

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

205

**CRM-12992-2020 &
CRM-A-712-2020**

Date of Decision: May 06, 2022

STATE OF PUNJAB

...APPELLANT

Versus

AMANDEEP SINGH @ AMAN

...RESPONDENT

**CORAM: HON'BLE MR. JUSTICE AUGUSTINE GEORGE MASIH
HON'BLE MR. JUSTICE SANDEEP MOUDGIL**

Present: Ms. Monika Jalota, Deputy Advocate General, Punjab,
for the appellant.

AUGUSTINE GEORGE MASIH, J.

CRM-12992-2020

Prayer in this application is for condonation of delay of 36 days
in filing the appeal.

For the reasons mentioned in the application, which is
supported by the affidavit of the Deputy Superintendent of Police, Banga,
Sub-Division District Shaheed Bhagat Singh Nagar, the same is allowed.
Delay of 36 days in filing the appeal stands condoned.

CRM-A-712-2020

Present is an application filed under Section 378 (3) Cr. P.C.
for permission to file an appeal against the judgment dated 19.08.2019
passed by the Special Court, Shaheed Bhagat Singh Nagar acquitting
respondent-Amandeep Singh @ Aman for the charges framed against him

under Section 22 of the Narcotic Drugs and Psychotropic Substance Act, 1985 (hereinafter referred to as 'NDPS Act').

2. In brief, the prosecution story is that on 14.09.2018, a team of police officials headed by ASI Balbir Singh was present at canal bridge, Village Kaleran in relation to patrolling and checking bad elements. On a motorcycle bearing registration No. PB07-B-2214, a person carrying a polythene bag having certain heavy articles therein hanging on the handle of the motorcycle was seen coming. Seeing the police party, he tried to turn back his motorcycle and was apprehended by ASI Balbir Singh with the help of other officials. He disclosed his name as Amandeep Singh @ Aman. ASI Balbir Singh informed the respondent that he had a legal right to get the search of polythene carry bag conducted in the presence of Gazetted Officer or a Magistrate and the arrangement could be made at the spot.

As he reposed faith in the police party, he consented for conducting the search by the police officials which was recorded. According to the prosecution, efforts were made to join the public witness but none was ready. The search of the polythene carry bag was carried out wherein 15 injections/glass ampules of Avil containing 10 ML and 15 injections of Buprenorphine containing 2 ML without batch number were recovered. After preparation of the parcel, the same was sealed with the impression 'BS'. Sample seal impression was prepared in triplicate and the same was handed over to ASI Sukhdev Singh. As the accused could not produce any valid license or permit for carrying the intoxicating injections, offence under Section 22 of the NDPS Act was made out and he was taken into custody.

3. The information in this regard was sent to the police station for

registration of the case and after the registration of the FIR, investigation was initiated. Challan was presented in Court after completion of the investigation and on receipt of the report of the Chemical Examiner, charge was framed by the Court under Section 22 of the NDPS Act against the respondent to which he pleaded not guilty and claimed trial. The evidence was led by the prosecution and after recording the statement under Section 313 of the Code of Criminal Procedure, option was given to the respondent to lead defence evidence which he opted not to do so.

4. The trial Court, on the basis of the evidence led by the prosecution, came to the conclusion that Section 50 of the NDPS Act having not been complied with, the respondent-accused was liable to be acquitted of the charges framed against him . That apart, it was also found that in the injections of Buprenorphine, which have been recovered from the accused, there was no mention with regard to the label of the injections either by the Investigating Officer or the Magistrate which are alleged to have been recovered from the accused. However in the report of the Chemical Examiner, it has been stated that the said ampules were labelled as 'Omigesic', which created doubt with regard to the ampules which were recovered from the accused and those which were sent to the Chemical Examiner. Certain discrepancies were also found in the statements of the police officials in cross-examination especially with relation to the recording of the statements as the Investigating Officer had said that the handwriting work was done by himself alone whereas the writing was found to be in different hand. ASI Sukhdev Singh had stated that the handwriting work was done by the Investigating Officer and the Head Constable Jaskaran Singh.

