

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRA-S-2333-SB-2017 (O&M)

Date of decision: 18.05.2019

Sandeep Kumar

....Appellant

Versus

State of Punjab

....Respondent

CORAM: HON'BLE MR. JUSTICE ARVIND SINGH SANGWAN

Present: Mr. Rajiv Vij, Advocate (legal aid counsel)
for the appellant.

Mr. Karanbir Singh, AAG, Punjab.

ARVIND SINGH SANGWAN, J. (Oral)

Present appeal has been filed challenging the judgment of conviction dated 01.04.2017, vide which the appellant was held guilty of offence punishable under Section 22 of Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'NDPS Act') and the order of sentence of even date, vide which the appellant was sentenced to undergo R.I. for a period of 10 years with a fine of Rs.1.00 lac and in default of payment of fine, to further undergo R.I. for six months.

This appeal is taken up in the category of cases, which are listed on Saturdays, as per directions of the Hon'ble Supreme Court, in which the accused are in judicial custody and the appellants are being prosecuted by the legal aid counsel.

As per the custody certificate dated 03.05.2019, the appellant has already undergone 02 years, 03 months and 22 days of total sentence, out of 10 years R.I. awarded by the trial Court.

Brief facts of the case are that the police party headed by ASI Kirpal Singh had apprehended the appellant and he was found in possession of 1800 ml of intoxicant liquid containing Codeine Phosphate salt, without any licence or permit, in the area of Super Market, Heera Colony Road, Bahadurgarh, Patiala on 25.08.2015. After completion of the investigation, challan for the offence punishable under Section 22 of NDPS Act was presented before the Court. On finding a prima facie case, the trial Court framed the charge, to which the appellant pleaded not guilty and claimed trial.

The prosecution, in support of its evidence, examined PW1 HC Dharmit Singh, PW2 HC Sikanderpal Singh, PW3 ASI Malwinder Singh, PW4 HC Rajesh Kumar, PW5 ASI Kirpal Singh, the Investigating Officer, PW6 ASI Sukhdev Singh and produced on record documents consent memo Ex.P1, recovery memo Ex.P3, ruqa Ex.P6, copy of FIR Ex.PW6/6, site plan Ex.P7, arrest memo Ex.P4, personal search memo Ex.P5, report under Section 57 of NDPS Act Ex.P8, inventory Ex.P9, remand request Ex.P10, order of learned Magistrate Ex.P11 and report of Chemical Examiner Ex.P12 and thereafter, the Public Prosecutor closed the prosecution evidence. Statement of accused under Section 313 Cr.P.C. was recorded, in which all the incriminating evidence against him was put to the appellant, however, the accused denied it as incorrect and pleaded false implication and no recovery has been effected from him. In the defence, the accused did not lead any

evidence. Thereafter, the trial Court, vide aforesaid judgment of conviction and order of sentence, convicted and sentenced the appellant under Section 22 of NDPS Act.

Learned counsel for the appellant has argued that as per statement of the Investigating Officer/PW5 ASI Kirpal Singh, the appellant was apprehended on suspicion of carrying some intoxicant liquid and recorded his consent memo Ex.P1, in which the appellant had given his consent that he has faith on the Investigating Officer and the search can be conducted by him. Learned counsel has referred to the consent memo Ex.P1 to argue that it is mentioned that the Investigating Officer ASI Kirpal Singh intended to effect search of the appellant but the appellant also has a right to be searched before a Gazetted Officer or Magistrate and therefore, it is not proper compliance of Section 50 of NDPS Act as clear notice under Section 50 of NDPS Act was not given and it was additionally mentioned that Investigating Officer intend to conduct the search of carry bag apart from a right of the appellant that he can get his search conducted by a Gazetted Officer or Magistrate.

