

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRA-S-3398-SB-2017(O&M)

Date of Order:09.09.2019

Jarnail Singh @ Jaila

..Petitioner

Versus

State of Punjab

..Respondent

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Ms. Simsi Dhir Malhotra, Advocate,
for the applicant-appellant.

Mr. Bhupender Beniwal, AAG, Punjab

ANIL KSHETARPAL, J.

Correctness and validity of judgment passed by Special Court convicting appellant under Section 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 has been assailed.

As per the case set up by the prosecution that on 29.05.2014 at about 4:30 p.m. appellant was found in conscious possession of 45 grams of intoxicant powder containing psychotropic substance Diphenoxylate Hydrochloride in the area of near canal bridge Village Nangal Fida within the jurisdiction of Police Station Bhogpur, Jalandhar without any permit or licence. The version of the Prosecution is that on 29.05.2014 when Premjeet Singh ASI (hereinafter referred to IO) along with HC Salinder Singh, Constable Mukesh Kumar and PHG Hardev Singh were on patrolling duty on their private vehicle in connection with checking of suspicious and bad elements and while they were going from Bhogpur to Adampur side on a metaled road and reached near Nangal Fida Canal Bridge, they saw

accused coming from opposite side on foot. On spotting the police party, appellant suddenly became perplexed and took a turn towards his left side i.e. towards fields. On suspicion, Investigating Officer with the help of other police officials nabbed the appellant and asked about his whereabouts, whereupon he disclosed his name as Jarnail singh @ Jaila son of Ujagar Ram, resident of Nangal Fidan, Police Station Bhogpur. Investigating Officer told the appellant that he suspects some intoxicant substance in the possession of the appellant and therefore, search is to be carried out. The Investigating Officer told the accused that he had legal right to get his search conducted from him or the Gazetted Officer or the Magistrate. But the appellant reposed confidence in the Investigating Officer and after getting it signed the consent memo the Investigating Officer tried to join independent witness but none consented for the same. Thereafter, Investigating Officer conducted the search and recovered polythene envelope containing some substance in it from the left pocket of the pant in the presence of other police officials. On checking the contents of polythene envelope intoxicant powder was recovered. The Investigating Officer drew two samples of 5 grams each from the recovered intoxicant powder and prepared two sample parcels of the same by putting 5 gram intoxicant powder each into two small plastic containers. On weighing, remaining intoxicant powder was found to be 35 grams which was put in separate plastic container and a bulk parcel was prepared. Investigating Officer sealed the said parcels as well as bulk parcel with his seal impression PS. The Investigating Officer also affixed his seal impression PS on form M-29 at the spot. Investigating Officer also prepared his specimen seal impression on the piece of paper and handed over his seal after use to HC

Salinder Singh. Thereafter, the Investigating Officer took the above said sample parcels and a bulk parcel into police possession and sent an information to the police station through PHG Hardev Singh, on which formal FIR was registered by ASI Baldev Singh. Lay out plan of the place of recovery was also prepared by the Investigating Officer and the accused was arrested. The intimation regarding arrest of the accused was sent to her daughter Amandeep Kaur and after formal arrest, the Investigating Officer again conducted his formal personal search but no valuable articles or currency was recovered from the appellant. Investigating Officer prepared personal search memo and statements of witnesses were recorded.

On reaching Police Station, Bhogpur, the Investigating Officer produced the appellant, the above said sample parcels, bulk parcel, form M-29, specimen seal paper, case file before SI/SHO Tarsem Lal, who after verifying the facts of the case from the appellant, sealed the sample parcels and bulk parcel with his seal impression TL. He also affixed his seal impression TL on form M-29 and also prepared his specimen seal on above said piece of paper and deposited the sample parcels, bulk parcel, form M-29, specimen seal with MHC Satnam Singh.

On the next date i.e 30.05.2014, Investigating Officer produced the appellant, sample parcels, bulk parcel, form-M29 before the learned Illaqa Magistrate after taking it from MHC Satnam Singh and moved an applications seeking orders of the Illaqa Magistrate. After seeing the case property and form M-29, the learned Illaqa Magistrate handed over sample parcels, bulk parcel and form M-29 to the Investigating Officer and the appellant was sent to judicial lock up. On return to the police station, Investigating Officer again deposited sample parcels, bulk parcel and form

M-29 with MHC Satnam Singh. Statements of witnesses were recorded and sample parcels were sent for its examination in due course on 03.06.2014 through constable Sandeep Singh.

On completion of the investigation, police report was submitted after receipt of chemical report by SI/SHO Tarsem Lal.

As noted above, appellant was convicted.

Prosecution in order to prove its case has examined PW1 Premjit Singh (Investigating Officer), PW2 Inspector/SHO Tarsem Lal (since retired), PW3, Constable Sandeep Singh, who had delivered the sample parcel in the office of the chemical examiner, PW4 MHC Satnam Singh who was posted as MHC, PW5 Salinder Singh, ASI, the recovery witness and thereafter prosecution closed the evidence.

After closure of the prosecution evidence, accused was examined under Section 313 Cr.P.C in which incriminating evidence and the documents were explained in the question-answer form to which the appellant pleaded false implication and innocence.

This court has heard learned counsel for the appellant as well as State counsel at length and with their able assistance gone through the judgment impugned herein and the record which has been requisitioned from the trial court.

