

**IN THE HIGH COURT FOR THE STATES OF PUNJAB AND
HARYANA AT CHANDIGARH**

**CRA-S-1534-SB-2016
Date of decision: 20.08.2019**

Jasleen Kaur

...Appellant

Versus

Union Territory of Chandigarh

...Respondent

CORAM: HON'BLE MR. JUSTICE ARVIND SINGH SANGWAN

Present:- Mr. G. S. Benipal, Advocate
for the appellant.

Mr. G. S. Rathore, Addl. P.P., U.T., Chandigarh.

ARVIND SINGH SANGWAN, J. (Oral)

This appeal is directed against the judgment of conviction dated 17.03.2016 and order of sentence dated 18.03.2016, passed by the trial Court, vide which the appellant was held guilty for commission of offence punishable under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (*for short 'the Act'*) and was sentenced to undergo rigorous imprisonment for a period of 06 months and to pay a fine of Rs. 5,000/-; in default of payment of fine, the appellant was ordered to further undergo rigorous imprisonment for 45 days.

During the pendency of this appeal, vide order dated 23.04.2016, the sentence of the appellant was suspended noticing the fact that appellant has undergone 02 months of actual sentence. Thereafter, this appeal was listed for final disposal noticing the fact that the appellant is a 28 years old unmarried girl with a stigma of conviction hanging over her.

Brief facts of the case, as per prosecution, are that on 04.07.2014, SI Tilak Raj along with ASI Brij Raj, HC Narinder Kumar,

Lady Constable Pooja and Lady Constable Seema was patrolling in government vehicle which was being driven by Constable Harjinder Singh. At about 2.30 PM, a *Naaka* was laid on the dividing road of Sector 11-C, Chandigarh for checking the snatching and theft cases. At about 3.00 PM, a girl aged about 24/25 years came on foot from the side of Sector 11-C/D, Chandigarh, who, on seeing the police party, turned back and started moving fastly. On this, the police party, comprising of two lady constables namely Constable Pooja and Constable Seema and first Investigating Officer SI Tilak Raj apprehended the appellant on suspicion and with the help of lady constables, he conducted the search of a plastic bag which the appellant was carrying in her right hand and from the said bag, one polythene was recovered which was found carrying some narcotic material i.e. smack. The Investigating Officer tried to join an independent witness at the spot but no one was ready. On weighment, the narcotic substance recovered came to 10 grams, out of which, two samples of 02 grams each were separated and all were converted to parcels and then sealed with the seal bearing impression 'TJ' and the same was taken into possession. The remaining 06 grams of contraband were also converted into a sealed parcel. Ruqa was prepared and the seal after use was handed over to ASI Brij Raj. After taking possession, ruqa was sent to police station through HC Narinder Kumar for registration of the FIR.

Learned counsel for the appellant has argued that it has come in the statement of PW-3 IO/SI Tilak Raj that after the recovery of contraband was effected, he prepared a seizure memo Ex. P-1 and then sent a ruqa Ex. P-2, which was prepared by him, to the police station through HC Narinder Kumar for registration of the FIR and thereafter, the present FIR bearing

No. 293 dated 04.07.2014 Ex. P-3 was recorded.

Learned counsel for the appellant has referred to LCR to argue that in the seizure memo/recovery memo Ex. P-1, the complete details of the FIR No. 293 dated 04.07.2014 are given. Learned counsel for the appellant has, thus, argued that admittedly after preparing this document, the ruqa was prepared giving all the details as mentioned in this seizure memo Ex. P-1 and the same was sent to police station, which was received in the police station by SI/SHO Rambir Singh at 4.44 PM and after making endorsement, the FIR was registered.

Learned counsel for the appellant has referred to cross-examination of PW-3 IO/SI Tilak Raj, wherein he has stated as under:

“....I had already prepared seizure memo of recovery, CFSL from, ruqa which I had already sent for FIR. I have seen ruqa Exhibit P2, at point A, which is the entry of FIR with the different pen in respect of the time 4:44 pm by SI Rambir Singh at the registration of FIR. It is correct that FIR number detail is mentioned in Exhibit P1. Voluntary said it was filled by the second IO. It is correct that only the FIR number is filled lateron by second IO and no other contents....”

