232 IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRM-A-1639-2019 (O&M)
Date of Decision: 06.02.2020

State of Punjab

.....Applicant/Appellant

VS.

Gurwinder Singh .....Respondent

CORAM : Hon'ble Mr. Justice Jitendra Chauhan and Hon'ble Mrs.Justice Archana Puri.

Present : Mr. A.A. Pathak, Addl. AG Punjab
for the appellant-State.

JITENDRA CHAUHAN.J.

CRM No. 23303 of 2019

For the reasons mentioned in the application which is duly supported by an affidavit, the delay of 83 days in filing the appeal is condoned and the application is allowed as prayed for.

Main case

This is an application for leave to appeal against the judgment dated 30.01.2019 passed by Judge, Special Court, Gurdaspur, vide which the accused/respondent was acquitted of the charge in FIR No.68 dated 15.09.2014 registered under Section 22 of Narcotic Drugs and Psychotropic Substances, Act, 1985 at Police Station Ghanie-Ke-Bangar, District Gurdaspur.

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

"2. Pithily stated, the prosecution version is that on 15-09-2014, a police

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contingent, headed by ASI Palwinder Singh, was going from Police Station Ghanie-Ke-Bangar towards Bishniwal Jangla Village Nasarke etc. in connection with patrolling and search of bad elements. When the police party reached near Canal bridge of Village Jangla, a haircut person was seen coming from the side of Village Sarchir, who on seeing the police party ahead tried to turn back. On suspicion, the police party apprehended him and on being inquired, he disclosed his name as Gurwinder Singh @ Kalu on of Mohinder Singh, resident of Village Maan Sand Wala Before conducting search of the accused, the Investigating Officer stated to him that he has firm suspicion that he was carrying some intoxicant substance and apprised the accused about his legal right to get himself searched in the presence of a Magistrate or a Gazetted Officer. However, the accused did not repose faith in Investigating Officer and his dissenting statement in this respect was recorded. Thereafter, Investigating Officer ASI Palwinder Singh requested Kirpal Singh, DSP, Fatehgarh Churian through wireless, to reach come at the spot and on his arrival, DSP Kirpal Singh introduced himself to accused as a Gazetted Officer and desired to conduct his personal search by stating that if the accused wishes then a Magistrate or Gazetted Officer can be called at the spot for the purpose of search. However, on reposing faith in DSP Kirpal Singh by the accused, his consent statement in this respect was recorded and thereafter on checking, polythene envelop containing, intoxicant powder was recovered, out of which two samples of 5/5 grams each were separated into two plastic containers and the remaining on weighing came out to be 390 grams, which was also put into a separate plastic container. Both the samples and the bulk powder were converted into separate parcels and the same were sealed with the seal bearing impression KS and PS. Specimen seal impression was also prepared. The aforesaid entire case property along with samples was taken into police possession, vide recovery memo. ASI Palwinder Singh handed over his seal after its use to PHC Sukhdev Singh. Form No.M29 was prepared at the spot. A ruqa was sent to the police station for registration of case against the accused. Rough site plan of place of recovery was prepared. Statements of witnesses were recorded. The case property was deposited with the judicial Malkhana. On receipt of Chemical report and completion of necessary formalities concerning investigation, challan was prepared and presented in the court."

After completion of investigation, challan/report under Section 173 Cr.P.C was presented in the Court.

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Charges under Section 22 of the NDPS Act was framed against the accused to which the accused did not plead guilty and claimed trial.

In order to prove its case, the prosecution had examined PW-1 ASI Sukhdev Singh, PW-2 Ankush Kumar, PW-3 PHC Surinder Kumar, PW-4 Retired Inspector Jaswant Singh, PW-5 DSP Kirpal Singh and PW-6 PHC Sucha Singh and closed the evidence.

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

No evidence in defence was led by the accused.

After appraisal of evidence, the learned trial court vide impugned judgment dated 30.01.2019, acquitted accused/respondent of the charges framed against him.

Feeling dissatisfied with the impugned judgment, the present appeal has been filed by the State of Punjab.

It is contended by the learned State counsel that accused-respondent was found in conscious possession of the intoxicant powder. The accused was caught on the spot and there is presumption that the accused was in conscious possession of narcotic substance. The prosecution had proved on record that the sealed parcels of the case property were intact. Recovery of 400 gms of intoxicant powder was effected from the conscious possession of the accused.

