

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

CRA-S-149-SB-2014 (O&M)

Pronounced on : 22.11.2023

Kashmir Singh

...Petitioner

Versus

State of Punjab

...Respondent

CORAM: HON'BLE MRS JUSTICE RITU TAGORE

Present: Mr. Narender Kumar Vashisht, Advocate (Legal Aid Counsel)
for the appellant.

Mr. Sandeep Vermani, Addl. AG, Punjab.

RITU TAGORE, J

1. Challenge in this appeal is to the judgment of conviction and order of sentence dated 23.10.2013 passed by Judge Special Court, Mansa, in a Sessions case bearing No.126 of 2011, emanating from FIR No.55 dated 26.12.2010, whereby appellant Kashmir Singh, has been convicted for commission of offence punishable under Section 22 of Narcotic Drugs and Psychotropic Substances Act, 1985 (in brevity as 'the Act') for keeping in his conscious possession 1kg and 10 grams intoxicant powder 'Alprazolam', without any permit or licence. He has been sentenced to undergo rigorous imprisonment for ten (10) years and to pay a fine of Rs. One lakh (Rs.1,00,000/-), in default whereof, to further undergo rigorous imprisonment for one year.

Prosecution case

2. The brief facts of prosecution case are as follows:

On 26.12.2010, Gurcharan Singh SI (PW-4) along with other police officials was traveling in an official vehicle, bearing No.PB-31C-9345 driven by Pal Singh HC for patrolling duty from village

Dulloval via link road to village Uddat Bhagat Ram. While the police party was one kilometer ahead of village Dulloval, they observed a person sitting on the right side of the road, carrying a plastic bag, in his hand. He was taking out some material from the polythene, on a piece of paper and making pouches. Upon noticing the police party, he appeared visibly perturbed.

On suspicion, Gurcharan Singh SI (PW-4) apprehended the said person with the help of police officials. Intoxicant powder was noticed on the fingers of his right hand, and mouth of the polythene bag was open with intoxicant powder stuck on it. When asked, the said person disclosed his name as Kashmir Singh son of Gura Singh (accused-appellant). Attempts were made to join an independent witness but nobody was available. Upon checking the polythene bag, intoxicant powder (Alprazolam) was recovered from the same.

Out of the aforementioned powder, 10 gram powder was separated and placed in a small plastic box and made into a sample parcel. Remaining powder upon weighing totaled 1 kg. The bulk powder was also packed into another parcel. Both the sample and bulk parcel were sealed by Gurcharan Singh SI (PW-4) with his seal bearing impression 'GS'. Sample seal chit (Ex.P-1) and Form-29 were prepared separately. After its use, seal was handed over to Darshan Singh HC (PW-3). Separate memo (Ex.PF) was prepared upon taking possession of the case property. Appellant could not produce any permit or license for keeping the above said powder, the contraband, in his possession.

Ruqa (Ex.PJ) was sent for registration of a case under Section 22/61/85 NDPS Act and FIR (Ex.PK) was registered. A site plan (Ex.PL) was prepared, and statements of the witnesses were recorded. Appellant was

arrested and his personal search was conducted, and memos (Ex.PG) and (Ex.PH) were prepared.

On return to the police station, Gurcharan Singh SI, presented the appellant and case property before Baghel Singh ASI, an officiating SHO, at P.S. Kot Dharmu (PW-1), who verified the case property and facts from the investigating officer, affixed his seal bearing impression 'BS' on the case property, attested sample seal chit (Ex.P-1) and Form No.29 and took the case property and prepared memo (Ex.PA), and kept the case property in his safe custody. On the next day i.e. on 27.12.2010, Baghel Singh ASI, produced case property, Form-29, inventory report (Ex.PC), appellant and moved an application (Ex.PD) before learned Magistrate, Mansa, who attested the case property and passed the order (Ex.PE) and directed to send the appellant to judicial custody. The bulk was deposited in judicial Malkhana, while the sample was retained by Baghel Singh ASI in his safe custody in police *Malkhana*, Police Station, Kot Dharmu. Special report (Ex.PB) was sent to area DSP.

