

330 IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRA-S-2830-SB-2014 (O&M)

Date of decision:19.05.2018

Lakhwinder Singh @ Leela

...Appellant

Versus

State of Punjab

...Respondent

CORAM: HON'BLE MR. JUSTICE ARVIND SINGH SANGWAN

Present: Mr. Jaspal Singh Pannu, Legal Aid Counsel
for the appellant.

Ms. Samina Dhir, DAG, Punjab.

ARVIND SINGH SANGWAN, J. (ORAL)

Prayer in this appeal is for setting aside the judgment of conviction and order of sentence dated 27.11.2013, vide which the appellant has been held guilty of offence punishable under Section 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'the Act'), passed by Special Judge, Bathinda and he was sentenced to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs.1,00,000/- and in default of payment of fine, to further undergo rigorous imprisonment for 06 months.

Brief facts of the case are that on 20.02.2012, PW-3 SI Gurcharan Singh along with PW-2 HC Harbans Singh, PHG Gurmej Singh and PHG Amrik Singh, on a private vehicle, were going from village Teona Pujarian to village Gehle Wala, in connection with police patrolling. When the police party reached one kilometer ahead of village Singhpura, it was noticed that one person was sitting near the room, carrying one plastic

envelope and making small packets from the polythene bag. On seeing the police party, he stood up with the polythene bag and on suspicion, he was apprehended by the police party and on asking, he disclosed his name as Lakhwinder Singh (appellant/accused). On opening the bag, some intoxicant powder was found and by taking 50 grams intoxicant powder as sample, the remaining residue, on weighing, came to one kilogram. Thereafter, SI Gurcharan Singh prepared two separate parcels, one for the sample and the other for the remaining residue and sealed both with impression 'GS'. Thereafter, the seal was handed over to HC Harbans Singh. It is further mentioned in the FIR that the police party took the sample parcel as well as the bulk parcels in possession and prepared separate recovery memos which were attested by the witnesses. The personal search of the accused/appellant was also conducted and personal search memo was prepared. Thereafter, the information by way of ruqa was sent to the police station, on the basis of which, a formal FIR was registered against the accused. Site plan of place of recovery was prepared and the statements of witnesses were recorded under Section 161 Cr.P.C. On the next day, the case property was produced before the Illaqa Magistrate. After obtaining the orders of the Illaqa Magistrate, the case property was deposited in the judicial malkhana and the sample parcel was sent to the Chemical Examiner. On receiving the report of the Chemical Examiner, the report under Section 173 Cr.P.C. was prepared and submitted before the Court. The Special Judge, Bathinda, supplied a complete copy of the report under Section 173 Cr.P.C. along with documents as per provision under Section 207 Cr.P.C. to the accused.

Thereafter, the trial Court vide its order dated 28.08.2012

framed charge under Section 22 of the NDPS Act against the appellant, to which he did not plead guilty and claimed trial.

The prosecution, in support of its case, examined PW-1 HC Visakha Singh, who tendered into evidence his affidavit Ex.P1 to the effect that on 29.02.2012, he had obtained the sample parcel from the SI Gurcharan Singh and deposited the same with the Chemical Examiner/FSL on 01.03.2012 and during the period, the parcel remained in his possession and the same remained intact. In cross examination, this witness stated that the sample parcel in possession of SI Gurcharan Singh, who was Additional SHO on that day.

