

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

CRA-S-262-SB-2018 (O&M)

Reserved on: 01.08.2022

Date of decision: 26.08.2022

BUTA KHAN

...Appellant

Versus

STATE OF PUNJAB

...Respondent

CORAM: HON'BLE MR. JUSTICE SURESHWAR THAKUR

Present: Ms. Manpreet Ghuman, Advocate
for the appellant.

Mr. M.S. Nagra, Asst. A.G. Punjab

SURESHWAR THAKUR, J.

1. The learned Special Judge, Patiala through a verdict drawn on 02.12.2017, upon Sessions Case No.10 of 21.02.2017, made a verdict of conviction, upon, the convict qua charges drawn against him, under Section 22 of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as “the Act”), and, thereafter through a separate sentencing order, drawn on 02.12.2017, proceeded to sentence the convict to rigorous imprisonment extending upto a term of 10 years, and, also imposed, upon him a fine of Rs.1,00,000/-, besides in default of payment of fine, he sentenced the convict to undergo rigorous imprisonment for one year.

2. The convict becomes aggrieved from the verdict of conviction, and, consequent therewith sentence (supra), as became imposed upon him, by the learned Convicting Court, and, is led to institute thereagainst, the instant appeal before this Court.

3. The investigating officer concerned, after apprehending the convict-accused at the crime site, caused recoveries of COREX, besides of LOMOTIL tablets, from the polythene bag lying in a black colour polythene bag, as, held in the right hand of the convict. On counting the recovered bottles make COREX, they were found to be 15, and, each bottle was found to be bearing manufacture date May 2016, and, expiry date October 2017. Moreover on counting the recovered intoxicant strips of LOMOTIL, they were found to be 9 in number, and, each strip was found to be containing, 60 tablets, and, total number thereof was found to be 540 tablets, besides, each strip was found to be bearing the manufacturing date January 2016, and, expiry date June 2018. The above made recoveries were kept in the same polythene bags, wherefroms they were retrieved, and, also at the crime site, the investigating officer concerned, proceeded to prepare cloth parcels of the seizure. The cloth parcel was sealed with seal impression IS.

4. The above recovery was, as unfolded in Ex. PW-2/B hence effected, at the crime site,.

5. The accused was arrested through memo embodied in Ex.PW-2/D. Through a memo drawn in Ex.PW-2/E, the investigating officer concerned, made a personal search of the convict, and, resultantly the recoveries as detailed therein became effected. Subsequently, the investigating officer concerned, caused production of the seizure, as made, at the crime site, before the SHO of the police station concerned, and, through a memo drawn in Ex.PW-2/F, and, in Ex.PW-2/G, at the police station concerned, the SHO after properly checking the case property attested the same with his seal impression bearing superscription GS. The FIR bearing No.62 of 01.09.2016 was registered at the police station

concerned, after a ruqa being sent there from the crime site through a police official, by the investigating officer concerned.

6. Ex.PW-2/L signed by the Judicial Magistrate concerned, and, contents whereof are extracted hereinafter, do on their perusal reveal, that during the course of preparation of the inventory with respect to the seizure rather the apposite seizure(s) becoming sealed with seal impression bearing superscription HS, and, also its perusal reveals that, the remaining case property appertaining to COREX, and, LOMOTIL becoming enclosed in separate case property parcels. Through Ex.PW-2/I, a parcel containing one bottle COREX, and, another parcel containing 20 tablets of LOMOTIL, became sent through Head Constable Ravinder Kumar No.1303/GRP, to the FSL Phase-4, Mohali, for the makings of analyses thereons. The FSL concerned, made thereons its opinion, opinion whereof, is borne in Ex.PW-2/N. A perusal of Ex.PW-2/N, unfolds that on examination of the stuff inside the cloth parcels concerned, an opinion being formed by the examiner concerned, that each of the parcels rather containing the prohibited psychotropic substance(s).

<i>Details of cases in which the Articles were recovered</i>	<i>Description of Articles</i>	<i>Weight/ Qnty.</i>	<i>Description remarks of seal used on the Articles</i>
<i>FI.R. No.62 Dated 01.09.2016 U/s 22-61-85 NDPS Act S/V Butta Khan P.S. GRP, Patiala</i>	<i>A parcel containing 1 sample bottle COREX A parcel containing sample 20 tablets LOMOTIL</i>	<i>1 bottle COREX 20 tablets LOMOTIL</i>	<i>HS</i>

The article sent through HC Ravinder Kumar No.1303/GRP certified that one articles are intact and in good condition. Each bottle of other articles being wrapped us separately.

Sd/-

*Sub Divisional Judicial
Magistrate, Rajpura*

Office of the assistant Inspector General, G.R.P. (Punjab), Patiala.

