

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRA-S-1563-SB-2016 (O&M)

Date of Decision : 20.02.2019

Tarsem Singh alias Soma

..... Petitioner

Versus

State of Punjab

..... Respondent

CORAM : HON'BLE MR. JUSTICE RAJ SHEKHAR ATTRI

Present : Mr. Manish Kumar Singla, Advocate
for the appellant.

Mr. V.G.Jauhar, Sr. DAG, Punjab.

RAJ SHEKHAR ATTRI, J. (Oral)

The appellant has assailed the judgment of conviction and order of sentence dated 05.04.2016, passed by the learned Judge, Special Court, Sangrur vide which he was convicted and sentenced to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs.1,00,000/- and in default of pay a fine to further undergo rigorous imprisonment for 02 years under Section 22 (c) of the Narcotic Drugs & Psychotropic Substances Act, 1985 (in short 'the Act').

Briefly stated, it is a case of the prosecution that on 21.05.2014 at about 2:30 p.m., the investigating team headed by ASI Major Singh (PW3) was going in a private vehicle for the purpose of patrolling. They found the appellant (hereinafter referred to as 'the accused'). On seeing the police party, the accused became perplexed and tried to retreat. On the basis of suspicion, he was overpowered and apprehended. He was given an offer to be searched before a gazetted officer or a magistrate, but the

accused reposed confidence in the investigating officer. On his search, 135 grams intoxicating powder (alprazolam) was recovered from his personal search. The investigating officer suspected the same to be intoxicant powder, therefore, two samples of 10 grams each were drawn and separated into two parcels. The bulk contraband came to be **115** grams which was also put in a separate parcel. All the parcels were sealed and the form No.29 was prepared. On return to the police station, the entire contraband along with the accused was produced before the SHO. On the next day, all the parcels were produced before the Magistrate who drew one representative sample containing 10 grams of the contraband, which sample was sent to chemical examiner, who opined that it contained traces of alprazolam. On completion of investigation, the challan was submitted.

In order to prove the guilt of the accused, the prosecution examined **PW1** Jaiwardhan Sharma, **PW2** Head Constable Harpal Kumar, **PW3** ASI Major Singh, **PW4** Head Constable Makhan Singh, **PW5** ASI Rajinder Singh and **PW6** Sub Inspector Inder Pal Singh.

On conclusion of prosecution evidence, the accused was examined under Section 313 Cr.P.C. and all the incriminating material was put to him to which he took the plea of his innocence and false implication.

In defence, he examined **DW1** Amarjit Singh and **DW2** Kala Singh.

On the appreciation of evidence, the trial court convicted and sentenced the accused, as stated above.

I have heard learned counsel for the appellant as well as learned State counsel and have gone through the record.

Learned counsel for the appellant has vehemently contended

that the prosecution has failed to prove the charges against the accused; that Sections 50 and 42 have not been complied with; that link evidence is missing and that the presence of the police party at the spot is doubtful. He has further argued that the trial court failed to appreciate the evidence on the record. In support of his contention, he has placed reliance upon the judgment of Delhi High Court in *Annabelle Analista Malibago vs. Dri 2018 (4) RCR (Criminal), 991* and the judgments of this Court in *CRA-S-3317-2015*, titled as Jaspal Singh vs. State of Punjab, decided on 17.11.2018; *CRA-S-4493-SB-2016*, titled as Kamal Tiwari vs. State of Punjab, decided on 18.08.2018 and *CRA-S-1458-SB-2012*, titled as Suresh Raut vs. State of Punjab, decided on 17.10.2018.

On the other hand, learned State counsel has submitted that the accused was apprehended by chance; that he was specifically apprised of his search before the Magistrate or a gazetted officer but he himself opted to be searched before the investigating officer and after due search 135 grams alprazolam was recovered.

I have given my thoughtful consideration to the rival contention and critically examined the evidence on record.