On 05.01.2011, the sample along with sample seal chit was handed over to Jagrup Singh HC (PW-2) for depositing the same in the office of Chemical Examiner, Kharar, who after deposit on the same day handed him the receipt. On receipt of report of Chemical Examiner (Ex.PX) and on completion of other necessary formalities, Challan on its completion was presented in the Court for trial.

Proceedings at the Trial

3. Copies of Challan prepared under Section 173 Cr.P.C. along with documents attached thereto was supplied to appellant free of cost, as envisaged under Section 207 Cr.P.C.

4. On finding a prima facie case for commission of offence punishable under Section 22 of the Act, charge was framed against the appellant, to which he pleaded not guilty and claimed trial.

5. Over the course of trial, prosecution examined four witnesses i.e. Baghel Singh, ASI (PW-1), the officiating SHO, who authenticated the proceedings carried by the investigating officer, prepared the report under Section 57 of the Act and conducted the proceeding under Section 52-A of the Act; Jagrup Singh HC (PW-2) is a messenger, who took sample parcel and deposited in the office of Chemical Examiner; Darshan Singh HC (PW-3), a recovery witness and to whom seal was given by the investigating officer after use; Gurcharan Singh SI (PW-4) is the investigating officer, before whom recovery was effected and conducted recovery proceedings, thereafter handed the appellant along with the case property and other documents to officiating SHO (PW-1). Various documents (as detailed above) were also tendered. Jagdeep Singh ASI and Ram Singh HC were given up as unnecessary, thereafter, prosecution closed the evidence.

Defence version

6. Statement of the appellant was recorded under Section 313 Cr.P.C. He claimed innocence by denying all the allegations levelled against him. He denied recovery of contraband from him. Appellant examined Balwant Singh HC (DW-1), who proved entries of the road register pertaining to the present case as Ex.D-1 to Ex.D-4 and, thereafter, appellant closed his defence evidence.

Trial Court Decision

7. Learned trial Court after appreciating the evidence available on record concluded that link evidence is complete and defence evidence failed to dent the same, and the testimonies of the official witnesses are believable

and coherent on the material aspect of the case and not liable to be rejected merely on the ground that same are not corroborated by independent witnesses. Further, concluded that entire mixture or solution of the drug content is to be considered while determining its quantity and held recovered quantity falls under the commercial quantity. As a result, held that prosecution has successfully proved its case against the appellant-accused beyond reasonable doubt, thereby convicted and sentenced the appellant-accused, as indicated above.

8. Aggrieved with the findings of conviction and order of sentence, the appellant-accused has preferred the instant appeal.

Contentions

9. Learned counsel for the appellant has assailed the findings of the learned trial Court on the following grounds:-

- i) Link evidence is incomplete as indicated by the defence witness (DW-1) and learned trial Court wrongly discarded his statement and record provided by him. MHC, incharge of *Malkhana* was also not examined to rule out any tampering with the case property;
- ii) Non-compliance of provisions of Section 50, 52-A (2) (c) of the Act;
- iii) Non-joining of independent witnesses in the recovery proceedings with no cogent explanation;
- iv) Prosecution's version seems improbable, and witnesses have discrepancies regarding measuring weights, number of seal affixed on case property and return of seal to investigating officer;
- v) Unexplained and undue delay in sending the samples to Chemical Examiner;
- vi) Complainant himself conducted the investigation that vitiated the investigation and the recovery;

vii) Percentage of salt is to be seen and not the entire mixture to determine the quantity of the contraband.

10. Concluding his arguments, learned counsel for the appellant contends that it is the fundamental duty of the prosecution to prove its case beyond reasonable doubts. However, the material omissions and legal infirmities as pointed above have indeed rendered the prosecution case highly doubtful. Learned trial Court failed to appreciate these deficiencies in the case and erred in believing the prosecution while disbelieving the defence version of false implication. Based on these grounds, a prayer for acquittal of the appellant has been made by setting aside the impugned judgment of conviction and sentence.

