

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRA-S-4283-SB-2018 (O&M)

Date of Decision : 18.12.2018

Amandeep Sharma alias Kala

..... Appellant

Versus

State of Haryana

..... Respondent

CORAM : HON'BLE MR. JUSTICE RAJ SHEKHAR ATTRI

Present : Mr. C.L.Sharma Advocate for the appellant.
Mr. Raj Kumar Makkad, DAG, Haryana.

RAJ SHEKHAR ATTRI, J. (Oral)

The appellant has come up in this appeal by assailing the judgment of conviction and order of sentence dated 25.09.2018, passed by the learned Judge, Special Court, Ropar, vide which he has been convicted and sentenced to undergo rigorous imprisonment for a period of 02 months and to pay a fine of Rs.10,000/- and in default of payment of fine to further undergo rigorous imprisonment for a period of 01 month under Section 18 of the Narcotic Drugs & Psychotropic Substances Act (in short 'the Act').

Briefly stated, it is case of the prosecution that on 21.09.2012, police party headed by ASI Rakeshwinder Singh intercepted the appellant, who was riding the motorcycle and the police officer suspected some contraband in his possession. Therefore, the investigating officer gave an offer to be searched in the presence of gazetted officer or Magistrate but the petitioner reposed confidence in the said officer. Upon conducting personal search of the appellant, 250 grams opium was recovered from the pocket of his lower garment, out of which two samples were extracted and the same were sent for chemical examination and the remaining contraband was taken into police possession. The sample was sent to FSL. As per the

chemical examiner report, the samples contained opium.

After investigation the challan was presented. The appellant-accused was charge-sheeted for the offence under Section 18 of the Act, to which he pleaded not guilty and claimed trial.

In order to prove its case, prosecution examined **PW1** Head Constable Prem Lal, **PW2** Head Constable Sushil Kumar, **PW3** ASI Rakeshwinder, **PW4** Inspector Manvir Singh, **PW5** Head Constable Jasmer Singh and **PW6** Head Constable Sanjay Kumar.

After closure of prosecution evidence, the appellant-accused was examined under section 313 Cr.P.C. in order to afford him opportunity to explain the incriminating evidence appeared against him. He pleaded his false implication.

On appreciation of evidence, the appellant was convicted and sentenced, as aforesaid.

I have heard learned counsel the appellant as well as learned State counsel and have gone through the record.

Learned counsel for the appellant has submitted that the appellant is a government servant; that nothing was recovered from him; that he has been roped in this case due to previous enmity with the investigating officer; that there is clear cut violation of Sections 50 and 42 of the Act; Form No.29 was not prepared at the spot; that link evidence is missing and the prosecution has failed to prove its case beyond reasonable shadow of doubt.

On the other hand, learned State counsel has contended that the prosecution has proved its case beyond reasonable shadow of doubt.

I have given my thoughtful consideration to the rival

contentions.

The Act has been enacted to consolidate and amend the law relating to narcotic drugs, to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances (to provide for the forfeiture of property derived from, or used in, illicit traffic in narcotic drugs and psychotropic substances, to implement the provisions of the International Convention on Narcotic Drugs and Psychotropic Substances) and for matters connected therewith.

Thus, the Act is a special law enacted by the Parliament with an object to control and regulate the operations relating to narcotic drugs and psychotropic substances. It is for this purpose that stringent provisions of law have been made. In this scenario, it is the duty of the prosecution to prove each fact by leading cogent and reliable evidence. Any flaw or slightest doubt in the evidence with regard to compliance of the mandatory provisions of the statute provides benefit of doubt to the accused.

The criminal justice delivery system adopted by this country comprises of three limbs - the investigating agency, the prosecution and the judiciary – all works in their respective spheres in an independent manner. Thus, it is requisite for the investigating agency to investigate in a sincere, impartial and bona fide manner without creating any doubt.

It has been specifically provided under the provisions of Section 50 of the Act that accused must be apprised of his right of search before a Magistrate or a Gazetted Officer. Recording the statement of a suspect or an accused under the custody of police to the effect that the suspect reposed confidence in the investigating officer with regard to compliance of Section 50 is itself violation of the provisions of this section.

In fact, provisions of Sections 25 and 26 of the Evidence Act have been incorporated in order to prevent the practice of torture and putting undue influence on the suspect or the arrested person.

