

CRM A-2182-2019 (O&M)
Date of Decision:-10.12.2019

State of Punjab

... Appellant

vs.

Bachittar Singh @ Mithu and another

....Respondents

**Coram: Hon'ble Mr. Justice Jitendra Chauhan
Hon'ble Mrs. Justice Archana Puri**

Present:- Mr. A.A. Pathak, Addl. A.G., Punjab.

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Jitendra Chauhan,J.(Oral)

This is an application under Section 378(3) of Code of Criminal Procedure for grant of leave to appeal against the judgment of acquittal dated 02.04.2019 passed by learned Judge, Special Court, Amritsar vide which accused/respondents were acquitted of the charge in FIR No. 182 dated 14.12.2015, registered under Sections 21 and 22 of the Narcotics Drugs and Psychotropic Substance Act (for short 'NDPS Act') at Police Station 'C' Division, Amritsar.

The brief facts of the case as noticed in the impugned judgment passed by the learned trial Court, in paragraph No. 2, are reproduced as under:-

2. *“Brief story of prosecution is that, “on 14.12.2015, SI Avtar Singh alongwith fellow police officials on private vehicles in connection with patrolling and search of bad elements were going from the side of Gujjarpura towards Tarn Taran Road via Gian Ashram School road. When the police party while patrolling reached near the Gian Ashram School, then from the opposite side two young men who had cloaked Lohies were seen coming. On seeing the police party, they got perturbed and while turning towards the park they very cleverly tried to throw the polythene bags which they were carrying in their hands, in the bushes in the park over the wall. In that process they were apprehended by the SI with the help of other police officials.*

On checking the polythene bag thrown by the accused, the same were found containing intoxicant tablets and bottles containing intoxicant syrup. On inquiry, they disclosed their names as Bachittar Singh @ Mithu and Baljit Singh @ Billa. Efforts were made to join independent witnesses in the police party but no one agreed. Out of the polythene bag carried by accused Bachittar Singh @ Mithu in his right hand, loose intoxicant capsules Provon Spas, were recovered. Out of these recovered capsules, 10 capsules were taken out to serve as sample which were put in a plastic container. The remaining four bulk capsules on counting came out to be 990 which were also put into a separate plastic container. Out of the same polythene bag 5 bottles of intoxicant syrup marka COSDYL COUGH SYRUP 100 ML were also recovered. Out of these bottles, one bottle was taken out to serve as sample which was put in a plastic container. The remaining four bulk bottles were also put into a plastic container. Out of the polythene bag carried by accused Baljit Singh @ Billa in his right hand, loose intoxicant capsules Provon Spas were recovered. Out of these recovered capsules 10 capsules were taken out to serve as sample which were put into a plastic container. The remaining four bulk capsules on counting came out to be 790 which were also put into a separate plastic container. Out of the same polythene bag 4 bottles of intoxicant syrup marka COSDYL COUGH SYRUP 100 ML were also recovered. Out of these bottles one bottle was taken out to serve as sample which was put in a plastic container. The remaining three bulk bottles were also put into a plastic envelope which was put in a separate plastic container. All the bulk and sample parcels were sealed with the seal impression 'AS' and sample seal was prepared separately by Investigating Officer (for short 'IO'). Form M-29 was also prepared and seals were also affixed on the same. The seal after use was handed over to HC Gurjit Singh. Recovered intoxicant capsules and bottles were taken into possession vide separate memo of recovery which was witnessed by HC Gurmeet Singh and HC Rajinder Kumar. As the accused could not produce any permit or license for possessing intoxicant capsules and syrup bottles, ruqa was sent to the police station for registration of the FIR on the basis of which, the present formal FIR was registered. Site plan of the place of recovery was prepared. The accused were formally arrested and statements of witnesses were recorded.” As per reports of the Chemical Examiner, salt Tramadol was found in both the parcels of alleged recovered capsules which is neither a narcotic drug nor a psychotropic substance. However, in the syrup bottles sent for chemical examination, salt 'Codeine' was found which falls within the ambit of NDPS Act. On completion of the

investigation and receiving of report from the office of chemical examiner, challan under section 21, 22 NDPS Act was prepared and presented against accused in the court by SHO, Police Station, PS 'C' Division, Amritsar”.

After investigation, challan was presented in the Court. Charge under Section 22 of the NDPS Act was framed against the accused, to which the accused pleaded not guilty and claimed trial.

In order to prove its case, the prosecution had examined PW 1/Avtar Singh, PW2/HC Balwinder Singh, PW3/ASI Gurjit Singh, PW4/HC Gurmeet Singh, PW5/retired Inspector Amrik Singh and closed its evidence.

