

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

SR. No.324

CRA-S-1476-SB-2004 (O&M)

Reserved on:09.01.2023

Pronounced on: 17.01.2023

Avtar Singh

...Appellant

Versus

State of Punjab

...Respondent

CORAM: HON'BLE MR. JUSTICE N.S. SHEKHAWAT

Present: Mr. Keshvam Chaudhary, Advocate,
for the appellant.

Mr. Vipin Pal Yadav, Addl. A.G., Punjab.

N.S. SHEKHAWAT, J.

The present appeal has been preferred against the judgment of conviction and order of sentence dated 09.07.2004 passed by the learned Judge, Special Court, Jalandhar, whereby the appellant was convicted for the punishable under Section 15 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as 'the Act') and sentenced to undergo rigorous imprisonment for a period of 03 years and to pay a fine of Rs.5,000/- with default stipulation.

The story of the prosecution in short is that on 04.08.1999, a police party, headed by S.I. Surjit Singh, was present in connection with patrol duty and in the meantime two persons were seen coming from the opposite side carrying a plastic bag each on their head. SI Surjit Singh and police party signaled them to stop and on this, one person Avtar Singh (present accused/appellant) ran away towards the field by throwing the

plastic bag from his head and another person was apprehended from the spot. Accused Avtar Singh was already known to the police and the second person on inquiry, told his name to be Chamkaur Singh s/o Bahadur Singh. The police party raised suspicion that there was some narcotic substance in the plastic bag, which was being carried by Chamkaur Singh on his head and in the bag, which had been thrown by Avtar Singh and he could get his search conducted in the presence of a Gazetted Officer or a Magistrate and a separate memo was prepared in this regard. Accused Chamkaur Singh expressed his desire to be searched in the presence of a Gazetted Officer and the consent memo Ex.PD was prepared to that effect. DSP Harjit Singh was informed by way of a wireless message. Karnail Singh, a villager, was seen coming and he was also joined with the police party. DSP Harjit Singh reached at the spot in his official vehicle and after disclosing his identity, he apprised the accused about his legal right and a separate memo was prepared in this regard. However, Chamkaur Singh expressed confidence in DSP Harjit Singh and accordingly at the instance of DSP Harjit Singh, search was conducted and both bags were found containing poppy husk. Total 65 kgs of poppy husk was recovered. One sample of 250 grams was separated from each of the gunny bags and the parcels were sealed with the seal bearing impressions "SS" & "HS". SI Surjit Singh gave his seal, after use to Karnail Singh, whereas DSP Harjit Singh kept the seal with himself. The necessary investigation was conducted at the spot in the presence of ASI Bhupinder Singh and Swaran Singh, and Chamkaur Singh was formally arrested in the instant case. On 29.08.1999, accused/appellant Avtar Singh was arrested in the present case and was produced before the competent

Court.

After necessary investigation, the final report under Section 173 Cr.P.C. was produced before the competent court by the police. Finding a prima facie case under Section 15 of the Act, both the accused were ordered to be charge sheeted, which was read over and explained to them, to which they pleaded not guilty and claimed trial. Later on, during the course of trial Chamkaur Singh absented himself and was declared as proclaimed offender, whereas the trial continued against the present appellant, which culminated into his conviction under Section 15 of the Act.

At this stage, it requires mention that after his arrest, Chamkaur Singh was tried and vide the judgment dated 06.07.2017, passed by the court of learned Special Court Jalandhar, he was ordered to be acquitted. During the course of arguments, the said judgment of acquittal regarding Chamkaur Singh was produced in the court by the learned counsel for the appellant and the same was taken on record as mark 'A'.

In order to bring home the guilt of the present appellant, the prosecution examined six witnesses. MHC Surjit Singh was examined as PW-1, who tendered his affidavit Ex.PA. He clearly stated on 04.08.1999, duly sealed parcels were deposited with him. In his cross-examination, he admitted that the sample was taken out of the Malkhana on 11.08.1999. The statement of Constable Ranjit Singh was recorded as PW-2, who tendered his affidavit Ex. PB and his statement was formal in nature. DSP Harjit Singh was examined as PW-3, who supported the case of the prosecution in totality and he was a witness of search and seizure. ASI Bhupinder Singh was examined as PW-4, who supported the case of the prosecution, as he

was the part of the raiding team. Surjit Singh, Inspector/SHO, was examined as PW-5 and he was heading the raiding team. Even he conducted the investigation as well and prepared the final report under Section 173 Cr.P.C.

