

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

435

**CRA S-186-SB-2005 (O&M)
Date of Decision: 11.04.2023**

Jassa Singh and another

...Appellant

Versus

State of Haryana

... Respondent

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

Present : Mr. K.P.S. Virk, Advocate
for the appellants.

Ms. Sheenu Sura, DAG, Haryana.

N.S.SHEKHAWAT, J.

The present appeal has been preferred against the judgment of conviction dated 12.01.2005 and order of sentence dated 13.01.2005 passed by the Court of learned Judge, Special Court, Kaithal, whereby, the appellants were convicted under Section 15 of Narcotics Drugs and Psychotropic Substance Act, 1985 (in short, '**the NDPS Act**') and were sentenced to undergo rigorous imprisonment for eight months and to pay a fine of Rs. 1,000/- each alongwith default stipulation.

As per the case of the prosecution, on 27.01.2003, Waryam Singh ASI alongwith other police officials was present on a Government Vehicle driven by Balbir Singh EHC and when they reached on the road from village Sair to village Paharpur, two young persons were seen coming on a scooter. One of them was driving the scooter and the second person was the pillion rider and were coming from the side of village Paharpur. Both the young persons had wrapped bed sheets around themselves and when they reached near the turn of village Sair, they stopped the scooter on seeing the police

party and tried to escape by turning back the scooter. The police party got suspicious and apprehended them. The pillion rider was having a sack (katta) of white colour containing something in it and was hiding the same under the bed sheet. On inquiry by the police officers, the driver disclosed his name and address as Jassa son of Dillu Ram resident of village Paharpur and the person who was pillion rider disclosed his name as Jagir Chand son of Laddu Ram resident of village Janetpur. Since the some narcotic substance was suspected, both the accused were served notice under Section 50 of the NDPS Act and were given an offer as to whether they wanted to get their search conducted in the presence of a gazetted officer, Magistrate or Investigating Officer. Both the persons consented to give their search in the presence of a gazetted officer. The notices were duly thumb-marked by the said two persons and were also signed by the witnesses. Separate consent memos were also prepared and were thumb marked by the accused and singed by the witnesses. DSP Guhla was informed by way of V.T. message and was requested to reach at the spot. After some time, Dharam Pal Singh Dalal, DSP, Guhla, reached at the spot on the government vehicle. The DSP verified the facts from the accused and the witnesses and on his directions, the Investigating Officer had searched the sack (katta). The weighing scale of the weights were arranged from village Sair and poppy husk was found in the sack. Two samples of 200 gms each were separated and the remainder quantity of poppy husk was found to be 13 kgs and 600 gms on weighment. Both the samples and the residue were converted into separate parcels and the IO affixed two seals of "WS" on both the samples as well as on the residue parcels.

The DSP also affixed two seals of “DS” on each parcels. The specimen seal impressions were also retained. The IO handed over the seal to ASI Ved Parkash whereas the DSP retained the seal with himself. All the parcels, specimen seal impressions and the scooter were taken into possession by the police and the recovery memo was attested by the DSP and signed by the witnesses. *Rukka* was sent to the police for registration of the case and the formal FIR was recorded. The necessary investigation was conducted by the Investigating Officer. Thereafter, the case property, accused as well as the witnesses were produced before Roop Singh SHO for verification. Roop Singh SHO verified the facts and affixed his seal “RS” on each of the parcels. Under the directions of the SHO, the case property was deposited with the MHC and the accused were formally arrested. A report under Section 57 of the NDPS Act was prepared by the SHO and it was sent to the DSP as well as SP.

After the completion of the investigation, the report under Section 173 Cr.P.C. was prepared and was presented in the competent Court.

Finding a *prima-facie* case, the appellants/accused were charge sheeted under Section 15 of the NDPS Act, to which, both of them pleaded not guilty and claimed trial.