11. As opposed, learned State counsel has supported the findings of conviction and legality of the sentence. It is stated that compliance of mandatory provisions of the Act has been made throughout from the time of search and seizure of the contraband from the appellant. The evidence shows that it was a chance recovery from the bag held by the appellant and, therefore, provisions of Section 50 of the Act are not attracted. On search of polythene bag, powder was found, regarding which he failed to produce any permit or licence. It is stated by learned State counsel that in present case, link evidence is complete, commencing from seizure of contraband till its testing, which is supplemented by the testimonies of PWs and Chemical Examiner's report (Exh.PX), proving that contraband remained intact and safe throughout, till it was tested and found to be containing an intoxicating powder, Alprazolam. The defence failed to impeach the testimonies of the witnesses on any count that remained consistent. The defence witness (DW-1) failed to create any dent in the link evidence and his evidence has been rightly rejected by the learned trial Court. Learned State counsel further

contended that delay in sending the sample to the office of Chemical Examiner, as such is of no consequence and referred to '**Hardip Singh Vs. State of Punjab**' 2008 (4) R.C.R. (Criminal) 97.

12. Learned State counsel while relying upon '**Raveen Kumar Vs. State of Himachal Pradesh**' 2020 (4) R.C.R. (Criminal) 873 submitted that statements of witnesses cannot be discarded merely on the ground that they are official witnesses unless the witnesses appear to be biased against the appellant-accused. The prosecution witnesses have consistently and impeccably supported the material allegations against the appellant-accused. By referring to a recent judgment of the Constitutional Bench of Hon'ble the Supreme Court in '**Mukesh Singh Vs. State**' (Narcotic Branch of Delhi) 2020 SCC OnLine SC 700, learned State counsel contended that if complainant has himself conducted the investigation would not *per se* make the ground to doubt the recovery unless bias is made out by the appellant, which in the circumstances, appellant failed to make out. By placing reliance on **Hira Singh and another Vs. Union of India and another** 2020 (20) SCC 272, learned State counsel stated that it is the entire mixture of contraband that need to be considered to determine the 'quantity of contraband' and not the percentage of the salt. It is submitted that there is no merit in the appeal and same be dismissed.

Analysis and Reasoning

13. Having duly considered the submissions in the light of evidence, I hold that appeal must succeed for the reasons recorded hereinafter.

14. Law relating to degree of proof required in Narcotic Drugs and Psychotropic Substances Act, 1985 has been settled by a Division Bench

judgment of this Court passed in '**Didar Singh @ Dara Vs. State of Punjab**', 2010 (3) R.C.R. (Criminal) 337, in the following terms:-

“20. Under the Narcotic Drugs and Psychotropic Substances Act, not only the very possession of the narcotics, drugs and psychotropic substances has been made an offence but severe punishment without exception has also been provided. The Act also provides for presumption of guilt emerging from possession of Narcotics Drugs and Psychotropic Substances. In case of commercial quantity of the narcotics, drugs and psychotropic substances, the minimum sentence of 10 years rigorous imprisonment besides minimum fine of Rupees one lac has been provided.”

15. Hon'ble the Supreme Court in '**Noor Aga Vs. State of Punjab and another**', 2008 (3) R.C.R (Criminal) 633 has held that under the Narcotic Drugs and Psychotropic Substances Act, the extent of burden to prove the foundational facts on the prosecution, i.e., proof beyond all reasonable conduct is more onerous. A heightened scrutiny test would be necessary to be invoked. It is so because whereas, on one hand, the Court must strive towards giving effect to the parliamentary object and intent in the light of the international conventions, but, on the other hand, it is also necessary to uphold the individual human rights and dignity as provided for under the UN Declaration of Human Rights by insisting upon scrupulous compliance of the provisions of the Act for the purpose of upholding the democratic values. It is necessary for giving effect to the concept of 'wider civilization'. It is further observed that while deciding such cases, the Courts must always remind itself that it is a well settled principle of criminal jurisprudence that more serious the offence, the stricter is the degree of

proof. Therefore, a higher degree of assurance would be necessary to convict an accused under the Narcotic Drugs and Psychotropic Substances Act.

