

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

CRM-A-88-2022 (O & M)
Date of decision: 11.10.2022

State of Punjab

....Appellant(s)

Versus

Bharat Kumar

....Respondent(s)

**CORAM: HON'BLE MR. JUSTICE G.S.SANDHAWALIA
HON'BLE MR. JAGMOHAN BANSAL**

Present: Mr. Navneet Singh, Sr. DAG, Punjab.

G.S.SANDHAWALIA, J.

CRM-11553-2022

Application has been filed for condonation of delay of 22 days in filing the application for grant of leave to appeal.

Keeping in view the averments made in the application duly supported by affidavit of the official, application is allowed. Delay of 22 days in filing the application for grant of leave to appeal is condoned.

CRM stands disposed of.

CRM-A-88-2022

The present application has been filed under Section 378(3) Cr.P.C. for grant of leave to appeal against the judgment of acquittal passed by the Special Court, Shaheed Bhagat Singh Nagar dated 25.11.2019, whereby acquittal has been recorded of the respondent in FIR No. 06 dated 18.01.2018 under Section 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short 'the Act'), P.S. Sadar Banga.

Counsel for the State has argued that the trial Court was not justified in applying the principles of Section 50 of the Act since the search was effected from the polythene envelop being carried on the handle of the motor cycle and, therefore, the benefit of mandate of Section 50 of the Act should not have been extended to the respondent. Accordingly, it is submitted that because there was no independent witness and merely because there were discrepancies in the statement of the police officials, it was not a ground for acquittal since it had come on record that recovery of 15 injections/glass ampules of Buprenorphine (2 ml each) and 14 injection vials of Avil (10 ml each) was made.

We have perused the paper book and the record which was summoned. The reasoning given by the trial Court is manifold to the extent that firstly the benefit was granted under Section 50 of the Act on the strength of the judgment of the Apex Court in ***Arif Khan @ Agha Khan vs. State of Uttarakhand, 2018 (2) RCR (Crl.) 931***. It was accordingly held that the accused having not been taken before any Gazetted Officer or a Magistrate in order to effect the search, mandatory provisions of Section 50 had been violated. The other aspect which weighed with the trial Court was that the consent statement which had been placed on record as Ex.P-10 shows that the offer of search was given by stating that he was carrying intoxicant injections of Buprenorphine and Avil in the polythene envelope. The accused had given his alleged consent which amounted to making a self inculpatory statement and it was only as such managed to show the compliance of the mandatory provisions of law. It was noticed that the consent memo itself talked about the fact that the accused had signed his consent statement in English and the trial Court rightly doubted as to how

the Investigating Officer would know that the accused was to sign in English under his consent statement. Thus, a finding was recorded that apparently the signatures of the accused were obtained on a blank paper and the body of the text was written thereafter and, thus, the consent memo itself was not properly prepared and could not be relied upon for seeking conviction. It was also noticed that in the FIR (Ex.P-14), it had been mentioned that “Diagesic” injections were recovered whereas the recovery memo alongwith the order passed by the Chief Judicial Magistrate dated 19.01.2018 (Ex.P-6) and the report of the Chemical Examiner (Ex.P-9) would go on to show that they were labeled as 'Omgesic'. Thus, it was held that different words had come on record regarding the injections recovered from the accused. Therefore, it was held that the prosecution could not prove the identity of the contraband as to what was recovered and seized from the accused and what was tested in the laboratory. Thus, the benefit was given while placing reliance upon judgment passed in ***Vijay Pandey vs. State of Uttar Pradesh, 2019(3) RCR (Crl.) 926.***

There were contradictions in as much as when the police party reached back at the police station, which was stated to be at 10.30 p.m. by PW-4 ASI Kulwinder Singh whereas Investigating Officer ASI Avtar Singh, who deposed as PW-6, stated that they had proceeded towards the police station from the place of recovery at about 5.20 p.m. It is a matter of record that the police station is only 6 kilometers as such from the place of recovery and the police party was stated to be on private vehicles as such. Therefore, apparently there is a major discrepancy between the statements of the two police officials. Resultantly, keeping in view the fact that no independent witness was joined and while noticing that it is not mandatory as such but on

account of the discrepancies and contradictions and the fact that the house of the accused was not raided to find out whether any other part of the contraband was available at his place and whether the accused was dealing with such contraband articles, the method of investigation and the lack of tracing the origin of the contraband was also frowned upon to give the benefit of doubt.