After the closure of the evidence, the statement of the accused-appellant was recorded U/s 313 Cr.P.C. and he pleaded his false implication. He stated that no recovery was effected from him. Since he belonged to the opposite faction of the ruling party i.e. being an active Akali Dal worker, he had been falsely implicated in the instant case. In defence, no evidence was led by the appellant/accused.

After hearing the counsel for both the parties and going through the record of the case, the learned trial Court concluded that the prosecution has successfully proved its case, bringing home the guilt against the accused/appellant. Accordingly, accused/appellant was convicted and sentenced as noted above.

Learned counsel for the appellant vehemently argued that in the instant case, it is apparent from the statements made by PW-1 MHC Surjit Singh and PW-5 Inspector Surjit Singh that after the alleged recovery of the poppy husk on 04.08.1999, the same was never produced before the learned Magistrate for certifying the correctness of the search, seizure and the raid as well as for collection of the samples for analysis and the mandatory provisions of Section 52 A of the NDPS Act were not complied with and the appellant is liable to be acquitted only on this ground alone. He further submitted that Karnail Singh was admittedly associated as an independent witness and his non-examination during the course of trial was fatal to the prosecution case. Apart from that, there were material discrepancies in the

statements of various witnesses produced by the prosecution, thus, it is apparent that the appellant had been falsely involved in the instant case.

The submissions made by learned counsel for the appellant have been controverted by the learned State Counsel by submitting that the mandatory provisions of the Act had been complied with by the police. Even the search was conducted in the presence of a Gazetted Officer as per requirement of the law and it was impossible for the police to plant such a huge recovery. Apart from that, there was no reason for the police to falsely involve the present appellant in a criminal case. Still further, the present appellant can never be permitted to take advantage of the technicalities of the law, as the FSL report had clearly supported the case of the prosecution with regard to the recovery of contraband from the present appellant. Still further, the witnesses produced by the prosecution got a chance to appear before the learned trial Court after several months and in the meantime they had the occasion to investigate and appear in number of other cases as well; consequently such minor discrepancies were bound to creep in their testimonies and the learned trial Court has taken a pragmatic view of the matter and the impugned judgment is legally sustainable.

I have heard the learned counsel for the parties and perused the case file minutely.

Section 52A of the NDPS Act has been reproduced as below:-

“52A. Disposal of seized narcotic drugs and psychotropic substances.-(1) The Central Government may, having regard to the hazardous nature, vulnerability to theft, substitution, constraint of proper storage space or any other relevant consideration, in respect of any narcotic drugs, psychotropic

substances, controlled substances or conveyances, by notification in the Official Gazette, specify such narcotic drugs, psychotropic substances, controlled substances or conveyance or class of narcotic drugs, class of psychotropic substances, class of controlled substances or conveyances, which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time, determine after following the procedure hereinafter specified.

(2) Where any narcotic drugs, psychotropic substances, controlled substances or conveyances has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs, psychotropic substances, controlled substances or conveyances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs, psychotropic substances, controlled substances or conveyances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs, psychotropic substances, controlled substances or conveyances in any proceedings under this Act and make an application, to any Magistrate for the purpose of—

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such magistrate, photographs of such drugs, substances or conveyances and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such magistrate and certifying the correctness of any list of samples so drawn.

(3) Where an application is made under sub-section (2), the

Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1972) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs, psychotropic substances, controlled substances or conveyances and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence.”

I find sufficient force in the arguments raised by learned counsel for the appellant that the police had failed to comply with the above provisions of the Section 52A of the Act. The prosecution examined PW-1 MHC Surjit Kumar, who clearly stated that on 04.08.1999, the sample parcels as well as the remainder quantity of poppy husk was deposited with him in the Malkhana and the same was duly sealed. Thereafter, on 11.08.1999, the samples were handed over to the police official for sending it for analysis. Even PW-5/SI Surjit Singh nowhere states that the sample parcels as well as the remaining quantity of the poppy husk were ever produced before the learned Magistrate, so as to certify the correctness of the inventory prepared by the police and for taking the photographs of the contraband in the presence of the Magistrate and as well as to allow the drawing of representative samples of such drugs in the presence of the Magistrate, so that the list of samples so drawn may be corrected and the samples may be subsequently sent to the FSL for analysis to prove the charge against the accused.

