

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

**CRA-S-177-SB-2004 (O&M)
Date of decision : 14.02.2020**

Harwinder Singh

...Appellant

Versus

State of Punjab

...Respondent

CORAM:- HON'BLE MR. JUSTICE JITENDRA CHAUHAN

Present: Mr. KPS Virk, Advocate
for Mr. K.S. Dhaliwal, Advocate,
for the appellant.

Ms. Harsimrat Rai, DAG, Punjab.

JITENDRA CHAUHAN, J.

The instant appeal is directed against the judgment and order dated 22.10.2003, passed by Judge, Special Court, Patiala (hereinafter referred to as 'the trial Court') whereby, the appellant was convicted under Section 15(c) of Narcotic Drugs and Psychotropic Substances Act, 1985 (in short 'NDPS Act') and sentenced to undergo rigorous imprisonment for ten years and fine of ₹100,000/- with default stipulation.

Brief facts of the present case as noticed in para Nos.1 to 3 of the impugned judgment passed by the trial Court are as under:-

“On 6.6.2001, Kehar Singh A.S.I. while

posted as Incharge of Police Post Tharua of Police Station Patran was leading the police party in an Allwyn Nissan vehicle and for patrolling purpose he was going from village Tharua towards village Sangra. At bus stand of village Tharua, Karanbir PW was associated in the police party. Later, naka was held on kacha path which leads from Sangra to village Chicharwal. In the meanwhile from the side of village Sangra, accused came driving in Maruti car No.PB-10-L-1875 which was signalled to stop. Suspecting that the accused was carrying some contraband in the car, Kehar Singh ASI told him that the search of his car is to be conducted and if he so desires, some gazetted officer or Magistrate could be called. Accused opted to the search of his car in the presence of some gazetted officer vide statement Ex.DA which was signed by him, attested by Karambir and Rupinder Singh HC.

2. *Thereupon, Ashwani Kumar, D.S.P. Circle Samana was called at the spot who on arrival disclosed his identity to the accused as gazetted officer and the accused concurred to the search in his presence vide memo Ex.PA which was signed by him. Later, search of the car which was conducted by Kehar Singh ASI in the presence of other police officials and Ashwani Kumar DSP resulted in recovery of 10 bags containing poppy husk. Two samples of 250 grams each were drawn from each bag and the remaining poppy husk of each bag were found to be 19 ½ Kgs. and after weighment these 19 ½ Kgs. were put back in those bags. Sample parcels as also the bags containing remaining poppy husk were separately sealed by Kehar Singh ASI with his seal*

bearing impression 'KS' and with the seal of Ashwani Kumar DSP bearing impression 'AK' which was also affixed on the chit Ex.P22. Both the seals were handed over to Karanbir Singh PW after use. Later, case property was seized vide memo Ex.PB. Maruti car was seized vide memo Ex.PC which was attested by the witnesses present at the spot.

3. Rs.200/- were also recovered from the personal search of the accused which were seized vide memo Ex.PD which was signed by the accused. Later, ruqa Ex.PJ was sent to the Police Station by Kehar Singh ASI through Jaswinder Singh Constable which formed the basis of formal F.I.R. Ex.PJ/1 recorded by Amarjit Singh SI. Later, investigating officer Kehar Singh ASI prepared side plan Ex.PK with correct marginal notes, arrested the accused and supplied him grounds of arrest vide memo Ex.PE and he recorded the statements of witnesses under Section 161 of the Cr.P.C.”

Upon completion of investigation and presentation of final report under Section 173 Cr.P.C., the accused was charged for commission of the offence under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985, to which he pleaded not guilty and claimed trial.

In support of its case, the prosecution has examined DSP Ashwani Kumar as PW-1, SI Amarjit Singh as PW-2, HC Surinder Pal as PW-3, Constable Satnam Singh as PW-4, HC Rupinder Singh as PW-5 and ASI Kehar Singh as PW-6.

Thereafter, statement of the accused under Section 313 Cr.P.C was recorded and entire incriminating circumstances appearing in the prosecution evidence were put to the accused to which he denied and pleaded false implication. It was stated that Major Singh, his relative, had taken the car from his house in his absence two days prior to the occurrence by saying that he is to take a patient to the hospital in the car and thereafter, Major Singh came to him and took him to Police Post Tharua on the pretext that Maruti car has been detained by the D.T.O. He had come to know that after taking huge amount from Major Singh, he was let off by the police and the appellant was falsely implicated in this case. He examined HC Paramjit Singh as DW-1; HC Rachhpal Singh as DW-2; Constable Narinder Singh as DW-3; Constable Sukhjinder Singh as DW-4; and HC Surjit Singh as DW-5, in his defence.

After appraisal of the evidence, learned trial Court convicted and sentenced the appellant as narrated above.

Hence the instant appeal.

Learned counsel for the appellants vehemently argued that the investigating officer, ASI Kehar Singh, PW-6, was not competent to conduct the investigation being Ad hoc ASI. Further, the case property was never produced before the Area Magistrate as per the mandate of Section 52-A of the NDPS Act. The only independent witness, Karambir Singh, who remained present during the recovery proceedings was not examined by the prosecution. The car in question was also not produced before the Court

during trial.

