

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRM-A-162-2020 (O&M)

Reserved on :21.03.2023

Date of Pronouncement: 11.04.2023

State of Punjab

...Appellant.

Versus

Sandeep Singh

...Respondent.

CORAM: HON'BLE MR. JUSTICE M.S. RAMACHANDRA RAO
HON'BLE MRS. JUSTICE SUKHVINDER KAUR

.....

Argued by: Mr. Sandeep Vermani, Addl. A.G., Punjab.

Sukhvinder Kaur, J.
CRM-2301-2020

Prayer made in the application is for condonation of delay of 09 days in filing the appeal.

For the reasons mentioned in the application, delay of 09 days in filing the appeal is condoned.

Application is allowed.

CRM-A-162-2020

1. Appellant-State of Punjab has preferred the instant application under Section 378(3) Cr.P.C. seeking leave to appeal against judgment dated 24.09.2019, passed by learned Judge, Special Court, Tarn Taran, vide which respondent/accused-Sandeep Singh has been acquitted.

2. The factual scenario, as highlighted by the prosecution, is that on 16.05.2015, police party headed by SI Vishwa Mittar and consisting of HC Charanjit Singh and other police officials were going for patrolling in the area of Baath Chowk Bye-pass, Opposite Grain Market, Tarn Taran.

Then from the side of village Kakka Kandiala, one motorcycle make Hero Honda Passion without any registration number came at a very fast speed, which was spotted by the police party. Two persons were riding that motorcycle. The person who was driving the motorcycle disclosed his name as Sandeep Singh son of Jaswant Singh, resident of new Madhopuri, Ludhiana and the person, who was the pillion rider, disclosed his name as Gora Singh son of Balbir Singh, resident of Kotakpura, District Faridkot. Police party tried to join some independent witness but nobody agreed for the same. Then personal search of Sandeep Singh was conducted and from the pocket of his trouser, which he was wearing, he tried to throw away some polythene envelope. Gora Singh also tried to throw away some polythene envelope, on the ground, after taking it out from the pocket of his shirt. The accused persons were apprehended and when the polythene envelop of Sandeep Singh was checked, then it was found containing intoxicant powder, out of which a sample portion of 5gms was separated and remaining bulk portion came to 250 gms. The same were put into separate plastic containers and converted into parcels and sealed with the seal VM and vide recovery memo, they were taken into the police possession. The Polythene envelope which was found in possession of Gora Singh was also found to contain the intoxicant powder and out of which a sample portion of 5 gms was separated and the remaining bulk portion came to 255 gms. These were also put into separate plastic containers and converted into parcels and sealed with the seal VM and were taken into police possession. The seal after use was handed over to HC Charanjit Singh. The motorcycle was also taken into police possession vide memo Ex.P8. Then Ruka was sent to the police station through HC Charanjit

Singh, on the basis of which, the present FIR was registered against the accused persons under Sections 22/61/85 of NDPS Act. On receipt of report from the office of Chemical Examiner and after the completion of all other necessary formalities of the investigation, the Challan was presented in the Court against the accused persons.

3. After finding a prima facie case against respondent-accused, he was charge-sheeted for the offence under Section 22 (c) of NDPS Act, to which he pleaded not guilty and claimed trial.

4. Accused Gora Singh was declared as proclaimed offender during pendency of the trial and after concluding the trial qua accused Sandeep Singh, the trial Court acquitted accused-Sandeep Singh.

5. Aggrieved by the said decision, appellant-State of Punjab has filed the present application for seeking leave, to file an appeal against acquittal of accused-Sandeep Singh.

6. We have heard Mr. Sandeep Vermani, Additional Advocate General, Punjab, and have also perused the record.

7. Learned counsel for the appellant has vehemently contended that the trial court has miserably failed to correctly appreciate the facts of the present case, that this case is a case of recovery of heavy commercial quantity of the contraband from the accused, which itself rules out false implication. He has contended that in case of chance recovery, provisions of Section 50 of NDPS Act, are not applicable and in this respect, he has relied upon **State of H.P. Vs. Sunil Kumar, AIR, 2014 SC 2564** and has contended that mere suspicion, even if it is a 'positive suspicion' or grave suspicion cannot be equated with 'reason' to 'Believe' as these are two completely different concepts. Section 50 of NDPS Act is applicable only in

case of personal search of the accused, acting on prior information by the Investigating Officer and it is not applicable in case of recovery of any bag or envelope in the hand of the accused. He has further contended that the non joining of the independent witness is also not fatal to the prosecution case as the people from general public hardly take any interest or are willing to become a witness in criminal proceedings and in this context, he has relied upon the judgment of Hon'ble Supreme Court in **Akmal Ahmad Vs. State of Delhi, AIR 1999 SC, 1315**. He has further urged that the link evidence is also complete in the present case. Section 57 of the NDPS Act is not mandatory and is only directory in the nature as held in **Gurbax Singh Vs. State of Punjab, AIR 2001 SC, 1002**. He has also contended that the delay in sending sample parcel is also not fatal to the prosecution, as held in **State of Orissa Vs. Kandun, Sabeo, AIR 2004(1) SCC 337** and has prayed that sufficient evidence is on record for conviction of the accused person, so the appellant may be granted leave to appeal against the judgment of acquittal qua respondent Sandeep Singh.

