

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRA-S No.2795-SB of 2015
Date of Decision-27.03.2018

Deepak Rana ... Appellant
Versus
State of Punjab ... Respondent

CORAM:-HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Ms. Nikhar Baranwal, Advocate for
Mr. R.K. Trikha, Advocate
for the appellant.
Mr. Randhir Singh Thind, DAG, Punjab.

RAJ MOHAN SINGH, J.

[1]. Appellant has preferred this appeal against the judgment of conviction and order of sentence dated 02.06.2015 passed by Judge Special Court, Hoshiarpur, whereby he was convicted for the offence punishable under Section 22 of the NDPS Act and sentenced to undergo rigorous imprisonment for a period of four and half months along with fine of Rs.2000/-. In default of payment of fine, he was to further undergo rigorous imprisonment for a period of one month.

[2]. In brief the prosecution story is that on 19.09.2013, police party was on patrolling. When the police party was present at Langeri Chowk near Maruti Suzuki Agency, Garhshankar road Mahilpur, they found a person coming on foot. On seeing the police party, he tried to turn back. He was arrested on suspicion. On being asked, he disclosed his name as Deepak Rana.

Investigating Officer introduced himself to the accused and apprised him about his right to be searched before a Gazetted Officer or Magistrate. The accused reposed his faith in the Investigating Officer. A consent memo was prepared. An effort was made to join public person, but none showed his/her willingness by citing personal problems. On personal search of the accused, white intoxicating powder wrapped in plastic envelope was recovered. Two samples of 5/5 grams each were taken out and remaining quantity was weighed which came out to be 40 grams. The case property was sealed and sample parcels were prepared. The accused was produced before the SHO, who also affixed his seal on the case property.

[3]. After considering the material on record, trial Court convicted and sentenced the appellant.

[4]. Learned counsel for the appellant contended that though the appellant has already undergone more than five months of actual sentence as against four and half months, but she wants to argue the case on merits because on the basis of conviction of the appellant, his services were terminated by the employer.

[5]. I have heard learned counsel for the parties.

[6]. Learned counsel for the appellant vehemently submitted that keeping in view the stringent provisions of the NDPS Act, compliance of Section 50 of the Act was mandatory in

nature. Section 50 of the Act has not been complied with. Learned counsel relied upon **Gurjant Singh @ Janta Vs. State of Punjab, 2013(4) RCR (Criminal) 874** and submitted that the Hon'ble Apex Court after considering the ratio of **State of Punjab Vs. Balbir Singh, 1994(1), RCR (Criminal) 736, State of Punjab Vs. Baldev Singh, 1993(3), RCR (Criminal) 533** and **State of H.P. Vs Pawan Kumar, 2005(2) RCR (Criminal) 622** has held that when the Investigating Officer on noticing contraband felt the need of invoking Section 50 of the Act and gave offer to the accused, then Principle No.1 as held in para No.25 of **Balbir Singh's case (supra)** would not apply. Once notice under Section 50 of the Act was given to the accused, then it was imperative on the part of the officer intending search to comply with requirement of Section 50 of the Act mandatorily.

[7]. Learned counsel further submitted that no effort was made to join independent witness despite in abundance. No inventory was prepared of the persons who allegedly refused to join the investigation. Police officer was empowered to take action against those persons who had refused to be associated in the investigation.

[8]. Learned counsel also submitted that in the present case, Section 52-A of the Act was not complied with. Representative samples were not drawn before the Magistrate,

nor the case property was produced before the Magistrate and no seal of the Court was affixed on the representative samples which were sent to FSL for chemical analysis. By citing **Union of India Vs. Mohanlal and another, 2016(1) RCR (Criminal) 858 (SC)**, learned counsel submitted that non-compliance of Section 52-A of the Act would result in material prejudice to the accused/appellant and he is entitled to be acquitted.