Thereafter, PW-2 HC Harbans Singh deposed that he along with police party headed by SI Gurcharan Singh, in a private vehicle driven by SI Gurcharan Singh, were on patrol duty and while going from village Teona Pujaraian towards village Gehlewala, after covering one kilometer towards village Singhpura, one person was noticed sitting near the kikkar tree on the left side of the road, carrying a plastic bag and was making a small packet from the polythene bag. On suspicion, he was apprehended by the IO and on inquiry, he disclosed his name as Lakhwinder Singh accused present in the Court on that day. Some intoxicant powder was found on the fingers of the hands of the accused and on opening of the bag, intoxicant powder was visible. Thereafter, 50 grams intoxicant powder was separated as a sample and it was converted into one parcel. Remaining intoxicant powder, on weighment, came to be one kg and it was also converted into a separate parcel by putting it in the polythene bag. It is further stated that both the parcels were sealed by the IO with the seal bearing impression 'GS' and sample seal chit Ex.P2 was prepared separately. This witness further

stated that the seal was handed over to him by SI Gurcharan Singh and the case property, along with sample seal chit, were taken into police possession vide memo Ex.P3, which was attested by him and other witnesses. It is further stated that the personal search of the accused was conducted vide personal search memo Ex.P4. Since the accused could not produce any licence or permit, he was arrested vide arrest memo Ex.P5. In the cross-examination, this witness clearly admitted that no offer of search was given to the accused under Section 50 of the Act. It is further stated that the accused was arrested at 2.30 p.m. and writing work was done by the IO by sitting in Zen car, a private vehicle owned by the IO and its colour was white and he did not know the registration number. This witness further stated that recovery memo was prepared after sending the ruqa and he was not asked by the IO to attest the parcels or the sample seal chit. This witness has further stated that neither attempt was made to join any witness at the spot from the passer by persons nor any one was directed by the IO to bring independent witness from the nearby villages. It is further stated that no special report under Section 57 of NDPS Act, was sent from the spot. This witness further stated that at that time, Inspector Paramjit Singh was the SHO of Police Station Talwandi Sabo and no entry was made by the MHC on their return to the police station in register No.19 regarding the case property, when it was produced before MHC by the IO.

Thereafter, PW-3 SI Gurcharan Singh, who was the Investigating Officer, deposed on the lines of PW-2 HC Harbans Singh. He stated that he tried to join the independent witness, but none was present. This witness further stated that on checking, the intoxicant powder was recovered from the bag and he separated 50 gram intoxicant powder as a

sample and converted it into a parcel and on weighing, the remaining powder came to be one kilogram. The same also converted into a separate parcel by putting in the plastic container. Both the parcels were sealed with the seal bearing impression 'GS' and sample seal chit Ex.P2 was prepared separately. Seal was handed over to HC Harbans Singh. This witness also deposed about the preparation of recovery memo Ex.P-3, personal search memo Ex.P-4, at the spot. Thereafter, he had sent the ruqa Ex.P-6 through PHG Amrit Singh to the police station, on the basis of which formal FIR Ex.P7 was recorded by ASI Joginder Singh. Since the accused could not produce any licence or permit, he was arrested vide arrest memo Ex.P5 and the memos were attested by the witnesses. Rough site plan Ex.P8 was prepared with correct marginal notes. Form No.29 was filled at the spot. Statements of witnesses were also recorded. Thereafter, he sent special report Ex.P9 to DSP and retained the case property in his possession and accused was put up in police lock up. This witness further stated that on the next day, he produced the case property along with sample seal chit, inventory report Ex.P10 and request letter Ex.P11 along with accused before the Illaqa Magistrate. The Illaqa Magistrate passed an order Ex.P12 regarding depositing of the case property with NDPS Godown and on return to the police Station, the case property was deposited with NDPS Godown except the sample parcel, sample seal chit and Form no. M-29.

This witness further stated that on 29.02.2012, he handed over the sample parcel, sample seal chit and Form No. M-29 to HC Visakha Singh for depositing the same with the Chemical Examiner, Kharar with a direction, he should have got the docket forwarded from the Office of SSP, Bathinda. On 01.03.2012, H.C. Visakha Singh deposited the sample parcel

along with the documents in the Office of Chemical Examiner and on return, he handed over the receipt. This witness produced the report of Chemical Examiner as Ex.P13 and rapat as Ex.P14 to Ex.P16. For the further reference, the cross-examination of this witness is reproduced as under:-