16. It must be kept in mind that under the Narcotic Drugs and Psychotropic Substances Act, it is the fundamental duty of the prosecution to prove beyond a shadow of reasonable doubt that the investigation conducted in the case is absolutely flawless, specifically with regard to the link evidence, which is of utmost significant aspect. It is incumbent upon the prosecution to prove that from the stage of affecting the recovery till the sample reaches the Chemical Examiner, there was no chance of tampering with it. Once the presumption is stumbling on this vital aspect, the benefit is to be extended to the accused.

Link Evidence incomplete

17. Learned trial Court noted that Balwant Singh, HC (DW-1) acknowledged that seal of office of Chemical Examiner is affixed on road certificate on deposit of the sample. Learned trial Court discarded the evidence of Balwant Singh, HC (DW-1) and road certificate (Ex.D-2), observing that absence of Chemical Examiner's seal on the road certificate, failed to establish involvement of C. Darshan Singh in handling the sample parcel. Learned trial Court also observed that prosecution evidence indicated that Baghel Singh, ASI (PW-1) entrusted the sample to Jagrup Singh, HC (PW-2), which was supplemented by the contents of chemical report (Ex.PX), confirming presentation of sample in the office on 06.01.2011. Consequently, learned trial Court dismissed significance of the entry (Ex.D-2) considering as stray entry and non examination of C. Darshan Singh as in-consequence, resultantly, held the link evidence as complete.

18. In my considered opinion, approach taken by learned trial Court is flawed. The road certificate (Ex.D-2), proved by Balwant Singh, HC

(DW-1), indicate that case property of this case was handled by C. Darshan Singh. Although, learned trial Court noted that Baghel Singh, ASI (PW-1) made the entry of handing the sample of this case to C. Darshan Singh for submission in the office of Chemical Examiner but discarded this crucial evidence, on the grounds narrated above. However, learned trial Court overlooked the fact that this entry was not challenged by the prosecution as fabricated. The appellant has proved the entry, be it stray. In the circumstances, it was obligatory on the part of the prosecution to provide explanation for this entry, not the appellant as incorrectly observed by learned trial Court. In the circumstances, statement of C. Darshan Singh becomes very material to establish that he never handled the case property.

19. Further, Baghel Singh, ASI (PW-1) deposed that case property was deposited in the Malkhana and Gurnam Singh was the MHC. Prosecution failed to examine MHC. His examination was material to establish whether case property remained safe, intact and un-tampered while it remained in *Malkhana*. This constitutes a serious inadequacy in the case of prosecution.

20. Furthermore, chemical report (Ex.PX) does not indicate who deposited the case property and whether it reached the office intact. Report does not even indicate the description of seals, number of seals or if it matches with the sample seal. In these circumstances, it cannot be asserted that link evidence is complete. The evidence presented display significant gaps in the prosecution case, casting serious doubts in the mind of the Court, whether sample of contraband allegedly prepared from the contraband recovered from the appellant was actually sent to the office of Chemical Examiner for analysis or if sent whether it remained intact? Learned trial Court overlooked these material discrepancies in the case of the prosecution,

leading to erroneous conclusion regarding the link evidence. In given evidence, it is reasonably concluded that in present case link evidence is incomplete.

Non Compliance of provisions of Section 52-A (2) (c) of the Act

21. There is another material infirmity in the case of the prosecution. The investigating officer (PW-4) did not comply with the provisions of Section 52-A (2) (c) of the Act, which provides drawing of sample before learned Magistrate. Evidence does not indicate that any representative sample was drawn before the learned Magistrate as mandated under Section 52-A (c) of the Act. Application (Exh.PD), moved by the investigating officer (PW-4) under Section 52-A of the Act does not indicate that any request was made before the learned Magistrate to draw sample, neither the order (Exh.PE) passed on application (Exh.PD) provides that any representative sample was drawn in his presence.