All these factors were taken into consideration by the trial Court while acquitting the respondent-accused. The present appeal has been filed against the said judgment.

5. Learned counsel for the appellant-State has submitted that the trial Court has failed to appreciate that it was a case of chance recovery whereas the accused was apprehended on the basis of suspicion and the contraband was recovered from the polythene carry bag hanging on the handle of the motorcycle which was being driven by the respondent-accused. The consent memo was also proved by ASI Balbir Singh, the Investigating Officer. Since the recovery has been effected from the spot on the basis of the suspicion and the accused was in conscious possession of the contraband, there is no reason in doubting the recovery or non-compliance of Section 50 of the NDPS Act.

6. As regards the non-joining the of the independent witnesses in the investigation, she has contended that the effort was made in this regard as it is apparent from the statements of the witnesses but none chose to join, which should not lead to the conclusion that the prosecution witnesses were not credible or were deposing falsely.

7. As regards the FSL report, mentioning the injections being labelled as 'Omigesic', it has been asserted that the recovery, which has been effected from the respondent-accused, was produced intact before the learned Magistrate who had put the seal bearing impression 'LS', which has been found to be intact by the Chemical Examiner at the time when the sample was opened for testing. The same cannot be, therefore, taken against the prosecution. She, on this basis, contends that the acquittal of the respondent-accused by the trial Court vide the impugned judgment deserves

to be set aside and the respondent-accused be convicted and sentenced.

8. We have considered the submissions made by the learned Counsel for the appellant-State and with her assistance, have gone through the judgment passed by the trial Court.

9. The first aspect, which has been highlighted by the learned counsel for the appellant-State, is that the recovery, which has been effected from the respondent-accused, is a chance recovery and not from the person of the accused and, therefore, Section 50 of the NDPS Act would not apply. This contention, on the face of it, appears to be quite impressive but when seen in the light of the evidence, the same would not be the correct position.

10. There is no dispute on the part of the counsel for the appellant-State that the provision of Section 50 of the NDPS Act requires strict compliance thereof being a mandatory provision of law. The consent memo (Ex. P1), which has been recorded, clearly indicates that the personal search of the respondent-accused for recovery of the contraband, on the basis of suspicion, was being carried out. After the personal search of the respondent-accused had been carried out, as has been admitted by the Investigating Officer as well as the other witnesses, protection of Section 50 of the NDPS Act is attracted. Reliance in this regard has been placed and rightly so by the trial Court on a judgment of the Supreme Court in **State of Rajasthan vs. Parmanand and another**, (2014) 5 SCC 345, where it has been held that if a carry bag carried by a person is searched and his person is also searched, then provision of Section 50 of the NDPS Act will be applicable. The contention, thus, of the counsel for the State that Section 50 of the NDPS Act is not attracted, cannot be accepted.

11. Another aspect, which has been pointed out with regard to the

non-compliance of Section 50 of the NDPS Act, is that while giving option to the accused for being searched in the presence of the Magistrate or a Gazetted Officer, it was also mentioned in the cross-examination of ASI Balbir Singh, Investigating Officer (PW6) that he gave offer to the accused that he can get his search conducted by a Gazetted Officer or a Magistrate or by him i.e. the Investigating Officer himself. This third option, which has been given, is alien to the provisions of Section 50 (3) of the NDPS Act. This aspect has also been dealt with by the Hon'ble Supreme Court in Parmanand's case (supra), wherein it has been observed that an Investigating Officer could not have given a third option to the respondent when the Statute does not provide for it, and if such option is given, the search conducted is vitiated. Therefore, the offer of search given to the respondent-accused by the Investigating Officer being an invalid offer cannot be said to be in accordance with law.