On examining the record, we are of the considered opinion that the trial Court did not fall in any error in taking the view which it has taken. It is to be noticed that it has been admitted by the PW-6-Investigating Officer namely ASI Avtar Singh that the personal search as such of the accused was also conducted and, therefore, the argument raised by the State that the recoveries were from the polythene bag and not from the person of the accused is also liable to be rejected. Reliance can be placed upon the judgment of the Apex Court in ***State of Rajasthan vs. Parmanand and others, 2014 (2) RCR (Crl.) 40***, wherein, it has been held as under:-

“12. Thus, if merely a bag carried by a person is searched without there being any search of his person, [Section 50](#) of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, [Section 50](#) of the NDPS Act will have application. In this case, respondent No.1 Parmanand’s bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of respondent No.2 Surajmal was also conducted. Therefore, in light of judgments of this Court mentioned in the preceding paragraphs, [Section 50](#) of the NDPS Act will have application.”

It is not disputed that the search was not carried out in the

in *Vijaysinh Chandubha Jadeja vs. State of Gujarat, 2010 (4) RCR (Crl.) 911* would come into play. The fact remains that the police party was also on private vehicles when they had stopped the accused. It has also come on record that no other person was stopped and it was only the respondent who was stopped and the recovery of 15 injections/glass ampules of Buprenorphine (2 ml each) and 14 injection vials of Avil (10 ml each) was effected. The Investigating Officer also admitted that he tried to join public witness in the investigation but nobody was ready to join. Apparently the police party was present at Bridge Canal of village Mahil Gehlan and had placed a *naka bandi* with private vehicles and it was at about 5.40 p.m. on 18.01.2014. As per the statement of other police personnel, one of them had left the spot while taking the lift to take the *ruqa* to the police station. The said official had also returned back to the spot while taking a lift from someone and, therefore, the stand as such that there was no independent person available or willing to join the police party apparently shows that the defence of the accused that he was picked up from the house alongwith the motor cycle seems to be a probable defence.

It has also been noticed that the consent memo (Ex.P-10) had been duly signed in English and the factum remains that in the memo itself, the police official had already mentioned that the accused had signed in English which is highly unlikely that he would know that he would sign in English at that point of time. Therefore, the credibility of the consent memo itself has been rightly doubted.

The factum of the FIR mentioning that the seized drug as such was showing the recovery of “Diagesic” injections but the sample and the report of the Chemical Examiner showed that they were labelled as

'Omgesic' and, therefore, there is an apparent contradiction as such which the prosecution failed to clarify. It is also to be kept in mind that the investigation was not taken to the logical conclusion by raiding the house of the accused to find out if other more recoveries were available and neither did the police tried to trace the origin of the contraband. In cross examination of the Investigating Officer, it has also come to light that the statement of the manufacturer was not recorded nor the premises of the manufacturer was visited and no effort was made to join them in the police proceedings. A perusal of the order as such of the Magistrate dated 19.03.2018 (Ex.P-6) would go on to show that the drug is stated to have been manufactured by unit at Dehradun but no effort as such was made to co-relate that it was from that particular manufacturing unit and that the same had been supplied in the said area to some chemist from where it is alleged to have come into the hands of the accused-respondent.

PW-4 ASI Kulwinder Singh has also admitted in his cross examination that no independent witness had joined despite the availability at the time of offer, search and recovery. The statement of the Investigating Officer has also said that they had proceeded towards the police station from the place of recovery at about 5.20 p.m. whereas the PW-3 SHO Rajiv Kumar, in his statement, has submitted that the accused was produced before him alongwith the injections at about 10-10.30 p.m. This would be highly unlikely keeping the fact that the distance between the police station and the place of recovery is only 6 kilometers as per the FIR and as noticed, even the police official had taken a lift and come back by the time the papers were being prepared and the number of the FIR was accordingly mentioned even

Thus, keeping in view the cumulative factors, we are of the considered opinion that the trial Court did not err in any manner while acquitting the respondent, who has examined the evidence in detail and there is a double presumption of innocence in favour of the respondent-accused. There is no vice of perversity in the judgment under appeal which would give us reason to reopen the same. Keeping in view the settled principle of law, we are of the considered opinion that no case is made out to grant leave to appeal against the judgment of acquittal recorded by the trial Court which has been rendered in favour of the respondent. The present application accordingly stands dismissed.

(G.S. SANDHAWALIA)
JUDGE

11.10.2022
shivani

(JAGMOHAN BANSAL)
JUDGE

Whether reasoned/speaking
Whether reportable

Yes/No
Yes/No