

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

CRA-S-564-2021 (O & M)
Date of Decision: 03.08.2021

Rajwinder Singh @ Happy

.....Petitioner

Versus

State of Haryana

....Respondent

CORAM: HON'BLE MR. JUSTICE HARNARESH SINGH GILL

Present: Mr. D.S.Virk, Advocate,
for the appellant.

Mr. Pradeep Parkash Chahar, DAG, Haryana.

HARNARESH SINGH GILL, J.

Case was taken up for hearing through video conferencing.

The instant criminal appeal is directed against the judgment and order dated 19.03.2021 passed by the learned Special Judge, Kaithal, whereby the appellant was convicted under Section 21(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short, 'NDPS Act') and sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rs.10,000/- with default stipulation.

The contour and adumbration of the prosecution case, relevant for deciding the instant appeal, is that acting on a tip-off, the police party raided the house of the accused-appellant, who tried to slip away, but had been apprehended.

The Investigating Officer had a suspicion that the accused was

in possession of narcotics, and therefore, his search was required. On being apprised the accused of his right to get the search conducted in the presence of a Gazetted Officer, he had agreed for the same and thereafter, on being informed, Sultan Singh, DSP, Guhla, had arrived there. On conducting the search of the accused, a sky blue polythene containing 'smack' was found in his left pocket. On being weighed, the substance was found to be 25 gram, including the weight of the polythene. The sample was drawn therefrom, which had been converted into parcel. The parcels of the case property and sample had been taken into police possession. The accused was arrested and the case property was deposited with the MHC. Having completed all the statutory formalities, challan was filed against the accused.

On finding a prima face case, the accused was charge-sheeted under Section 21 of the NDPS Act, to which he pleaded not guilty and claimed trial.

In order to prove its case, the prosecution examined Sub Inspector Krishan Kumar as PW 1, Head Constable Raj Singh as PW 2, Constable Rajesh as PW 3, DSP Sultan Singh as PW 4, Head Constable Sukhchain Singh as PW 5, Assistant Sub Inspector Joginder Singh as PW 6, Sukhwant Rai, Ahlmad as PW 7, Sub Inspector Satbir Singh as PW 8 and Assistant Sub Inspector Jaipal as PW 9. Thereafter, the learned A.P.P. closed the prosecution evidence.

Statement of the accused under Section 313 Cr.P.C. was recorded and the entire incriminating circumstances

appearing in the prosecution evidence was put to him to which he pleaded false implication. In his defence, he had examined Assistant Sub Inspector Randhir Singh as DW 1.

After appreciating and taking into consideration the entire oral as well as documentary evidence, the accused-appellant was convicted and sentenced, as noticed above.

Being aggrieved and dissatisfied with the impugned judgment of conviction and order of sentence, the present appeal has been filed.

I have heard the learned counsel for the parties and gone through the entire record with meticulous care.

Learned counsel for the appellant contended that Exemptee ASI Joginder Singh, while appearing before the trial Court as PW 6, had claimed himself to be an ASI, but in fact, he was not holding the substantive rank of ASI and had been in the rank of the Head Constable. To elaborate his argument, learned counsel relied upon the deposition of DW 1 ASI Randhir Singh. The said DW 1 categorically stated that HC/EASI Joginder Singh, Investigating Officer in the present case, was promoted an officiating Head Constable w.e.f. 23.02.2010 and was further promoted an EASI we.f. 07.01.2011 and that he was not holding the rank of a substantive ASI at the relevant time. He further contended that HC/EASI Joginder Singh was not competent to investigate the present case at the relevant time and, therefore, the alleged recovery effected by him, would be *per se* illegal and has not only affected the case of the prosecution, but it has vitiated the very trial. In support of his contentions, the learned

counsel relied upon the judgments rendered by Hon'ble the Supreme Court in Roy VD Vs. State of Kerala, 2001(1) Apex Court Journal 49 (SC) and by a Coordinate Benches of this Court in CRA-S-376-Sb-2016, titled as 'Robin Masih Vs. State of Punjab', decided on 20.11.2019 and 'State of Punjab Vs. Mohinder Pal 2020 (1) RCR (Criminal) 300.

Learned counsel for the appellant further contended that there is an over-writing on the date in the notice and consent memo (Ex.P-5 and Ex.P-6) while appending the signatures by the Investigating Officer. The Investigating Officer had signed the notice and consent memo by putting the date as 04.07.2016, but subsequently by making over-writing, the same had been changed to 03.07.2016.

Conversely, piercing into the arguments of the learned counsel for the appellant, learned State counsel submitted that the appellant had rightly been convicted and sentenced by the trial Court; that the appellant had been apprehended at the spot and that the appellant had failed to prove his previous enmity with the police officials to impart a motive on their part for his false implication.

After hearing the respective submissions of the learned counsel for the parties, this Court finds that the alleged recovery of smack effected in the present case, has been rendered doubtful. The deposition of DW 1 Assistant Sub Inspector Randhir Singh as well as the record produced by him would decipher that HC/EASI Joginder Singh, Investigating Officer in the present case, was actually promoted an officiating

Head Constable on 23.02.2010 and an Exmpetee Assistant Sub Inspector on 07.01.2011. Being not a substantive Assistant Sub Inspector, HC/EASI Joginder Singh was an *Ad hoc* ASI and holding the substantive rank of a Head Constable. As such, he was not competent to exercise the powers and perform the duties as specified in Sections 42 and 67 of the NDPS Act. In this regard, reliance can be placed upon Roy VD (supra), wherein it has been held that no officer other than an empowered officer can resort to Section 41(2) or exercise powers under Section 42(1) NDPS Act or make a complaint under clause (d) of sub-Section (1) of Section 36-A NDPS Act.

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 earch. 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, a Coordinate Bench of 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”

Besides this, there is an over-writing in the notice and consent memo (Ex.P-5 and Ex.P-6) on the date. The Investigating Officer had signed the notice and consent memo by putting the date as 04.07.2016, but subsequently by making over-writing, the date had been changed to

03.07.2016. The said over-writing could be seen even with naked eyes. Such over-writing in the notice and consent memo under Section 50 NDPS Act, is sufficient to hold that thick clouds of suspicion are hovering over the case of the prosecution.

It is a cardinal principle of the criminal law that the prosecution has to prove the guilty of the accused beyond the shadow of a reasonable doubt. However, the prosecution has failed to do as such in the present case, which entitles the accused to the benefit of doubt.

In view of the above discussion, this Court finds substance in the submissions of the learned counsel for the appellant. Hence, the present appeal is allowed; the impugned judgment of conviction and order of sentence passed by the trial Court are set aside; and the accused-appellant is acquitted of the charge framed by giving the benefit of doubt, and he be released forthwith in this case, if not required in any other case.

03.08.2021
praveen kumar

(HARNARESH SINGH GILL)
JUDGE

Whether speaking/reasoned
Whether Reportable

Yes/No
Yes/No