“ Form No.29 was filled at about 4.00 PM. I handed over seal after use to HC Harbans Singh at 3.30 PM. He returned back the seal to me on 21.02.2012 in the police station. Some of the writing work was done by me while the remaining writing work was done by HC Harbans Singh, while sitting on the ground. HC Harbans Singh scribed his statement in his own hand at 5.15 PM and he also scribed the statement of PHG Gurmej Singh at 5.30 PM. The weights and scale and boxes were already lying in the investigation bag. I did not send any one to bring the weights and scale. I became aware about the intoxicating powder at 3.00 PM and it was of light green colour. The powder was started to be weighed at 3.00 PM and was completed by 3.30 PM. First of all sample was drawn and sealed and thereafter, the remaining powder was weighed and sealed. Recovery memo was completed by 3.45 PM. Sample seal was prepared by me in my own handwriting. Weight of contraband was not mentioned on the sample seal. HC Harbans Singh had attested the memos first of all. Only one memo was prepared before sending the ruqa. Ruqa carrier went on foot from the spot and returned back on a private car at 6.00 PM at the spot. From the personal search of the accused no contraband was recovered. Village of accused is only 13-14 KM away from the spot. Place of recovery is metaled road and thoroughfare. Many persons met us in the way after leaving the police station. We had not checked any person on the way nor we had checked any vehicle. Place of recovery is 10 km from police station, Talwandi Sabo towards east. Village Teona Pujarian is about

2/2-1/2 Km from the spot towards west. We remained at the spot for about 4-1/4 hours. Accused was noticed from a distance of 10 karams. He was arrested at about 4.30 PM. Recovery was effected four hours prior to sun set. I did not attempt to join any photographer. I do not remember the registration number of the vehicle. However, it was of dove colour and was a jeep. Said jeep was lying parked in the police station and was involved in some case. I did not send any special report under Section 57 of NDPS Act from the spot. However, later on, on 20.02.2012 special report was sent by post. I returned to the police station at about 8.00 PM. I was officiating as SHO on 20.02.2012 and I officiated only for one day. On 21.02.2012, regular SHO Paramjit Singh Inspector returned to the police station. I do not know where he had gone on 20.02.2012. But he had gone at 12.30 noon while I had left the police station at 1.30 PM. ASI Joginder Singh officiated as SHO of the police station while I was away to the alleged place of recovery. When I returned to the police station, even ASI Joginder Singh was not present in the police station and in absence of said ASI, MHC was officiating as SHO. I did not produce the case property and accused before the said officiating SHO. Entries were made in register No.19 on 20.02.2012, 21.02.2012 and 29.02.2012 with regard to this case and the entries were made by me again said by the MHC. When ever the entry is made in register No. 19, the case property is deposited in the malkhana. I do not remember the name of the MHC. On 21.02.2012, I had taken out the case property from the Malkhana for producing the same before the Illaqa Magistrate. After return of regular SHO to the police station, I did not produce the case property before him. No representative sample was drawn in the Court nor sample parcel was got sealed with the seal of the Magistrate nor any request was made to get the case property photographed. I do not know if accused was practicing as a Ayurvedic and Unani medicine expert. It is wrong to suggest that no recovery was

affected from the accused or that the case property was tampered with or that the accused has been falsely implicated in this case. No raid was conducted at the place of origin of the contraband nor any effort was made to do so.”

Thereafter, the statement of the appellant/accused was recorded under Section 313 of Cr.P.C. in which, he denied all the incriminating evidence put to him and further stated that he is innocent and has been falsely implicated in this case. However, no defence evidence was led.

The trial Court, thereafter, vide impugned judgment of conviction and order of sentence convicted the appellant under Section 22 of the NDPS Act and sentenced him to undergo rigorous imprisonment of 10 years with a fine of Rs.1,00,000/-.

