

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

725

CRA-S-1601-SB-2018(O&M)

Reserved on : 20.05.2022

Pronounced on : 25.05.2022

Jaspal Singh @ Pala

.....Appellant

Versus

State of Punjab

.....Respondent

CORAM: HON'BLE MR. JUSTICE VINOD S. BHARDWAJ.

**Present: Mr. Parminder Singh Sekhon, Advocate,
for the appellant.**

Mr. Karanbir Singh, A.A.G., Punjab.

VINOD S. BHARDWAJ, J.

The present appeal has arisen out of judgment of conviction and order of sentence dated 01.03.2018 passed by the Judge Special Court, Mansa, whereby the appellant-accused has been convicted in FIR No.50 dated 07.08.2013 under Section 22/61/85 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as the “NDPS Act”), registered at Police Station Jaurkian, District Mansa and has been sentenced to undergo rigorous imprisonment for a period of 10 years for the offence punishable under Section 22 of the NDPS Act. A fine of ₹1,00,000/- has also been imposed upon him and in default of payment of fine, the appellant has been sentenced to further undergo rigorous imprisonment for a period of one year.

Briefly, the facts of the prosecution case are that on 07.08.2013, ASI Parshotam Singh along with other police officials was on patrolling duty in a Govt. vehicle bearing registration No.PB-31-C-9345 and were going from village Behniwal to Parion. When the police party reached at the bridge of the canal in the village Parion, then one person was seen coming from the village Parion side. He was holding one polythene carrybag in his right hand. On seeing the police party, he turned towards his left hand side which attracted suspicion whereupon the above said person was apprehended by ASI Parshotam Singh with the help of other police officials. On enquiry made by ASI Parshotam Singh, the apprehended person disclosed his name as Jaspal Singh @ Pala. He disclosed his identity to the accused as posted as ASI in Police Station Jaurkian and told the appellant that he is suspected of some contraband in the plastic carrybag in possession of the accused and search of the same is to be conducted. He is having legal right to get the same conducted in the presence of a gazetted officer or a Magistrate and the arrangements for the same can be made. The accused reposed faith in him and accordingly consent memo of the accused was prepared. Then ASI Parshotam Singh checked the polythene carrybag in possession of accused Jaspal Singh. On search of the polythene carrybag, 19 vials of Rexcof each of 100 ml and 15 strips of Carisol tablets each strip containing 10 tablets total 150 tablets were recovered. One vial of Rexcof 100 ml and one strip of 10 tablets were taken out as samples and its parcel was prepared. Separate bulk parcel of remaining 18 vials of Rexcof and 14 strips of tablets Carisol was also prepared. Both the parcels were sealed by the Investigating Officer with his seal bearing impression 'PS'. Sample seal chit was prepared and seal after use was handed over to HC Darshan Singh.

Case property was taken into police possession vide recovery memo which was attested by the witnesses. Accused could not produce any licence or permit regarding possession of above said contraband. Ruqa was sent to the police station on the basis of which FIR was recorded. Rough sketch plan of the place of recovery was prepared. Personal search of the accused was conducted. The accused was arrested. Statements of the witnesses were recorded. On return to the police station, IO/ASI Parshotam Singh produced the accused and case property along with sample seal before ASI Harnek Singh, Officiating SHO, P.S. Jaurkian who verified the facts from the accused and appended his seal on the entire case property bearing impression 'HS'. He took the case property in his possession vide memo which was attested by IO. Special reports under Section 57 of the NDPS Act were sent. On the next day, he produced the accused and case property before the Ld. Illaqa Magistrate. After producing the case property in the Court, he deposited bulk parcel in judicial Malkhana and kept the sample parcel along with sample seal chit in his own custody. Sample was sent to the Laboratory. On receipt of report of chemical examination laboratory and completion of investigation, the challan against the accused was prepared and presented in the Court.

On presentation of the challan, copies of the documents relied upon by the prosecution were supplied to the accused free of costs as required under section 207 Cr.P.C.

After hearing the counsel for the respective parties and after going through the record, a *prima facie* case for commission of an offence under Section 22 of the Narcotic Drugs and Psychotropic Substances Act was made out against the accused for keeping in his conscious possession 19

vials of Rexcof and 150 tablets of Carisol without any permit or licence on 07.08.2013 at about 2.15 pm, in the area of village Parion in District Mansa. A separate charge sheet was served upon him for the offence under section 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 to which the accused pleaded not guilty and claimed trial.

In order to prove its case against the accused that he was found in possession of 19 vials of Rexcof each of 100 ml and 150 tablets of Carisol without any permit or licence, the prosecution examined ASI Parshotam Singh as PW1, SI Harnek Singh as PW2, ASI Darshan Singh as PW3, ASI Parveen Kumar as PW4, C Harjinder Singh as PW5 and closed the prosecution evidence. Prosecution also proved on record sample seal chit as Ex.P1, consent memo as Ex.PA, recovery memo as Ex.PB, personal search memo of the accused as Ex.PC, ruqa as Ex.PD, FIR as Ex.PE, rough site plan of the place of recovery as Ex.PF, intimation of arrest memo as Ex.PG, memo Ex.PI whereby SHO took the case property in his possession, special report under section 57 of the NDPS Act as Ex.PJ, inventory report as Ex.PK, request to deposit the case property in judicial malkhana as Ex.PL with orders passed by the court on it as Ex.PM and Ex.PN, report of Chemical Examiner as Ex.PX, affidavit of C. Harjinder Singh as Ex.P5/A and bulk parcel as Ex.MO1.

Upon closure of the prosecution evidence, statement of accused Jaspal Singh was recorded under section 313 Cr.P.C. wherein he had denied all the incriminating material put to him as being incorrect. Accused pleaded that he is innocent and had been falsely implicated in the present case and nothing incriminating was recovered from his possession.

In defence, the accused examined Chet Singh as DW1 and

closed his defence evidence.

Upon consideration of the evidence adduced by the respective parties and also the arguments advanced on behalf of the respective parties, the Judge Special Court, Mansa concluded that the prosecution succeeded in proving its case against the appellant-accused Jaspal Singh @ Pala and that he was found to be in conscious possession of the contraband. He was accordingly held guilty and convicted for the commission of offence punishable under Section 22 of the NDPS Act. Hence, the present appeal.