Learned counsel for the appellant has, thus, argued that once the Investigating Officer himself has admitted in his cross-examination that in the seizure memo, he has mentioned the FIR number, hence, the recovery effected from the appellant is doubtful. To buttress his arguments, learned counsel for the appellant has relied upon the judgment of Hon'ble Supreme Court in *Kamaljit Singh vs. State of Punjab, 2019 (4) Scale 18* and a judgment of this Court in *Ajay Malik & Ors. vs. State of U.T., Chandigarh, 2009 (3) R.C.R. (Criminal) 649*.

Learned counsel for the appellant has next argued that though it is mentioned in the FIR that when the appellant was apprehended, the police party was consisting of two lady constables, i.e. Constable Pooja and Constable Seema, and the personal search of the appellant was conducted by one of the lady constables, however, none of the lady constables has been examined as witness, therefore, there is a clear violation of Section 50(4) of the Act which provides that search of a female is to be conducted by a lady constable and in the absence of such witness being examined in Court, a valuable right of the appellant to cross-examine such witness has been denied, hence, the appellant is entitled to acquittal. In this regard, learned counsel for the appellant has placed reliance upon ***Shinderpal Kaur vs. State of Punjab, 2016 (2) RCR (Criminal) 241***, wherein it is held that giving up the lady constable as a witness makes her presence doubtful at the spot as she is the most material witness. Similar view is taken in ***Darshana @ Moli vs. State of Punjab, 2014 (5) RCR (Criminal) 162***.

Learned counsel for the appellant has further argued that it is a case where no notice under Section 50 of the Act was given despite the fact that personal search of the appellant was conducted by a lady constable on the asking of the IO/SI Tilak Raj. Reliance is placed upon ***State of Rajasthan vs Parmanand and another, 2014(2) RCR (Criminal) 40*** to submit that apart from searching the bag of a suspect, when the personal search of the accused is also conducted, the mandatory provisions of Section 50 of the Act are required to be followed and in the absence of the same, the accused is entitled to acquittal. Similar view is taken by Hon'ble Supreme Court in ***S. K. Raju alias Abdul Haque alias Jagga vs. State of West Bengal, 2018 (9) SCC 708***.

Learned counsel for the appellant has next argued that the appellant has set up a defence before the trial Court while recording her statement under Section 313 Cr.P.C. that she was picked up from her house situated at Sector 15, Chandigarh at about 09.00 AM along with one of her neighbour Vishesh Thakur and they were taken to police station and later on she was falsely implicated in this case. It is further stated that one police official from Police Post, Sector 22, Chandigarh, has also visited police station and he was making phone calls to the appellant a day prior to the alleged incident asking her to visit the Police Post, Sector 22, Chandigarh in respect of some complaint received against her by one of her old friend namely Gaurav Kohli with regard to snatching of Rs. 12,000/- from him. However, aforesaid Vishesh Thakur was released by the police in the evening and the appellant was involved in the present case.

Learned counsel for the appellant has further argued that the appellant has led voluminous evidence to prove that a day prior to the day of incident, the appellant has received phone calls from the Police Post, Sector 22, Chandigarh. In this regard, learned counsel has referred to the statement of DW-1 Constable Pawan Kumar that landline number 0172-2700319 is installed at Police Post, Sector 22, Chandigarh.

Learned counsel for the appellant further submitted that DW-2 Harvinder Singh, Assistant Nodal Officer, Vodafone has proved that mobile number 99889-11449 is in the name of Gaurav Kohli s/o Pawan Kumar and this witness proved the call details of the phone as Ex. D-2; list of the towers as Ex. D-3 and Customer Application Form as Ex. D-4.

