

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

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**CRM-A-1150-2019 (O&M)
Date of Decision : 04.09.2019**

State of Punjab

... Applicant

Versus

Vivek Singh @ Vicky

...Respondent

**CORAM: HON'BLE MR. JUSTICE AJAY TEWARI
HON'BLE MR. JUSTICE HARNARESH SINGH GILL**

Present: Mr. H.S.Sullar, DAG, Punjab.

HARNARESH SINGH GILL, J.

The applicant, State of Punjab has filed the present application under Section 378(3) Cr.P.C. for grant of leave to appeal against the judgment dated 28.02.2019 passed by the Judge, Special Court, Fatehgarh Sahib.

2. Vide impugned judgment, the trial Court has acquitted the respondent of the charge under Section 22 of Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'NDPS Act')

3. As per the prosecution case, police party headed by ASI-Ram Naresh, while on patrol duty on 09.09.2013 at 11:00 p.m. spotted a clean shaven person who on seeing the police party suddenly took U-turn and thus on suspicions, he was apprehended. On inquiry, he disclosed his name as Vivek Singh @ Vicky. Before the search, he was apprised of getting his search conducted in the presence of a Gazetted Officer or a Magistrate who

would have been called at the spot. The respondent showed his confidence/faith in the Investigating Officer and expressed his consent to subject himself to the personal search by the Investigating Officer. Accordingly, the consent memo was executed. On search a polythene bag was recovered from the left pocket of his trouser in which 10 pouches labelled as Phenotil containing 100 tablets each (total 1000 tablets) were recovered.

4. After completing the necessary formalities and after taking the samples, the same were sent for the chemical analysis. On the basis of the chemical analysis and on the conclusion of the investigation, report under Section 173 Cr.P.C. was presented in the Court.

5. During the trial, the Investigating Officer, ASI-Ram Naresh had died before his deposition. Therefore, ASI-Buta Singh appeared for the deposition. The report of Chemical Examiner Ex.P-13 was tendered in evidence.

6. Accordingly charge under Section 22 of NDPS Act was framed against the respondent-accused to which he pleaded not guilty and claimed trial.

7. In order to prove its case, the prosecution had examined as many as 5 witnesses. The statement of the respondent/accused under Section 313 Cr.P.C. was recorded to which he pleaded false implication and innocence but did not lead any evidence.

8. After taking into consideration the evidence on record, the respondent-accused was acquitted of the charge framed against him.

9. Aggrieved against the same, State of Punjab has filed the present application seeking leave to appeal against acquittal.

70. Learned State counsel has argued that there is recovery of the alleged contraband from the respondent-accused and it is proved on record that 10 pouches of 'Phenotil', each containing 100 tablets (total 1,000 tablets), were recovered from the conscious possession of the respondent-accused. The said recovery was in bulk. The samples were sent for chemical analysis and were found to be 'Diphenoxylate Hydrochloride'.

11. It has been further argued that the respondent-accused was well apprised of his legal rights to get the search conducted in the presence of a Gazetted Officer or Magistrate, but he gave his consent to be searched by the Investigating Officer. Thus, necessary compliance was made during the search under Section 50 of the NDPS Act. Thereafter, the case property and the samples were duly deposited by the Investigating Officer with the officiating SHO. The average weight of each tablet being 75 mg, the weight of 1000 tablets in total comes to 75 grams which quantity wise falls within the commercial limits of 'Diphenoxylate Hydrochloride'. According to the schedule, more than 50 grams of tablets of 'Diphenoxylate Hydrochloride' would fall under the category of commercial quantity.

12. We have heard the arguments raised by the learned State counsel and have carefully gone through the case file with his able assistance.

13. It has come in the evidence that as per the recovery witness ASI-Buta Singh, the search of the respondent led to the recovery of 10 pouches labelled as Phenotil. Each pouch was labelled to be containing 100 tablets. All the pouches were torn and all the tablets were put out from all the pouches. Thereafter, two samples of 10 tablets each, were separated and converted into separate sample parcels and remaining 980 tablets and empty

pouches were converted into the bulk parcel.