22. NDPS Act was amended in year 1989 and Section 52-A was incorporated, which reads as under:-

"52-A. 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 1872) 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."

23. Hon'ble the Supreme Court in **Union of India Vs. Mohanlal and another, 2016 (3) SCC 379** while speaking on Section 52-A (2) (c) observed as under:-

"15. It is manifest from Section 52-A (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.

16. 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.

17. 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.”

24. In ‘**Simarnjit Singh Vs. State of Punjab**’ 2023 SCC OnLine SC 906, Hon’ble the Supreme Court while acquitting the accused relied upon **Mohan Lal (supra)** and held that mandate of Section 52-A of the Act was not complied with, and made the following observations in para No. 10 and 11 :-

“10. Hence, the act of PW-7 of drawing samples from all the packets at the time seizure is not in conformity with the law laid down by this Court in the case of Mohanlal. This creates a serious doubt about the prosecution’s case that substance recovered was a contraband.

11. Hence, the case of prosecution is not free from suspicion and the same has not been established beyond a reasonable doubt. Accordingly, we set aside the impugned judgments insofar as the present appellant is concerned and quash his conviction and sentence.”

25. Hon’ble the Supreme Court in ‘**Mangilal Vs. State of Madhya Pradesh**’ 2023 SCC OnLine 862, while acquitting the accused, has observed that mandate of Section 52-A of the Act has to be complied with by observing that:-.

"8. Before any proposed disposal/destruction mandate of Section 52A of the NPDS Act requires to be duly complied with starting with an application to that effect. A Court should be satisfied with such compliance while deciding the case. The onus is entirely on the prosecution in a given case to satisfy the Court when such an issue arises for consideration. Production of seized material is a factor to establish seizure followed by recovery. One has to remember that the provisions of the NDPS Act are both stringent and rigorous and therefore the burden heavily lies on the prosecution. Non-production of physical evidence would lead to a negative inference within the meaning of Section [114\(g\)](#) of the Indian Evidence Act, 1872 (hereinafter referred to as the Evidence Act). The procedure contemplated through the notification has an element of fair play such as the deposit of the seal, numbering the containers in seriatim wise and keeping them in lots preceded by compliance of the procedure for drawing samples."

26. It is a case where no sample was drawn in the presence of Magistrate in compliance of mandatory provisions of Section 52-A (2) (c) of the Act. Learned trial Court failed to notice this material infirmity in case of the prosecution and fell into grave error, in recording conviction to the appellant. Rather, benefit of same should have gone to the appellant.

Un-explained delay in sending sample to Chemical Examiner

27. Dealing with the submission of delay of 10 days in sending the sample to the Chemical Examiner. The recovery is dated 26.12.2010 and according to the statement of Baghel Singh, ASI (PW-1), he handed the sample parcel and sample chit along with Form-29 to Jagrup Singh, HC (PW-2) on 05.01.2011 for deposit in the office of Chemical Examiner and as per the statement of Jagrup Singh, HC (PW-2), he deposited on the same

day. Jagrup Singh, HC (PW-2) was confronted with his statement (Ex.DA) where factum of handing over Form-29 is not mentioned.

28. A representative sample of any contraband after its seizure and deposit in *Malkhana* or with concerned SHO is required to be sent to Chemical Examiner within 72 hours as per the instructions issued vide standing order No.1 of 1988 dated 15.03.1988 issued by Narcotics Control Bureau. The sanctity of the instructions came up for consideration in **Noor Aga (supra)** wherein it was observed as under:-

“Logical corollary of these discussions is that the guidelines such as those present in the Standing Order cannot be blatantly flouted and substantial compliance therewith must be insisted upon for so that sanctity of physical evidence in such cases remains intact. Clearly, there has been no substantial compliance of the guidelines by the investigating authority which leads to drawing of an adverse inference against them to the effect that had such evidence been produced, the same would have gone against the prosecution.”

