

IN THE HIGH COURT OF PUNJAB AND HARYANA AT  
CHANDIGARH  
CRA-S-4699-SB of 2016(O&M)  
Date of Decision: March 10, 2018

Akash Kumar Gupta  
..... Appellant  
Versus  
State of Punjab  
..... Respondent

CORAM:- HON'BLE MRS.JUSTICE LISA GILL

Present: Mr.Arshdeep Bhullar, Advocate  
for the appellant.  
Ms. Gulnoor Ghuman, AAG.,Punjab.  
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LISA GILL, J (Oral).

Appellant has been convicted for the offence punishable under Section 22 of the Narcotics Drugs & Psychotropic Substances Act, 1985 (for short-' the Act') by the learned Special Judge, Kapurthala, vide impugned judgment dated 04.11.2016 and by a separate order of even date he has been sentenced as under:-

| Offence u/s | Sentence                                                                                                                          |
|-------------|-----------------------------------------------------------------------------------------------------------------------------------|
| 22 NDPS Act | Rigorous imprisonment for 10 years; besides pay a fine of ₹1,00,000/- and in default thereof to further undergo RI for six months |

Aggrieved therefrom, present appeal has been filed by the appellant.

Brief facts essential for the adjudication of this case are that FIR No. 60 dated 21.05.2014, was registered against the appellant. SI Devinder Singh (PW-4), No. 370, SHO GRP Amritsar, stated that on 21.05.2014, he was posted as SHO Police Station GRP, Jalandhar and the police party headed by him was on patrolling and checking duty on Platform No. 2 & 3 at Railway Station, Phagwara. At about, 7.00.a.m., when the police party reached near the shed towards Jalandhar side, the appellant was found siting

on a bench under the shed. The appellant on seeing the police party became nervous and tried to flee from the spot alongwith his trolley bag. The appellant was apprehended on suspicion by PW-4-SI Devinder Singh with the help of other police officials. The appellant, on inquiry, disclosed his name as Akash Kumar Gupta. PW-4-SI Devinder Singh, disclosed his identity to the appellant and informed him that he was suspected to be in conscious possession of some contraband. His search was required to be conducted. The appellant was apprised that he has a legal right to be searched before a Gazetted Officer or a Magistrate, but the appellant reposed confidence in PW-4-SI Devinder Singh. Consent memo Ex.PW1/A was prepared, which was signed by the appellant and witnessed by ASI Pavittar Singh and HC Harmesh Lal. An attempt was made by PW-4-SI Devinder Singh to join public witnesses, but none was ready. The trolley bag in possession of the appellant was searched and following contraband was recovered:-

1. 4320 Capsules of Spasmo Proxyvon i.e. 540 Strips of Spasmo Proxyvon each containing 8 capsules.
2. 6000 tables of lomotil i.e. 300 strips each strip containing 20 tablets of lomotil and
3. 30 bottles of Rexcof each containing 100 ml.

Two strips of Spasmo Proxyvon were taken and converted in separate parcels. Similarly, two strips of lomotil tablets and two bottles of Rexcof were converted into separate parcels and remaining bulk of all the three parcels as above were converted in three separate parcels. All the six sample parcels and three bulk parcels were sealed with the seal bearing impression 'DS' of PW-4 SI Devinder Singh. Separate seal impression and Form.M-29 was prepared at the spot. Seal after use, it is stated was handed over to ASI Pavittar Singh. The entire case property was taken in police

possession vide recovery memo Ex.PW1/B. The appellant was arrested vide memo Ex.PW1/C. Ruqa Ex.PW4/A was sent through HC Harmesh Lal, on the basis of which, formal FIR Ex.PW4/B was registered by SI Baldev Krishan.

Special report Ex.PW4/B1 was sent to DSP, GRP, Jalandhar. Site plan EX.PW4/C with marginal notes was prepared. Statements of the witnesses under Section 161 Cr.P.C., were recorded. PW-4 thereafter, directly went to the Judicial Court Complex, Phagwara and produced the entire case property, Form M-29, sample parcels as well as the accused before the learned Sub-Divisional Judicial Magistrate, Phagwara. An application for making the inventory report Ex.PW4/E was prepared. Order Ex.PW4/D1 was passed by the learned SDJM, Phagwara who found all the seals intact and after verifying the facts appended his signatures. Order dated 21.05.2014, is on record as Ex.PW4/D.

PW-4-SI Devinder Singh, further revealed that on return to the Police Station, the entire case property was kept in double lock. The case property was taken out on 23.05.2014 from the double lock and three bulk parcels were deposited with the Judicial Malkhana, Kapurthala. Three sample parcels were taken out from the double lock and handed over to HC Surinderpal alongwith docket form vide order no. 144/21 for depositing the same in the office of Forensic Science Laboratory, Mohali (for short 'FSL'). It is further revealed that HC Surinderpal directly went to the office of FSL, Mohali, but the concerned officials returned the samples with the objection that the same should be deposited alongwith forwarding letter from the Halqa DSP in the name of Director, FSL, Mohali. HC Surinderpal, on returning to the Police Station handed over the parcels to PW-4-SI Devinder Singh, who immediately kept them in double lock again. Thereafter, on

06.06.2014, PW-4- SI Devinder Singh, again took out the said three sample parcels from double lock alongwith docket form obtained from the office of DSP, Sub-Division and handed over the samples to HC Kulwinder Singh for depositing the same in the office of FSL, Mohali. Report of the Chemical Examiner Ex.PW4/G was received. Form No. M-29 is available as Ex.PW4/H. Separate seal impressions are Ex.PW4/I.