No.3062526 date 07.09.16

Sd/-
Assistant Inspector General,
G.R.P (Punjab), Patiala.

HC Ravinder Kumar 1303,
Mobile No.9855045410
MHC 8588075631
Dated 07.09.2016

7. The report of the Chemical Examiner Ex.PW-2/N, is ad-verbatim reproduced hereinafter.

“xxx

3. Case reference: FIR No.62 dated 01.09.2016 U/S 22/61/85 ND & PS Act, PS GRP Patiala.

4. Date of Receipt: 07.09.2016

5. Mode of Receipt: Through HC Ravinder Kumar, 1303/GRP

6. Articles Received: Two parcels marked as 1 and 2 in the laboratory, each sealed with one seal of 'HS' alleged to contain intoxicating material. Seals on the parcels were found intact and tallied with the specimen seal impressions.

On opening the parcels were found to contain the following:

Parcel no.1: A small sized plastic bottle labelled as 'COREX' containing 100 ml orange coloured liquid material.

Parcel no.2: Twenty tablets of white colour in a strip labelled as 'Lomotil'.

Average weight = 63 mg/tablet

7. Purpose of reference: Analysis and Report.

8. Identification & Tests:

Ingredients present	Average quantity of ingredients in the parcel no.	
Chlorpheniramine Maleate	3.4mg/5ml	-
Codeine Phosphate	9.5mg/5ml	-
Diphenoxylate Hydrochloride	-	2.3mg/tablets
Atropine Sulphate	-	0.022mg/tablet

REPORT

The contents of the parcels no.1 & 2 under reference have been analyzed separately by chemical analysis. On the basis of analysis, the ingredients alongwith their quantities found present in these have been given at serial No.8 (Identification and Tests) of this report.

Caused it examined

Examined by

Sd/- Asst. Director (Toxi)

Sd/- (Sandeep Kaur)

Assistant Director (Toxicology)

(Scientific Officer (Toxicology)

Forensic Science Laboratory

Scientific Officer (Toxicology)

Punjab Phase-IV, S.A.S. Nagar

Forensic Science Laboratory

Punjab Phase-IV, S.A.S. Nagar”

8. Since a perusal of Ex.PW-2/B reveals that, the recovery of the seizure was made from the polythene bag held, by the convict, at the relevant time, in his right hand. Resultantly when the recovery was made obviously not from any of the pockets of the trouser(s) or of the shirt or from pockets of the over clothes, if any, worn, at the relevant time, by the convict, and/nor, became effected, upon, the contraband being tethered onto the body of the convict. Therefore, when only in the latter events, there was a dire statutory necessity qua prior to the making of a personal search of the convict rather by the investigating officer concerned, qua the convicts' apposite written consent within the ambit of Section 50 of the Act, hence being obtained by the investigating officer concerned. In sequel when given the effectuation of recovery from the polythene bag held, rather by the convict in his right hand, thereupon, the afore recovery, did save the application thereons, qua the mandate of Section 50 of the Act.

9. Though, at the crime site, and, as unfolded by the recovery memo to which Ex.PW-2/B is assigned, the seizure was enclosed in a cloth parcel, and, thereons seal impression IS was embossed, and, also though subsequently at the police station concerned, the SHO concerned, as unveiled by Ex.PW-2/F, and,

by Ex.PW-2/G, hence made on the sample cloth parcels seal impression GS, but

since the case property became subsequently produced before the learned Magistrate concerned, for enabling him to prepare an apposite inventory, and, when there, as unfolded by Ex.PW-2/N, the bulk parcels were embossed with seal impression HS, and, the remaining sample parcels became also, after becoming enclosed in cloth parcels, rather embossed with seal impressions HS. Consequently, the seal impressions, as carried on the bulk as well as on the sample cloth parcels concerned, were required to remain in an untampered condition, from the phase commencing from the preparation of Ex.PW-2/B, upto their production in Court. The evidence in respect of the case property, remaining untampered, and, that too uninterruptedly from the drawing of Ex.PW-2/B, upto production thereof in Court, became comprised in qua each of the cloth parcels concerned, in contemporaneity, to their respective production (s) in Court, rather unveiling qua each carrying seal impression HS.

10. However, the sample parcels are revealed in Ex.PW-2/L, to become sent through HC Ravinder Kumar, to the FSL concerned, and, therein it is also echoed, that each of the sample parcels became embossed with seal impression HS.

