and not examined in evidence. He has further referred to the evidence of Head Constable Lal Chand, who has been examined as PW4, wherein he states that weighing material was already with the Investigating Officer. However, weighing scale was of small size and not of computer scale whereas as per the Investigating Officer it was a weighing scale was a computer scale. He submitted that non-examination of constable Manjit Singh creates a strong doubt. He further submitted that as per the case of the prosecution, both the appellants were given option to get themselves searched from a Gazetted Officer or from the Executive Magistrate, however, both consented to conduct their search from the Investigating Officer.

According to Head Constable Lal Chand, PW4, two separate consent memos were prepared, whereas there is only one joint consent

memo produced by the prosecution. Even, Gurdeep Singh, ASI (Investigating Officer) when appeared as PW3 has stated that consent memo was prepared jointly.

On the other hand, learned Additional Advocate General, Punjab, has submitted that there is no substance in the arguments of learned counsel for the appellants as the minor contradictions pointed out are bound to happen with the passage of time. He submitted that the witnesses were examined after a period of 1 year and 4 months of the incident. He further submitted that non-joining of independent witness is not necessary.

This Court with the able assistance of learned counsel for the parties gone through the judgment passed by the Special Judge and the record.

In the first information report, while giving particulars of the narcotic substance recovered has been described as amphetamine, whereas in the report of Forensic Science Laboratory it is alprazolam. No doubt, learned counsel for the State has submitted that the narcotic drug was in the form of powder and, therefore, exact chemical composition can be only determined by the Forensic Science Laboratory, however, this is not the only difference. The entire case of the prosecution is that brown coloured powder was recovered. Gurdeep Singh, ASI as well as Head Constable Lal Chand have deposed before the court about colour of the powder recovered (narcotic substance recovered in powder form). However, when one examines report of the Forensic Science Laboratory, it is mentioned that the sample which has been sent for analysis, when opened 5 gram of blue powdery material having peach coloured particles were found in both the parcels. There is a mark different between blue colour and brown colour.

Further as contended by learned counsel for the appellants that the police party was travelling on a patrolling duty in a private vehicle being driven by Raj Kumar. However, Raj Kumar has neither been associated by the police nor he has been examined in evidence. It is not the case of the prosecution that private vehicle in which police party was allegedly travelling had left the place after leaving the police party at the place of incident. It is also not the case of the prosecution that the police party along with the accused did not return to the Police Station on the aforesaid vehicle. In such circumstances, non-examination of Raj Kumar, who was an independent person, was necessary. However, prosecution has not given any reason as to why Raj Kumar, driver of the jeep, was not named in the list of witnesses supplied by the prosecution and hence not examined.

Still further, availability of the computer scale with the Investigating Officer at the place of incident and recovery is also doubtful. As per first information report, computer scale was arranged. Whereas as per Gurdeep Singh, ASI (Investigating Officer) computer scale was brought by Constable Manjit Singh. However, when Head Constable Lal Chand was examined as PW4 he has stated that weighing material was already with the Investigating Officer but weighing scale was of small size but not of computer scale. As noted earlier Manjit Singh, who was the important witness to throw light on the availability of the computer scale with the Investigating Officer or its arrangement by him has not been examined by the prosecution rather given up.

Learned Additional Advocate General, Punjab, is correct in submitting that some variation in the oral evidence is bound to happen due to difference in perception of each individual as well as with the passage of

time. However, in the present case, contradictions are not only in the oral evidence but also in the basic documents on which the prosecution has based its case. This Court has already discussed the differences, which have been pointed out and do not need any repetition.

No doubt, association of the independent witness is not required. However, it is necessary for the court to examine the evidence with more care and caution if an independent witness has not been associated.

From the discussions made above, it is apparent that the case set up by the prosecution cannot be held to be proved beyond reasonable doubt. The Narcotic Drugs and Psychotropic Substances Act, 1985 makes a provision for imposition of severe punishment. The evidence led by the prosecution in such cases is to be examined with more care and caution, ruling out possibility of any false implication. The prosecution must establish and prove the case against the accused beyond any reasonable doubt. In the present case, the prosecution has failed to do so.

In these circumstances, judgment of conviction and order of sentence is set aside. By a separate order of even date, the appellants have been directed to be released from the custody, if not required in any other case.

July 21, 2018
nt

(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned
Whether reportable

: Yes/No
: Yes/No