

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

CRA-S-1607-SB-2017 (O&M)

Date of Decision:25.08.2023

Gurpreet Singh

... Appellant

Versus

State of Punjab

... Respondent

CORAM : HON'BLE MR. JUSTICE HARPREET SINGH BRAR

Present: Mr. Dinesh Kumar Prajapati, Legal Aid Counsel
for the appellant.

Ms. Ishma Randhawa, Addl. A.G., Punjab.

HARPREET SINGH BRAR, J. (ORAL)

1. The present appeal is directed against the judgment of conviction dated 13.10.2016 passed by the learned Judge, Special Court, Amritsar in case bearing FIR No.67 dated 03.06.2014 registered under Section 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act) registered at Police Station Mehta, District Amritsar whereby the appellant has been convicted for commission of offence under Section 22 of the NDPS Act and vide order of sentence dated 21.10.2016 he has been sentenced to undergo rigorous imprisonment for a period of 10 years with a fine of Rs.1 lakh and in default of payment of fine to further undergo rigorous imprisonment for one year.

FACTUAL BACKGROUND

2. In brief, the version put forth by prosecution is that on 03.06.2014, while being on patrolling duty, ASI Sawinder Singh (Investigating Officer) along with other police officials was present at Dhardeo Wadala Link Road, where police

party noticed that one person, who was coming on foot from western side, got perplexed after looking at the police party and started walking briskly in opposite direction. He threw a polythene bag on the ground which he was carrying in his hand. Thereafter, ASI Sawinder Singh apprehended him on the basis of suspicion and on being asked, he disclosed his name as Gurpreet Singh son of Mukhtiar Singh. Before checking that polythene bag, which was thrown by accused-Gurpreet Singh on the ground, ASI tried to join an independent witness but no one came forward. Thereafter, Gurpreet Singh opened the said polythene bag in the presence of ASI Sawinder Singh, which contained intoxicant powder. A weighing machine was arranged by ASI Sawinder Singh and after taking a sample of 10 grams from that intoxicant powder in a plastic container, which was converted into parcel, weight of remaining contraband was measured as 90 grams. The said contraband was put in another plastic container and converted into bulk parcel. Both the parcels were sealed by ASI Sawinder Singh with his seal bearing impression 'SS'. Form M-29 was also prepared at the spot and the case property was taken into possession while preparing a recovery memo. Ruqa was sent to the police station through Constable Tejinder Singh on the basis of which formal FIR was registered and further investigation was started.

3. On return to the police station the entire case property was produced before officiating SHO Kuldip Singh. After verification, said SHO put the accused behind bars. Both, the sample and bulk parcel, were checked by the SHO and then he affixed his own seal bearing impression 'KS' thereon. On next day, accused was produced before the Illaqa Magistrate for authentication of the case property. Inventory as required under Section 52-A of NDPS Act, was also prepared. On 04.06.2014, SHO Sukhwinder Singh had given both the sample and bulk parcel to ASI Sawinder Singh Investigating Officer, who deposited the same

in judicial malkhana. On 09.06.2014, SI Shaminderjit Singh handed over one sample parcel of 10 gms of intoxicant powder sealed with impression 'SS' and 'KS' along with form M-29 and sample seal to HC Kuljit Singh for depositing the same to the office of Chemical Examiner, Kharar, Punjab. Sample parcel was sent to the office of Chemical Examiner duly sealed with intact seal impressions 'SS' and 'KS' and thereafter report of Chemical Examiner was received, according to which, the said sample contained Diphenoxylate Hydrochloride. After completion of investigation, challan against the accused was prepared and presented in the court. As per Section 207 Cr.P.C., copies of documents as relied upon by the prosecution were supplied to the accused free of costs.

4. After considering the rival contentions and perusing the record, commission of offence under Section 22 of the NDPS Act was made out against the accused and thus, he was charged accordingly. Contents of the charge were read over and explained to the accused to which he pleaded not guilty and claimed trial.

5. In support of its case, the prosecution examined as many as six witnesses and thereafter closed its evidence.

6. Statement of accused was recorded under Section 313 Cr.P.C. wherein he denied the charge framed against him and pleaded innocence. The appellant further put forth his defence that he was illegally picked up from his house in the presence of his family, Sarpanch and other respectable persons of the village. In fact, no recovery was made from him whereas the alleged recovery had been planted upon him.

7. In his defence, appellant had examined two witnesses, who deposed that the appellant was picked up from his house on 03.06.2014 and thereafter, recovery of the contraband was planted falsely upon him.

CONTENTIONS

8. Learned counsel appearing for the appellant argues that there are serious flaws in the investigation conducted by the police as provisions of NDPS Act have been violated while carrying out the investigation. It is argued that the contraband was recovered from the polythene bag lying on the ground and no recovery was effected from the person of the appellant, therefore, it cannot be said that the appellant was in conscious possession of the alleged contraband. It is further argued that ASI Sawinder Singh, who was complainant in the present case, had carried out the investigation, which is against the settled position of law. The complainant should have refrained himself from further investigation of the case but he carried on with the same and recorded statements of witnesses under Section 161 Cr.P.C. and thereby, vitiated the trial and hence, the accused is entitled for acquittal.