Thereafter, the appellant has filed the present appeal and it may be noticed here that the sentence of the appellant was suspended on 16.08.2016 as he had completed 04 years, 01 month and 29 days of actual sentence out of 10 years rigorous imprisonment, in the light of the Division Bench judgment of this Court in ***Daler Singh Vs. State of Punjab, 2007(1) R.C.R. (Criminal) 316.***

Learned counsel for the appellant has argued that there is clear non-compliance of Section 50 of the NDPS Act. Learned counsel for the appellant has submitted that both PW-2 HC Harbans Singh and PW-3 SI Gurcharan Singh have admitted that no notice under Section 50 of the NDPS Act was given to the accused/appellant before conducting the search. Learned counsel for the appellant in support of his arguments referred to the judgment in State of ***Rajasthan Vs. Parmanand and another, 2014 (2) RCR (Crl.) 40***, wherein the Hon'ble Supreme Court has held that while conducting search in a case under the NDPS Act, if the personal search of

the accused is also conducted, Section 50 of the NDPS Act will have an application. The operative part of this judgment is reproduced as under: -

“Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application. In this case, respondent No.1 Parmanand’s bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of respondent No.2 Surajmal was also conducted. Therefore, in light of judgments of this Court mentioned in the preceding paragraphs, Section 50 of the NDPS Act will have application.”

Learned counsel for the appellant further argued that PW-3 SI Gurcharan Singh conducted the entire investigation despite availability of regular SHO on the next day and as such the investigation stand vitiated.

Counsel for the appellant has relied upon the Judgment in ***State by Inspector of Police, Narcotic Intelligency Bureau, Madurai, Tamil Nadu Vs. Rajangam, 2010 (15) SCC 369***, wherein the Hon'ble Supreme Court has held as under:-

"The learned counsel appearing for the accused submitted that the controversy involved in this case is no longer res integra. In Megna Singh v. State of Haryana (1996) 11 SCC 709, this Court has taken a categorical view that the officer who arrested the accused should not have proceeded with the investigation of the case. The relevant paragraph reads as under:

"4. We have also noted another disturbing feature in this case. P.W.3, Sri Chand, Head Constable arrested the accused and on search being conducted by him a pistol and the cartridges were recovered from the accused. It was on his complaint a formal first

information report was lodged and the case was initiated. He being complainant should not have proceeded with the investigation of the case. But it appears to us that he was not only the complainant in the case but he carried on with the investigation and examined witnesses under Section 161 Cr.P.C. Such practice, to say the least, should not be resorted to so that there may not be any occasion to suspect fair and impartial investigation."

The ratio of Megna's case has been followed by other cases. In another case in Balasundaran v. State 1999 (113) ELT 785 (Mad), in para 16, the Madras High Court took the same view. The relevant portion reads as under:

"16. Learned Counsel for the appellants also stated that P.W. 5 being the Inspector of Police who was present at the time of search and he was the investigating officer and as such it is fatal to the case of the prosecution. P.W. 5, according to the prosecution, was present with PWs 3 and 4 at the time of search. In fact, P.W. 5 alone took up investigation in the case and he had examined the witnesses. No doubt the successor to P.W. 5 alone had filed the charge sheet. But there is no material to show that he had examined any other witness. It therefore follows that P.W. 5 was the person who really investigated the case. P.W. 5 was the person who had searched the appellants in question and he being the investigation officer, certainly it is not proper and correct. The investigation ought to have been done by any other investigating agency. On this score also, the investigation is bound to suffer and as such the entire proceedings will be vitiated."

Learned counsel for the appellant has further argued that PW-3 SI Gurcharan Singh moved an application Ex.P11 before the Magistrate for granting permission to deposit the case property i.e. one

sample parcel and one bulk parcel, in the judicial malkhana on 21.02.2012.

On this, Judicial Magistrate, 1st Class, Bathinda passed the following order on 21.02.2012:-

*“ Present: SI Gurcharan Singh SHO PS Talwandi Sabo.
Accused in custody.*

Heard. In view of the police request, accused is remanded to judicial custody till 06.03.2012. Accused be produced before Ld. Judge Special Court, Bathinda for said date.