8. It is well settled proposition of law that judgments of acquittal should not be interfered with lightly and courts have to be extremely careful while hearing such appeals. The Appellate Court is to interfere with the order of acquittal only, when there is perversity of facts and law.

9. Now coming to the merits of the present case, having heard learned counsel for the applicant-State at length and having perused the judgment as well as the other relevant record, we are of the considered opinion that the prosecution was unable to prove its case against the accused beyond the reasonable doubt. It has to be borne in mind that the NDPS Act provides for very stringent punishment in case the accused is

found to have committed an offence under the same and therefore, it is all the more important and imperative for the prosecution to prove its case beyond the reasonable doubt. It is for this reason that several safeguards have been provided under the Act and it is obligatory upon the investigating agency and then the prosecution to comply with these provisions.

10. The perusal of the judgment of learned trial Court reveals that a very well reasoned judgment discussing about each aspect has been passed.

11. The trial Court has rightly held that the prosecution has badly failed to comply with the mandatory provisions under Section 50 the NDPS Act. The perusal of the statement of PW6 Retd. Inspector Vishwa Mittar, who is the investigating officer, reveals, that he has stated that when he was going to conduct search of the accused, in the meantime Sandeep Singh took out a polythene bag from pocket of his pant and Gora Singh also took out a polythene bag from pocket of his shirt and both of them tried to throw away these polythene bags but were apprehended in their attempt to do so. Then on checking the polythene envelope of Sandeep Singh, it was found to be containing intoxicant powder, out of which a sample of 5gms was separated and put into a plastic container which was converted into parcel and remaining bulk portion was weighed which came out to be 250 gms, which was put into another separate plastic container and converted into parcel. On checking the polythene envelope of Gora Singh, it was also found to contain the intoxicant powder, out of which a sample of 5 gms was separated and put into a plastic container which was converted into parcel and the remaining bulk portion was weighed which came out to be 255 gms, which was put into another separate plastic container and converted into parcel. All the parcels were sealed with seal impression VM. So from his

testimony it is apparent that while conducting the search of the accused persons no offer as required under Section 50 of the NDPS Act was made and consequently no consent memo was prepared. No gazetted officer was called at the spot. In his cross-examination, the Investigating Officer has categorically admitted that recovery was effected from the hands of the accused persons while they were trying to throw away the polythene packets on the ground. He has again categorically admitted that no compliance of Section 50 of the NDPS Act was made by him and he did not make any offer prior to the personal search of the accused and no gazetted officer was called at the spot. The testimony of PW2-HC Charanjit Singh, the recovery witness is completely contradictory to the Investigating Officer when he has stated in his cross-examination that before conducting the personal search of accused the Investigating Officer apprised the accused of his legal right to be searched from him or from gazetted officer or from Magistrate. However, he has also admitted that no consent memo was prepared in this regard. So from the testimonies of these two most material witnesses of the prosecution, it clearly transpires that before conducting search of the accused no offer was made to them and no consent memo was prepared and no gazetted officer was called at the spot and as such, there is complete violation of Section 50 of NDPS Act. So, when admittedly the accused was carrying the contraband in a polythene bag which was taken out of pocket of his trouser, then obviously recovery was effected from personal search of the accused and in that eventuality Section 50 of the NDPS Act was attracted. So this contention of learned State counsel is devoid of any merit that since it was a chance recovery so no compliance of Section 50 of the NDPS Act was required to be made.

12. From the testimony of the above said two prosecution witnesses, it is further apparent that no independent witness was joined by the police at the time of the alleged recovery. It has been admitted by PW6 in his cross-examination that alleged place of recovery is a thoroughfare. He has also stated that he tried to join the public witness in the police party but none was ready. But the abovesaid bare statement of PW6 is not sufficient to prove that any serious and sincere attempt was made by the Investigating Officer to join some public witness or respectable inhabitants of the locality at the time of the alleged recovery, even though the independent persons were available there for this purpose. Neither anything came on record that any action was taken by the Investigating Officer against the persons who refused to join as independent witness in the police party, nor any particulars of such persons have been recorded who were not willing to join the police party. Trial Court has rightly observed that joining of the independent witness, when there was ample opportunity for the same, would have lent some credence to the prosecution case. But when no independent witness has been joined as prosecution witness despite ample opportunity, then much authenticity and creditworthiness cannot be attached to these proceedings conducted by the Investigating Officer. Moreover, the non joining of the independent witness has assumed more importance especially, when the prosecution evidence is not cogent, convincing and reliable on other accounts also and when PW2 the recovery witness and Pw6 the Investigating Officer are contradictory to each other even on the point of making the offer to the accused at the time of conducting of his personal search.

