

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

**CRA-D No. 361-DBA of 2004 (O&M)
Date of Decision: 04.02.2019**

State of Punjab

..... Appellant

Versus

Toofan Singh

..... Respondent

**CORAM: HON'BLE MR. JUSTICE JASWANT SINGH
HON'BLE MR. JUSTICE ARUN KUMAR TYAGI**

Present: Mr. H.S. Grewal, Additional Advocate General, Punjab
for the appellant/State.

Mr. Sanjay Gupta, Advocate for
Mr. Kuldeep Singh Saini, Advocate
for the respondent.

JASWANT SINGH, J.

1. This criminal appeal has been directed against the judgment dated 23.10.2002, rendered by the Court of Judge Special Court, Ludhiana (in short "Trial Court"), whereby the Trial Court has acquitted respondent Toofan Singh S/o Sh. Sardar Singh, of the charge under Section 18 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as the Act, 1985).

2. Tersely put the facts of the prosecution are that PW-5 S.I. Dalip Kumar along with other police officials was present on 07.11.1993 at Chowk, Transport Nagar, G.T. Road. One Pawan Kumar S/o Wazir Chand of Islam Ganj was also associated with the police party. Meanwhile, on four-wheeler bearing Registration No. PUK 3041 being driven by a turban gentleman came from the side of Sherpur Chowk and six persons were found sitting in this four wheeler. PW-5 S.I. Dalip Kumar signalled the

vehicle to stop. On receiving the signal, the driver of the four-wheeler

stopped the vehicle and all the six passengers of the vehicle came down from the vehicle. On interrogation, the passengers disclosed their names as Toofan Singh (respondent herein), Parvez Kumar, Gurcharan Singh, Mahesh Kumar and Bhupinder Singh @ Prem Singh and the last person disclosed his name as Ram Chand. The driver of the vehicle disclosed his name as Sucha Singh S/o Babu Singh. PW-5 S.I. Dalip Singh told the occupants of the vehicle that as they were suspected to in possession of some illicit drug. As a result of this suspicion, the PW-5 S.I. Dalip Singh gave them option as to whether they wanted to be searched before a Magistrate or a Gazetted Officer. All the passengers including this respondent stated that they had faith in him and he may conduct the search of them. Thereafter, PW-5 S.I. Dalip Singh, conducted the search of the jute bag held by respondent-Toofan Singh and on search, opium wrapped in glazed paper was recovered. Out of the total recovered opium, two samples of 100 grams each were separated and remaining opium, on weight found to be 19 kgs. 800 grams. The same was converted into separate parcels. The accused / respondent failed to produce any permit or license to keep the opium in his possession. On account of his failure to produce permit or license, in this regard he was found to have committed the offence under Section 18 of the Act. Further, out of the personal search of the respondent, ₹ 105/- in cash were recovered and the same was also taken into police possession vide separate recovery memo. The grounds of arrest were prepared. *Ruqa* was sent to the police station upon which the formal F.I.R. Ex. PE/1 was recorded. Rough site plan was also prepared at the spot. On returning from the police station, the case property was deposited by PW-5

After completing the various formalities, the samples were sent to the lab of Chemical Examiner. On receipt of the Chemical Examiner's Report, the respondent was challaned. He was charged under Section 18 of the Act by the Trial Court.

In order to strengthen the charge, the prosecution has examined the following witnesses:

PW-1 HC Narinder Singh, PW 2 C. Sadhu Singh No.2615, PW 3 HC Ranjit Singh No.1718, inspector Naginder Singh, PW 5 S.I. Dalip Kumar, PW 6 Gian Singh No.2606 & PW 7 Shri S.S.Gupta, learned Additional Sessions Judge, Mansa and closed the evidence after tendering in evidence report of the Forensic Science Laboratory (FSL), Punjab, Chandigarh, Ex-PZ.

Thereafter the respondent was examined under Section 313 Cr.P.C. in which all the incriminating circumstances appearing by way of prosecution evidence were put to him. He pleaded his innocence and false implication. He also produced his defence evidence. After appreciation of entire evidence, the Trial Court has acquitted the respondent. Feeling aggrieved against the judgment of Trial Court, the State has preferred instant appeal.

3. Counsel for the appellant/State has argued that the Trial Court has gravely erred in acquitting the accused, especially, when there was huge recovery of 20 kg opium. By no stretch of imagination, case can be planted. He further argued that it is evident from the prosecution evidence on the record that provisions of Section 50, 55 and 57 were complied with by the Investigating Officer. The Investigating Officer was duly authorized to conduct the investigation and the Trial Court has wrongly observed that

PW-5 S.I. Dalip Kumar, (Investigating Officer) was not authorized to conduct the investigation. There was no necessity on the part of prosecution to make the compliance of the Section 50 of the Act as contraband was not recovered from the personal search of the accused. There was no delay in sending the sample in the lab of Chemical examiner and there is no flaw in the link evidence. He has also argued that the Trial Court has wrongly observed in the impugned judgment that examination of independent witness was necessary and in the absence of Independent witness, the case of prosecution has to be doubted. In this manner, he has prayed that the judgment of the Trial Court is liable to be reversed and accused be convicted.