Case property i.e. One sample parcel allegedly containing 50 gm of intoxicant (powder) and one parcel containing 1 kg both sealed with seals bearing impression GS produced before me being Duty Magistrate. Inventory is certified to be correct. The case property is ordered to be deposited in NDPS godown for safe custody.

*Karan Garg,
(D) JMIC/21.02.2012 ”*

Learned counsel for the appellant has submitted that despite a specific order passed by the Magistrate that the case property, which includes one sample parcel allegedly containing 50 gm of intoxicant powder and one parcel containing 1 kg, both sealed with seals bearing impression 'GS' are ordered to be deposited in NDPS Godown for safe custody. But, the statement of PW-3 SI Gurcharan Singh read with statement of PW1 HC Visakha Singh clearly makes out that only the bulk parcel was deposited in the NDPS Godown and PW-3 kept the sample parcel, the sample seal chit and Form No.M-29 with him. As such, the sample parcel remained in the custody of PW-3 from 20.02.2012 till 29.02.2012 when it was handed over to PW-1 HC Visakha Singh in gross violation of the direction given by the

Magistrate.

Counsel for the appellant has further argued that as per cross-examination of PW-3, he has stated that the seal bearing impression 'GS' vide which the sample parcel was sealed on 20.02.2012, which was handed over to HC Harbans Singh PW-2, was returned back to him on 21.02.2012 i.e. on the next day and therefore, there was every possibility that the sample parcels which remained in possession of PW-3 along with the original seal for a period of more than 9 days, the seal was kept intact by PW-3. In support of his arguments, counsel for the appellant has relied upon a judgment in ***Harjinder Singh Vs. State of Punjab, 2016 (1) RCR (Criminal) 197***, wherein this Court has held as under: -

“The recovery was effected on 11.08.2002 and the sample parcel was sent to FSL Laboratory on 21.08.2002. Thus, there was a delay of 10 days in sending the sample. As observed by the Division Bench of this Court in Parminder Singh vs. State of Haryana 2006 (4) Recent Criminal Reports (Crl.), 495(DB), according to the Narcotic Control Bureau Instructions, the sample parcel should have been deposited within 72 hours with the Chemical Examiner. Herein, the prosecution has not given any explanation for withholding the sample for such a long time.”

Counsel for the appellant has further submitted that no reason has been given by PW-3 as to why the sample parcel, despite the order of Magistrate, was kept by him in his possession and the same was taken back on the very next day i.e. prior to deposit of the sample parcel in the FSL and the delay of 9 days in sending the sample to FSL makes the case highly doubtful.

Counsel for the appellant has next argued that there is clear violation of Section 52-A of the NDPS Act. Counsel for the appellant, with

reference to the statement of PW-3, has submitted that he has admitted that he remained officiating SHO for one day i.e. 20.02.2012 on which day the alleged recovery was made by the appellant and on the next day i.e. on 21.02.2012, the same Investigating Officer PW-3 produced the accused along with case property before the Judicial Magistrate, 1st Class, Bathinda, though the regular SHO Paramjit Singh had joined the duty on 21.02.2012. Therefore, there is absence of compliance of Section 52-A of the Act, which provides that after the arrest of the accused person, he along with case property should be produced before the SHO/Incharge of the police station and inventory report be prepared by him, the conviction is liable to be set aside. Counsel for the appellant, in this regard has relied upon a judgment in ***Union of India Vs. Mohanlal and another, 2016(2) RCR (Crl.) 858***, wherein the Hon'ble Supreme Court with reference to the procedure regarding seizure and sampling of a contraband under Section 52-A of the NDPS Act, has observed as under:-