11. The report of the FSL concerned, which has been *ad-verbatim* reproduced hereinabove, though reveals that, at the time of the sample cloth parcels becoming received in the FSL concerned, rather the sample cloth parcels carrying seal impression HS, but subsequently after the retrievals therefrom qua the stuff inside each, and, whereafter the apposite stuff, upon, becoming analysed, and, examined, it become opined, that it contains the prohibited substance, but significantly the Chemical Analyst concerned, did not yet proceed to re-enclose the examined stuff, into the cloth parcels nor did he proceeded to emboss thereons, rather the seal impression of the FSL concerned. The result of

the above omission, does cause the inevitable effect, that the prosecution has been unable to link the opinion of the FSL, as carried in PW-2/N, with the bulk parcels, which however never became sent for analysis to the FSL concerned. The further consequence thereof, is obviously that the bulk parcels concerned, cannot be concluded to be also containing the prohibited substance.

12. The above infirmity was curable through the Public Prosecutor concerned, casting an appropriate motion before the learned Special Judge concerned, that yet samples being drawn from the bulk preserved in the police malkhana concerned, and, theirs through a validly drawn certificate, rather being sent, to the FSL concerned. However, the Public Prosecutor concerned, never cast the above motion before the learned Special Judge concerned, and, the above omission, begets a sequel, that the prosecution for proving the charge against the accused depended, only upon Ex.PW-2/N, which however for reasons (supra), does not link the opinion made therein rather with the bulk parcel(s).

13. An additional fortification to the above inference, becomes garnered from the factum that, not only the bulk parcels were required to be produced in Court, but also the sample cloth parcels, as sent to the FSL concerned, under a validly drawn road certificate, were also necessarily required to be produced in Court, to ensure that, not only upto the transmission of the sample cloth parcels to the FSL concerned, the thereons made seals impression, remained untampered with or remained intact, but also necessarily required that, after examination of the stuff inside the cloth parcels, the Chemical Analyst concerned, not only re-enclosing the stuff examined inside the cloth parcels, but also embossing thereons', the seal impressions of the FSL concerned. However, as above stated, the above did not happen, and, nor did the Public Prosecutor

concerned, despite the above infirmity, cast any motion for the requisite purpose before the learned Special Judge concerned, with the resultant ill-sequel, that the infirmity (supra), hence percolating the report of the FSL rather remaining alive.

14. The above narrated necessities are not merely perfunctory nor are mechanical, rather work towards unflinchingly proving the charge drawn against the accused. The charge would become efficaciously proven, only when the stuff inside the cloth parcels, is opined to be the apposite prohibited substance, which though however, is revealed in Ex.PW-2/N, but yet the FSL concerned, was to re-enclose the stuff examined inside the cloth parcels concerned, and, was to also emboss thereons, the seals of the FSL, as, then the cloth parcels would become retrieved to the police malkhana concerned, for thereafter theirs becoming produced before the learned Special Judge concerned, which again never happened.

15. The sample cloth parcels whereons an adverse opinion, becomes drawn against the convict, by the FSL concerned, can never become the property of the FSL concerned, "but is case property" and, is obviously required to be returned, by the FSL concerned, to the police malkhana concerned, for thereafter its becoming produced in Court, as, only upon its production in Court the factum of its provenly becoming linked with the road certificate, and, also its apposite link, with the report of the FSL, would become established, and, rather only when after examination of the stuff inside cloth parcels, the same, became re-enclosed in them, and, thereafter the seals' of the FSL become also embossed, hence, on each of the sample cloth parcels. Reiteratedly the above has not happened, and, as above stated despite the sample cloth parcels comprising the case property, they became unlawfully retained, at the FSL concerned. Even otherwise, the incriminatory opinion of the FSL concerned, is required to be

corroborated, by the production of the apposite sample cloth parcels, as, sent to it, rather before the learned trial Judge concerned, as the primary evidence for relying, upon the report of the FSL concerned, is the stuff inside the sample cloth parcels concerned. The reason being that alike, the report of a Handwriting Expert concerned, which becomes bedrocked, upon the apposite documents sent to it for comparison, and, as such, the writings concerned, becoming necessarily to become appended with the report, as they are rather the best primary evidence for supporting the report of the FSL concerned, also rather, the stuff inside the sample cloth parcels, is the apposite primary evidence to not only prove the charge, but also for corroborating the incriminatory opinion, as made thereons, by the Chemical Analyst concerned, therefore, the primary evidence (supra), is required to be produced in Court, and, also is required to be proven to be then in an untampered condition.