In the case in hand, on perusal of the consent memo Ex.PW2/A it transpires that the investigating officer had told the accused that he could get the search of the bags conducted in front of the gazetted officer or a magistrate but accused reposed confidence in the investigating officer. It clearly violates the provision of Section 50 which is mandatory one. When a person is under the custody or control of the police officer, especially when he is the complainant as well as the investigating officer, recording of such a statement with regard to conducting search of the suspected material before the same police officer is completely inadmissible in evidence. It also violates the provision of Sections 24 and 25 of the Evidence Act. In the case in hand, in the consent memo PW2/A, it is specifically mentioned that accused himself wrote in his handwriting that he has no objection if the investigating officer conducts his search. The writing in itself seems suspicious in nature. Learned counsel for the appellant has submitted that infact the signatures of the appellant were obtained on blank paper whereon consent memo Ex.PW2/A was prepared. This Court is also of the view that after obtaining the hand-writing and signatures of the appellant remaining part of Ex.PW2/A was prepared thereafter. This practice should be brought to an end. This court is of the considered view that consent memo Ex.PW2/A is inadmissible and it violates the provision of Section 50 of the Act. Thus, it vitiates very search of accused and seizure of contraband from him.

Now coming to the argument with regard to non-preparation of

Form No.29 at the spot. This fact has been categorically admitted by PW2 Head Constable Sushil Kumar, who has stated that it was prepared in the police station. Contrary to it, PW3 ASI Rakeshwinder Singh has stated that it was prepared at the spot but PW3 was never declared hostile and his evidence is also liable to be appreciated to this effect. Apart from it, there is material contradiction with regard to preparation of Form No.29 (Ex.PW3/A) in the evidence of the prosecution. This also creates a doubt in the prosecution story.

With regard to return of seal of the investigating officer, the contradictory versions have been putforth. It is mentioned in the FIR that the seal was handed over to PW2 Head Constable Sushil Kumar at the spot. Surprisingly, prosecution is claiming that the public witness namely Raju alias Billa was present at the spot and he accompanied police party to the police station. When a public witness is present, it becomes obligatory on the part of the investigating officer to hand over the seal to him, otherwise it creates a doubt in the prosecution story. Moreover, no reason has been assigned as to why the seal was not handed over to said public witness Raju alias Billa. The personal liberties and reputation of the offender is at stake in a case under the Act. Therefore, utmost precautions should have been taken by the investigating agency and case be proved beyond reasonable shadow of reasonable doubt, especially when no gazetted officer or Magistrate had been called at the spot rather the case property had been handled by the police personals.

It is pertinent to mention here that PW2 has stated that he returned the seal to the investigating officer at about 9/10 a.m. on the next day. Upto that time the case property was also with the investigating

officer. In such circumstances, it was incumbent on the part of investigating officer to produce the documentary evidence available to him under the Punjab Police Rules, 1934 wherein it has been provided that police shall maintain register No.19 and the entries with regard to storage of articles of the case property be made therein. In the case in hand extract from register No.19 has not been produced for the reasons best known to the prosecution. Thus, an adverse inference should be drawn accordingly.

PW3 ASI Rakeshwinder Singh (investigating officer) has submitted that the seal was handed over to him after 2-3 days. His version amounts to a contradiction, which goes to create a doubt in veracity of prosecution case.

If the version of PW2 Head Constable Sushil Kumar is accepted, then the case property as well as the seal were with the police and there was every possibility of tampering with the same. Apart from it, no material document was produced when the seal was handed over to PW3 Rakeshwinder Singh. The police was duty bound to make an entry in the daily diary register with regard to the handing over and the return of the seal and also with regard to deposit of case property. PW2 Head Constable Sushil Kumar was subordinate to PW3 Rakeshwinder Singh and was under his influence. In this view of the matter, handing over the seal to him, especially when it is alleged that an independent witness was present, is a mockery of law and procedure.

The link evidence is also missing. PW1 Head Constable Prem Lal has stated in his police statement that the samples parcel were handed over to him on 25.05.2012 and he got prepared a docket on that date and deposited the sample parcels in the forensic science laboratory

But when he tendered his affidavit Ex.PA (wrongly mentioned in his statement Ex.PW1/A) he made an improvement by stating that the sample parcel was handed over to him on 25.09.2012. When he was confronted with the police statement, it was found that he mentioned the date of receiving the parcel as 25.05.2012 in his police statement under Section 161 Cr.P.C. But this fact could have been proved by producing documentary evidence i.e. daily diary register and register No.19. But non-production of the same draws an adverse inference because best evidence was available in the police station, but the same has been withheld for the reasons best known to the prosecution. Apart from it, a bare perusal of affidavit Ex.PA reveals that it is nowhere mentioned as to when he deposited the sample parcel and on which date he handed over the receipt in the police station.