The following foremost questions arise out of the case for decision:-

- (i) Whether the provisions of Section 50 of the Act have been complied with ?*
- (ii) Whether the object of Section 50(1) of the Act is to provide a safeguard to the accused and it also confer on the suspect to check the misuse of power, to avoid harm to innocent persons and to minimize the allegations of planting or foisting of false cases by the law enforcement agencies ?*

First of all coming to the compliance of Section 50 of the Act. The Act was enacted with the purposes, *inter alia*, to make stringent provisions for the control and regulation of operation relating to narcotic drugs and psychotropic substances and to provide for deterrent punishment including forfeiture of property derived from use illicit trafficking of such drugs and substances. The law under this statute being stringent against the accused involved in the field of illicit drug trafficking and drug abuse, the legislature has made time and again several provisions obligatory for the prosecution to comply with, which the courts have interpreted it to be mandatory.

The construction of this section is not *res integra* rather it has been subject matter of Constitution benches on so many occasions. The Hon'ble Supreme Court in *Vijaysinh Chandubha Jadeja vs. State of Gujrat (2011) 1 SCC 609* while explaining the object of Section 50 of the Act, has made the following observations:-

“Sub-S (1) of S.50 makes it imperative for the empowered officer to “inform” the person concerned about the existence of his right that if he so requires, he shall be searched before a gazetted officer or a Magistrate, failure to do so vitiate the conviction and sentence of an accused. Where the conviction been recorded only on the basis of possession of the contraband. The said provision is mandatory and requires strict compliance. Mere asking the suspect to give his consent for search by the police does not amount to compliance of the provisions of S.50.”

In *Arif Khan vs. State of Uttrakhand 2018 (2) RCR Criminal 931*, it has been observed in para Nos.22 to 25 as under:-

22.Indeed, the latter Constitution Bench decision rendered in the case of Vijaysinh Chandubha Jadeja (supra) has

settled the aforementioned questions after taking into considerations all previous case law on the subject.

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 10 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 vs. State of Rajasthan](#), 2013 (2) SCC 67 and [Narcotics Control Bureau vs. Sukh Dev Raj Sodhi](#), 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 11 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.”

Thus, the law requires that there must be strict compliance of Section 50 and violation thereof renders the search and seizure nugatory.

In the case in hand, no independent witness has been joined nor search has been conducted either before a Magistrate or a gazetted officer. The endeavour has been made by producing consent memo Ex.P5 of accused to establish that he was apprised of his right to be searched before a Magistrate or a gazetted officer. However, it is added therein that accused reposed confidence upon ASI Major Singh who was the investigating officer. This memo has been attested by ASI Rajinder Singh as well as Head Constable Gurbaksh Singh and thumb marked by the accused.

Firstly, learned counsel for the petitioner has vehemently contended that in a manner in which the consent memo Ex.P5 has been prepared itself establish that thumb impression of the petitioner was obtained on a blank paper which was subsequently converted into this document Ex.P5. To appreciate this argument, this court would like to consider the evidence of both PW3 ASI Major Singh and PW5 ASI Rajinder Singh. Both the said prosecution witnesses were present at the spot and the document were prepare in their presence.

ASI Major Singh (PW3) in his deposition has categorically stated that he told the accused of suspicion on him of possession of some intoxicant with him. This court would like to reproduce the relevant part of the examination-in-chief as under:-

“At about 02:30 P.M. when the police party reached half kilometer ahead of Katcha Passage, after village Benara, the accused present in the Court was coming on feet. The accused returned towards back side on seeing the Police party and was apprehend on suspicion. Then I told the accused of suspicion on him of possession of some intoxicant with him. The accused has the right to search in the presence of Magistrate or Gazetted Officer. The accused can be taken before the Magistrate or Gazetted Officer or they can be called at the spot. The accused reposed faith in me by memo of Ex.P5, which was thumb marked by the accused and witnesses by the ASI Rajinder Singh and HC Gurbaksh Singh and attested by me.”

This part of the statement of PW3 ASI Major Singh appeared to be doubtful in nature. It is mentioned that the investigating officer told the accused that he suspected some intoxicant in his possession but he nowhere used these words that the accused has the right to be searched in his presence or he be taken before a Magistrate or a gazetted officer or either of them can be called at the spot. He nowhere stated that he apprised the accused of his right of search before a Magistrate or a gazetted officer or that he read over or explained vide memo Ex.P5 to the accused. In the cross-examination, he has given paradoxical plea unknown to the case of the prosecution i.e. bringing the accused before a Magistrate or a gazetted officer. This court would like to reproduce the relevant part of the cross-examination of PW3 ASI Major Singh as under:

“When Ex.P5, consent statement was recorded I have not seen any incriminating article with the accused. The accused was brought to the nearest Gazetted Officer or Magistrate before his personal search. It is correct that in Ex.P-5, it is not mentioned that this document is explained to the accused nor he admitted to be correct to be same.”