13. Trial Court has further rightly pointed out that provisions of

Section 57 of the NDPS Act have also not been complied with. Admittedly no report was sent by the Investigating Officer to his Superior Officer, with regard to the alleged apprehension of the accused and the alleged recovery of contraband from them. In this respect PW6 Inspector Vishwa Mittar, the Investigating Officer is very categorical when he has stated that no special report was sent by him from the place of recovery as well as from the police Station.

14. Trial Court has rightly observed that the provisions of Section 57 of the NDPS Act may be directory in nature, but that does not mean that this should not be complied with by the Investigating Officer deliberately and intentionally.

15. PW5 ASI Balraj Singh has also admitted in his cross-examination that he did not send any special report under Section 57 of the NDPS Act. It has been held by the Hon'ble Apex Court in **Gurbax Singh Vs. State of Haryana, 2001(1) RCR (Criminal), 702 (SC)**, that non compliance of provisions of Sections 52, 55 and 57 which are no doubt, directory and violation thereof, would not ipso-facto vitiate the trial or conviction. However, the Investigating Officer cannot totally ignore these provisions as such failure will have bearing on the appreciation of evidence regarding search of the accused and seizure. So non compliance of the above said provisions is fatal in the case of the prosecution.

16. The trial Court has further rightly held that there was delay of 18 days in sending the sample parcel to the Office of Chemical Examiner, Kharar in the present case, which has not been explained. The alleged recovery in the present case was effected on 16.05.2015. PW1 HC Gurwinder Singh has stated that on 03.06.2015, he was handed over the

sample for depositing the same in the Office of Chemical Examiner, Kharar, which was deposited by him on the same day. So when the alleged recovery had been effected on 16.05.2015 then it has not been explained that why there was delay of 18 days in sending the sample to the Office of Chemical Examiner, Kharar on 03.06.2015. In **Ramji Singh Vs. State of Haryana 2007(3) RCR (Criminal), 452**, it has been held that as per the standing instructions issued by the Narcotics Control Bureau, the sample must be dispatched to the laboratory within 72 hours of its seizure to avoid any legal objections. In that case, the samples were forwarded to the Chemical Examiner, after 8 days of their seizure and this circumstance was held to be fatal to the prosecution case. So in the instant case also, when there is unexplained delay of 18 days in sending of the sample and till sending of the sample the sample seal remained with the police, then possibility of the tampering with the sample cannot be ruled out, which is fatal to the case of the prosecution.

17. As per provisions of Section 52-A of the NDPS Act it is obligatory for the officer concerned to ensure that as soon as contraband is seized, he should approach the Magistrate for grant of permission to draw the representative sample in his presence, then enlist the same and correctness of the list of sample has to be certified by the Magistrate, which has not been done in the present case and provisions of Section 52-A of the NDPS Act have not been complied with, at all.

18. Trial Court has rightly held that there is no such material on record to show that the Officer Incharge of Police Station City Tarn Taran had prepared any inventory of the articles of the case property and moved any application for certifying its correctness. The learned Magistrate also

did not give certificate regarding the correctness of case property and did not prepare any inventory as per the provisions of Section 52-A of the Act.

19. The perusal of police requests Ex.P12 and P13 reveal that the entire property which had already been prepared by the police, was marked as seen by the Magistrate concerned, and no representative samples were drawn by said Magistrate, which is in complete violation of Section 52-A of the Act.

20. So, keeping in view the totality of all the circumstances discussed above, the case law cited by learned State counsel is of no help to him, being not applicable to the facts of the case in hand. The trial Court has thus rightly reached at the conclusion that the case of the prosecution is doubtful and it has failed to establish the charge levelled against the accused beyond the shadow of reasonable doubt and has rightly acquitted the accused-Sandeep Singh.

21. In view of the above, no case is made out for grant of leave to appeal against acquittal of accused Sandeep Singh. The application without having any merits stands dismissed and the leave to appeal is declined.

(M.S. RAMACHANDRA RAO)
JUDGE

(SUKHVINDER KAUR)
JUDGE

11.04.2023

Komal

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