9. Learned counsel for the appellant further argues that no independent witness was joined by the Investigating Officer, despite the fact that the place of alleged recovery was a thoroughfare. It is also argued that provisions of Section 50 of the NDPS Act were not complied with as the appellant was not apprised of his legal right to be searched before a Gazetted Officer or a Magistrate. PW-5 Sawinder Singh, who was the Investigating Officer, stated in his cross-examination that he did not give the option to the accused to be searched in the presence of Gazetted Officer or a Magistrate. Further, the personal search memo is also not available on record.

10. Learned counsel for the appellant also argues that there is unexplained delay of six days in sending the sample to FSL. It is settled position of law that the contraband after seizure and deposit in the Malkhana or with the SHO is to be sent to the FSL within 72 hours as per the instructions issued by the Narcotics

Control Bureau vide notification No.1/88. In support of his arguments, learned counsel for the appellant vehemently relies upon the judgment rendered by this Court in CRA-S No.1830-SB of 2014 and other connected appeal titled as ***ArjunSingh @ Marra and another Vs. State of Punjab*** decided on 28.07.2023.

11. Per contra, learned counsel appearing on behalf of the respondent-State argues that provisions of Section 50 of the NDPS has no application to this case, as the contraband was recovered from a polythene bag, which was carried by the accused and later was thrown on the ground and was not recovered from the person of the accused. In order to strengthen her argument, she relied upon the judgment passed by a three judge bench of Hon'ble Supreme Court in ***State of Rajasthan Vs. Ratan Lal (2009) 11 SCC 464***.

12. Learned State counsel further argues that the accused is not entitled to acquittal on the sole ground that the complainant himself was the Investigating Officer unless and until it is proved that the accused suffered the vice of unfairness or bias, which has to be decided on a case to case basis. It is also argued that delay of 6 days in sending the samples to the FSL is not fatal to the prosecution case, as all the official witnesses supported the prosecution case and there was no evidence produced in rebuttal that the case property was tampered with. Even the report of the Chemical Examination, which was placed on record as Ex.PX proved that the sample contained Diphenoxylate Hydrochloride.

ANALYSIS AND OBSERVATION

13. I have heard learned counsel for the parties and have gone through the records with their able assistance.

14. Learned counsel for the appellant has forcefully argued that provisions of Section 50 of the NDPS Act were not complied with, as the appellant was not made aware of his legal right to be searched before a Gazetted Officer or a

Magistrate. The above contention of the learned counsel for the appellant, when tested on the anvil of the facts and circumstances of the present case, this Court finds that the above argument with regard to non-compliance of Section 50 of the NDPS Act is required to be rejected. Undisputedly, the alleged contraband was not recovered from the person of the accused rather the same was seized from a polythene bag carried by the appellant. The rigor of Section 50 of the NDPS Act would be made applicable in a case where the recovery is not made from the person of the accused but along with the recovery of the contraband, the accused was also subjected to personal search. In the present case, personal search of the appellant was not conducted. As such, in the opinion of this Court Section 50 of the NDPS Act has no application. The Hon'ble Supreme Court in ***State of Rajasthan Vs. Ratan Lal*** (supra), while discussing in detail the most appropriate meaning of word 'person' has observed that though the word 'person' has neither been defined under the NDPS Act nor under the Code of Criminal Procedure, 1973 but Section 11 of the Indian Penal Code, 1860 says that the word 'person' includes any company or association or body of persons whether incorporated or not. Similar definition of the word 'person' has been given in Section 3 (42) of the General Clauses Act, 1897. In the said case, the recovery was effected from a polythene bag and while dealing with the question of non-compliance of the provisions of Section 50, the Hon'ble Supreme Court has held that the most appropriate meaning of the word 'person' appears to be the 'body of a human being as presented to public view usually with its appropriate coverings and clothing'. A bag, briefcase or any such article or container etc. can, under no circumstances, be treated as body of a human being, therefore, it is not possible to include these articles within the ambit of word 'person' occurring in Section 50 of the NDPS Act. Since the alleged contraband was recovered from the bag,

which was carried by the accused, Section 50 of the NDPS Act cannot be made applicable in such a situation.

15. A glaring omission on the part of the Investigating Officer is non-compliance of Section 52-A of the NDPS Act. The mandate of Section 52-A of the NDPS Act requires the representative sample to be drawn in the presence of the Magistrate but in the present case, no such exercise was done, which would render the case of the prosecution highly doubtful. A two Judge Bench of the Hon'ble Supreme Court in ***Union of India vs. Mohanlal and another, 2016 (1) RCR (Criminal) 858***, speaking through Justice T.S.Thakur has held as under:-

“20. To sum up we direct as under:

(1) No sooner the seizure of any Narcotic Drugs and Psychotropic and controlled Substances and Conveyances is effected, the same shall be forwarded to the officer in-charge of the nearest police station or to the officer empowered under Section 53 of the Act. The officer concerned shall then approach the Magistrate with an application under Section 52A(ii) of the Act, which shall be allowed by the Magistrate as soon as may be required under Sub-Section 3 of Section 52A, as discussed by us in the body of this judgment under the heading 'seizure and sampling'. The sampling shall be done under the supervision of the magistrate as discussed in paras 13 and 14 of this order.”