Final report under Section 173 of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.') on completion of investigation was presented against the appellant. Charge against the appellant was framed on 05.10.2015, to which appellant pleaded not guilty and claimed trial.

In order to prove its case, the prosecution examined four witnesses and tendered in evidence the relevant documents.

The appellant in his statement under Section 313 Cr.P.C., while denying the incriminating evidence put to him pleaded innocence and false implication while stating that he was in-fact picked up from his house. In defence, two witnesses were examined by the appellant.

The learned trial Court, on consideration of the facts and circumstances of the case, the evidence on record, concluded that the prosecution had succeeded in proving the appellant to be in conscious possession of the contraband in question without any legal permit or license. Consequently, the appellant was convicted for the offence punishable under Section 22 of the Act and sentenced as detailed in the foregoing paras.

Aggrieved therefrom, the present appeal has been filed.

Learned counsel for the appellant vehemently argues that the learned trial Court has grossly erred in convicting the appellant of the offence punishable under section 22 of the NDPS Act. It is argued that there is an unexplained delay in the deposit of the samples with the FSL, Mohali.

Recovery is alleged to have been effected on 21.05.2014, but the samples were ultimately deposited on 06.06.2014. It is contended that there is nothing on record as to why from 30.05.2014 to 06.06.2014, no action was taken by the authorities to remove the objections raised by the FSL, Mohali. Therefore a serious doubt is cast on the prosecution case. Moreover, it is vehemently argued that no independent witness was joined at the time of the alleged recovery, even though, recovery is stated to have taken place at the Railway Station.

Learned counsel for the appellant further argues that there is a violation of the mandatory provisions of Section 50 of the Act, in as much as a proper offer was not addressed to the appellant. Moreover, the consent memo was not signed by the appellant. Therefore, it cannot be said that there is a valid consent. Moreover, the investigation has been carried out by the official, who has effected the recovery. The proceedings are vitiated on this count as well. No information, it is contended was sent to the senior officers as required under the Act.

Another point strenuously urged on behalf of the appellant is that specimen seal was not found on Form M-29. Learned counsel further submits that there is a cutting on the date mentioned under the signatures of the SHO, GRP, Jalandhar on Form-M-29. Therefore, the entire case was prepared by the police authorities while sitting at the Police Station. The link evidence, it is argued is woefully missing in the present case. Even, the Malkhana Incharge was not examined. Therefore, tampering with the case property cannot be ruled out. It is thus prayed that this appeal be allowed and conviction of the appellant be set aside and he be acquitted of the charges against him.

Learned counsel for the State, however, submits that there is

clear and cogent evidence on record clearly pointing to the guilt of the appellant. All the mandatory provisions of the Act have been complied with. The link evidence is in place. It is denied that the signatures of the appellant do not appear on the consent memo. It is further urged that even otherwise, the recovery has been effected from the bag which was in conscious possession of the appellant and recovery was not effected from his person. Therefore, the provisions of Section 50 of the Act are not attracted. It is thus prayed that the present appeal be dismissed.

I have heard learned counsel for the parties and have gone through the record of the case with their assistance.

A perusal of the record reveals that the prosecution has been successful in proving its case beyond the shadow of reasonable doubt against the appellant. It is not in dispute that the recovery in the present case was a chance recovery. The appellant was apprehended on the basis of suspicion. He tried to flee from the spot and was apprehended by the police party headed by PW-4-SI Devinder Singh. PW-4 has clearly narrated the events as they unfolded in no uncertain terms. A perusal of Ex.PW1/A reflects that PW-1-ASI Pavittar Singh, after revealing his identity to the appellant expressed that he had a suspicion of the appellant carrying some intoxicant substance in the trolley bag carried by him. Appellant was specifically asked whether he would like to have the search of this bag conducted before a Gazetted Officer or a Magistrate. A perusal of the record reveals that this memo is duly signed by the appellant. The contention of the learned counsel for the appellant that this memo has not been signed is factually incorrect. The argument raised on behalf of the appellant that before conducting the personal search of the appellant, no separate consent was sought as stated by PW-4-SI Devinder Singh, is an argument noticed

only to be rejected. It is not in dispute that the recovery of the contraband was effected from the trolley bag being carried by the appellant. Before conducting the search of the said bag, option was clearly given to the appellant and he reposed faith in PW-4-SI Devinder Singh and opted for the search to be conducted by PW-4. Therefore, the said argument is irrelevant in the facts and circumstances of the case.

