

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

CRA-S-3317-SB-2015

Date of decision: 17.11.2018

Jaspal Singh

....Appellant

Versus

State of Punjab

....Respondent

CORAM: HON'BLE MR. JUSTICE RAJ SHEKHAR ATTRI

Present: Mr. Lakhwinder Singh Mann, Advocate
for the appellant.

Mr. Saurav Khurana, DAG, Punjab.

RAJ SHEKHAR ATTRI, J.

The above named appellant has preferred this appeal against the judgment of conviction and order of sentence dated 13th July, 2015 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.1,00,000/- or in default of payment of fine, to further undergo rigorous imprisonment for a period of one year under Section 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'the Act').

Briefly stated, it is a case of prosecution that on 31.01.2013 at about 04:45 PM, ASI Pavittar Singh (PW-5) accompanied by other police officials was present at the place of recovery. They waylaid the accused/appellant who was driving a motorcycle. The Investigating Officer suspected that the appellant had some contraband in his possession as well as in the plastic bag carried by him on his motorcycle. He apprised the accused of his legal right to get his search or search of his bag

conducted in the presence of a Magistrate or a Gazetted Officer. However, accused reposed confidence in the Investigating Officer. On the search of the bag, same led to recovery of 28 pouches each 100 tablets of phenotil, 6 strips each of 10 tablets of alprazolam, 59 strips each of 10 tablets of Diazepam, 13 strips each of 10 capsules of the parvonspas. Then two pouches each of 100 tablets of the phenotil, two strips each of 10 tablets of Alprazolam, 2 strips each of the 100 tablets of Diazepam, two strips each of 10 capsules of the parvonspas, were separated, respectively, from the said drugs as samples of the same. The bulk of contraband drugs was put in the same plastic bag and was sealed with seal bearing impression 'PS'. The samples were also sealed separately and were sealed with seal impression 'PS'. The sample of seal as Ex.PA was prepared separately. The sealed sample parcels and sealed bulk parcel along with sample seal were taken in possession vide memo Ex.PB. However, seal after use was handed over to HC Karamjit Singh.

On return to the police station. The case property along with the accused was produced before the SHO Darshan Singh, who also put his seal having impression 'DS' on each parcel. Thereafter, case property was deposited with the MHC (Mohrar Head Constable) who was incharge of the store room. The sample sent to Forensic Science Laboratory which opined that the parcel contained Discyclomine hydrochloride-9.4 mg/cap, Dextropropoxyphene hydrochloride-64.5mg/cap, Paracetamol-399.6mg/cap; in the second parcel Diphenoxylate hydrochloride-2.3mg/tab, Atropine sulphate-0.023mg/tab; Parcel No.3 contained Alprazolam-0.45mg/tab and parcel No.4 contained Diazepam-4.8mg/tab.

After conclusion of the trial, accused was convicted and sentenced as aforesaid.

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

DW-1 HC Baljinder Singh was called by accused along with the record of the police station. He produced daily diary report and store room register and placed on record its Exhibit as Ex.D1. A bare perusal of the same transpires that vide DDR No.36, SI Darshan Singh left the police station for holding nakabandi at G.T. Road at 11:00 pm. But the investigating officer had not returned in the police station till then. There is no report available on the record, if he had returned on the same day. Thus, it is very much clear that after 11:00 p.m. SI Darshan Singh was not available in the police station when Investigating Officer reached there along with police party, accused and case property.

Vide DDR No.37, ASI Pavittar Singh along with the police officials returned to the police station at 11.15 p.m. after conducting investigation in FIR No.28 dated 31.01.2013 i.e. the case in hand and he deposited the entire case property before MHC Jaswinder Singh and accused Jaspal Singh was lodged in the lockup.

On bare perusal of abovesaid reports No.36 and 37 of 31st January, 2013, it transpires that the case property was produced in the police station at about 11:15 pm and same was never produced before SI Darshan Singh.

During recording of the evidence, PW-1 SI Darshan Singh has stated that ASI Pavittar Singh had came to him at 10:40 pm in the

police station and he produced the accused as well as the case property before him, but these facts are falsified by record of the police station Ex. D1 vide which he left the police station at 11:00 pm and before it, police party had not arrived at police station rather, they arrived only at 11:15 pm. He went to extent of conceding in the cross-examination that he deposited the case property with MHC at 11:00 pm vide Ex.D37. Case property was deposited at 11:15 pm not by SI Darshan Singh but by ASI Pavittar Singh.

The production of the case property before the Magistrate is also of doubtful nature. The order dated 01.02.2013 (wrongly written as 01.01.2013) (Ex.PN) of the Magistrate, read as under:-

“Present: Sh. S.S. Sahota, APP for the State.

Accused in custody with Sh. Mohit Puri, Adv.

Case property as alleged in the application produced. Same is seen and signed, which are duly sealed with PS and DS. Case property is ordered to be deposited in Judicial Malkhana.”

Mere perusal of the same reveals that none of the police officials were present before the Magistrate and only Assistant Public Prosecutor Sh S.S.Sahota, was present.

Learned Sub Divisional Judicial Magistrate, has opined that the case property as alleged in the application was produced before him and he attested and signed the same and directed to deposit the same in Judicial *Malkhana*. He did not draw any representative sample. Contrary to it, ASI Pavittar Singh has stated in the cross-examination that learned Magistrate had drawn up representative samples from bulk case property.

This court would like to reproduce relevant part of the examination as under:-

“ The accused on the next day was produced before the Illaqa Magistrate by moving application Ex.PM. The representative samples were taken by the court from the bulk of the case property and the order dated 1.2.2013 (wrongly written as 1.1.13) Ex.PN was passed. The bulk parcel of the case property and the representative sample parcel were deposited with the judicial malkhana on the same day. The sample parcels were deposited with MHC Jaswinder Singh on the same day. The statement of MHC Jaswinder Singh with regard to sending the sample parcels to the office of FSL Mohali were recorded on 8.2.13.”