It is next argued that as per PW5, after he conducted the search and recovered the alleged contraband, which was 1800 ml intoxicant liquid, two samples of 100 ml each were separated and remaining, on measurement, found to be 1600 ml, the same were sealed and Form No.29 was prepared at the spot, the case property was taken into possession vide recovery memo Ex.P3, which was attested by HC Sikanderpal Singh and Balwinder Singh. Learned counsel has referred to the consent memo Ex.P1, arrest memo Ex.P4

and personal search memo Ex.P5 to submit that all these documents bear signature of the appellant, whereas in the recovery memo, which is a document of effecting recovery of alleged contraband, his signatures were not taken, which raises a doubt about preparation of this document at the spot.

Learned counsel for the appellant has next argued that as per statement of PW5, after conducting the investigation, he effected the recovery and has also prepared the recovery memo and thereafter, a ruqa Ex.P6 was sent to the police station for registration of the FIR. It is further submitted that on this ruqa Ex.P6, it is mentioned that the same was sent at 5.40 p.m. from the spot and it was received in the police station at 6.20 p.m., and thereafter, **FIR No.152** was registered against **DDR No.47**. It is also argued that when the FIR was registered, all the documents like recovery memo Ex.P3, arrest memo Ex.P4, personal search memo Ex.P5 and the site plan Ex.P7 were already prepared at the spot and therefore, mentioning of complete details of the FIR along with date, sections of Act and police station, raises a suspicion about the investigation conducted by the Investigating Officer, as the FIR was registered much later, after preparation of these documents. With reference to cross-examination of PW5, learned counsel has next argued that he has given all the details about the time, when the aforesaid documents were prepared prior to sending of ruqa, as the appellant was apprehended at about 2.30 pm when the consent memo was prepared and none of the prosecution witnesses has explained in their statement as to how the FIR number is mentioned in these documents, which were prepared much prior to registration of the FIR at 6.20 p.m.

It is further argued that a perusal of the site plan Ex.P7 shows that this document is prepared by blue pen, whereas the *FIR No.152* is mentioned by black pen, which again raises a suspicion about preparation of this document at the spot, though it is so stated by PW5.

Learned counsel has further argued that when the application Ex.P10 was submitted before the Illaqa Magistrate for seeking the police remand of the appellant and the same was duly forwarded by the Public Prosecutor on 26.08.2015, there is no mention of Form No.29. In this application, it is mentioned that recovery is of 1800 ml of intoxicant liquid and there is no reference with regard to details of two samples of 100 ml each and remainder parcel of 1600 ml and even in the order of Illaqa Magistrate Ex.P11, there is no mention that Form No.29 was produced along with case property for verification of the seals on the same with the sample parcel as well as the bulk parcel. It is next argued that it has come in the statement of PW5 ASI Kirpal Singh that Form No.29 was partially filled at the spot and it demonstrate the reason that the same was not produced before the Illaqa Magistrate immediately, so that the discrepancy may not be pointed out by him.

Learned counsel for the appellant has also argued that PW2 HC Sikanderpal Singh, in his cross-examination, has stated that he has not seen the case property, when his statement was recorded and PW4 HC Rajesh Kumar, who was MHC in the police station, in the cross-examination, has stated that when the case property was produced before him, he had made an entry in register No.19 as well as DDR, but he has not brought the said

register before the Court and in fact, the same is not part of the report submitted under Section 173 (2) Cr.P.C.

Learned counsel has referred to the cross-examination of PW5 ASI Kirpal Singh, in which he has stated as under: -

“..... No other attempt for joining (wrongly mentioned as ‘adjoining’) any independent witness was made at the spot. Even no punch, sarpanch or Lambardar was called at the spot from the adjoining localities to join as independent witness....”

It is thus argued that it is admitted case that the police has not even made any effort to join the independent witness. It is further submitted that PW5 ASI Kirpal Singh, the Investigating Officer as well as the officer, who conducted the search and effected the recovery and thereafter, he himself conducted the entire investigation and at any point of time, no second Investigating Officer was called at the spot.