ARGUMENTS OF THE APPELLANT

Learned counsel appearing on behalf of the appellant has contended that the total recovery which is shown as 19 vials of Rexcof each of 100 ml and 15 strips of Carisol tablets each strip containing 10 tablets to a total of 150 tablets of Carisol. He contends that in so far as the Carisol tablets are concerned, they do not fall under any psychotropic substance described in the Schedule and as such no offence under the NDPS Act is attracted for being in possession of 150 tablets of Carisol. It is submitted that in so far as the recovery of 19 vials of Rexcof each measuring 100 ml is concerned, the said recovery is not proved against the appellant and is liable to be rejected. He further submits that the recovery in question is suspect and is also not substantiated by compliance of statutory mandate. Besides, no independent witness was joined in the proceedings and that there has been a failure on the part of the Investigating Agency to comply with the mandate of Section 50 of the NDPS Act and also of the procedure prescribed under Section 52-A of the NDPS Act. He has also argued that the link evidence that would establish the safe custody of the seized contraband is also not established by the prosecution and that the property in question was

neither gotten verified nor any reference sample has been drawn in the presence of the Illaqa Magistrate or verification of the sample of case property done by the Magistrate. It is pointed out that the case property remained in possession of the investigating officer for merely two weeks before the same is sent for chemical examination and as such it raises grave suspicion about the case property being tampered with. Besides, the inventory of the seized contraband so prepared by prosecuting agency do not reflect the batch number or the other material particulars of the said contraband and as such the sample so drawn cannot be said to be a representative sample of the entire case property so seized.

The relevant submissions advanced by the learned counsel for the appellant-accused are elaborated as under:-

- i) Learned counsel has submitted that as per the statement of the Investigating Officer ASI Parshotam Singh who has appeared as PW1 at his evidence that the Investigating Officer had a suspicion about the appellant-accused carrying a contraband in a polythene carry bag held by him and that an offer is claimed to have been made.
- ii) It is specifically stated in the deposition of the Investigating Officer that after preparing the consent memo of accused as Ex.PA, the appellant-accused had put his left thumb impression on the same.
- iii) A reference is also made to the statement of PW3-ASI Darshan Singh who is a witness to the consent memo and even the said witness has stated that the left thumb impression of the appellant-accused was affixed on the consent memo.
- iv) A reference is thereafter made to the relevant document i.e. the consent memo Ex.PA which shows that the thumb impression makes a

mention of RTI. He contends that even though the consent memo records that the left thumb impression has been affixed, however, the prosecution has written RTI against the said thumb impression. A further reference is made to the form *Jamatalashi* on which the thumb impression of the appellant-accused is affixed and that the same does not find any mention, whereas the arrest memo Ex.PG prepared at the spot again shows that RTI of the appellant-accused has been affixed. He thus contends that there was no actual offer made to the appellant-accused and that evidently the thumb impression had been obtained on a blank piece of paper and that the documentation has been written and completed thereafter. He further contends that even though the offer was made, however, the search was conducted by the ASI himself.

ARGUMENTS BY RESPONDENT: STATE

The aforesaid submission of the learned counsel for the appellant-accused is controverted by learned State Counsel by raising an argument that the recovery of the contraband in question has been effected from the polythene carry bag held by the appellant-accused and as such, it was not recovered from the body/person of the appellant-accused. Resultantly, the mandate of Section 50 of the NDPS Act is not applicable. Once the requirement of Section 50 of the NDPS Act was not applicable, it cannot be said that non-compliance of the same actually caused a prejudice to the appellant-accused. Besides, a mere writing of 'RTI' instead of 'LTI' on the consent memo and recovery memo does not vitiate the recovery as the said error seems to be inadvertent. The object behind obtaining thumb impression/signature of an accused is only to ensure that such an offer is made to an accused and affixation of any such impression/signature is an

acknowledgment of the same. It is not the case set-up by the appellant-accused that the thumb impression does not relate to him or that the offer was never actually made.

I have heard learned counsel appearing on behalf of the appellant on the said aspect and have taken into consideration the rival submissions as well as the documents referred.

DISCUSSION & ANALYSIS

A. The Hon'ble Supreme Court in the matter of **Jeet Ram Versus The Narcotics Control Bureau, Chandigarh** bearing Criminal Appeal No.688 of 2013, decided on 15.09.2020 has held that provisions of Section 50 of the NDPS Act are applicable only in case of a personal search. The said view has also been expressed by the Hon'ble Apex Court in the matter of **State of Punjab Versus Baljinder Singh and another**, reported as **2019(10) SCC 473**. It is not in dispute that the recovery in question has been effected from the polythene carrybag held by the appellant-accused in his hand and was not effected on the personal search of the appellant-accused. Thus, the requirement of Section 50 of the NDPS Act would not get attracted. In any case, it is undisputed that the thumb impression of the appellant-accused had been obtained. It has also not been established as to what prejudice has thus occasioned as a result of negligent abbreviation used by the concerned official in writing 'RTI' instead of 'LTI'. The object of Section 50 of the NDPS Act is to apprise a person about his right to be searched before a Gazetted Officer or a Magistrate and once the said aspect is not in dispute, despite the said mandate not being applicable to the case in hand, a mere irregularity or carelessness exercised by the concerned official in misdescription of the thumb impression does not cause prejudice to the

recovery so effected. The argument is accordingly found to be without any merit.

B. The next argument raised on behalf of the appellant is that the case of the police/Investigating Agency is not corroborated by any independent evidence and that no valid explanation has been given as to why the Investigating Officer would not have associated private persons/independent witnesses. He submits that a total of five witnesses have been relied upon by the prosecution and that all the said five witnesses happen to be the police officials.

The aforesaid submission of the appellant-accused is controverted by the learned State Counsel who has submitted that a recovery effected in the presence of the police witnesses does not get vitiated. He has pointed out that attempt made by the Investigating Officer to associate independent witnesses could not be fructified as the people expressed their unwillingness to be associated with the said proceedings.