29. The investigating officer is obliged to follow the procedural safeguards as provided in the instructions as long as they do not override the provisions of the NDPS Act and supplement the procedural protection given in the Act. In **‘State of Punjab Vs. Baldev Singh’ (1999) 6 SCC 172**, it was stated:

"It must be borne in mind that severer the punishment, greater has to be the care taken to see that all the safeguards provided in a statute are scrupulously followed."

30. This Court in **‘Malkiat Singh @ Kala Vs. State of Punjab’ 2009 (1) R.C.R. (Criminal) 353**, while relying upon the observations made by Hon’ble the Supreme Court in **‘State of Rajasthan Vs. Gurmail Singh’**

2005 (2) R.C.R. (Criminal) 58, with regard to delay in sending the samples to Chemical Examiner, observed that:-

*"11. It was next submitted by the Counsel for the appellant, that though the alleged recovery was effected on 03.07.1997, yet the samples were sent to the office of the Chemical Examiner on 08.07.1997 and, thus, the delay of 5 days, in sending the same to the office of the Chemical Examiner, remained unexplained and, as such the possibility of tampering with the same, until the same reached the Laboratory, could not be ruled out. No explanation, whatsoever, was furnished, as to why the samples were not sent to the office of the Chemical Examiner, for about 05 days. Had any explanation been furnished, the matter would have been considered, in the light thereof, but in the absence of any explanation, having been furnished, in this regard, the Court cannot coin any of its own. In **Gian Singh v. State of Punjab, 2006(2) R.C.R. (Criminal) 611 (P&H)**, there was a delay of 14 days, in sending the sample to the office of the Chemical Examiner. Under these circumstances, it was held that the possibility of tampering with the sample, could not be ruled out, and the link evidence was incomplete. Ultimately, the appellant was acquitted, in that case. In '**State of Rajasthan vs. Gurmail Singh' 2005 (2) R.C.R. (Criminal) 58 : 2005(1) Apex Criminal 521 (SC).**', the contraband remained in the Malkhana for 20 days. The malkhana register was not produced, to prove that it was so kept in the malkhana, till the sample was handed over to the Constable. In these circumstances, in the aforesaid case, the appellant was acquitted. In **Ramji Singh v. State of Haryana, 2007(3) RCR (Criminal) 452 (P&H)**, the sample was sent to the office of the Chemical Examiner after 72 hours, the seal remained with the police official, and had not been handed over to any independent witness. Under these*

circumstances, it was held that this circumstance would prove fatal to the case of the prosecution. No doubt, the prosecution could lead other independent evidence, to prove that none tampered with the sample, till it reached the office of the Forensic Science Laboratory. The other evidence, produced by the prosecution, in this case, to prove the link evidence, is not only deficient, but also unreliable. In the instant case, the principle of law, laid down, in the aforesaid authorities, is fully applicable to the facts of the present case. The delay of 05 days, in sending the samples to the office of the Chemical Examiner, and non-strict proof, by the prosecution, that the same was not tampered with, till it was deposited, in that office, must prove fatal to the case of the prosecution, as the possibility of tampering with the same, could not be ruled out. The submission of the Counsel for the appellant, in this regard, being correct, is accepted."

31. As noticed above, the witnesses have not furnished any explanation for the delay in sending the sample to the Chemical Examiner. If any explanation had been furnished by the witnesses, the matter would have been considered in light thereof. However, in absence of any explanation of delay of ten days in sending the samples to the office of Chemical Examiner and further with no clarity in the statements of the witnesses about deposit of Form-29 in the office of Chemical Examiner, possibility of tampering of the sample cannot be ruled out under these circumstances. In view of the peculiar facts of the case, as noted above, the observations made in **Hardip Singh (supra)** cannot be taken as parallel to this case as in aforesaid case, delay of 40 days in sending the sample to Chemical Examiner was held not fatal, where seals were found intact on the sample parcel when handed over to Chemical Examiner. In the

facts, where link evidence is incomplete, the delay in sending the sample to Chemical Examiner assumes importance and is certainly fatal to the prosecution.