In reply, learned State counsel has submitted that before effecting the recovery, a notice under Section 50 of NDPS Act was duly served upon the appellant, informing him about his legal right to be searched before a Gazetted Officer or Magistrate and therefore, proper procedure has been followed. It is further submitted that recovery was effected from a polythene bag, which the appellant was carrying in his right hand and PW5 ASI Kirpal Singh, Investigating Officer has conducted the investigation in a fair manner.

Learned State counsel has further argued that as per the recovery memo Ex.P3, contraband was recovered from the appellant and as per FSL report, the same was found to be containing Codeine Phosphate, which fall

under the commercial quantity and the seals on the parcels were found to be intact.

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

- (a) A perusal of the consent memo Ex.P1 shows that the Investigating Officer has virtually offered search of the appellant himself, by additionally informing him that he has a right to be searched before a Gazetted Officer or Magistrate, which is not legal in terms of the judgment of the Hon'ble Supreme Court in **State of Rajasthan Vs. Parmanand and another, 2014 (2) RCR (CrI.) 40.**
- (b) Further, a perusal of consent memo Ex.P1, arrest memo Ex.P4 and personal search memo Ex.P5, shows that signatures of the appellant were taken on these documents, however, in the recovery memo Ex.P4, which is most relevant document, signatures of the appellant were not obtained and therefore, it raises a suspicion that it was not prepared at the spot. These documents further show that complete details of **FIR No.152** have been mentioned on these documents, though it has come in the statement of PW5 ASI Kirpal that after preparation of these documents, ruqa Ex.P6 i.e. written information for registration of the FIR was sent at 5.40 p.m. and the FIR was registered at 6.20 p.m. vide DDR No.47 and therefore, prior to registration of the FIR, these documents were prepared at the spot and this fact is

not explained by any of the prosecution witness that how the FIR number was mentioned in these documents and therefore, in view of judgment of Hon'ble Supreme Court in **Ajay Malik and others Vs. State of U.T., Chandigarh, 2009 (3) RCR (Crl.) 649**, it raises a doubt about the prosecution case, as none of the prosecution witness could explain as to how the *FIR No.152* is mentioned in black pen, whereas the entire documents were prepared in blue pen, which again raises a doubt about the same.

- (c) Even in the application moved before the Illaqa Magistrate Ex.P10 on 26.08.2015, though forwarded by the Public Prosecutor, there is no reference of Form No.29, which bears the sample seals 'KS' and 'MS' and therefore, the Magistrate has no occasion to tally the same with the sample parcel and the bulk parcel, though it is mentioned in the order dated 26.08.2015 that the seals were intact, however, the Magistrate has not followed the proper procedure by tallying with the seals with the sample seal chit, as it was never produced before him.
- (d) It has come in the statement of PW5 ASI Kirpal Singh, Investigating Officer that he did not make any attempt to join any independent witness. It is settled principle of law that non-joining of the independent witness does not make the prosecution case doubtful, however, in the peculiar facts and circumstances of the case, when there are number of discrepancies, as noticed above, it was incumbent upon the

Investigating Officer at least to make effort to join the independent witness and his clear admission that he did not make any attempt for joining the independent witness shows that he has not conducted the investigation in a proper manner.

- (e) It is not disputed by learned State counsel that the entire investigation was conducted by PW5 ASI Kirpal Singh and he himself conducted the personal search, after recording the consent memo of the appellant and even subsequent investigation was conducted by him, therefore, in view of judgment of the Hon'ble Supreme Court in **Mohan Lal Vs. State of Punjab, 2018 (4) RCR (CrI.) 101**, the appellant-accused was denied the right of fair investigation, as no second Investigating Officer was called at the spot.

For the reasons recorded above, present appeal is allowed and the judgment of conviction dated 01.04.2017 and order of sentence of even date, passed by the trial Court, are set aside. The appellant be set at liberty, if he is not required in any other case.

[ARVIND SINGH SANGWAN]
JUDGE

18.05.2019
vishnu

Whether speaking/reasoned	Yes/No
Whether reportable	Yes/No