PW3 ASI Major Singh could not establish if the accused was apprised of his right and consent memo Ex.P5 was read over and explained to the accused.

Let us analyse the evidence of PW5 ASI Rajinder Singh, another eye witness of the recovery proceedings. Although, he has stated in his examination-in-chief that the investigating officer apprised the accused that he has the right to be searched in the presence of Magistrate or the gazetted officer or the accused can be taken before them, yet in the cross-examination he (PW5) has taken entirely the contradictory version. He has stated that the consent memo Ex.P5 was not explained to the accused nor he admitted the same to be correct. The said witness was never declared hostile nor he was confronted with the consent memo Ex.P5 by the public prosecutor. There is no reason to disbelieve the version given by him. If the same is accepted then it is fatal to the case of the prosecution.

On the deep scrutiny of the evidence, it is established that the accused was not aware of the contents of consent memo (Ex.P5) but his thumb impression was obtained in clandestine manner. Thus, he was never apprised to be searched before a gazetted officer or a Magistrate. It seems that Ex.P5 was prepared merely as a formality for the sole purpose to bring home the accusation against the accused. Thus, this court is of the view that Ex.P5 is not a reliable document. There is complete violation of Section 50 of the Act.

Apart from it, no sincere efforts were made to join an independent witness despite an opportunity as the farmers were present in the nearby fields.

It is the golden principle of criminal jurisprudence that if from

appraisal of the evidence, two paradoxial views arise, then the view favourable to the accused be accepted by applying the principle of benefit of doubt.

The legal term of **benefit of doubt** has wider connotation. We have applied the adversarial system of criminal jurisprudence where the prosecution has to prove its case beyond shadow of reasonable doubts. In this arena, the fortress build by the prosecution is complete dark and if a ray of doubt - which creates improbabilities in the prosecution evidence - intervenes therein, then the fortress converted into rubbles and this provides benefit of doubt to the accused.

Here PW5 has categorically stated that the contents of the consent memo were never apprised to the accused. Thus, it was mere formality and non-compliance of Section 50 of the Act. Hon'ble Spreme Court in Arif Mohammad's case (supra) has categorically stated that the provisions of Section 50 of the Act are mandatory in nature and violation thereof vitiates the search and recovery proceedings.

The matter in controversy can be discussed from another angle. Undisputedly, consent memo Ex.P-5 and its preparation has been taken as an incriminating circumstance against the accused and the same has been put to him in his statement under Section 313 Cr.P.C. While he was in police custody, his signatures were obtained on Ex.P5. It has been used as a incriminating circumstance and it amounts to confession before the police officer because a confession is a statement of the accused admitting his guilt or admitting the circumstances leading to his guilt.

It was observed by their lordship of the Privy Council in Pakala Narayanaswami v. Emperor, AIR 1939 Privy Council 47, that the

word “confession” as used in the Evidence Act cannot be construed as meaning a statement by the accused suggesting the inference that he committed the crime. A confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence.

Under the Act as well as under the criminal procedure Code, 1973, the investigating agency has been given ample powers to collect the evidence. There is every possibility that they obtained the confessions from the offenders by using undue influence. This is why the legislature has not relied upon the confessions obtained by the police and for this purpose Sections 25 and 26 have been enacted in the Indian Evidence Act, 1872. Section 26 of the Indian Evidence Act says that no confession made by any person while he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

Intention of legislature in enacting Sections 25 and 26 was to deter the police from extorting confessions, by rendering such confessions absolutely inadmissible in proof unless made in the immediate presence of a Magistrate. The prohibition contained in Section 25 should be applied very strictly.

However, the Narcotic Drugs & Psychotropic Substances Act has been framed as per the resolution adapted by the UN Committee---. Some of the provisions do not suit to the Indian legal system. The provisions of extracting confession with regard to giving consent for search of the investigating officer is clearly violates the provisions of Sections 25 and 26 of the Evidence Act. Unless, it has been made before a Magistrate or a gazetted officer.

Ex.P5 cannot be relied upon especially when the same was not suffered in the presence of an independent witness or a gazetted officer or a Magistrate.