14. The basic stand of the prosecution remains that all the pouches were torn open and the tablets were removed and mixed. This factor will clearly lead to serious tampering of the case property. It was not the requirement of law that the tablets from all the pouches were to be mixed and then samples to be drawn. The tablets cannot be equated to a powder which can be made homogeneous by thoroughly mixing the same and from the homogeneous mixture, whatever sample is drawn that can be considered to be representative sample. However, in the case of hard tablets, the mixture of tablets removed from 10 different pouches cannot be considered as a homogeneous mixture. The samples drawn from the mixed tablets, cannot be considered as a sample, worth representing the entire bulk.

15. Thus, from the statement of the recovery witness, it becomes clear that while drawing the two samples, only 20 tablets were separated from the alleged recovery of 1,000 tablets which even though were originally not loose, but in 10 pouches, with an utter violation of the rules, were removed from the pouches and converted into loose tablets.

16. The trial Court has rightly taken into consideration the judgment delivered by the Division bench of this Court in the case ***State of Punjab v. Dharam Singh, 2010(3)RCR (Criminal) 94*** wherein it has been held as under:-

“As per story, 1850 tablets were recovered. Two samples, each of 25 tablets, were separated. One sample parcle of 25 tablets was sent to the laboratory for report. As per report of laboratory, Diazepam to the extent of 5 mg in each tablet was found. That means in 25 tablets, quantity of Diazepam was 125 mg. Loose tablets were

recovered from the dabba carried by the respondent-accused in a plastic envelope. Question is whether the remaining tablets were containing 5 mg of Diazepam in each tablet or not. In case we presume that all the tablets, i.e., 1850 were containing 5 mg. of Diazepam per tablet, then as per quantity of Diazepam in each tablet, then as per quantity of Diazepam in each tablet, total recovery of Diazepam would be of 92.50 gm., which is non-commercial. Learned State counsel failed to convince how the remaining tablets are presumed to be of Diazepam to the extent of 5 mg per tablet, when tablets recovered were not in the form of strips.”

17. Moreover, it is a well settled law that unless the total contraband was sent for chemical examination, it cannot be considered to be the same, on the basis of the samples sent for chemical examination. Thus, an improper procedure of drawing the samples had been carried out by the prosecution agency by taking an assumption that 10 sample of tablets, were sent for forensic analysis and according to Ex.P3 it was 'Diphenoxylate Hydrochloride'. As far as the consent given by the accused -respondent, the settled law has to be complied with i.e. the statutory provisions of Section 50 of the NDPS Act that even if the suspect has given his consent in writing to be searched by the Police Officer and if the suspect was not produced before any Magistrate or Gazetted Officer, the search was bad for the non-compliance. Similarly in the present case, the search was not made in the presence of the Magistrate or Gazetted Officer.

18. As far as the statements of the prosecution witnesses are concerned, there are discrepancies in the statements of official witnesses. As per the prosecution version i.e. ASI Buta Singh, the respondent-accused was nabbed on 08.09.2013 at 11 p.m.. The case property was deposited by the

officiating SHO with MHC of the Police Station on 09.09.2013 but document Ex.P-3 i.e. Form No. 29 was signed by SHO, Satnam Singh on 10.09.2013. The prosecution has not placed any explanation before the trial Court and thus there being discrepancies in the testimonies of the official witnesses, the trial Court has rightly found the prosecution case doubtful and acquitted the accused of the charge framed against him.

19. In view of the above, it is held that the trial Court was justified in acquitting the respondent. The judgment of acquittal is neither unreasonable nor perverse and hence calls for no interference.

20. Consequently, the application seeking leave to appeal is dismissed. Leave to appeal is declined.

21. Since the main case is decided pending CRM if any, stands disposed of.

(AJAY TEWARI)
JUDGE

(HARNARESH SINGH GILL)
JUDGE

04.09.2019

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Whether speaking/reasoned? *Yes*

Whether reportable? *Yes*