In the instant case, there is no evidence in the shape of any order or statement to show that there was any compliance of the provisions

of Section 52A of the Act. In fact, the record reveals that from 04.08.1999 to 11.08.1999, the samples as well as the residue were not taken out of the Malkhana, whereas the police party/SHO were under a legal obligation to produce the sample as well as the remaining quantity of the poppy husk before the learned Magistrate on 04/05.08.1999, whereas they failed to do so. Apart from that, the judgment of acquittal of Chamkaur Singh has also been taken on record as Mark 'A' and it is apparent that he has been acquitted due to non-compliance of Section 52A of the Act. It is apparent that Chamkaur Singh was apprehended at the spot, whereas, as per the prosecution witnesses, the appellant had allegedly run away from the spot and was arrested later on. Thus, the present appellant has a case better than the case of Chamkaur Singh and even the learned trial Court should have extended the benefit of acquittal to the present appellant.

Apart from that, it is evident from the record that before DSP Harjit Singh could reach the spot, Karnail Singh, a villager, was associated by the police party at the time of the raid and he had been a witness to the entire search and seizure and was a witness to the entire initial investigation. However, the prosecution failed to examine the said witness and it raises a doubt about the veracity of the allegations levelled by the prosecution. No doubt, the prosecution is not obliged to examine the independent witness, if he has been won over by the accused or is not likely to support the case of prosecution, but as a rule of caution and to prove the charge beyond doubt, such witnesses should be examined by the prosecution. The prosecution cannot run away from its responsibility of examining an independent witness by simply saying that he had been won over by the

accused. Had he been won over by the accused, he would have certainly appeared as a defence witness, which is not the case here. Thus an adverse inference is liable to be drawn against the prosecution due to non-examination of the said independent witness.

While dealing with Section 52A of the Act, this Court in the case of **Nek Singh Vs. State of Haryana, 2018 (2) RCR (Criminal) 712** has observed as under:-

“10. Counsel for the appellant, in support of her arguments, has relied upon a judgment in Union of India v. Mohan Lal and another, 2016 (1) RCR (Criminal) 858, wherein the Hon'ble Supreme Court with reference to the procedure regarding seizure and sampling of a contraband under Section 52A of the NDPS Act, has observed as under: -

"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 (c) 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 52A 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. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52A(4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-section (2) and (3) of Section 52A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure. Be that as it may, a conflict between the statutory provision governing taking of samples and the standing order issued by the Central Government is evident when the two are placed in juxtaposition. There is no gainsaid that such a conflict shall have to be resolved in favour of the statute on first principles of interpretation but the continuance of the statutory notification in its present form is bound to create confusion in the minds of the authorities concerned instead of helping them in the discharge of their duties. The Central Government would, therefore, do well, to re-examine the matter and take suitable steps in the above direction."

11. Counsel for the appellant has, thus submitted that it is not proved from the statement of any of the prosecution witness

that the accused, long with case property, was either produced before the Illqa Magistrate or any order was passed after verifying the case property or inventory was prepared and no such direction was issued that the sealed property be deposited either in Judicial Malkhana or Police Malkhana. Counsel for the appellant has further submitted that in the affidavits i.e. Ex. PD, submitted by PW-5 HC Satyapal, and Ex.PE, submitted by PW-6 Trilok Kumar, it is nowhere stated that the seal(s) of the parcels was intact at the time of depositing the same with the Malkhana or during transit to hand over the same with FSL, Madhuban, the same was not tampered with.”

In view of the above-said discussion, the appeal succeeds and is hereby allowed. The judgment of conviction and order of sentence dated 09.07.2004 passed by the learned Judge, Special Court, Jalandhar, are set aside. The bail bonds of appellant stand discharged and he may be released from custody, if not on bail and if not required in any other case.

Pending application, if any, is also disposed off, accordingly.

Case property, if any, be dealt with, and, destroyed after the expiry of period of limitation. The trial Court record be sent back.

17.01.2023
mks

(N.S. SHEKHAWAT)
JUDGE

Whether Speaking/Reasoned: YES / NO

Whether Reportable: YES / NO