After hearing learned counsel for the parties, this court is of the view that the appeal deserves to be allowed on more than one grounds: which are noted as under:-

In the present case, on 29.05.2014, ASI Premjit Singh had carried out search and is an Investigating Officer of the present case. It is undisputed that ASI Premjit Singh is in fact a Head Constable holding a

ORP rank which if expended means Own Rank and Pay. Therefore, Premjit Singh was not even adhoc Assistant Sub Inspector of police. In cross-examination Premjit Singh admits that he is drawing the pay of Head Constable. As per notification issued by Government of Punjab dated 03.09.1987, the President of India was pleased to empower the officers of and above the rank of Assistant Sub Inspector of Police to exercise the powers and perform the duties specified in aforesaid Sections 42 and 57 of the NDPS act, 1985.

This issue has already been examined by two Division Benches of this court and it has been held that recovery of narcotics by a police party headed by a Head constable of police is not proper. Reference in this regard can be made to a Division Bench judgment in the case of **State of Punjab vs. Thana Singh, 1994(2) RCR(CrL) 430** and **Bikkar Singh vs. State of Punjab, 2006(3) R.C.R(CrL) 16**. Hence, fundamentally the Investigating Officer was not even competent. Although, there is no necessity to further examine this case, however, it is considered appropriate to deal with other contentions of learned counsel for the appellant.

It has further been noticed from the statement of PW1 ASI Premjit Singh that the appellant was not given proper option as required under Section 50 of NDPS Act. As per the Investigating Officer, appellant had been given option to get his search conducted from him (Investigating Officer) or a Gazetted officer or a Magistrate. Section 50 of the NDPS Act has been interpreted by the Hon'ble Supreme Court in the case of **State of Rajasthan v. Parmanand, 2014(2) R.C.R(CrL) 40**, wherein it has been laid down that the option which is required to be given has to get the search conducted from a nearest Magistrate or a nearest Gazetted officer. Para 19

of the judgment in the case of **State of Rajasthan vs. Parmanand** is reproduced for reference:-

“19. We also notice that PW-10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate or before a nearest gazetted officer or before PW-5 J.S. Negi, the Superintendent, who was a part of the raiding party. It is the prosecution case that the respondents informed the officers that they would like to be searched before PW-5 J.S. Negi by PW-10 SI Qureshi. This, in our opinion, is again a breach of [Section 50\(1\)](#) of the NDPS Act. The idea behind taking an accused to a nearest Magistrate or a nearest gazetted officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer. Therefore, it was improper for PW-10 SI Qureshi to tell the respondents that a third alternative was available and that they could be searched before PW-5 J.S. Negi, the Superintendent, who was part of the raiding party. PW-5 J.S. Negi cannot be called an independent officer. We are not expressing any opinion on the question whether if the respondents had voluntarily expressed that they wanted to be searched before PW-5 J.S. Negi, the search would have been vitiated or not. But PW-10 SI Qureshi could not have given a third option to the respondents when [Section 50\(1\)](#) of the NDPS Act does not provide for it and when such option would frustrate the provisions of [Section 50\(1\)](#) of the NDPS Act. On this ground also, in our opinion, the search conducted by PW-10 SI Qureshi is vitiated.”

Thus, there was violation of section 50. The judgment passed by the Hon'ble Supreme Court has also been followed by the Division Bench of this Court in the case of **Hardeep Singh @ Deepa and others, 2019(3) R.C.R.(CrL), 307.** Still further, on the aspect of effort of the

prosecution to join independent witness is also doubtful. Premjit Singh, Investigating Officer has stated that there was no shortage of private witnesses at the spot as public was passing by but no one was consulted. On further cross-examination he does not remember the names of the person who were asked to join. Even their names were not recorded in the statement or memo prepared. As per the case set up by the prosecution, the Investigating Officer had requested certain persons to join as independent persons but they declined. However, reading of the first part of statement of Premjit Singh, Investigating Officer, wherein states that no effort was made by him or any other police official, who were members of police party, to join any independent witness. Still further, Premjit Singh admits that he did not verify from the appellant as to from where he had procured the aforesaid intoxicant powder. Still further, he has admitted that form M-29 (Ex.PX) was not seen by the learned Illaqa Magistrate. However, later on he explained that original form M-29 which was seen by the Illaqa Magistrate has been retained by the Forensic Science Laboratory. The Investigating Officer has also stated that he had recorded the statement of SHO, however, on the judicial file there is no statement of the Station House Officer. Thereafter he wanted to explain that it is part of the police file but in police file also there was no statement of SHO. Thereafter he took a stand that this fact is recorded in the Zimni order, however, zimni was also not produced.

It may further be noted here that as per the case of the prosecution, the sample was sent for chemical examination on 03.06.2014 although, the date of sending sample was inadvertently mentioned as 30.06.2014. However, on being asked he admitted that there is no entry in register no.19 and 21 regarding sending of sample on 03 06.2014. When

Tarsem Lal appeared as PW1, he admitted the aforesaid error. He also admitted that no report under Section 57 was submitted to him. He also went on to admit that specimen seal impression two in number on the peace of papers were not on the record.

In view of the aforesaid it is apparent that prosecution has failed to prove its case beyond shadow of reasonable doubt. Prosecution has failed to remove all reasonable doubts.

Before parting, it must be noticed that from the reading of the judgment passed by the Special Court, it is apparent that the Presiding Judge did not deal with all the arguments which were noticed. Learned Special Judge after noticing the various arguments dealt with only one argument of non-joining of independent witness. It is expected that the learned Special Judge, which is holding a trial, should deal with all the contentions/submissions of learned counsel for the parties and thereafter deliver its judgment. Every accused has a right to defend his case. Hence, judgments passed by the learned Special Court in a cursory manner, is not appreciated.

Appeal allowed.

September 09, 2019
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(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned
Whether reportable

: Yes/No
: Yes/No