The necessity to join any independent private witness is only an additional safeguard or prudence exercised by the Investigating Agency. The same is not a mandatory requirement prescribed under the NDPS Act or the Rules framed thereunder. Moreover, it is a matter of common knowledge that the private persons are usually not inclined to associate themselves in any police proceedings and usually perceive the same as a harassment. Owing to the said perception, which may not be wholly ill-founded, the witnesses from the general public prefer not to help the Investigating Agency or associate themselves in any proceedings being conducted by them. Besides, people also nurture apprehension about a possible fall out with the anti-social elements in the event of the person

joining the police in any proceedings being conducted against the person for violation of law. Resultantly, there is disinclination in the people wanting to become a part of any of the police proceedings out of choice. Besides, the Hon'ble Supreme Court has held in the matter of **Raveen Kumar Versus State of Himachal Pradesh** bearing Criminal Appeal No.2187-88 of 2011, decided on 26.10.2020 that lack of independent witnesses cannot be perceived as being fatal to the case of the prosecution. The omission only casts an added duty on the Courts to adopt a greater degree of care while scrutinizing the testimonies of the police officers, which if found reliable can be basis of a successful conviction.

The aforesaid view had also been taken by the Hon'ble Supreme Court in the matter of **Rizwan Khan Versus The State of Chhattisgarh**, reported as 2020(9) SCC 627, wherein the Hon'ble Supreme Court held that testimonies of official witnesses cannot be rejected on the ground of non-corroboration by the independent witnesses.

It is thus well-settled that the examination of independent witnesses is not an indispensable requirement for launching and conducting proceedings against the persons accused for the commission of offence under the NDPS Act and that any such non-examination cannot be termed as fatal to the case of the prosecution.

In view of the above, the argument of the appellant that failure to associate independent witnesses renders the recovery suspect is not found as a tenable argument in law and is accordingly rejected.

MATERIAL DISCREPANCIES

C. Learned counsel for the appellant has raised an argument that the case is surrounded by various suspicious circumstances

that would render the recovery suspect and would itself defeat the case of the prosecution through an established violation of the provisions of Section 52-A of the NDPS Act. It has been pointed out that as per the anticipated case of the prosecution, there is no description of the property mentioned in the inventory prepared by the prosecution as Ex.PK. He further contends that when the case property was produced before the Sub Divisional Judicial Magistrate, Sardulgarh on 08.08.2013 vide Ex.PM, an order was passed whereby the Sub Divisional Judicial Magistrate has only initialled the parcels in token of its correctness. It is further noticed that no separate request for the representative sample had been made by the prosecution. The stated sample parcel was informed to be containing 01 vial of Rexcof 100 ml and 10 tablets of Carisol. Hence, neither any representative sample was drawn in the presence of the Magistrate nor the sample drawn by the police was seen or verified by the Sub Divisional Judicial Magistrate. It is further pointed out that the remaining case property was stated to be in a second parcel and that despite an order passed to deposit the same in judicial Malkhana vide Ex.PN, the same was not deposited in the judicial Malkhana and no evidence has been led by the respondent-State to establish that the case property was ever deposited in the judicial Malkhana. Besides, he submits that even though the order by the Sub Divisional Judicial Magistrate was passed on 08.08.2013, the report of the FSL, Ex.PX shows that the same was received at the FSL on 23.08.2013. He submits that there is no explanation furnished by the prosecution for the inordinate delay in submitting the samples to the FSL. It is argued that the said samples remained in custody of the Investigating Officer during the entire period. He also submits that the sample seal had been handed over to the Investigating

Officer on the next day itself i.e. 09.08.2013 and the said aspect stands duly reflected in the statement of PW3-ASI Darshan Singh. Various other suspicious and discrepant circumstances were also pointed out which shall be elaborated in the subsequent part of the judgment.

On the strength of the said discrepant circumstances, learned counsel representing the appellant contends that the recovery in question is thus suspicious and that the sample so drawn cannot be linked to the case property, in the absence of any description of the case property or any connection of the same with the rest of the case property. He further submits that the result of the FSL analysis cannot thus be applied to the entire case property, in the absence of any material description of the remaining case property and to hold the same to be homogenous and that the result of the sample analysis cannot be applied to the rest of the seized case property. Various other aspects were pointed out that are culled out in the subsequent part of the judgment.

The submissions are responded to by the learned counsel appearing on behalf of the respondent-State by arguing that the said discrepancies have no bearing in so far as the recovery of the contraband is concerned and that in the absence of the appellant-accused establishing that the remaining contraband did not relate to the sample so drawn, the results of the analysis by the FSL have to be applied to the entire case property.

He has also argued that the discrepancies pointed out by the appellant-accused are immaterial and do not cause any dent to the case of the prosecution. Any minor irregularity or negligence committed by the Investigating Agency cannot be misread to extend any benefit to the appellant-accused who has been convicted for being in possession of

commercial quantity of Rexcof which is a prohibited contraband under the NDPS Act.

I have heard learned counsel for the respective parties and have gone through the relevant extracts of the evidence and the facts thereof. In order to appreciate as to whether the discrepancies have any material bearing on the case or not, it would be necessary to refer to the said discrepancies that are available in the case of the prosecution and the same are noticed as under:-

i) The Investigating Officer, ASI Parshotam Singh while appearing as PW1 had specifically submitted that he had separated 01 vial of Rexcof of 100 ml and 01 strip of 10 tablets of Carisol as sample and converted into a parcel and the separate bulk parcel of remaining 18 vials of Rexcof and 14 strips of Carisol tablets by putting them in a plastic bag. The seal after use was handed over to HC Darshan Singh and that the entire case property along with the sample seal chit was taken into possession vide recovery memo Ex.PB, which was duly attested by HC Darshan Singh and HC Gamdoor Singh. He also submitted that the entire case property along with the sample seal and form No.29 were produced before ASI Harnek Singh who was the officiating SHO of Police Station Jaurkian who verified the facts of the case and further sealed the case property with his seal bearing impression "HS" while keeping the seal of the appellant intact.