[9]. FSL report on record would show that the representative samples were found to be sealed bearing impressions BS and PS. Those seals were of Balwinder Singh (Investigating Officer) and Paramjit Singh (SHO). No seal of the Magistrate was found. Even the Judicial Magistrate Ist Class, Garhshankar vide order dated 20.09.2013 has observed that three sealed parcels were produced before him by the Investigating Officer which were allegedly recovered from accused Deepak Rana. One case property parcel was containing 40 grams white powder a type of intoxicant and other two sample parcels were containing 5 grams of white powder a type of intoxicant each were produced before him by the police bearing seals impressions BS and PS. After attestation, the case property was returned to the Investigating Officer. There is no reference that the representative samples were drawn in the presence of the Magistrate, rather the same had already been drawn by the Investigating Officer and only sealed parcels were produced before the Judicial Magistrate Ist Class, Garhshankar.

[10]. Learned counsel further submitted that Balwinder Singh (Investigating Officer) after effecting arrest and recovery of the contraband proceeded to investigate the case further which was not permissible under law. The person effecting search and seizure should not have proceeded to investigate the offence at a later stage being a complainant. In **Gannu and another Vs. State of Punjab, 2017(3) RCR (Criminal) 566** and **State by Inspector of Police, Narcotics Intelligence Bureau, Madurai, Tamil Nadu Vs. Rajangam, (2010) 15 SCC 369**, the aforesaid proposition was held and non-compliance thereof, has to be credited in favour of the accused in acquitting him. Statement of PW 1, ASI Balwinder Singh would show that representative samples were not drawn in front of the Magistrate. The entire statement did not show entry of the contraband in Register No.19 maintained in the police station. No incriminating material was put to the accused in his statement under Section 313 Cr.P.C. Non-putting of incriminating material to the accused in terms of deposit of contraband in *Malkhana*, its entry in the register and its dispatch for analysis would render the prosecution story inadmissible. Even statements of PW 1, PW 2 and PW 5 remained conspicuous in terms of narration of incriminating fact regarding entry of the contraband in Register No.19 maintained in the police station. No such contraband was recorded in the register so as to depict the same as case property in police record. The absence of such material fact in the statements of the

material witnesses would show that there was no legal custody of the contraband with the police. The seal after use was allegedly handed over to the police official.

[11]. Learned counsel further submitted that in **Tulsi Ram Vs. State of H.P., 2008(1) Criminal Court Cases 375 (HP) (DB)**, the Division Bench of the Himachal Pradesh High Court held that the recovery of contraband from the person of the accused would attract compliance of Section 50 of the NDPS Act. Non-joining of independent witness, absence of proper explanation and recording of the case property in the register would provide missing link evidence which would result in acquittal of the accused.

[12]. On the other hand, learned State Counsel opposed the arguments of the learned counsel for the appellant on the ground that on chemical analysis, the contraband was detected to be Dextropropoxyphene and the quantity, even if, found to be non-commercial in nature, the same attracted lawful conviction for non-commercial.

[13]. Having heard learned counsel for the parties, I am of the view that the prosecution has miserably failed to comply with Section 50 of the Act. No step was taken by the Investigating Officer to join the independent witness in the investigation. The accused was having right to be told in respect of his legal rights to be searched before the Gazetted Officer or Magistrate. The

alleged confidence reposed by the accused in the Investigating Officer was not sufficient to presume that valid offer was given by the Investigating Officer to the accused in terms of his rights to be searched before the Gazetted Officer or Magistrate. The documents prepared by the police in terms of Exs.PA, PB and PC would show that FIR No.132 dated 19.09.2013 under Section 22 of the NDPS Act, Police Station Mahilpur, District Hoshiarpur finds mentioned at the top of these documents, which are suggestive of the fact that these documents were prepared only after registration of the case. However, these documents ought to have been prepared before the registration of the case at the time of alleged arrest, recovery and seizure of the contraband.