In this case, there are other major discrepancies which create doubt in the prosecution story. PW3 ASI Major Singh has stated that Head Constable Gurmail Singh was sent to deliver ruqa and he had gone on a motorcycle. Contrary to it, PW5 ASI Rajinder Singh has stated that HC Gurmail Singh had gone to police station on foot to deliver the ruqa. In this situation, it was necessary either to examine Head Constable Gurmail Singh or to produce the relevant entry of DDR. If Head Constable Gurmail Singh had gone on motorcycle then he might have reached within few minutes. The ruqa was received at 5:25 p.m. and entry no.6 was entered in the daily diary register and it was completed at 6:10 p.m. Had he gone on foot then it was not possible for him to reach before 6 p.m.

PW3 ASI Major Singh has stated that the plastic container in which the powder was put was already with him. But PW5 ASI Rajinder Singh has stated that the plastic container was brought by some police official from the nearby area. This is also a material discrepancy from which it transpires that the police party had not gone to the spot.

On bare peusal of the report of chemical examiner, it transpires that alprazolam in traces has been found in the contents of the parcel Ex.P-17. This fact goes to prove that entire sample was not alprazolam. In this view of the matter, it was obligatory on the part of the investigating officer or the SHO of the police station to send the entire powder to the chemical examiner and sending only a sample of 10 grams itself, creates a doubt in the veracity of the case of prosecution.

In the report Ex.P-14, submitted by the investigating officer to the Deputy Superintendent of Police on 21.05.2014, it is simply mentioned that 135 grams intoxicant powder has been recovered from the accused and he has been arrested. Only few lines to this extent has been mentioned and it is not a detailed report. The said report is silent as to who were the members of the police party; whether the provisions of Section 50 of the Act has been complied with or in which manner the recovery has been effected and the parcelling was conducted. As such, this report is farcical and is not acceptable.

The link evidence in this case is also missing. The order dated 22.05.2014 (Ex.P15), passed by the learned Sub Divisional Judicial Magistrate, Dhuri reveals that the case property was produced before him by ASI Major Singh and from the bulk parcel, one representative sample containing 10 grams was separated, which was duly sealed with the seal bearing impression 'AS' of the investigating officer and the remaining bulk weighing 105 grams was also sealed with the same seal bearing impression 'AS'. Thus, on 22.05.2014, there were three parcels i.e. two drawn at the spot and one before the Magistrate and the bulk containing 105 grams intoxicant powder. It is specifically mentioned in Ex.P-15 that the case property was handed over to the investigating officer to deposit the same with the judicial malkhana and the sample drawn before him was ordered to be sent to chemical examiner for the purpose of chemical examination. Thus, the contraband was handed over to ASI Major Singh on 22.05.2014. The report of chemical examiner Ex.P-18 shows that sample was received in the laboratory on 02.06.2014 through HC Harpal Singh. Thus, between 22.05.2014 till 02.06.2014, the sample parcel remained in the custody of

ASI Major Singh (PW3). In his deposition, PW3 ASI Major Singh, has stated that he deposited the representative parcel with the malkhana Munishi on return to the police station. But surprisingly, the extract of Register No.19 which is store room register (Ex.P-16) proves that the representative parcel bearing seal of learned Magistrate was not deposited in the malkhana. This document Ex.P-16 was prepared and attested by ASI Major Singh (PW3) on 22.05.2014. Even nothing is mentioned if the sample parcel or bulk parcel was withdrawn from the malkhana for the purpose of producing the same before the Magistrate.

On the independent appraisal of evidence adduced on file, this court is of the view that the learned trial court failed to appreciate the evidence on the record and the impugned judgment sans reasoning. Therefore, the same is not sustainable under the provisions of law and is liable to be set aside.

Consequently, the instant appeal stands accepted and the judgment of conviction and order of sentence dated 05.04.2016, passed by the learned Judge, Special Court, Sangrur are hereby set aside. The appellant is acquitted of the charges framed against him. His bail/surety bonds stands discharged. He be set at liberty forthwith, if he is not required in any other case. Fine, if any, deposited by the appellant, be refunded to him against proper receipt.

(RAJ SHEKHAR ATTRI)
JUDGE

20.02.2019
mamta

Whether speaking/reasoned
Whether Reportable :

Yes/No
Yes/No