There is nothing on record to establish that the seized contraband was deposited in the Malkhana or entrusted to the custody of MHC after the same was produced before the SHO;

(ii) Even though the Investigating Officer submits that the case property was produced before the officiating SHO who had further sealed

the case property with his seal bearing impression “HS” and took the case property in his possession vide memo Ex.P1, however, in the special report Ex.PJ sent by the officiating SHO under Section 57 of the NDPS Act, there is no reference to the case property having been sealed by the officiating SHO with his seal bearing impression “HS”;

(iii) Even though it is mentioned in the special report prepared under Section 57 of the NDPS Act that the sample parcel as well as the bulk parcel along with the sample seals were got deposited in the Malkhana, however, no evidence has been brought on record to suggest that the case property was ever deposited in the Malkhana on 08.08.2013 and/or the same was handed over to the Investigating Officer for production before the Sub Divisional Judicial Magistrate;

(iv) That the Investigating Officer has said in his evidence that the colour of the Rexcof Syrup was off-white, however, as per the FSL report Ex.PX, the bottle contained orange coloured liquid material and was not off-white in colour;

(v) That the Investigating Officer specifically admitted that the Rexcof Syrup is a manufactured drug of a Company, hence, despite distinct identification features such as batch numbers and other particulars of the syrup are written on the vials of the same. However, no details of the batch number/lot number, date of manufacturing, date of expiry or even the product label had been mentioned in the inventory Ex.PK so prepared by the respondent;

(vi) That the Investigating Officer himself admitted that the sample was not separated from each vial and that the contents of the bulk parcel were not verified by the officiating SHO himself or even the Sub Divisional

Judicial Magistrate;

vii) That the Investigating Officer while appearing as PW1 has specifically stated that he had received the seal on the next day itself. The same stands corroborated by the statement of ASI Darshan Singh, the then Head Constable.

viii) The ASI does not state or testify about depositing the samples/bulk parcel in the Malkhana and no memo or witness has been examined to establish the same;

ix) The officiating SHO Harnek Singh has appeared as PW2 who claimed to have appended his seal bearing impression “HS” on the bulk parcel as well as the sample parcel, however, submission of the said parcels/material in the Malkhana is not testified. He has owned the special report Ex.PJ under Section 57 of the NDPS Act to have been sent to the DSP wherein it does not find mention that he had sealed the parcels with his seal impression “HS”;

x) It is further admitted by the officiating SHO while appearing as PW2 that pursuant to the order passed by the Court, the bulk parcel was deposited in the judicial Malkhana, however, the sample parcel was kept by him in his custody. The said parcel was handed over to Constable Harjinder Singh on 22.08.2013 i.e. after 14 days to get the same forwarded from the office of SSP, Mansa and to deposit the same in the FSL, Mohali. Hence, the witness admits of retaining the parcel with himself for a period of 14 days;

xi) Even though the said witness states that the case property was deposited in the judicial Malkhana on 08.08.2013 in reference to the bulk sample, however, the said aspect was not established and the case property

was never produced before the Court at the time of recording of evidence and no witness was called or document exhibited to show that the case property was actually deposited in the judicial Malkhana;

xii) The officiating SHO while appearing as PW2 also accepts that there is no dispatch or receipt of the special report and that he had duly signed the special report Ex.PJ after conducting all the proceedings and reading the contents of the same. The said witness was duly confronted with the absence of mentioning about affixing of his seal, however, there is no explanation furnished by the officiating SHO regarding the aforesaid discrepancies;

xiii) PW3-ASI Darshan Singh (the then HC) has acknowledged that batch number, manufacturing number, expiry and Company number etc. was not mentioned in any of the memos. The said witness also acknowledges that no separate sample was taken from each vial for its testing;

xiv) Constable Harjinder Singh has appeared as PW5 and has testified only to the effect that the sample parcel was handed over to him by the SHO at 03.00 pm;

xv) The bulk case property was not produced before the trial Court and no document in support of depositing the same in Malkhana thereof has been exhibited. Besides, the case property was also not shown to the Investigating Officer and/or the accused for verification of the same and to compare the batch number which is needed to ascertain the date of manufacturing/expiry etc. with the sample sent for FSL examination and for which report Ex.PX has been recovered;

xvi) That no request was made by the Investigating Agency for withdrawal of its representative sample before the Sub Divisional Judicial

Magistrate and that the contents of the parcels were not verified by the Sub Divisional Judicial Magistrate;

xvii) In order to establish its case against an accused, it was incumbent upon the prosecution to have fully established that the seized and recovered quantity of contraband were duly stored and could not have been tampered with while in safe custody. Besides, it was also required to be established that the sample so drawn was a representative sample of the contraband so seized. In the absence of any details with respect to the bulk sample regarding the identity or description of the material so seized, there is nothing on record to suggest that the material seized and sealed in the bulk parcel was of the same make, manufacturing, lot, brand or contained the same salts. Moreover, the bulk sample was also not produced before the Court at the time of evidence despite such specific questions having been asked. Hence, the sample so drawn cannot be held representative of the bulk sample seized and the result of the sample analysis may not be *ipso facto* held applicable to the remaining bulk sample as well.

xviii) Apart therefrom, no evidence has been led to establish that the bulk parcel was deposited with the judicial Malkhana in compliance of the order dated 08.08.2013 passed by the Sub Divisional Judicial Magistrate or that the contraband after seizure was deposited with the MHC.

xix) No explanation has been given as to why the Investigating Officer/SHO retained the sample parcel with them for a period of 14 days prior to the same being sent to the FSL for examination. Considering that the seal after use had already been handed over to the Investigating Officer on the very next day, it becomes imperative for the prosecution to come up with a satisfactory explanation for the failure to deposit the sample/bulk parcel

with the respective Malkhana. The aforesaid aspect gains significance considering that the Investigating Officer has stated that the seized contraband was off-white in colour, whereas the FSL report shows that it was orange in colour. There is a marked difference between the colour shades and can be well identified.