DW-5 S. P. Jain, Nodal Officer, Bharti Airtel proved the call detail record of mobile numbers 99153-26483, 97795-80949, 97795-80922,

95013-61835, 99150-33329, 97795-80954 along with details of tower locations, customer's application forms for the period from 03.07.2014 and 04.07.2014 and certification under Section 65-B of the Evidence Act. As customer application form, mobile number 97795-80922 was issued Incharge, Police Post, Sector 22, Chandigarh; mobile number 97795-80949 was issued to Incharge, Police Post Neelam and mobile number 97795-80954 was issued to Inspector Technical, however, all the aforesaid numbers were issued in then name of I.G.P., Chandigarh, Sector 9, Chandigarh. This witness proved the certified copy of the customer application form, details of the mobile numbers and users name as Ex. D-10.

Learned counsel for the appellant has thus submitted that mobile number 99153-26483 was used by the appellant on 03.07.2014 and 04.07.2014 i.e. the date of registration of the FIR.

The appellant produced DW-8 Vishesh Thakur, the person who was also taken by the police along with the appellant. This witness has stated that in the evening, he was released by the police after taking a sum of Rs. 25,000/- from his father.

DW-10 HC Sunder Lal proved on record the Crime Register for 03.07.2014 and 04.07.2014 and stated that as per the record, one call on number 100 was received from mobile number 99889-11449 at about 10.22 PM on 03.07.2014 and this call was made regarding snatching near Dispensary, Sector 22, Chandigarh and as per the feedback received from the PCR officials, the complainant was Gaurav Kohli who has stated that one unknown lady and two gents have committed the snatching. This witness produced on record photocopy of the Crime Register dated 03.07.2014 as Exhibit D-27.

Learned counsel for the appellant has further submitted that the trial Court has disbelieved the entire defence evidence only on the ground that the appellant has not proved on record that mobile number 99153-26483 was in fact issued in her name and, therefore, all the call details relating to mobile phone numbers of police officials of Police Post, Sector 22, Chandigarh, Police Post Neelam and Gaurav Kohli, on whose asking the police has given call to the appellant regarding a snatching complaint, are irrelevant.

Learned counsel for the appellant has referred to order dated 20.05.2015, passed by the trial Court, on an application moved by the appellant for preserving the call details of the nine mobile numbers including that of the appellant for the period of 03.07.2014 to 04.07.2014. Learned counsel further submitted that when the appellant moved application that she has been allotted mobile number 99153-26483 by Airtel, the prosecution did not file any reply to the said application and, therefore, the trial Court allowed the application on 20.05.2015 directing the concerned service provider to preserve the call details which were later on proved by examining the aforesaid defence witnesses.

Learned counsel for the appellant has, thus, argued that once in the application for preserving the call details, the appellant has specifically stated that she has been allotted the said number and was using the same on 03.07.2014 and 04.07.2014, in the absence of contest to the same by the prosecution, there was no occasion for the trial Court to form an opinion that the appellant has failed to prove that she was allotted the aforesaid number. Moreover, there is no denial by prosecution witnesses in this regard.

In reply, learned counsel, appearing for the U.T., Chandigarh, has argued that in the seizure memo Ex. P-1, the details of the FIR number was given in anticipation of registration of FIR. However, he could not dispute that in the ruqa Ex. P-2, which was prepared simultaneously at the spot, no such FIR number is mentioned.

Learned counsel for U.T., Chandigarh has further argued that it is a case of chance recovery, therefore, the mandatory provisions of Section 50 of the Act are not required to be followed.

Learned counsel for U.T., Chandigarh has further argued that the trial Court has rightly declined to accept the defence version of the appellant as she has failed to prove that she was allotted mobile number 99153-26483.

After hearing learned counsel for the parties and perusing the record, I find merit in the present appeal for the following reasons:

(a) As per the version in the FIR, the police party, on suspicion, apprehended the appellant who was carrying a bag in her right hand and conducted a search in which 10 grams of smack were recovered. It is a case of IO/PW-3 Tilak Raj that even the personal search of the appellant was conducted through a lady constable, who was never examined as a prosecution witness. Therefore, in view of the judgment of Hon'ble Supreme Court rendered in ***Parmanand's case (supra)*** as well as ***S. K. Raju's case (supra)***, the prosecution has not followed the proper procedure.