4. As against this, counsel for the respondent/accused has argued that there is no flaw in the impugned judgment of the Trial Court. The Trial Court has rightly observed that despite availability of the Independent witness, the non-examination of that witness has weakened the case of prosecution. The Trial has rightly given the due weightage to the defence evidence. In fact, it is a false case and has been planted by the prosecution on the asking of a person with whom the respondent / accused was at daggers drawn. The sample was transmitted to the lab of chemical examiner with such a huge delay and the delay has not been explained by the prosecution. In the wake of major contradictions and discrepancies in the case of prosecution, the Trial Court has rightly given the benefit of doubt to the accused / respondent. At last he has argued that the instant appeal may kindly be dismissed.

5. At the very outset of the case, we are of the view that after appreciation of the facts and evidence, it appears that there are so many

disturbing features in the case of prosecution which are so serious and would merit the rejection of the prosecution case outrightly. Before enumerating the infirmities in the prosecution case, we would like to put on record that case under NDPS Act, has to be dealt with seriousness, skill and transparency at all levels. Where on one hand menace of drug trafficking is eating the vitals of the Nation and so it needs to be eliminated from the globe, but at the same time, we need to understand that offence under NDPS Act, carries a stringent punishment and so every precaution has to be taken by the Investigating agency to ensure fairness and transparency. There is an in built mechanism provided under the Act which guards the rights of the accused. There are mandatory requirements to be followed at investigation level and breach of those requirements would mean nothing less than the acquittal of the accused.

This Court views that there is no flaw and legal error in the judgment of the Lower Court vide which it has acquitted the accused / respondent. The Trial Court has observed that PW-5 S.I. Dalip Kumar, Investigating Officer was not authorized to conduct the investigation because at the relevant time he was not promoted as A.S.I on regular basis. Now, it was the bounden duty of the prosecution to prove that PW-5 S.I. Dalip Kumar was authorized to conduct the investigation of the present case. But as ill-luck would have it, the prosecution has totally failed to rebut the notification being relied upon by the defence before the Trial Court. No cogent evidence was produced by prosecution that PW-5 S.I. Dalip Kumar was competent to effect the search and seizure of the contraband from the possession of respondent. It also transpires that no law was cited by the prosecution before the Trial Court to controvert the stand of the defence that

at the rank of Head Constable, PW-5 S.I. Dalip Kumar was competent to conduct the investigation.

6. It is also crystal clear that sample for analysis was transmitted to the lab of chemical Examiner, Chandigarh on 19.11.2014, i.e. after gap of 99 days from the date of effecting of alleged recovery. This inordinate delay in transmitting the sample to the lab of chemical Examiner has not been explained by the prosecution. We are of the view that if other evidence led by the prosecution is weak and un-trustworthy, the delay in sending the sample parcel to FSL assumes great importance. Delay in transmitting the sample to the lab of chemical Examiner cannot rule out the possibility of tampering with the sample. Moreso, the prosecution has also failed to examine its witness who deposited the sample parcel in the lab of chemical Examiner. In the absence of examination of this material witness, the prosecution has not explained where the sample remained in the custody from the date of effecting recovery till it was deposited with the chemical Examiner. In other words, the custody of sample from 07.11.1993 to 19.11.14 has not been explained. So in these circumstances, there could be chances of tampering with the sample. In case there are chances of tampering with the sample, the benefit of doubt goes to the accused.

7. Although, joining of independent witness is not the rule of law but rule of prudence. Sometimes, the Court insists independent corroboration where there is doubt in the prosecution story. It is admitted case of prosecution that one Pawan Kumar was associated by the police in raiding party but that witness has not been examined by the prosecution to support its case and the non-examination of this witness during trial goes to show that case of prosecution is not free from doubt.

8. The Trial Court has observed that there is violation of Section 50 of the Act, 1985. No doubt, provision of Section 50 of the Act would not be attracted as the recovery of contraband was not from the possession (person) of respondent but we are of the view that when prosecution has stated that option under Section 50 of the Act was given but thereafter strict compliance of Section 50 of the Act was not made and it can be said that there is violation of Section 50 of the Act and it has vitiated the trial.

9. We are also of the view that there is also violation of Section 42 of the Act. For attracting the applicability of Section 42, it is necessary that the Officer empowered to conduct the search and seizure of contraband has reason to believe from personal knowledge or information regarding movement of Narcotic Drug or Pshychotropic Substance. However, if the action is not upon his personal knowledge or information, the requirement of Section 42 would not be applicable. The prosecution has built up its case as unfolded in F.I.R. that the Investigating Officer PW-5 S.I. Dalip Kumar had reason to believe that there would be movement of illicit drug and for this reason he got stopped the vehicle being allegedly occupied by respondent-Toofan Singh. As such, there is violation of Section 42 of the Act, for not communicated the information by the Investigating Officer to his seniors. As such, we are of the view that the Trial Court has rightly acquitted the respondent / accused on the ground that Investigating Officer who conducted the search and seizure had not complied with mandatory provision of law. There is no good ground to interfere with order of acquittal which is reasoned one, supported by statutory provision of law in NDPS Act.

No other point was raised before us.

10. Further reasons recorded here-in-above, this **appeal** is **dismissed**. The judgment of Court below dated 23.10.2002 is affirmed. Bail bond and surety bond of respondent stands cancelled.

(JASWANT SINGH)
JUDGE

February 04, 2019
'dk kamra'

(ARUN KUMAR TYAGI)
JUDGE

Whether Speaking/reasoned	Yes/No
Whether Reportable	Yes/No