LEGAL POSITION

In the matter of **Gaunter Edwin Kircher Versus State of Goa, Secretariat Panji, Goa**, reported as 1993 AIR (SC) 1456, the accused was prosecuted after recovery of two pieces of Charas weighing 7 gms. and 5 gms. Only one piece weighing less than 5 gms. was sent for chemical analysis. It was held by the Hon'ble Supreme Court that in the absence of the sample being representative of the entire quantity, it could not be said that the entire recovered quantity of 12 gms. was a narcotic drug. The relevant extract of the said judgment is reproduced hereinafter below:-

“As already mentioned only one piece was sent for chemical analysis and P.W. 1, the Junior Scientific Officer who examined the same found it to contain Charas but it was less than 5 gms. From this report alone it cannot be presumed or inferred that the substance in the other piece weighing 7 gms. also contained Charas. It has to be borne in mind that the Act applies to certain narcotic drugs and psychol, tropic substances and not to all other kinds of intoxicating substances. In any event in the absence of positive proof that both the pieces recovered from the accused contained Charas only, it is not safe to hold that 12 gms. of Charas was recovered from the accused. In view of the evidence of P.W. 1 it must be held that the prosecution has proved positively that Charas weighing about 4.570 gms. was recovered from the accused. The failure to send the other piece has given rise to this inference. We have to observe that to obviate this difficulty, the concerned authorities would do

better if they send the entire quantity seized for chemical analysis so that there may not be any dispute of this nature regarding the quantity seized. If it is not, practicable, in a given case, to send the entire quantity then sufficient quantity by way of samples from each of the packets or pieces recovered should be sent for chemical examination under a regular panchnama and as per the provisions of law.”

A Division Bench of this Court in the matter of **State of Punjab Versus Dharam Singh**, reported as **2010(3) R.C.R.(Criminal) 94**, while dealing with the judgment of acquittal in a case where 1850 loose diazepam tablets were recovered in a plastic *dabba* from the accused, wherein sample of 25 tablets was sent to the Laboratory and as per the report 05 mg diazepam was found in each tablet, it was observed that the prosecution failed to convince as to how the remaining seized contraband could be presumed to be of diazepam especially when the recovery was loose and was not in the form of strips. The relevant extract of the said judgment is reproduced hereinafter below:-

“32. As per story, 1850 tablets were recovered. Two samples, each of 25 tablets, were separated. One sample parcel of 25 tablets was sent to the laboratory for report. As per report of the laboratory, Diazepam to the extent of 5 mg in each tablet was found. That means in 25 tablets, quantity of Diazepam was 125 mg. Loose tablets were recovered from the dabba carried by the respondent accused in a plastic envelope. Question is whether the remaining tablets were containing 5 mg of Diazepam in each tablet or not. In case we presume that all the tablets, i.e., 1850 were containing 5 mg. of Diazepam per tablet, then as per quantity of Diazepam in each tablet, total recovery of Diazepam would be of 92.50 gm., which is non-commercial. Learned State counsel failed to convince how the

remaining tablets are presumed to be of Diazepam to the extent of 5 mg per tablet, when tablets recovered were not in the form of strips.”

Furthermore, while dealing with the aspect of failure to deposit the sample in the Malkhana despite order passed by the Magistrate rendering the prosecution case doubtful and conviction in the case was set aside in the matter of **Buta Singh Versus State of Punjab**, reported as **2018(2) R.C.R.**

(Criminal) 41. The relevant extract of the said judgment is reproduced hereinafter below:-

“26. Counsel for the appellant has submitted that it is in the evidence of the prosecution that there was no batch number or name of manufacturer with regard to 33 bottles of Rexcof and therefore the sample was not properly drawn with regard to said recovery. In support thereof, he has placed reliance upon Gaunter Edwin Kircher v. State of Goa , AIR 1993 Supreme Court 1456, wherein the Hon'ble Supreme Court has held as under: -

"Then the other ingredient that has to be satisfied is whether the substance found in possession of the appellant was intended for his personal consumption and not for sale or distribution. No doubt as the Section lays down the burden is on the appellant to prove that the substance was intended for his personal consumption. As to the nature of burden of proof that has to be discharged depends upon the facts and circumstances of each case. Whether the substance was intended for personal consumption or not has to be examined in the context in which this exception is made. In the instant case the accused though in general has taken a plea of denial but his examination under Section 313 Cr. P.C., 1973 by the Magistrate reveals that there was such a plea namely that it was meant for his personal consumption. In the

judgment of the trial court it is noted that the accused made an, application on 23.3.90 stating that the piece said to have been recovered from him was less than 5 gms. and not 12 gms. As alleged and that the application was written and signed by the appellant himself. The prosecution case itself shows that he was having this substance in a pouch alongwith a chillum (smoking pipe) and smoking material. The averments made by the appellant in the application and as extracted by the trial court would themselves show that it was meant for his personal consumption. The above surrounding circumstances under which it was seized also confirm the same. The appellant is a foreigner and as a tourist appears to have carried this substance for his personal consumption. We are aware that the menace of trafficking in narcotic drugs and psychotropic substance has to be dealt with severely but in view of the provisions of Section 27, we are unable to hold that the small quantity found with the appellant was not meant for his personal consumption and that on the other hand it was meant for sale or distribution. Therefore, the appellant is liable to be punished as provided under Section 27 of the Act.

From the records it appears that the appellant has been in jail for more than three years but that may not be relevant since the sentence prescribed under Section 27 is only six months. We are only just mentioning it as a fact.

In the result the conviction of the appellant under Section 20(b)(ii) of the Act and sentence of 10 years R.I. are set aside. Instead he is convicted under. Section 27 of the Act and is sentenced to undergo 6 months' R.I. and to pay a fine of ₹1 lac in default of payment of which to further undergo 6 months' R.I. Subject to the above modifications, the appeal is disposed of."