“It is manifest from Section 52A (2)(c) (supra) that upon seizure of the contraband the same has to be forwarded either to the officer in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory (b) certifying photographs of such drugs or substances taken before the Magistrate as true and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn. Sub-section (3) of Section 52- A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer in charge of the Police Station or the officer empowered, the officer concerned

is in law duty bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-section (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure. Be that as it may, a conflict between the statutory provision governing taking of samples and the standing order issued by the Central Government is evident when the two are placed in juxtaposition. There is no gainsaid that such a conflict shall have to be resolved in favour of the statute on first principles of interpretation but the continuance of the statutory notification in its present form is bound to create confusion in the minds of the authorities concerned instead of helping them in the discharge of their duties. The Central Government would, therefore, do well, to re-examine the matter and take suitable steps in the above direction.”

It is, thus, submitted that despite the fact that on 21.02.2012, SHO Paramjit Singh, Inspector has returned to the Police Station, PW-3 himself prepared the inventory report and produced the appellant along with the case property before the Magistrate in gross violation of the Section 52

of the Act.

Learned counsel for the appellant has further argued that there are material discrepancies in the statement of PW-2 HC Harbans Singh and PW-3 SI Gurcharan Singh. It is submitted that PW-2 HC Harbans Singh has stated that PW-3 was sitting in a Zen car of white colour whereas PW-3 has stated that the police party had gone in a Jeep of dove colour and the said Jeep was lying parked in the police station as it was involved in some case. It is further submitted that PW-2 has stated that only the recovery memo was prepared before sending the ruqa ExP-6 to the police station whereas PW-3 has stated that the sample seal chit Ex.P2, recovery memo Ex.P3, personal search memo Ex.P4 as well as arrest memo Ex.P5 were prepared before sending the ruqa to the police station. It is further submitted that PW-2 stated that no attempt was made to join any witness at the spot nor any person was directed by the IO to bring independent witness from the nearby villages whereas, PW-3 has stated that he tried to join the independent witness, but none was present.

Learned counsel for the appellant has further argued that as per cross-examination of PW-3, when the aforesaid documents Ex.P2 to Ex.P5 were already prepared, the information was sent to the Police Station vide ruqa Ex.P6. It is further submitted that a perusal of the ruqa Ex.P6 shows that the same was written at about 4.15 PM and thereafter, the endorsement with regard to registration of FIR No.19 was made by ASI Joginder Singh.

Learned counsel for the appellant has further submitted that PW-3 has stated that he received the information regarding the registration the FIR at about 6.00 PM, however, in all these documents Ex.P-2 to P-5, FIR number is mentioned and there is no explanation as to how prior to

registration of the FIR, the FIR number finds mentioned in the documents Ex.P2 to P5 which were prepared prior to sending ruqa to the police station. Counsel for the appellant has relied upon judgment of this Court in **2009(3) RCR (Criminal) 649, Ajay Malik and others Vs. State of U.T., Chandigarh**, wherein, it has been held by this Court that where there is no explanation from the side of the prosecution, regarding mentioning of the FIR number in the documents, which were prepared by the police at the spot, prior to sending an intimation to the police station for registration of the FIR, it raises a doubt on the integrity of the prosecution version. Counsel for the appellant has further argued that the SHO/ Investigating Officer has not done the photography or the videography at the spot to show the genuineness of the investigation conducted by the police and prayed for acquittal of the appellant/accused.

In reply, learned State counsel, on the basis of custody, has not disputed the fact that the appellant has undergone more than 04 years of actual sentence and is not involved in any other case.

After hearing counsel for the parties, I find merit in the present appeal for the following reasons:

(a) Admittedly, it is a case of clear non-compliance of Section 50 of the Act. PW-2 has admitted in unequivocal terms that no notice under Section 50 of the NDPS Act was given to the accused person before effecting the search. Even the statement of PW-3 the Investigating Officer is silent about the same and no notice or consent memo was prepared or exhibited on trial Court record. Therefore in view of **Parmanand's case (supra)**, the accused was denied his legal right under Section 50 of the Act.