12. The very purpose of giving an option to an accused is not only to bring transparency in the system but to give a chance to the accused to get himself searched in the presence of an independent officer, to avoid any false implication by plantation of a narcotic drug case. Wherever there is a mandatory provision of a Statute, neither anything can be deleted nor added thereto and if the same is so done, that would amount to an illegality which cannot be cured. The Investigating Officer cannot be said to be an independent person and even if consent is given by an accused for being searched by him, the said offer is not a valid offer when he is being prejudiced by a wrong information having been given to him to believe that the Statute empowers the Investigating Officer to search by putting him on an equal pedestal of a gazetted officer or a Magistrate.

13. Now moving on to the second important aspect, which has been taken into consideration by the trial Court for giving the benefit of doubt to the respondent-accused, is the non-mentioning of the factum of the samples of Buprenorphine injections being labelled as 'Omigesic'. The said aspect gives a fatal blow to the case of the prosecution and creates a doubt as to whether the same sample, which was taken at the time when the recovery was effected, has been sent and checked by the Chemical Examiner and, therefore, the report of the Chemical Examiner itself cannot be read in the context of the ampules recovered from the accused.

14. It is an admitted position that there is no mention in the order passed by the Magistrate and the documents placed on record by the prosecution about there being any labelling on the vials of the Buprenorphine injections. Even the Investigating Officer has not mentioned the same or has, in his statement before the Court, so asserted. The report of the Chemical Examiner, however, clearly spells out that the samples were labelled as 'Omigesic'. This being a discrepancy which goes to the extent of coming to a conclusion that the report of the Chemical Examiner cannot be connected with the recovery allegedly effected of the injections from the accused. The said aspect raises a serious doubt with regard to the genuineness of the prosecution version and thus, leads to the conclusion that the recovery, which has been effected, if any, was not the same which has been converted into samples and sent to the Chemical Examiner.

15. The argument of the learned counsel for the State that the seal, which has been put by the Magistrate and marked as 'LS', which was found intact, would not really show or prove that the samples were the same which were recovered from the accused. The reliability and trustworthiness for

such samples cannot be, thus, relied upon where strict provisions of the NDPS Act are required to be complied with. The said plea, thus, cannot be accepted of the State counsel.

16. There are contradictions, discrepancies in the testimonies of the prosecution witnesses which cast doubt upon the veracity of their statements especially with reference to the handwriting being different in the police file where the Investigating Officer having stated that he had done the handwriting work himself whereas the other member of the police party ASI Sukhdev Singh (PW4), in his cross-examination, has stated that handwriting work was done by the Investigating Officer ASI Balbir Singh and Head Constable Jaskaran Singh.

This aspect has also been pointed out by the learned trial Court mentioning the discrepancies in the statements of the prosecution witnesses. A doubt, as has been rightly created in the mind of the trial Court which is well placed and based upon the non-compliance/violation of the mandatory provisions of the law as also the credibility of the prosecution witnesses especially when there are discrepancies and contradictions in their testimonies.

17. Another aspect, which has been pointed out and mentioned by the trial Court, is that after the recovery has been effected, nothing has been mentioned as to whether any effort has been made by the prosecution with regard to the source, from where the contraband was procured by the accused and similarly, as to where this contraband was sought to be delivered. Neither the origin of the contraband nor the final destination thereof has been sought to be traced what to say found. This also creates a doubt in the mind of the Court with regard to the truthfulness and the

credibility of the recovery effected from the accused. This is a glaring lapse on the part of the Investigating Officer which has been taken into consideration.

18. In the light of all the above aspects, we do not find the present to be a fit case where permission to file appeal against the judgment dated 19.08.2019 passed by the Special Court, Shaheed Bhagat Singh Nagar is made out and, therefore, permission to file an appeal stands declined.

19. Thus, the appeal stands dismissed.

(AUGUSTINE GEORGE MASIH)
JUDGE

(SANDEEP MOUDGIL)
JUDGE

May 06, 2022
pj

Whether speaking/reasoned:	Yes/No
Whether Reportable:	Yes/No