On the other hand, the learned State counsel supports the judgement of conviction and order of sentence passed by the trial Court and submits that the appellant has been rightly convicted and sentenced. It is contended that the appellant was apprehended from the spot. No previous enmity or motive has been alleged or proved by the appellant.

This Court heard the arguments of the learned counsel for the parties and has carefully gone through the record of the case.

The prime defect in the prosecution case is that the investigating officer, ASI Kehar Singh, PW-6, was not competent to conduct investigation as he was an Ad hoc ASI and holding the substantive rank of a Head Constable. This fact has been admitted by the investigating officer himself during his cross-examination. Further, DW-5, HC Surjit Singh, who brought the service record of the investigating officer has categorically deposed that *“ASI Kehar Singh is working as ASI on O.R.P. (own rank pay). His original Rank is Head Constable till today. ORP rank is not regular promotion. No exemption was given to ASI Kehar Singh for training of ASI by the competent authority. According to the official record he is taking the pay of head constable”*. Dealing with a similar question of law, Hon'ble the Supreme Court in ***Gurjant Singh @ Janta Vs. State of Punjab, 2013 (4) R.C.R (Criminal) 874***, has held as under:-

“25. One of the grounds raised on behalf of the appellant was that P.W.3 was not holding the post

of D.S.P. In a substantive manner in order to hold that he was a Gazetted officer on the date of search. According to the appellant, P.W.3 was not a regularly promoted D.S.P. But was only an Inspector functioning as a D.S.P. In a category called "Own Rank Pay" D.S.P. According to the appellant, P.W.3 was drawing the pay of an Inspector from I.R.D. and was not holding the post of D.S.P. On a regular basis. It was, therefore, contended that such a person who was not duly promoted as D.S.P., cannot be equated to the status of a Gazetted officer in order to hold that a search was conducted in his presence was a valid search as contemplated under Section 50 of the NDPS Act. As far as the said point raised on behalf of the appellant, we do not find any material or a counter-stand taken to the effect that P.W.3 was a regularly promoted D.S.P. Or that as per the rules even as an 'Own Rank Pay' D.S.P., he would be equated to any other D.S.P., holding a substantive post. Unfortunately, as stated by us earlier, the trial Court having taken a view that Sections 42 and 50 were not applicable, completely omitted to examine the said defence raised on behalf of the appellant. We also do not find any contra evidence laid on behalf of

the prosecution to counter the said ground raised on behalf of the appellant.”

Similarly, this Court in ***Bikkar Singh Vs. State of Punjab, 2006***

(3) R.C.R. (Criminal) 16, has laid down as under:-

“12. Secondly, it is evident from the cross-examination of PW-1 SI Gurmail Singh, who is the Investigating Officer in this case, that he was ad hoc ASI and had not passed the departmental course for promotion as A.S.I. Further, it is also admitted by him that he was receiving pay of Constable Grade II at the time of occurrence of this case. Not only that DW-1 Constable Preet Inder Singh also proved from the summoned record that the substantive rank of SI Gurmail Singh was Constable Grade II and that his SI rank is only O.R.P. (own rank promotion). He also proved that SI Gurmail Singh had never passed any course for promotion as Head Constable or that of Assistant Sub Inspector. In his further cross-examination he admitted it to be correct that before promotion to the rank of SI, one has to pass the course of Head Constable and also that of ASI. In this view of the matter, it can be safely inferred that he was not

competent to exercise the powers and perform the duties specified in Sections 42 and 67 of the Act within the area of his jurisdiction”

Further, the most important link evidence in this case would have been the independent witness, namely, Karambir Singh, who remained associated with the police party during the entire recovery proceedings. Even the seals were handed over to him. However, for the reasons best known to the prosecution, this witness was not examined. The non-examination of the independent witness is a material circumstance against the prosecution and benefit thereof, ought to be extended to the appellant.

In this case, the case property was never produced before the Area Magistrate in compliance of the mandate of Section 52-A of the NDPS Act. Although, the investigating officer has stated during his examination-in-chief that he had produced the accused and the case property before the Area Magistrate vide application Ex.PL, but there is no reference with regard to any order passed on such application by the Area Magistrate. Rather, in his cross-examination, he has admitted that there is no such order on record. Further, even the special report of the present case was not promptly sent to the Area Magistrate. The investigating officer has admitted that he had taken the special report to the Area Magistrate on 07.06.2001, whereas the alleged recovery was effected on 06.06.2001. The sending of special report to the senior officials and the Area Magistrate is vital safeguard against the

manipulations by the investigating agency and the unexplained delay in sending the special report creates a doubt in the prosecution story.

In view of the above discussion, this Court has no hesitation to hold that the recovery proceedings in the instant case have been rendered doubtful for the reasons enumerated above. Consequently, the instant appeal is allowed; the impugned judgment and order passed by the trial Court are set aside; and the accused is acquitted of the charges framed by giving the benefit of doubt.

Allowed.

(JITENDRA CHAUHAN)
JUDGE

14.02.2020

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Whether Speaking/reasoned	Yes/No
Whether Reportable	Yes/No