29(ii) The statement of PW3 Inspector Dalbir Singh, on careful scrutiny, clearly make out a case that provisions of Section 50 of NDPS Act were not at all followed. This witness has clearly admitted that he has not informed the accused regarding his right under Section 50 of NDPS Act. This witness has further stated that the samples were sealed with seal impression 'DS' which was handed over to independent witness Ami Chand. However, after 04 days, the seal was taken back i.e. 06 days prior to sending the sample parcels, both the seal and parcel were in custody of this witness. This witness has also stated that since the time of recovery i.e. 07.06.2010 till deposit of the sealed sample parcels with FSL on 17.06.2010, it remained in his custody and it was never deposited in the malkhana of police station, despite the order of Judicial Magistrate Ex.PK. This raises a serious doubt about the procedure adopted by PW3 Inspector Dalbir Singh, as he kept the seal as well as the sealed sample parcels with him for 11 days and never deposited the same in judicial malkhana."

Moreover, seizure and sampling process notified by the Central Govt. vide Standing Order No.1/89 as noticed by the Hon'ble Supreme Court in its judgment in the matter of **Union of India Versus Mohanlal and another**, reported as **2016(1) R.C.R. (Criminal) 858**, has also not been followed. The relevant extract of the said judgment is reproduced hereinafter below:-

Seizure and sampling:

11. Section 52A(1) of the NDPS Act, 1985 empowers the Central Government to prescribe by a notification the procedure to be followed for seizure, storage and disposal of drugs and psychotropic substances. The Central Government have in exercise of that power issued Standing Order No. 1/89 which prescribes the procedure to be followed while conducting seizure of the contraband. Two subsequent standing orders one

dated 10.05.2007 and the other dated 16.01.2015 deal with disposal and destruction of seized contraband and do not alter or add to the earlier standing order that prescribes the procedure for conducting seizures. Para 2.2 of the Standing Order 1/89 states that samples must be taken from the seized contrabands on the spot at the time of recovery itself. It reads:

"2.2. All the packages/containers shall be serially numbered and kept in lots for sampling. Samples from the narcotic drugs and psychotropic substances seized, shall be drawn on the spot of recovery, in duplicate, in the presence of search witnesses (Panchas) and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchnama drawn on the spot."

It is manifest from Section 52A (2)(c) (supra) that upon seizure of the contraband the same has to be forwarded either to the officer in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory (b) certifying photographs of such drugs or substances taken before the Magistrate as true and © to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn. Sub-section (3) of Section 52- A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer in charge of the Police Station or the officer empowered, the officer concerned is in law duty bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples

has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct.

STORAGE:

15. The Narcotic Drugs and Psychotropic Substances Act, 1985 does not make any special provision regulating storage of the contraband substances. All that Section 55 of the Act envisages is that the officer in charge of a Police Station shall take charge of and keep in safe custody the seized article pending orders of the Magistrate concerned. There is no provision nor was any such provision pointed out to us by learned counsel for the parties prescribing the nature of the storage facility to be used for storage of the contraband substances. Even so the importance of adequate storage facilities for safe deposit and storage of the contraband material has been recognised by the Government inasmuch as Standing Order No. 1/89 has made specific provisions in regard to the same. Section III of the said Order deals with "Receipt of Drugs in Godowns and Procedure" which inter alia provides that all drugs shall invariably be stored in "safes and vaults" provided with double locking system and that the agencies of the Central and the State Governments may specifically designate their godowns for storage purposes and such godowns should be selected keeping in view their security angle, juxtaposition to courts etc. We may usefully extract paras 3.2 to 3.9 comprising Section III supra at this stage for ready reference:

"3.2. All drugs invariably be stored in safes and vaults provided with double-locking system. Agencies of the Central and State Governments, may specifically, designate their godowns for storage purposes. The godowns should be selected keeping in view their security angle, juxtaposition to courts etc.

3.3 Such godowns, as a matter of rule, shall be placed under the over-all supervision and charge of a Gazetted

Officer of the respective enforcement agency, who shall exercise utmost care, circumspection and personal supervision as far as possible. Each seizing officer shall deposit the drugs fully packed and sealed in the godown within 48 hours of such seizure, with a forwarding memo indicating NDPS Crime No. as per Crime and Prosecution (C & P Register) under the new law, name of the accused, reference of test memo, description of the drugs, total No. of packages/containers etc.

3.4 The seizing officer, after obtaining an acknowledgement for such deposit in the format (Annexure-I), shall hand acknowledged over such to the Investigation Officer of the case along with the case dossiers for further proceedings.

3.5 The officer-in-charge of the godown, before accepting the deposit of drugs, shall ensure that the same are properly packed and sealed. He shall also arrange the packages/containers (casewise and lot-wise) for quick retrieval etc.

3.6 The godown-in-charge is required to maintain a register wherein entries of receipt should be made as per format at Annexure-II.

3.7 It shall be incumbent upon the Inspecting Officers of the various Departments mentioned at Annexure II to make frequent visits to the godowns for ensuring adequate security and safety and for taking measures for timely disposal of drugs. The Inspecting Officers should record their remarks/observations against Col. 15 of the Format at Annexure-II.

3.8 The Heads of the respective enforcement agencies (both Central and State Governments) may prescribe such periodical reports and returns, as they may deem fit, to monitor the safe receipt, deposit, storage, accounting and disposal of seized drugs.

3.9 Since the early disposal of drugs assumes utmost consideration and importance, the enforcement agencies may obtain orders for pre-trial disposal of drugs and other articles (including conveyance, if any) by having recourse to the provisions of sub-section (2) of Section 52A of the Act."

A reference in this regard is also made to the Division Bench judgment of this Court in the matter of **Harbhajan Singh alias Bhajan Singh and others Versus State of Punjab**, reported as **2019(2) R.C.R.(Criminal) 939**, wherein it was observed that case property in the NDPS Act is required to be kept in safe custody from the date of seizure till its production in the Court. As and when the case property is taken out or re-deposited in Malkhana, necessary entry is required to be made in the Malkhana register in terms of Rule 22.70 of the Punjab Police Rules, 1934. Failure to comply with the provisions of the Rules so enshrined leads to a doubt whether the case property recovered was the same property and sent to FSL or whether it was case property of some other case. The accused therein were accordingly acquitted and the judgments of conviction were set aside. The relevant observations of the Division Bench of this Court are reproduced hereinafter below:-

"15. Entry in the Malkhana register to the effect that who had taken the property to the Court and brought it back, is necessary as per Punjab Police Rules, 1934. Para 22.70 of the Punjab Police Rules, 1934, reads as under:

"22.70. Register No. XIX- This register shall be maintained in Form 22.70.