In support of the charge, the prosecution examined six witnesses. PW1 HC Ishwar Singh tendered his affidavit Ex.PA in his evidence, whereas PW2 Balbir Singh, ASI, recorded formal FIR Ex.PB/1 on receipt of *rukka* Ex.PB from ASI Waryam Singh. He had also made his endorsement Ex.PB/2 on the *rukka*. The prosecution examined Dharam Pal Dalal, DSP, Guhla, as PW3, who had reached

at the spot on getting the V.T. Message. He was a witness to the search and seizure of the contraband. He received a report under Section 57 of the NDPS Act (Ex.PD) and forwarded the same to S.P. Kaithal. He stated that Ex.P1 was the residue parcel, whereas Ex.P2 was the second sample, which were produced in the Court. In his cross-examination, he admitted that particulars on Ex.P1 were not visible/legible. He further stated that 3/4 passers by were asked to join the investigation. Constable Rajinder was sent to village Sair to bring the witnesses but no one came. ASI Waryam Singh was examined as PW4, who was the main witness of the prosecution. He supported the case of the prosecution, as narrated in the FIR. He had conducted the initial investigation also. In his cross-examination, he admitted that in the presence of DSP, attempt was made to associate two independent witnesses from village Sair. No one was sent to village Sair to bring the witnesses. No one came on the spot and the people passed from a distance. An attempt was made to join member Panchayat etc., from village Sair but none came. No one was sent to village Sair to bring the Panch, Sarpanch etc. He further stated that the recovery memo was in his hand writing. The prosecution further examined Constable Suresh Kumar, who tendered his affidavit Ex.PJ in his evidence. The prosecution examined ASI Roop Singh as PW6, who was working as SHO on 27.01.2003. After apprehending the accused and the recovery of the case property, the witnesses, the accused and the case property were produced before him by ASI Waryam Singh. He verified the facts of the case from the accused as well as the witnesses and had put his seal impression "RS" on the case property Ex.P1.

After closure of the prosecution evidence, the statements of the accused were recorded and they pleaded their false implication. They stated that nothing was recovered from their possession and the case has been planted on them.

Learned counsel for the appellants vehemently argued that in the instant case, the provisions of Section 52-A of the NDPS Act were not complied with by the prosecution. As per the case of the prosecution vide recovery memo Ex.PC, both the sample parcels, residue parcels, specimen seal impressions and the scooter were taken into possession by the police. The witnesses, accused and the recovered contraband were produced before the concerned SHO for verification. However, the empowered officer had to prepare an inventory under Section 52-A of the NDPS Act and then to make an application to any Magistrate for the purpose of certifying the correctness of the inventory so prepared, taking photographs of the recovery and certifying those photographs and then allowing for drawing representative samples and certify them. However, the said procedure was not followed by the police team, which apprehended the accused at the spot. Countering the said submissions, the learned State counsel submitted that the provisions of Section 52-A of the NDPS Act were directory in nature. The entire procedure related to the recovery of the contraband was followed and prayed for upholding the judgment passed by the learned trial Court.

I have considered the rival submissions made by both the sides and have perused the record in this regard. Section 52-A of the NDPS Act has been reproduced for the ready reference:-

[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 4[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 4 [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 4 [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 4 [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 5 [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 1 [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.]

While interpreting the provisions of Section 52-A of the NDPS Act, the Hon'ble Apex Court in the matter of **Union of India**

Vs. Mohan Lal, 2016(1) RCR, Criminal, 858 held as follows:-

“13. 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 52- A 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 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-section (2) and (3) of Section 52-A 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”.

Now adverting the facts of the instant case, it can be clearly seen that the prosecution examined the most material witness PW4 ASI Waryam Singh, who nowhere stated that the procedure as prescribed under Section 52-A of the NDPS Act had been followed. Even the prosecution has not placed on record any inventory or photographs, taken in compliance of the provisions of Section 52-A of the NDPS Act. Even, the prosecution could not exhibit any application moved to the Magistrate for the purpose of certifying the correctness of the inventory or for certifying photographs of such drugs and no representative samples were drawn in the presence of the Magistrate. Consequently, it is apparent that the provisions of Section 52-A of the NDPS Act were not complied by the prosecution.

Apart from that, after the arrest of the accused/appellants and on seizure of the contraband, they were to be produced before the Magistrate for the purpose of verification of the facts and for obtaining any such orders from the Magistrate regarding deposit of recovered contraband in the police or judicial Malkhana and to be sent to the FSL. Rather from a perusal of the statement of PW6 ASI Roop Ram, who was working as SHO, it is apparent that he had directed the case property to be deposited with the MHC and no directions were issued to produce the same before the Magistrate concerned. Thus, the procedure prescribed by the law was completely overlooked by the Investigating Officer.

