

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRA-S No.4059-SB of 2016(O&M)
Date of Decision-17.02.2018

Jagdish Singh @ Thandu
Versus

... Appellant

State of Punjab

... Respondent

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

Present: Mr. Jagdish Rai, Advocate
for the appellant.

Mr. Rahul Rathore, DAG, Punjab.

RAJ MOHAN SINGH, J.

[1]. Appellant has preferred this appeal against the judgment of conviction and order of sentence dated 27.09.2016 passed by Judge Special Court, Patiala, whereby he was convicted for the offence under Section 22 of the NDPS Act and sentenced to undergo rigorous imprisonment for a period of 10 years along with fine of Rs.1,00,000/-. In default of payment of fine, he has to further undergo rigorous imprisonment for a period of 2 years. He was also convicted for the offence under Section 22(B) of the NDPS Act and sentenced to undergo rigorous imprisonment for a period of 3 years along with fine of Rs.5000/-. In default of payment of fine, he has to further undergo rigorous imprisonment for a period of 6 months. Both the sentences were ordered to run concurrently.

[2]. Prosecution story started with the allegations that on 21.04.2013, ASI Parkash Masih posted in Police Station Tripuri,

Patiala along with his officials was on patrolling duty for search of bad elements. When the police party was present in the area of Green Park Chowk, one Manjit Singh came there and started talking with ASI Parkash Masih. In the meanwhile, one person was seeing coming from the side of village Jhil. On seeing the police party, he tried to retract his steps and turn back. On suspicion, he was apprehended with the help of companions. On being asked, he disclosed his name as Jagdish Singh @ Thandu. ASI Parkash Masih disclosed his identity to him and told him that he was having suspicion of carrying some contraband. He was also informed about his right to be searched before the Magistrate/Gazetted Officer. Jagdish Singh @ Thandu reposed his confidence in ASI Parkash Masih and his consent was recorded which was signed by the accused. On personal search of the accused i.e. from the right pocket of his trouser, polythene bag containing capsules of turquoise colour were recovered which were 160 in number. Capsules were having SPM-PRX inscribed thereon. Two samples of 10 capsules each were prepared and the remaining 140 capsules were put in separate container. Parcels were prepared which were sealed with the seal of ASI Parkash Masih bearing impression PM. From the left pocket of the accused, intoxicant powder was recovered. Two samples of 10 grams each were separated and the remaining powder was also separated in different parcel. Parcels were also sealed with the seal of ASI Parkash Masih with an impression of

PM. Sample seals were separately prepared. Recovery articles were taken into police possession vide separate memo. Seal after use was handed over to Manjit Singh (witness). From the personal search of the accused, a mobile phone Micromax and Rs.200/- currency notes were recovered from his shirt. Recovery articles were also taken into police possession. It was also revealed that left arm of the accused was broken and he had tied up a bandage. On the basis of *ruqa* sent to the police, FIR came to be registered. Thereafter, ASI Parkash Masih proceeded to prepare site plan and the accused was arrested. Report under Section 57 of the NDPS Act was prepared and was sent from the spot. The case property was produced before SHO/SI Kulwant Singh who verified the same and put his seal bearing impressions KS on the parcels and on the specimen seals. Thereafter, SHO deposited the case property with MHC Bishamber Singh. On 22.04.2013, the case property was produced before the Judicial Magistrate First Class, Patiala. On 23.04.2013, sample parcel of intoxicant powder was sent to Chemical Examiner through HC Jaspal Singh. One sample parcel of 10 intoxicant capsules was sent through HC Jaspal Singh to Chemical Examiner firstly on 30.04.2013 and secondly on 02.05.2013, when on earlier occasion, it was returned with some objections of rectification. On analysis, the powder was found containing diphenoxylate vide report dated 03.08.2013. Vide report dated 27.11.2013, the average weight of 656 mg per capsule was reported in respect of

capsules. On receipt of Chemical Examiner Report, challan was presented.

[3]. After due compliance under Section 207 Cr.P.C, the accused was chargesheeted for the commission of offence under Section 22 of the NDPS Act to which he pleaded not guilty and claimed trial.

[4]. Prosecution examined PW 1 ASI Parkash Masih, PW 2 HC Jaspal Singh, PW 2 (repeat) HC Bachittar Singh, PW 4 SI Kulwant Singh and PW 5 MHC Bishamber Singh.