16. Even otherwise, the above necessity of the above legally enjoined acts, becoming performed by the Chemical Analyst working, at the FSL concerned, does apart from reasons (supra), also facilitate the convict, to ask for apposite re-examinations from the FSL concerned, but that would happen only when the sample cloth parcels are produced in Court. The facilitation to the accused to ask for re-examination of the stuff inside sample cloth parcels, rather by the FSL concerned, whereons an adverse opinion is earlier made by the Chemical Analyst concerned, does necessarily ensue to the accused, as the report of the FSL concerned, has only a presumption of truth, and, obviously its opinion, does not enjoy any conclusivity in law. Therefore, for facilitating the accused, to rebut the opinion of the FSL concerned, rather the production of the sample cloth parcels, in Court after their retrieval from the police malkhana concerned, is, of utmost significance. However, neither the above defence has

been purveyed to the accused nor obviously any opportunity has been given to the accused, to rebut the presumption of truth, enjoined by the report of the FSL concerned, to which Ex.PW-2/N is assigned, and, all the above hindrances to the accused hence for his efficaciously propagating his defence, have made their emergence, only because the FSL concerned, has not returned the sample cloth parcels to the FSL concerned, and, nor obviously the sample cloth parcels, as, became sent to it, never became produced in Court. Resultantly, on the above ground also, the adverse opinion, as made on the stuff inside the sample cloth parcels concerned, cannot become the plank for concluding that, the presumption of truth, if any, as attached to it, being linked either to the bulk, and/or, it carrying any legal efficacy, given apparently the stuff inside, the sample cloth parcels concerned, becoming probably destroyed, and/or, not being preserved.

17. Be that as it may, though, during the course of the examination-in-chief of PW-2, the bulk parcels became shown to him, and, though he identified them to be the ones in respect whereof, an inventory became prepared, by the learned Judicial Magistrate concerned, and, though also he did make echoings, in his examination-in-chief, that the bulk parcels remained untampered with, but the above made deposition of PW-2, and, which became corroborated by PW-5, does not yet link the opinion of the FSL concerned, to the bulk parcels, as became produced in Court. The reason being that the bulk parcels remained in the malkhana concerned, and, even despite the above infirmity existing in the report of the FSL concerned, and, even despite the sample cloth parcels becoming never returned to the FSL concerned, conspicuously the Public Prosecutor never asking the leave of the Court qua the bulk cloth parcels, being sent to the FSL concerned, rather for the stuff inside them becoming examined.

Therefore, for want of the above, no conclusion can be formed, that the stuff inside the bulk cloth parcels also contained the prohibited substance(s).

18. From the above, the following principles emerge:

- a) The bulk as well as the sample cloth parcels concerned, are case property, and, both are amenable for orders with respect to their destruction or confiscation to the State, as the case may be, being rendered only by the jurisdictionally empowered Court, and, that too upon the completest termination of the trial, as becomes entered into by the jurisdictionally empowered Court(s). Dominion over the bulk parcels, and, or over the sample cloth parcels can neither be assumed by the SHO of the police station concerned, and, nor can be assumed by the Chemical Analyst working at the FSL concerned.
- b) The production in Court of the bulk as well as of the sample cloth parcels, as, sent to the FSL concerned, is of utmost importance, as the opinion made by the FSL concerned, on the stuff inside the cloth parcels concerned, would link it with the bulk parcels, yet only upon production of the sample cloth parcels, before the learned trial Judge concerned, as the examined stuff inside the sample cloth parcels, is the primary evidence to prove the charge, and, to also corroborate the opinion of the FSL.
- c) The report of the FSL concerned, has a rebuttable presumption of truth, and, the accused for availing the right to rebut the presumption of truth attached to the opinion of the FSL concerned, can ask for re-examination by the FSL concerned, of the stuff inside the cloth sample parcels concerned, and, that would

occur only when the sample cloth parcels are produced in Court, otherwise not.

d) The stuff inside the cloth sample parcels, is the primary evidence, and, report of the FSL concerned, as made in respect thereof is secondary evidence, and, unless primary evidence is adduced before the Court, the secondary evidence does not acquire any probative vigor or any evidentiary worth.

19. The result of the above discussion is that, the impugned verdict suffers from a gross infirmity, of gross misappraisal of the above, and, requires its being annulled, and, set aside.

20. In consequence, there is merit in the instant appeal, and, the same is allowed. The impugned verdict, as, drawn, upon the convict, by learned Special Judge concerned, is quashed, and, set aside. The personal, and, surety bonds of the convict are directed to be forthwith cancelled, and, discharged. The convict if in custody, and, if not required in any other case, is directed to be forthwith released from prison. Release warrants be accordingly prepared. Fine amount, if any, deposited by the accused be forthwith refunded to him, but in accordance with law. Records of the Court below, be sent down forthwith. Case property, if not required, be dealt with, and, destroyed after the expiry of the period of limitation

21. Pending miscellaneous application(s), if any, stand(s), disposed of.

(SURESHWAR THAKUR)
JUDGE

26.08.2022

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