It is pertinent to note that in this case, the case property was immediately produced before the learned Sub-Divisional Judicial Magistrate, Phagwara on 21.05.2014 itself. I have perused Ex.PW4/H i.e. Form-M-29. It bears the signatures of the learned Sub-Divisional Judicial Magistrate, Phagwara appended on 21.05.2014 itself. Detail of the contraband recovered is duly mentioned in the said form. The sample seal is contained on a separate sheet Ex.PW4/I. The said sample seal is duly verified by the learned Sub-Divisional Judicial Magistrate, Phagwara on 21.05.2014 itself. Therefore, contention of learned counsel for the appellant that sample seal is not found present on Form-M-29 can be of no benefit to him. Similarly, the averments that the cutting in the date under the signatures of SI Devinder Singh, SHO, GRP, Jalandhar, casts a doubt on the prosecution case, is not tenable. It is noticed that date 25.05.2014 has first been written. The number 1 has been written over 5 of 25 and thereafter, the date has again been written as 21.05.2014. It is duly counter-signed by PW-4-SI Devinder Singh. The said document is duly verified by the learned Sub-Divisional Judicial Magistrate, Phagwara on 21.05.2014, itself. PW-1-ASI Pavittar Singh, has specifically explained that the date was changed at the spot itself. Thus, no doubt arises regarding the genuineness of this document as agitated.

PW-4-SI Devinder Singh, specifically stated that after

producing the sample parcels, sample seals and the rest of the contraband before the learned Sub-Divisional Judicial Magistrate, Phagwara, the entire case property was kept in double lock in the GRP, Police Station. The three bulk parcels were taken out by PW-4-SI Devinder Singh on 21.05.2014 and deposited with the Judicial Malkhana, Kapurthala. It is to be noticed that the three sample parcels were retained by PW-4 and kept under double lock. He has specifically stated that he handed over the three sample parcels to HC Surinderpal on 30.05.2014 for depositing the same with the office of FSL, Mohali. The said samples were returned with an objection as detailed in the foregoing paras. The sample parcels, it is specifically stated were again kept under double lock by PW-4. They were taken out again on 06.06.2014 and handed over to SH Kulwinder Singh for depositing the same in the office of FSL., Mohali. HC Kulwinder Singh has duly tendered his affidavit Ex.PW3/A in this respect. HC Surinderpal-PW-2 has also tendered his affidavit Ex.PW2/A. All the three witnesses have clearly stated that no tampering was done with the samples while in their possession and none was allowed to tamper with the said samples. PW-1-ASI Pavittar Singh, who was posted as Incharge Police Post, GRP, Phagwara, Kapurthala, has reiterated the incident as it unfolded. He has explained that the entire writing work was done by PW-4, SI Devinder Singh due to an injury on his hand. Thus, it cannot be said by any stretch of imagination that link evidence in this case is missing or that a shadow of doubt is cast on the recovery in question.

Another argument raised on behalf of the appellant is that non joining of an independent witness in the proceedings is fatal to the prosecution case. Submission of learned counsel for the appellants that the trial is vitiated due to the absence of independent witnesses is not borne out from the record of this case. Official witnesses have given a graphic

description of the events as they unfolded leading to the recovery of the contraband from the trolley bag. They have supported the prosecution version on all material aspects. There is no reason whatsoever to doubt their testimony. In the absence of any positive evidence on record to show that the official witnesses even know the appellant earlier or had an axe to grind against the accused, or were inimical towards him, non-joining of an independent witness by itself cannot be fatal to the prosecution case. It has been held by the Hon'ble Supreme Court in **Dharampal Singh v. State of Punjab, 2010 (4) R.C.R. (Criminal) 504** that mere absence of independent witness by itself would not vitiate the proceedings until and unless it is shown that evidence on record is unreliable and untrustworthy.

As per the Chemical Examiner Report Ex.PW4/G, it is specifically mentioned that the seals on the parcels were found intact and tallied with the specimen seal impressions. The contents were verified to be the intoxicant substances as mentioned above. Mandatory provisions of the Act have been duly complied with. Link evidence is complete. There is no evidence on record to indicate false implication of the appellant. Commercial quantity of narcotic substance was recovered from the appellant. The appellant is proved to have been in conscious possession of the said contraband without any legal permit or license to carry the same. It is admittedly, a commercial quantity for which a minimum sentence of 10 years is prescribed by the Act. Therefore, the appellant has been rightly convicted by the learned trial Court for the offence punishable under Section 22 of the Act. Prosecution has indeed succeeded in proving its case beyond reasonable doubt against the appellant. No other arguments has been raised.

Learned counsel for the appellant is unable to point out any illegality, infirmity or perversity in the impugned judgment of conviction

and order of sentence dated 04.11.2016, passed by the learned Special Judge, Kapurthala. The said judgment and order dated 04.11.2016 is accordingly upheld.

Consequently, this appeal is dismissed.

March 10, 2018

s.khan

[LISA GILL]

Judge

Whether speaking/reasoned : Yes/No.

Whether reportable : Yes/No.