Either no representative sample was drawn or if drawn then the same has been withheld by the prosecution. He produced the bulk MO1, second sample MO2 to MO8 before the court during trial. It also created doubt with regard to drawing of the representative samples.

Section 52A of the Act is of mandatory in nature. The documentary evidence i.e. Ex.D2 establishes that SI Darshan Singh left the police station at 11:00 pm and after his departure, ASI Pavittar Singh arrived at police station at 11:15 pm and the case property was directly deposited with MHC. It falsifies the statement of PW1 with regard to production of case property with him.

Hon'ble Supreme Court in *Union of India Vs. Jarooparam*, (2018) 2 SCC (Criminal) 465, 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 [See also : 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.

It is clear principle of law that if two views have emerged from the examination of the evidence, then favourable to the accused be adopted and he be given the benefit of doubt.

In the case in hand, the recovery has been effected from the traffic-prone road. It is the admitted case that numerous persons were

present and several witnesses were asked to join the investigation. But none was ready to join. This furnish an explanation that nobody was ready to join the investigation but no list of any person has been putforth, who refused to join the investigation. Even no action has been taken against such a person under the law. Thus, in this circumstances of the case, non-joining of independent witnesses is fatal to the case of the prosecution.

In present case provisions of Section 50 of the Act should have been complied with because when accused was apprehended, it was suspected that he was having some contraband in his personal possession. PW2 has stated that investigating officer suspected some contraband with the accused as well as in the bag which was tied on the motorcycle. This court would like to reproduce the relevant part of the examination-in-chief hereunder:-

“ The time was 4:45 pm. IO stopped the motorcycle of accused. On asking accused disclosed his name as Jaspal Singh r/o village Jasran. IO disclosed his identity and designation to the accused and suspected some contraband with him and in a bag tied with the motorcycle and apprised the accused about his legal right to make his search in the presence of gazetted officer who could be made available at the spot to make his search after understanding about his legal right of search. Accused reposed confidence in IO to make his search. ”

Similarly, the deposition of Investigating Officer Pavittar Singh PW5. He deposed in the following terms:-

“ The accused was apprehended by me with the help of fellow police officials. On asking the accused disclosed his name as Jaspal Singh son of Sampuran Singh, r/o Walia Street, Village Jasran, Mandi Gobindgarh. I disclosed my

identity and designation to the accused and told the accused that I had suspicion that the accused had some contraband in his possession and in the plastic bag carried by him on his motorcycle. I also showed my intention to the accused for conducting his search and the search of the plastic bag carried by him. I also apprised the accused that the accused had legal right either to get his search or the search of his bag conducted in the presence of the Magistrate or the gazetted officer and if the accused had so intention to the said effect then the said officer could be called at the spot. The accused after considering his right ultimately reposed in me and in my police party for conducting his search and the search of the bag. The memo Ex.PB was written by me.”

Thus, before the search, Investigating Officer had suspected that some contraband is there in the personal possession of the accused. But he was not properly apprised of his right to get search of his person. In *Arif Khan @ Agha Khan Versus State of Uttarakhand, 2018(2) R.C.R.(Criminal) 931*, it has been observed in para 23 as under:-

“23. Their Lordships have held in Vijaysinh Chandubha Jadeja (supra) that the requirements of Section 50 of the NDPS Act are mandatory and, therefore, the provisions of Section 50 must be strictly complied with. It is held that it is imperative on the part of the Police Officer to apprise the person intended to be searched of his right under Section 50 to be searched only before a Gazetted officer or a Magistrate. It is held that it is equally mandatory on the part of the authorized officer to make the suspect aware of the existence of his right to be searched before a Gazetted Officer or a Magistrate, if so required by him and this requires a strict compliance. It is ruled that the suspect person may or may not choose to exercise the right provided to him under Section 50 of the NDPS Act but so far as the officer is concerned, an obligation is cast upon him under Section 50 of

the NDPS Act to apprise the suspect of his right to be searched before a Gazetted Officer or a Magistrate. (See also Ashok Kumar Sharma vs. State of Rajasthan, 2013 (2) SCC 67 and Narcotics Control Bureau vs. Sukh Dev Raj Sodhi, 2011 (6) SCC 392)”

While relying upon the ratio decedendi laid down in *Arif case (supra)*, this court is of the view that there is complete violation of provisions of Section 50 of the Act which is mandatory and non-compliance thereof vitiates the recovery.

The link evidence is also missing. PW1 initially stated that he produced the case property before the Magistrate but a bare perusal of Ex.PM transpires that in fact this application was prepared by him earlier. But after alteration it was prepared and signed on 01.02.2013. A bare perusal of Ex.PM (*ibid*) establishes one fact that the case property was neither produced by PW1 Darshan Singh nor by PW5 Pavittar Singh. However, prosecution has failed to prove as to who produced the case property. It could have been easily proved by producing the documentary evidence and store room register No.19, but non-production thereof, draws adverse inference against the prosecution. No reason has been assigned why those documents has been withheld, though very much available in the police station. A criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment. On search of issue as to effect or relevant facts, the sole object is to search the truth.

It is to be noted that the entire case property of the prosecution hinges on the alleged recovery of the narcotic substances from the appellant, but this fact is not proved beyond reasonable doubt. But the trial court had not properly appreciated the evidence.

Thus, the findings of the trial court are not sustainable under the provisions of law and same are contrary to evidence available on record.

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

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

(RAJ SHEKHAR ATTRI)
JUDGE

17.11. 2018
m. sharma

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