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We have heard the learned State counsel and have gone through the case file very carefully.

The learned trial Court has acquitted the respondent on the following grounds:-

> *1. The Investigating Officer ASI Palwinder Singh was not examined by the prosecution and ASI Chander Parkash was shown to be the Investigating Officer in the list of witnesses and he was given up and was not examined by the prosecution.*
>
> *2.No independent witness was joined. No action was taken against those who refused to join as witness.*
>
> *3.The provisions of Section 50 of the NDPS Act were not complied with as the recovery was effected from the right pocket of trouser of the accused.*
>
> *4. There is delay of 28 days in sending the sample to the office of the Chemical Examiner, Kharar.*

We have gone through the case file carefully and find that the judgment of acquittal has been rightly passed in the given set of facts. Though, it is a case of recovery of 400 gms of intoxicating powder from the accused but there is violation of Section 50 of the NDPS Act. The recovery was alleged effected from the right pocket of trouser of the accused but still no valid offer of personal search before a Gazetted Officer was not made to the accused.

In ***Arif Khan @ Agha Khan vs. State of Uttarakhand 2018(2) R.C.R. (Criminal) 931***, it was held by Hon'ble the Supreme Court as under:-

> "23. Their Lordships have held in ***Vijaysinh Chandubha Jadeja (supra)*** that the requirements of Section 50 of the

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> 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).”**

The place of recovery was a thoroughfare but no independent witness was joined in the recovery proceedings. No action has been taken against the persons who had refused to join the police party. Neither ASI Palwinder Singh nor ASI Chander Parkash have been examined. Further, there is delay of 28 days in sending the sample to the office of Chemical Examiner, Kharar. There is no reason to differ from the view taken by the learned trial Court.

It is a settled law as has been held in ***C. Antony Vs. K.G. Raghavan Nair***, 2002(4) RCR (Criminal) 750 that even if a second view on appreciation of evidence is possible, the Court will not interfere in the acquittal of the accused unless the judgment suffers from any perversity. In the cases of acquittal, there is double presumption in his favour; first the presumption of innocence, and

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secondly the accused having secured an acquittal, the Court will not interfere until it is shown conclusively that the inference of guilt is irresistible.

In ***Anil Kumar Gupta vs. State of U.P. 2001(2) RCR (Criminal) 292 SC*** it was held as under:-

> "This Court held that "the mere fact that a view other than the one taken by the trial Court can be legitimately arrived at by the appellate Court on reappraisal of the evidence, cannot constitute a valid and sufficient ground to interfere an order of acquittal unless it comes to the conclusion that the en approach of the trial Court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable. While sitting in judgment over an acquittal, the appellate Court is first required to seek an answer to the question whether the findings of the trial Court are pal ably wrote, manifestly erroneous or demonstrably unsustainable. If the appellate Court answers the above question in the negative, the order of acquittal is not to be disturbed. Conversely, if the appellate Court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can then-and then only- reappraise the evidence to arrive at its own conclusions".
>
> (emphasis supplied)
>
> 11. This Court following the decision in Ramesh Babulal Doshi, further observed that 'there cannot be any denial of the factum that the power and authority to appraise the evidence in an appeal, either against acquittal or conviction stands out to be very comprehensive and wide, but if two views are reasonably possible, on the state of evidence: one supporting the acquittal and the other indicating conviction, then and in that event, the High Court would not be justified in interfering with an order of acquittal, merely because it feels that it, sitting as a trial court, would have taken the other view. While reappreciating the evidence, the rule of prudence requires that the High Court should give proper weight and consideration to the views of the trial Judge. But if the judgment of the Sessions Judge was absolutely perverse, legally erroneous and based on a wrong appreciation of the evidence, then it would be just and proper for the High Court to reverse the judgment of acquittal, recorded by the Sessions Judge, as otherwise,

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there would be gross miscarriage of justice".

In the instant case, the findings recorded by the learned trial Court are based on correct appreciation of evidence and do not suffer from any infirmity and perversity much less illegality.

Thus, the application seeking leave to appeal is hereby dismissed.

(JITENDRA CHAUHAN)
JUDGE

(ARCHANA PURI)
JUDGE

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Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No

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