With the exception of articles already included in register No. XVI every article placed in the store-room shall be entered in this register and the removal of any such article shall be noted

in the appropriate column. The register may be destroyed three years after the date of the last entry."

The register is to be maintained in Form 22.70. It reads as under.

"FORM NO. 22.70.

Police Station _____

*Register No. XIX.-Store-Room Register (Part-I) Column 1.-
Serial No.*

2. No. of first information report (if any), from whom taken (if taken from a person), and from what place.

3. Date of deposit and name of depositor.

4. Description of property.

5. Reference to report asking for order regarding disposal of property.

6. How disposed of and date.

7. Signature of recipient (including person by whom dispatched).

8. Remarks.

(To be prepared on a quarter sheet of native paper)."

16. It is necessary that as and when case property is taken out from Malkhana, necessary entry is required to be made in the Malkhana Register and also at the time when case property is redeposited in the Malkhana. Case property in NDPS cases is required to be kept in safe custody from the date of seizure till its production in the Court. It is also necessary that when case property is taken out from Malkhana, DDR is made and also at the time when case property is re-deposited in the Malkhana. Thus, it casts doubt whether it is the same case property which was recovered from the accused and sent to FSL or it was case property of some other case.

17. Sub-rule (2) of Rule 22.18 of Punjab Police Rules, reads as under:

"(2) All case property and unclaimed property, other than cattle, of which the police have taken possession

shall, if capable of being so treated, be kept in the storeroom. Otherwise the officer in charge of the police station shall make other suitable arrangements for its safe custody until such time as it can be dealt with under sub-rule (1) above.

Each article shall be entered in the store-room register and labelled. The label shall contain a reference to the entry in the store-room register and a description of the article itself and, in the case of articles of case property, a reference to the case number. If several articles are contained in a parcel, a detail of the articles shall be given on the label and in the store-room register.

The officer in charge of the police station shall examine Government and other property in the storeroom at least twice a month and shall make an entry in the station diary on the Money following the examination to the effect that he has done so."

18. Rule 27.18 of Punjab Police Rules, reads as under:

"27.18. Safe custody of property.-

(1) Weapons, articles and property sent in connection with cases shall on receipt be entered in register No. 1 and shall (excluding livestock) be properly stored in the store-room of the head of the prosecuting agency, or the police station. See Rule 22.18. When required for production in court such articles shall, at headquarters, be taken out in the presence and under the personal order of an officer of rank not less than prosecuting sub-inspector and an entry made in the register of issue from and return to the prosecuting agency's store-room, which register shall be maintained in Form 27.18(1). Animals sent in connection with cases shall be kept in the pound attached to the police station at the place to which they have been sent, and the cost of their keep shall be

recovered from the District Magistrate in accordance with Rule 25.48.

(2) In all cases in which the property consists of bullion, cash, negotiable securities, currency notes or jewellery, exceeding in value Rs. 500 the Superintendent shall obtain the permission of the District Magistrate, Additional District Magistrate or Sub-Divisional Officer to make it over to the Treasury Officer for safe custody in the treasury.

(3) All cash, jewellery and other valuable property of small bulk, which is not required under sub-rule (2) above to be sent to the treasury, shall be kept in a locked strong box in the storeroom. Each court orderly shall be provided with a strong lock-up box in which he shall keep all case property while it is in his custody in the court to which he is attached. Case property shall invariably be kept locked-up in such box except when it is actually produced as an exhibit in the course of proceedings. After being so produced it shall be immediately replaced in the lock-up box. Boxes shall be provided from funds at the disposal of the District Magistrate.

(4) Property taken out of the main store-room for production in court shall be signed for by the court orderly concerned in register No. 2 and the prosecuting officer authorizing the removal shall initial this entry. Such officer shall similarly, after personal check, initial the entry of return of the property to the main store-room on the closing of the courts.

(5) Every day, when the courts close, an officer of the prosecuting branch of rank not less than that of sub-inspector shall personally see that the articles produced in court are returned to the store-room, restored to their proper places in the shelves, cup-boards or strong box and

registered as required by sub-rule (4) above. The opening of the storeroom in the morning and its closing in the evening shall invariably be in the presence of the police officials named in this rule. Animals brought from the pound shall be repounded under the supervision of a head constable."

19. Thus, it is evident from rule 22.18 that the case property is required to be kept in store room and each article is to be entered in store room, registered and labelled and label shall contain a reference to the entry in the store-room register and a description of the article itself and, in the case of articles of case property, a reference to the case number. If several articles are contained in a parcel, a detail of the articles is required to be given on the label and in the store-room register. Similarly, it is prescribed in Rule 27.18 that weapons, articles and property sent in connection with cases shall on receipt be entered in register No. 1 and shall (excluding livestock) be properly stored in the store-room of the head of the prosecuting agency, or the police station. The case property when required for production in court such articles shall, at headquarters, be taken out in the presence and under the personal order of an officer of rank not less than prosecuting sub-inspector (now APP/PP) and an entry made in the register of issue from and return to the prosecuting agency's store-room, which register shall be maintained in Form 27.18(1). Property taken out of the main store-room for production in court is required to be signed by the court orderly concerned in register No. 2 and the prosecuting officer authorizing the removal shall initial this entry. Such officer similarly, after personal check, is required to initial the entry of return of the property to the main store-room on the closing of the courts. It is further

provided in this Rule that every day, when the courts close, an officer of the prosecuting branch of rank not less than that of sub-inspector shall personally see that the articles produced in court are returned to the store-room, restored to their proper places in the shelves, cupboards or strong box and registered as required by sub-rule (4) above. The opening of the storeroom in the morning and its closing in the evening shall invariably be in the presence of the police officials named in this rule. In case property is required to be committed to the higher Court, then under Rule 27.19, the parcel shall be sealed with the seal of the court and made over to the head of the police prosecuting agency, who shall produce it with unbroken seals before the superior court, or, if so ordered by competent authority, shall make it over to some other officer authorized so to produce it.