Still further, the learned counsel for the appellants further argued that the recovery of the contraband in the instant case was doubtful as the recovery memo was not signed by the accused nor ASI Ved Parkash and HC Raghbir Singh, the witnesses of recovery were

examined by the prosecution. Since the prosecution miserably failed to examine the most material witnesses, the accused were entitled to the benefit of doubt. The said submissions have been opposed by the learned State counsel on the ground that the prosecution had examined PW4 ASI Waryam Singh and PW3 Dharam Pal Dalal, DSP Guhla, who had conclusively proved the recovery of the contraband from the present appellants. She submitted that the accused had raised hypertechnical arguments and the said submissions are liable to be rejected. I have considered the rival submissions made by learned counsel for both the sides. From the record, it is evident that vide recovery memo Ex.PC, the police team had recovered the contraband and the scooter from the appellants on the spot and the recovery memo was prepared by ASI Waryam Singh. Surprisingly, the signatures of the accused/appellants are missing on the said recovery memo nor it has been mentioned that the appellants/accused had refused to sign the said memo. Ved Parkash ASI and HC Raghbir Singh had signed the recovery memo Ex.PC as witnesses. However, none of them was examined by the prosecution. In fact, both the said witnesses were most material witnesses to prove the recovery of the contraband as well as scooter from the present appellants and their non-examination is fatal for the case of the prosecution.

Apart from that, learned counsel for the appellants submitted that in the instant case, no independent witness was joined in the investigation, even though, the prosecution had plenty of opportunities to do so. The recovery was effected near village Sair, which had a Panch, yet, no attempt was made to join anyone from the Panchayat as an independent witness. Even, no action was taken by

the police against the persons, who had refused to join as independent witnesses. Learned counsel appearing on behalf of the State has countered the said submissions by submitting that the independent witnesses had refused to join the proceedings against the drug peddlers and no adverse inference can be drawn from the same. I have heard the learned counsel for the parties and perused the evidence with their able assistance. In the instant case, the recovery was effected in the presence of PW3 Dharam Pal Dalal, DSP, Guhla. He clearly admitted that the IO had tried to join the independent witnesses, but none was ready to join. 3/ 4 passers by were asked to join the investigation. Further, Constable Rajinder Singh was sent to village Sair to bring the witnesses but no one came. Similarly, PW4 ASI Waryam Singh also admitted that no one was sent to village Sair to bring the witnesses. No one came near to them at the spot and the people passed from a distance. Still further, no one was sent to village Sair to bring Panch and Sarpanch etc., and no one was associated during the course of investigation. Thus, it is apparent that no sincere efforts were made to join the independent witnesses during the search and seizure procedure by the police. No doubt, the testimonies of official witnesses can be very well relied upon, if the same inspires confidence. In the instant case, the recovery was itself doubtful in view of the findings recorded above. It was imperative on the part of the police to join the independent witnesses in such circumstances. Consequently, an adverse inference is liable to be drawn against the prosecution for non joining the independent witnesses.

Apart from that, I have also perused the record with the assistance of the learned counsel for the parties. Even the CFSL Form

or Form 29 was not prepared at the spot or even thereafter. The Form was very crucial as the sample seal etc., are required to be affixed and on this Form only, which has to be sent to the FSL to rule out the possibility of tampering the samples. Non-compliance of this safeguard alone casts a cloud of suspicion on the prosecution case. Apart from that, the police had recovered a scooter from the spot bearing registration No. HR08-9864. However, the Investigation Agency did not conduct any investigation in the said case and no attempts were made to verify the facts as to whom the scooter belonged.

In view of the above, the appeal succeeds and the judgment of conviction dated 12.01.2005 and order of sentence dated 13.01.2005 passed by the Court of learned Judge, Special Court, Kaithal are set aside and the appellants are acquitted. Their bail bonds and surety bonds are ordered to be discharged.

All pending applications, if any, are disposed off, accordingly.

The case property, if any, may be dealt with as per the rules after expiry of period of limitation for filing the appeal.

Records of the Court below be sent back.

11.04.2023
amit rana

(N.S.SHEKHAWAT)
JUDGE

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