The statements of the accused were recorded under Section 313 Cr.P.C., in which all the incriminating circumstances appearing in the prosecution evidence were put to the accused, to which they denied and pleaded false implication.

No evidence in defence was led by the accused.

After appraisal of the evidence, the learned trial Court vide impugned judgment of acquittal dated 02.04.2019 acquitted the accused/respondents of the charges.

Thus, the present application seeking leave to file appeal has been filed by the State of Punjab.

It is contended by the learned State counsel that the learned trial Court fell into error in acquitting the respondent after holding that provisions of Section 50 of the NDPS Act were not complied with. It is asserted that the recovery was from the Polythene bag which cannot said to be forming part of the body, therefore the provisions of Section 50 of the NDPS Act are not attracted in the instant case.

We have heard the learned counsel for the appellant and have gone

through the case file carefully.

The learned trial Court has acquitted the accused/respondents on the following grounds:-

- (a) There was discrepancy between the statements of PW1 I.O. and PW2, the carrier of the contraband. It has been admitted by PW2 that the sample was sent for chemical analysis on 04.01.2016 whereas as per the IO, the same was sent on 06.01.2016. Not only that, PW2 had admitted during cross examination that only two capsules were handed over to him and nothing else was handed over to him whereas SHO Amrik Singh PW5 has deposed that he handed over 4 samples sealed with seal impression 'PS' alongwith form No. 29, which is contradictory to the stand of PW2. It has been further admitted by PW2 that there was no seal impression of the learned Magistrate. Whereas as per inventory (Ex. PK), sealed impression AK was affixed on the sample seal. However, as per the report of chemical examination Exhibit P-Z there was no sealed impression AK on the sample parcels.
- (b) There was non compliance of Section 50 of the Act as no offer for being searched in the presence of a Gazetted Officer or Magistrate was made to the accused.

We have gone through the case file carefully and find that the judgment of acquittal has been passed rightly as it has been admitted by the Investigating Officer that the provisions of Section 50 of the NDPS Act were not complied with. The provisions of Section 50 of the Act are not a mere ritual but has an object beneath it. Moreover, there are discrepancies in the statements of PW1, IO PW2 and PW5 with regard to the number of capsules and the seal impression 'AK' affixed upon the parcels sent for chemical examination.

Hon'ble the Supreme Court in '**Arif Khan @ Agha Khan v. State of Uttarakhand, 2018(2) R.C.R.(Criminal) 931**' has held as under:-

“23. Their Lordships have held in *Vijaysinh Chandubha Jadeja* (supra) that the requirements of Section 50 of the NDPS Act are mandatory and, therefore, the provisions of Section 50 must be strictly complied with. It is held that it is imperative on the part of the Police Officer to apprise the person intended to be searched of his right under Section 50 to be searched only before a Gazetted officer or a Magistrate. It is held that it is equally mandatory on the part of the authorized officer to make the suspect aware of the existence of his right to be searched before a Gazetted Officer or a

Magistrate, if so required by him and this requires a strict compliance. It is ruled that the suspect person may or may not choose to exercise the right provided to him under Section 50 of the NDPS Act but so far as the officer is concerned, an obligation is cast upon him under Section 50 of the NDPS Act to apprise the suspect of his right to be searched before a Gazetted Officer or a Magistrate. (See also *Ashok Kumar Sharma v. State of Rajasthan, 2013(2) R.C.R.(Criminal) 1 : 2013 (2) SCC 67* and *Narcotics Control Bureau v. Sukh Dev Raj Sodhi, 2011(3) R.C.R.(Criminal) 370 : 2011 (6) SCC 392*).

24. *Keeping in view the aforementioned principle of law laid down by this Court, we have to examine the question arising in this case as to whether the prosecution followed the mandatory procedure prescribed under Section 50 of the NDPS Act while making search and recovery of the contraband "Charas" from the appellant and, if so, whether it was done in the presence of a Magistrate or a Gazetted Officer so as to make the search and recovery of contraband "Charas" from the appellant in conformity with the requirements of Section 50.*

25. *In our considered view, the evidence adduced by the prosecution neither suggested and nor proved that the search and the recovery was made from the appellant in the presence of either a Magistrate or a Gazetted Officer."*

In the instant case, there is no reason to differ from the view taken by the learned trial Court. The judgment of acquittal does not suffer from any perversity or illegality calling for interference at the hands of this Court, therefore, the present application for leave to appeal is declined.

Moreover, there is an inordinate delay of 35 days in filing the present application. No sufficient cause has been shown by the learned State counsel for condoning the delay.

Thus, the present application for condonation of delay is also dismissed.

(JITENDRA CHAUHAN)
JUDGE

(ARCHANA PURI)
JUDGE

10.12.2019
manoj

Whether speaking/reasoned
Whether Reportable:

Yes/No
Yes/No