16. Recently, a two Judge Bench of the Hon'ble Supreme Court in ***Mangilal vs. The State of M.P.***, CrI. Appeal No. 1651 of 2023 decided on July 12, 2023, speaking through Justice M.M. Sundresh, while acquitting the accused, has observed that the mandate of Section 52-A of the NDPS Act has to be duly complied with. The following was observed:-

“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 a 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.”

17. Admittedly, the representative sample was sent after a delay of 6 days for chemical examination to FSL, Kharar, Mohali. As per instructions issued vide Standing Order No.1 of 1988 dated 15.03.1988 by the Narcotics Control Bureau, the representative sample is required to be sent to the Chemical Examiner within 72 hours. The Standing Orders are mandatory in nature and the omission on the part of the Investigating Officer with regard to non-compliance of Section 52-A of the NDPS Act coupled with the violation of Standing Order No.1 of 1988 *ibid* in sending the sample after a delay of 6 days would tantamount to be a serious flaw in the investigation, which suffocates the prosecution case completely. The sanctity of the statutory instructions contained in the Standing Orders issued by the Narcotics Control Bureau came up for consideration before the Hon'ble Supreme Court in **Noor Aga vs. State of Punjab, 2008 (16) SCC 417**, where a two Judge Bench, speaking through Justice S.B.Sinha, has held as under:-

“32. Recently, this Court in State of Kerala & Ors. v. Kurian Abraham (P) Ltd. & Anr. [(2008) 3 SCC 582], following the earlier decision of this

Court in Union of India v. Azadi Bachao Andolan [(2004) 10 SCC 1] held that statutory instructions are mandatory in nature.

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 these 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.”

18. The delay of 6 days in sending the samples to the Chemical Examiner also make the ratio of law in ***Union of India Vs. Bal Mukund and others 2009 (2) RCR (Criminal) 574, Malkiat Singh alias Kala Vs. State of Punjab 2009 (1) RCR (Criminal) 353*** and ***State of Rajasthan Vs. Gurmail Singh 2005 (2) RCR (Criminal) 58*** applicable in the present case.

19. Another conspicuous omission on the part of the Investigating Officer was with regard to ensuring safe custody of the bulk as well as the representative samples. In the manner in which the bulk and representative samples were handled, possibility of tampering with both the sealed parcels cannot be ruled out. PW-5 Sawinder Singh, Investigating Officer while deposing before the learned trial Court has admitted in his cross-examination that it is correct that MO.1 and MO.2 do not bear mudd number, malkhana and judicial malkhana number nor there is any date on which said samples were deposited in judicial malkhana. He further deposed that it is correct that in Ex.PW3/D, there is no mention regarding handing over of form M-29 and sealed sample and that the same were deposited with case property in double lock. The prosecution has not made any effort to produce Register 19 during the course of trial to rule out any possibility of tampering and to prove that the bulk parcel and the sample parcels

were kept in safe custody. There are other glaring discrepancies in the case of the prosecution with regard to arranging of scale for weighing the seized contraband and no explanation is forthcoming with regard to non-joining of any independent witness during the course of investigation, even though the recovery was made from a road, which is frequently visited by the general public.

20. It is well settled law that non-examination of an independent witness is not fatal for the case of the prosecution but in the instant case neither any effort was made to associate any independent witness nor any explanation is forthcoming for not doing so. A two Judge Bench of the Hon'ble Supreme Court in ***Krishan Chand vs. State of H.P. AIR 2017 (SC) 3751*** has laid down the ratio that the failure of the investigating officer to associate an independent witness at the time of recovery creates a dent in the case of the prosecution. A two Judge Bench of the Hon'ble Supreme Court in ***Gorakh Nath Prasad vs. State of Bihar, 2018(1) RCR (Criminal) 108*** has acquitted the accused holding that the case of the prosecution cannot be entirely based upon the statements of the official witnesses when no independent witness has been joined in the investigation.

21. There are gaping holes and inadequacies in the prosecution evidence and the link evidence is completely missing. The prosecution has miserably failed to knit together the chain of circumstances which point towards the hypothesis of the complicity of the appellant beyond reasonable shadow of doubt. Resultantly, the appeal is allowed. The judgment of conviction dated 13.10.2016 and order of sentence dated 21.10.2016 passed by the learned Judge, Special Court, Amritsar are set aside. The appellant-Gurpreet Singh is acquitted of the charges framed against him. His bail bonds and surety bonds stand discharged.

22. Pending miscellaneous application(s), if any, shall also stand disposed of.

23. The case property, if any, may be dealt with as per rules after expiry of period of limitation for filing the appeal(s). Record of the case be sent back to the Court below.

(HARPREET SINGH BRAR)
JUDGE

August 25, 2023
Pankaj*

Whether speaking/reasoned	Yes
Whether reportable	Yes