[14]. In **State of Rajasthan Vs. Parmanand and another, 2014(2) RCR (Criminal) 40**, the Hon'ble Apex Court while dealing with the aforesaid proposition held that in the absence of such clear, unambiguous and individual communication, search was vitiated even if, the accused opted and reposed faith in the Investigating Officer to conduct search. Hon'ble Apex Court after relying upon decision in **Paramjit Singh and another Vs. State of Punjab, 1997(1) RCR (Criminal) 293** considered the aforesaid proposition that on personal search of the accused, he must be apprised of his individual right to be searched before the Magistrate or Gazetted Officer. Compliance of Section 50 of the NDPS Act is mandatory from the stage when the Investigating

Officer came to know that the accused was carrying some contraband.

[15]. The accused was required to be searched in the presence of the independent officer. The officer who had conducted the search of the accused was only a member of raiding party and such reposition of faith by the accused would be in contravention of the spirit of Section 50(1) of the NDPS Act.

[16]. As per prosecution case, representative samples were not drawn in the presence of the Magistrate and said omission has gone against the spirit of Section 52-A of the NDPS Act. Principle of fair and impartial investigation should have been adhered to by the prosecution. The person effecting search and seizure, proceeded to investigate the offence at a later stage. The said officer was not competent to investigate the offence being Judge of his own cause. In **Gannu and another's case (supra)**, it was observed by this Court that after arrest and seizure of the accused, the arresting officer should refrain from conducting the further investigation being Judge of his own cause. In order to have fair and impartial investigation, the investigation should have been conducted by any other officer. It was also held that representative samples must be drawn before the Magistrate as per ratio laid down in **Union of India Vs. Mohanlal and another's case (supra)**.

[17]. In **State by Inspector of Police, Narcotic Intelligence Bureau, Madurai, Tamil Nadu Vs. Rajangam's case (supra)**, the Hon'ble Apex Court considered the aforesaid controversy on the basis of earlier precedents that the person arresting and effecting search being complainant should not have proceeded with the investigation of the case. Such officer was not only the complainant in the case, but he carried on with the investigation and examined witnesses under Section 161 Cr.P.C would negate the concept of fair and impartial investigation. While relying upon the said proposition, Division Bench of Calcutta High Court in **Laltu Prasad Vs. The State of West Bengal, 2017(2) RCR (Criminal) 237** has held in the same manner. The plinth of justice dispensation system is founded on the faith, trust and confidence of the people. A litigant reasonably expects adherence to the rules pertaining to fundamental adjective and seminal substantive law while delivering reasoned decision. The fair trial is depending upon fair investigation which should have been conducted by any other person, other than the one who arrested and effected seizure of the contraband. Reference can be made to the obiter of Hon'ble Supreme Court in **Ajay Singh and another Vs. State of Chhattisgarh and another, 2017(1) RCR (Criminal) 559.**

[18]. The occurrence took place on 19.09.2013. As per FSL report, the sample was received in the laboratory on 30.09.2013.

According to the instructions/notification No.1/88 issued by the Narcotics Control Bureau, the samples were required to be sent to the FSL within 72 hours. In view of **Union of India Vs. Bal Mukund and others, 2009(2) RCR (Criminal) 574** and **CRA-S No.1449-SB of 2008** titled **Satpal Vs. State of Haryana** decided on 06.08.2012, non-compliance in the aforesaid context would render the prosecution case to be doubtful.

[19]. On the basis of aforesaid facts and circumstances of the case, the prosecution case is found to be doubtful in the context of complicity of the appellant for the offence alleged against him. The appellant has already completed the requisite sentence.

[20]. For the reasons recorded hereinabove, I acquit the appellant from the charges levelled against him. Appeal is accordingly allowed. Impugned judgment of conviction and order of sentence dated 02.06.2015 passed by Judge Special Court, Hoshiarpur is hereby set aside. Normal consequence to follow after acquittal of the appellant.

(RAJ MOHAN SINGH)
JUDGE

27.03.2018
Prince

Whether Reasoned/Speaking	Yes/No
Whether Reportable	Yes/No