[5]. Statement of the accused was recorded under Section 313 Cr.P.C in which he pleaded his innocence and false implication. However, no evidence in defence was led by the accused.

[6]. Investigating Officer of the case i.e. PW 1 Parkash Masih elaborated the steps taken by him in the investigation of the case. In his cross examination, he admitted that no secret information was received in respect of the accused. Place of occurrence was a thoroughfare being commercial and residential area within the jurisdiction of Municipal Corporation, but no attempt was made by him to call any Municipal Councilor. He further stated that prior to apprehension of the accused, 4-5 persons were also checked, but their particulars could not be noted down. Manjit Singh was independent witness who was having acquaintance with him who used to visit police station.

The witness could not tell the number of visits paid by Manjit Singh to the Police Station. He further stated that he detected the intoxicant powder only by smell. Report under Section 57 of the NDPS Act was prepared at the spot. PW 2 HC Jaspal Singh tendered into evidence his duly sworn affidavit Ex.PW 2/A in respect of carrying samples to FSL. PW 2 (repeat) HC Bachittar Singh stood by the prosecution story and proved sample seals Exs.P1 and P2, recovery memo Ex.PB, search memo Ex.PC and memo of arrest and other documents. The witness admitted that place of recovery was a thoroughfare and independent witness Manjit Singh was not of his acquaintance as he never met him prior to the date of recovery. The witness admitted that the weighing machine was available with Investigating Officer in his kit. SHO Kulwant Singh was examined as PW 4. He stood by the prosecution story and testified in respect of Exs.P1 and P2. He also stated that he had affixed his seal at number of places. MHC Bishamber Singh tendered into evidence his duly sworn affidavit Ex.PW5/A and stated in his cross examination that the case property was deposited with him twice and was taken out from *malkhana* on three occasions.

[7]. Learned counsel for the appellant submitted that the appellant was charge-sheeted firstly on 14.03.2014, whereby Judge Special Court, Patiala served him the chargesheet in respect of complicity of the accused when he was found in conscious possession of 180 intoxicant capsules of spasmio

proxyvon containing salt therein dextropropoxyphene and 220 grams of intoxicant powder containing salt therein diphenoxylate without any valid permit or licence, thereby committing an offence under Section 22 of the NDPS Act. The said charge was amended and thereafter amended chargesheet was issued on 27.09.2016 to the effect that on 21.04.2013 at about 8.30 PM, the accused was found in conscious possession of 160 intoxicant capsules of spasma proxyvon containing salt therein dextropropoxyphene without any valid permit or licence, thereby committing an offence under Section 22 of the NDPS Act. Learned counsel contended that in the amended chargesheet, there was no reference of 220 grams of intoxicant powder allegedly recovered from the accused and number of intoxicant capsules were also changed from 180 to 160. No amended charge was framed for intoxicant powder and the prosecution started to lead prosecution evidence even without there being any charge qua intoxicant powder. Investigating Officer also deposed in the context of 160 intoxicant capsules and 220 grams of intoxicant powder. After completion of prosecution evidence even in the statement of the accused, the prosecution put the first question to the following effect:-

“It is evidence against you that on 21.04.2013 at about 8.30 PM in the area of green park chowk, Tripuri Town, Patiala, you were found in conscious possession of 180 intoxicant capsules of spasom proxyvon containing salt therein dextropropoxyphene and 220 grams of intoxicant powder

*containing salt diphenoxylate without any permit or licence.
What do you have to say?”*

To the aforesaid question, answer of the accused was in negative.

[8]. By referring to aforesaid anomalous situation, learned counsel submitted that the entire trial stood vitiated on account of no charge for the intoxicant powder and there was material discrepancy with regard to total number of intoxicant capsules which were allegedly recovered from the accused. Secondly, learned counsel submitted that the Investigating Officer who allegedly recovered the contraband and arrested the accused could not have proceeded with the investigation of the case at a later stage being a complainant. Thirdly, learned counsel submitted that the representative samples were not taken before the Magistrate in compliance of Section 52-A of the NDPS Act. Learned counsel further submitted that when the accused was personally searched and contraband was recovered, then the accused must have been individually informed that he has a right to be searched before the Magistrate or Gazetted Officer. A joint communication of the right available under Section 50(1) of the NDPS Act would frustrate the import of Section 50 of the NDPS Act. Such communication should be clear, unambiguous and should have been communicated individually.