Non-joining of independent witness

32. As regards the submission of non-joining of independent witnesses in the recovery proceedings carried against the appellant, it is settled that non-examination of an independent witness is not *per se* fatal to case of the prosecution, yet, this aspect gains relevance and importance in case where other available material on record creates suspicion. Nonetheless, such an omission casts an added duty on the Courts to adopt a greater degree of care while scrutinizing the testimonies of the police officials.

33. Admittedly, in present case no independent witness was joined in the recovery despite the place of recovery being a thoroughfare. Darshan Singh HC (PW-3), recovery witness, deposed that investigating officer did not go to nearby village nor sent any one to call any independent person from the village. He also stated that no *Sarpanch* or *Panch* was called from village Dullowal. The investigating officer, Gurcharan Singh, SI (PW-4) stated that he tried to join independent witness but no one was available at that time. However, admitted that no respectable person was called from village Dullowal. The time of recovery is somewhat between 12.30 a.m. to 1.30 p.m. as I.O. stated that he handed the seal after use to Darshan Singh, HC (PW-3) at 1.30 p.m. The place of recovery was a link road and thoroughfare. According to the witnesses, they stayed at the spot till 5.30 p.m. and village Dullowal is at a distance of 1kms and village Uddat Bhagat Ram 3 kms. from the spot. It is highly improbable that in winter season, during day time, no person crossed the road. That being so, independent

witness could be associated at least to provide some semblance of fairness in the proceedings.

34. I am aware that in chance recovery, subsequent inclusion of independent witness will not be material, however, to attach fairness to the recovery proceedings being done at the spot, the requirement of independent witness cannot be undermined especially in the facts of present case. Evidence shows that no earnest effort was made to join an independent witness to the recovery proceedings. In the circumstances, where prosecution case is riddled with infirmities, as detailed herein above, the non-association of public witnesses has gained relevance and importance. Hon'ble the Supreme Court in '**Krishan Chand Vs. State of Himachal Pradesh**' 2017 AIR (SC) 3751 held that the failure of the I.O. to associate an independent witness at the time of recovery creates a dent in the case of the prosecution. In '**Gorakh Nath Prasad Vs. State of Bihar**' 2018 (1) R.C.R. (Criminal) 108, Hon'ble the Supreme Court, while acquitting the accused held that case of prosecution cannot be entirely based upon the statements of official witnesses when no independent witness has been joined in the investigation.

35. Furthermore, prosecution case appears quite improbable. A person having contraband would not sit on the roadside a thoroughfare, in day time, that too in open noticeable to all and prepare pouches of contraband. No person would commit any criminal activity in open. A natural tendency of an offender is to commit such illegal acts in secrecy and under cover. Further, witnesses (PW-3 & PW-4) are discrepant about the types of measuring weights possessed by the I.O. Darshan Singh, HC (PW-3) stated that I.O. possessed all types of weights; whereas he stated he had weights of 10 gm and 1 Kg only. Gurcharan Singh, SI (PW-4), the

investigating officer stated that he affixed seals five times and took the seal from Darshan Singh, HC (PW-3) on the next day. Darshan Singh, HC (PW-3) stated that I.O. used seals 5 to 6 times and he returned the seal on same day after deposit of the case property. These discrepancies coupled with other infirmities in the case of prosecution, assumes importance.