20. In Punjab Police Rules, Malkhana register is assigned serial number-19. It is in a tabular form. There are different columns like who has deposited the case property and when it was taken out and deposited back. These details are very material and every deposit made in the Malkhana/Store Room is to be recorded and also at the time when it is re-deposited.

21. In the instant case, there is nothing on record to suggest that these Rules were followed while producing case property in the Court and on returning the same. These Rules have been framed to ensure that case property from its initial stage of seizure till production in the Court remains safe/intact and is restored to store room in the presence of senior police officer. Property taken out of the main store-room for production in court is required to be signed by the court orderly concerned in Register No. 2 and the prosecuting officer authorizing the removal is required to initial this entry. Such officer

shall similarly, after personal check, initial the entry of return of the property to the main store-room on the closing of the courts.

CONCLUSION

The provisions of the NDPS Act are strict in application considering the gravity of offence, the punishment prescribed and the presumptions under Section 54 of the Act. The presumption is against the accused but the same is not absolute and is rebuttable. As the punishment prescribed under the Act increases with the increase in quantity and the sentence becomes more stringent, adequate safeguards, precaution and prudence is required to be established on record. The result of sample must be established by the prosecution in order to apply the said result of analysis to the entire seized quantity. For the same, homogeneity of the seized contraband is required to be proved to the satisfaction of the judicial conscience. The onus is on the prosecution to establish the said question of fact. Result of chemical analysis cannot be assumed to be applicable to the entire quantity of the seized contraband unless either the homogeneity of the sample is established or it is established that owing to the distinct identification features of a formulation, such result would be applicable to the entire haul it would not be safe to apply the sample analysis result to the total quantity seized.

The burden is also on the prosecution to establish that the contraband remained safe, while in custody. The said burden cannot be presumed to be satisfactorily discharged until the suspicious circumstances likely to raise apprehensions to a reasonable mind about it not being tampered are dispelled. The various guidelines of prudence and precaution elucidated through judicial pronouncements are only the guiding factors to

be adopted by the Investigating Agency to ward off any suspicion about the sampling, seizure, storage and analysis process followed by it.

While any one circumstance may not necessarily be sufficient to vitiate the recovery or render the recovery suspect, existence of a large number of serious lapses in basic rules of prudence can certainly lead to a grave suspicion. The burden of proof being on the prosecution, an accused is only required to create a reasonable doubt about the case of prosecution to claim benefit of such lapse.

A Court of law cannot be expected to turn a blind-eye to breach of ordinary prudence and ignore the consequential right which accrues in favour of an accused person solely because the case is registered under the NDPS Act and that the recovered quantity is commercial. An accused is tried for commission of an offence and convicted for an offence proved against him. Such conviction is not based on preponderance of probabilities or grave likelihood of the accused being involved in the commission of offence. Law needs no reiteration that suspicion, how-so-ever grave, is not a substitute of proof.

The lapses that go to the root of recovery or give rise to serious and well-founded apprehensions cannot be ignored by a rant of negligent errors.

Prosecuting agency being an essential tool in the dispensation of justice is also required to not only act fairly but must also be seen to be acting fairly and as per the procedure known to law. A cumulative effect of discrepancies that individually seem non-descript can collectively be damaging to the entire edifice of the prosecution case.

On a perusal of the aforementioned judicial pronouncements

that a sample cannot be held to be a representative sample of the property so seized in the absence of the material particulars and details and noticing that there is a failure on the part of the Investigating Agency to establish that the case property was kept in safe custody or that it was infact kept intact, it cannot be held that the appellant-accused is liable for being in possession of the entire quantity of alleged contraband so seized. The result of the sample analysis cannot be applied to the entire quantity for want of material on record to suggest and establish that the entire seized contraband was of the same make, batch and manufacturing facility and was manufactured in the same lot or was within the expiration date as on the date of its seizure. Further, there is no explanation as to why the Investigating Officer/SHO kept the samples in his possession instead of depositing the same with the Malkhana especially when the seal of the said property had already been returned to him. The same leads to a suspicion well founded in light of the fact that the Investigating Officer stated that the seized material was off-white in colour, whereas the colour of the contraband seized was orange. No explanation has also been furnished as to why the distinct mark of identification of the contraband was not mentioned in the inventory and why the seized contraband was not produced in Court to verify the same and ascertain that the seized bulk sample carried identical contraband and that the analysis result of the FSL would apply to the entire amount of contraband seized. No explanation has also been furnished for non-compliance of the procedure prescribed under the Punjab Police Rules.

Taking into consideration the discrepant circumstances noticed in the preceding paras and the precedent judgments of this Court as well as of the Hon'ble Supreme Court relating to the violation of the provision of

Section 52-A of the NDPS Act, it leads to a suspicion regarding the seized property having been kept intact or in safe custody in the facts of the instant case. Section 55 of the NDPS Act mandates an officer-in-charge of a Police Station to take charge of the contraband and to keep it in safe custody. Even though the said provision is an enabling provision and not a mandatory provision, however, blatant disregard of the same may mandate an explanation to be tendered by the Investigating Agency for non-compliance thereof. In a matter where the seized items were not produced in the Court as an Exhibit and the case of the prosecution being based solely on the testimony of the police officers and in the absence of any satisfactory explanation by the prosecution for non-production of the seized contraband as an Exhibit in the trial, the benefit of doubt was extended to an accused by the Hon'ble Supreme Court in the matter of **Gorakh Nath Prasad Versus State of Bihar**, reported as (2018) 2 SCC 305.

Accordingly, the appellant-accused is entitled to a benefit of doubt in his favour. The judgment of conviction and order of sentence dated 01.03.2018 passed by the Judge Special Court, Mansa in FIR No.50 dated 07.08.2013 under Section 22/61/85 of the NDPS Act, registered at Police Station Jaurkian, District Mansa, is accordingly set aside and the appellant-accused is discharged.

The instant appeal is allowed.

May 25, 2022
seema

(VINOD S. BHARDWAJ)
JUDGE

Whether speaking/reasoned: Yes/No

Whether Reportable: Yes/No