[9]. Learned counsel emphasized that Manjit Singh the alleged eye-witness was not examined. Evidently, seal after used

was handed over to the said witness. Statement of Investigating Officer was conspicuous in respect of receipt of seal from the said witness who was known to the Investigating Officer being a regular visitor of the police station. On the strength of this submission, learned counsel contended that Manjit Singh was a stock witness and even he was not examined in the context of link evidence. There was inordinate delay in sending the samples to FSL. First sample of intoxicant powder was sent on 23.04.2013. Second sample in respect of intoxicant capsules was sent only on 02.05.2013. The prosecution has not explained as to why both the intoxicant items were not sent on the same day and the inordinate delay was more than 72 hours of alleged recovery of the same. At last, learned counsel submitted that the prosecution was to ensure fair trial to the accused and the same has not been done in the present case.

[10]. As against this, learned State Counsel submitted that the recovery was lawfully effected. In case of chance recovery, compliance of Section 50 of the NDPS Act is not mandatory. The investigation conducted by PW 1 ASI Parkash Masih has not in any way prejudiced the appellant and the alleged violation pointed out by the learned counsel for the appellant has not created any dent in the prosecution case, which otherwise was found in consonance with the material on record.

[11]. I have considered the rival submissions made by learned counsel for the parties.

[12]. Perusal of both the chargesheets dated 14.03.2014 and 27.09.2016 issued by Judge Special Court, Patiala would show that in the first chargesheet, 180 intoxicant capsules of spasma proxyvon and 220 grams of intoxicant powder were made subject matter of chargesheet. In the second chargesheet, intoxicant capsules were reduced from 180 to 160 and there was no reference of intoxicant powder. The trial proceeded on the basis of amended chargesheet. There was no amended charge regarding 220 grams of intoxicant powder. Reply filed on behalf of prosecution, remained unsatisfactory as to how ASI Parkash Masih (PW 1) tried to substantiate allegation of the prosecution in respect of 180 intoxicant capsules and 220 grams of intoxicant powder. Even prosecution put question No.1 to the accused in respect of 180 intoxicant capsules and 220 grams of intoxicant powder in his statement under Section 313 Cr.P.C. It means that prosecution was not alive to the material on record and in such an anomalous situation, the case can be viewed from the angle of mistrial. In respect of manufacturing drugs, which were allegedly recovered on 21.04.2013, the trial proceeded for the offence under Section 22 of the NDPS, which was applicable only in case of psychotropic substance. Secondly, when the contraband was allegedly recovered from the accused, the accused was required to be individually informed about his right to be searched before

the nearest Magistrate or before the nearest Gazetted Officer. A joint communication of the right available to the accused under Section 50(1) of the NDPS Act has virtually gone against the import of Section 50 of the NDPS Act. The right under this Section was required to be communicated individually in clear and unambiguous terms.

[13]. 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.

[14]. 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 by contravention of the spirit of Section 50(1) of the NDPS Act.

[15]. 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 Vs. State of Punjab, 2017(3) RCR (Criminal) 566**, 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, 2016(1) RCR (Criminal) 858 (SC)**.

[16]. In **State by Inspector of Police, Narcotic Intelligence Bureau, Madurai, Tamil Nadu Vs. Rajangam, 2010(15) SCC 369**, 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.**

[17]. The occurrence took place on 21.04.2013. There was no reason to segregate the sample of both the intoxicant for sending them to the FSL. First sample of intoxicant was sent to the FSL on 23.04.2013 and the second sample was sent only on 02.05.2013 with some explanation. 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. The only alleged independent witness namely Manjit Singh was not examined and the entire prosecution story rested upon the testimonies of official witnesses which on the aforesaid test would render the prosecution story doubtful on the threshold of fair and impartial investigation and non-compliance of mandatory provisions of Sections 50 and 52-A of the NDPS Act.

[18]. Taking into totality of facts and circumstances of the case, I found the prosecution case to be doubtful in the complicity of the petitioner for the offence alleged against him, therefore, I acquit the appellant from the charges levelled against him. Appeal is accordingly allowed. Appellant be set free forthwith, if not required in any other case.

(RAJ MOHAN SINGH)
JUDGE

17.02.2018
Prince

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