(b) The prosecution has even failed to follow the procedure prescribed under Section 50(4) of the Act which provides that in case of personal search of a female, it is to be conducted by a lady constable.

Though the IO/PW-3 SI Tilak Raj has stated that the personal search of the

appellant was conducted by Lady Constable Seema, however, the said witness was never examined in Court as she was given up by the public prosecutor by making a statement on 13.05.2015 and, therefore, the appellant/accused was denied a valuable right to cross-examine such witness in view of *Shinderpal Kaur's case (supra)* and *Darshana's case (supra)*.

(c) It has also come in the cross-examination of IO/PW-3 SI Tilak Raj that at the time when ruqa Ex. P-2 was sent to the police station, the recovery was already effected, vide recovery memo Ex. P-1. As per this witness, ruqa was sent to the police station around 4.30 PM and it was received in the police station at 4.44 PM, as per the endorsement made by the SHO and only thereafter, the FIR was registered. Therefore, mentioning the complete details of FIR on Ex. P-1, i.e. recovery memo, which was registered before 4.30 PM, raises suspicion about recovery. IO/PW-3 SI Tilak Raj, in his cross-examination, has admitted this fact. Therefore, in view of the judgment of Hon'ble Supreme Court in *Kamaljit Singh's case (supra)*, the case of the prosecution becomes doubtful.

(d) I find that the reason given by the trial Court for discarding the entire defence evidence regarding the call details only on the ground that the appellant has failed to prove that she was allotted mobile number 99153-26483 is erroneous. As perusal of the interim order dated 20.05.2015, passed by the trial Court on an application moved by the appellant, shows that the appellant has specifically stated in the application that she has been allotted mobile number 99153-26483 and has requested for preserving the call details of nine mobile numbers of the police officials/PCR/Gaurav Kohli and Police Post. The prosecution did not file any reply to the said

application and the same was allowed, vide order dated 20.05.2015, which is a part of record. Therefore, in such scenario, there was no need for the appellant to lead independent evidence that she has been allotted mobile number 99153-26483 by service provider Airtel, when she was leading other evidence to prove that all the other phone numbers from which she was receiving calls belonging to the different police officials including landline number of Police Post, Sector 22, Chandigarh, from where the appellant received a call a day prior to the day of incident with regard to a complaint given by her old friend Gaurav Kohli regarding snatching of Rs. 12,000-, though, subsequently, the involvement of the appellant was never found in the said case.

(e) The appellant has led evidence of DW-8 Vishesh Thakur, who stated that on 04.07.2014, he was also taken by the police party from the common PG accommodation, where the appellant was also residing in a separate room. He further stated in the evening, the police, after taking some amount from his father, released him, however, the appellant was involved in a case under the NDPS Act.

(f) The call details of the aforesaid mobile numbers, which have been proved by defence witnesses, i.e. Vodafone, Bharti Airtel, BSNL, show that the appellant, prior to her arrest, had received phone calls from the police officials which primarily shows that she was sought to be interrogated in a complaint given by aforesaid Gaurav Kohli with regard to a complaint of snatching and later on, the appellant was arrested in the present case under NDPS Act.

(g) Therefore, I find that the defence evidence led by the appellant is more plausible regarding her false implication and the prosecution has

failed to prove its case.

Therefore, in view of the above discussions, the present appeal is allowed and judgment of conviction dated 17.03.2016 and order of sentence dated 18.03.2016, passed by the trial Court, are hereby set aside. The appellant is acquitted of the charge framed against her.

Bail/surety bonds be discharged, accordingly.

20.08.2019

Waseem Ansari

(ARVIND SINGH SANGWAN)
JUDGE

Whether speaking/reasoned

Yes/No

Whether reportable

Yes/No