Informant himself is the investigator

36. Constitutional Bench of Hon'ble the Supreme Court in **Mukesh Singh (supra)**, observed that investigation would not suffer the vice of unfairness or bias if informant itself is the investigator. Also, observed that in such like NDPS cases where there is reverse burden of proof, the burden shall be on the prosecution to prove that no prejudice is caused to the accused in the investigation of the case conducted by the complainant/informant and at the same time accused has to establish bias and/or unfair investigation by the investigator. The appellant has raised the plea of false complicity. After scrutinizing the infirmities in the case of the prosecution, mentioned above, when tested in the light of the observations made above, it becomes clear that the investigating officer failed to conduct a proper investigation. This failure has not only prejudiced the appellant but has also undermined the prosecution's case.

Non-compliance of provision of Section 50 of Act

37. The argument advanced by learned counsel for appellant regarding non-compliance of provision of Section 50 of the Act is concerned, same is not tenable in the facts of the case. PWs stated that no offer was given to appellant as required under Section 50 of the Act. Admittedly, recovery in present case is a chance recovery, from polythene bag being carried by appellant-accused and not from the personal search of the accused. Therefore, Section 50 of the NDPS Act is not applicable. It is

only in case of recovery of contraband from the person of accused, compliance of provision of Section 50 of the NDPS Act is mandatory as settled by Constitutional Bench of Hon'ble the Supreme Court in the case of **'Vijaysinh Chandubha Jadeja Vs. State of Gujarat' (2011) 1 SCC 609** observing that in a case of personal search only the provision of Section 50 of the NDPS Act is required to be complied with. Same principle was reiterated in case titled **'Rajesh Dhiman and others Vs. State of Himachal Pradesh'** and **'Gulshan Rana Vs. State of Himachal Pradesh'** reported as **(2020) 10 SCC 740**.

Whether percentage of the salt of contraband or the entire quantity of recovered contraband is determinable for qualifying the quantity under the Act

38. Insofar as the contention of learned counsel for the appellant for considering the percentage of the salt of the contraband and not the entire quantity of recovered contraband for determining the culpability under the Act is concerned, same stand answered by Hon'ble the Supreme Court in **Hira Singh** (supra) observing that it is the total quantity of the contraband and not the percentage of the salt to be considered while considering the guilt of the accused. Learned counsel for the appellant was unable to bring to the notice of this Court any observation to the contrary. The aforesaid argument thus cannot be countenanced.

39. It is the bounden duty of the prosecution to establish its' case beyond reasonable doubt by bringing cogent and qualitative evidence. It is settled principle of criminal jurisprudence that more serious the offence, stricter the degree of proof. Under the NDPS Act, the extent of burden to prove the foundational facts on the prosecution are more onerous for such type of cases, a higher degree of assurance thus would be necessary to convict a person under the NDPS Act.

40. In view of the discussion above and the cumulative effect of the infirmities, the prosecution has failed to prove its case against the appellant-accused beyond a shadow of reasonable doubt. The learned trial Court overlooked significant deficiencies discussed herein above, in the prosecution case and fell in error in holding the appellant guilty.

41. No other argument was urged.

42. As an upshot of the aforesaid discussion, appeal is allowed. The judgment of conviction and order of sentence dated 23.10.2013 passed by Judge Special Court, Mansa, is hereby set aside. Appellant is acquitted of the charge.

43. The appellant is on bail on account of suspension of his sentence vide order dated 04.03.2016 passed by Coordinate Bench. In view of the provisions of Section 437-A of Cr.P.C. 1973, appellant is directed to execute bonds within a period of 30 days from receiving the certified copy of this judgment, to the satisfaction of learned trial Court/successor Court, which shall remain in force for six months in terms of Section 437-A Cr.P.C. Copy of this judgment along with trial Court record be sent forthwith to learned trial Court and one copy of this judgment be also sent to Legal Aid Counsel representing the appellant. A copy of judgment, if applied for, be made available to the appellant. The case property, if any, may be dealt with as per rules after expiry of period of limitation of filing the appeal.

44. Pending miscellaneous applications, if any, stand disposed of accordingly.

(RITU TAGORE)
JUDGE

Pronounced on: 22nd November, 2023
Manpreet/Rimpal

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