(b) The Investigating Officer, who prepared the inventory

report and completed the investigation is the same person and therefore, the investigation is faulty. It has come in the evidence of PW-3 that he himself conducted the arrest; investigation and also prepared the inventory and then himself produced the accused before the Magistrate, despite the fact, that on the day, when the accused and the case property were produced before the Magistrate, the SHO Paramjit Singh was available in the police station. Therefore in view of ***Rajangam's case (supra)***, the investigation was not done in accordance with law.

(c) Even there is clear violation of Section 52-A of the Act. In the cross-examination of PW-3, it has come that he was SHO for one day i.e. on 20.02.2012 and on the next day i.e. 21.02.2012, SHO Paramjit Singh had joined the duty. However SI/PW3 himself prepared the inventory report and never produced the case property and the accused before the SHO and thereafter, on 21.02.2012 PW-3 himself produced the accused as well as case property etc. before the Magistrate. In view of the judgment of Hon'ble the Supreme Court in ***Union of India's case (supra)***, the entire proceedings initiated by PW-3 stand vitiated.

(d) Even otherwise, it has come in the statement of PW-3 that on 20.02.2012, he has handed over the sample seal parcel to PW-2 HC Harbans Singh and it was returned back on the very next day i.e. 21.02.2012 to him. A perusal of the order Ex.P-12 passed by the Illaqa Magistrate shows that on the application moved by PW-3, it was directed that the case property, which included the sample parcel as well as bulk parcel, be deposited in the NDPS Godown, whereas, PW-3 deposited only the bulk parcel and kept the sample parcel along with the sample seal chit and Form No.M-29 with him for a period of about 9 days, when he deposited the same

with FSL, Kharar on 01.03.2012 through PW-1 HC Visakha Singh.

Therefore, neither there is any explanation on behalf of PW-3 as to why he has violated the order of Magistrate in not depositing the sample parcel in the NDPS Godown nor there is any explanation with regard to delay of 10 days in sending the same to the FSL, especially in view of the fact that it remained in his own possession along with the original seal, which he received back on the very next day i.e. 21.02.2012, thus, it makes the case of the prosecution highly suspicious.

(e) The documents Ex.P-2 to P-5, which are sample seal chit, recovery memo of case property, personal search memo and arrest memo of the appellant, which as per statements of PW-2 and PW-3 were prepared before sending the ruqa / intimation to the police station vide Ex.P-6 and thereafter, the FIR was registered. All these documents find mention the FIR number, which again makes the case highly suspicious in view of the judgment in *Ajay Malik's case (Supra)*.

(f) Even otherwise, there are material contradictions in the statement of PW-2 HC Harbans Singh and PW-3 SI Gurcharan Singh and therefore, the prosecution case is not proved beyond doubt.

(g) It is worth noticing that the conduct of PW-3, in conducting the investigation and preparing the inventory report himself and then its producing before the Magistrate himself, is highly suspicious as neither he had given a notice under Section 50 of the Act to the accused nor recorded his consent memo. Though in a given case, non-joining of an independent witness may not be necessary, however, in the present case, non-joining of an independent witness has shattered the prosecution version. Not only, this is, the manner in which PW-3 himself has conducted the entire

investigation, prepared the inventory report and then, himself produced case property before the Magistrate and then in gross violation of the order of the Magistrate (Annexure P-12) directing him to deposit the case property in NDPS Godown, kept the sample parcels with him for a period of 09 days along with original seal, demonstrates that the prosecution of the appellant /accused was done by him in violation of mandatory provision of Act being an Incharge of police station for one day only.

For the reasons stated above, the present appeal is allowed and the judgment of conviction and order of sentence dated 27.11.2013 passed by the trial Court is set aside. The appellant stands acquitted and his bail / surety bonds are discharged.

(ARVIND SINGH SANGWAN)
JUDGE

19.05.2018
Hemlata

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