In this case, the prosecution has asserted that the case property was produced before the Magistrate on 22.09.2012, who passed the following order (Ex.PW3/4) on that day:-

“The prosecution has moved application for authentication of the case property as it is to be disposed of by the committee framed under the rules. Case property i.e. opium weighing 230 gram produced before me which is sealed with seals 'RS' and 'MS'. Two samples of opium weighing 10 gram each also produced before me which is also sealed with seals 'RS' and 'MS'. The case property opened in the presence of undersigned and one sample of 10 gram opium is separated from the case property and is to be kept on record as proof of the case property. Remaining case property repacked and was sealed with the seal bearing letters “KSS’. Case property i.e. 220 gram opium, one sample already drawn by the concerned police and one sample drawn before the undersigned are ordered to be deposited in the Judicial

Malkhana. One sample, out of two already drawn samples by the Investigating Officer was handed over to ASI Rakeshvinder Singh on his request. Photographs of the case property and samples were also taken in my presence in the Court. Case property be disposed of by the committee as per rules and authentication certificate is accordingly given.”

The Magistrate had separated one parcel of 10 gram opium from the bulk, which was kept as a proof of the case property and the remaining case property was repacked and it was sealed with seal bearing impression 'KSS' and the same was deposited in judicial malkahana. It is nowhere submitted that learned Magistrate put his own seal on each article of the case property, but contrary to it in the affidavit of PW5 Jasmer Singh, it is mentioned that all the articles i.e. two sample parcels and bulk parcel were also having one more seal of CJM. PW2 has also stated that sample parcels were sealed with the seal bearing impression 'RS' and 'MS'. Even from the report of chemical examiner, it transpires that sample parcels sent to it were bearing only two seal impressions i.e. 'MS' and 'RS', but nothing is mentioned if seal of CJM was also affixed on same or not. In this view of the matter, there is every possibility that the parcel sent to the chemical examiner was materially changed as it did not bear the signatures and seal of the CJM.

In this case, the numerous public witnesses were very much available, but they were not joined for the reasons known to the investigating officer. Both PW2 Head Constable Sushil Kumar and PW3 ASI Rakeshwinder Singh have admitted that in the nearby school; in the nearby fish farm and also in the Forest Rest House, numerous independent witnesses were available, but those have not been joined. The non-joining of available witnesses creates a doubt in the genuineness of prosecution

story. It is the case of the prosecution that one independent witness Raju alias Billa was present at the spot but, he has not been examined rather he has been given up by the public prosecutor. This fact is not understandable as to why a material witness has been given up and why the prosecution has relied upon the testimony of official witnesses. If an independent witness has been joined, it becomes obligatory for the prosecution to produce him before the trial court. If such a witness has been won over, even then he has to be examined and he can be confronted with his police statement. However, nothing is brought on the record on what basis the public prosecutor formed the opinion that such a witness has been won over.

Ruqa was sent at 7:30 p.m. from the spot. Before sending ruqa ample time was spent in preparing consent memo; giving offer of search; in effecting search and in preparing ruqa. PW2 has stated that the memos were prepared after despatching the ruqa. This fact stands corroborated from the statement of PW2 that the police party remained at the spot from 7:30 p.m. to 10:40 p.m. whereas ruqa was delivered at 7:30 p.m. The question of preparing memos before it does not arise at all. It transpires that recovery memo and other memos were prepared after sending ruqa. This fact in itself creates a doubt in the prosecution story. However, said doubt could have been dispelled by producing the documentary evidence i.e. copy of the roznamcha to establish as to when the police party had left the police station. But due to non-production of documentary evidence, an adverse inference is drawn against the prosecution and the benefit of doubt stands extended towards the appellant.

In the peculiar circumstances of the case, it is held that the prosecution case is full of discrepancies and non-examination of Raju alias

Billa creates a doubt in the entire story of the prosecution.

This court is of the view that the prosecution story is doubtful and the same is not acceptable. Learned trial court has failed to appreciate the evidence properly. Therefore, the judgment of conviction and sentence order are not sustainable in the eyes of law and are liable to be *set aside*.

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

He be set at liberty forthwith if not required in any other case.

The amount of fine, if any deposited by him, be refunded to him.

(RAJ SHEKHAR ATTRI)
JUDGE

18.12.2018
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Whether speaking/reasoned
Whether Reportable :

Yes/No
Yes/No