

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

CRA-S-2184-SB-2014(O&M)

Date of decision: 28.07.2023

Shiv Nath

..... Appellant

Versus

State of Punjab

..... Respondent

CORAM : HON'BLE MR. JUSTICE HARPREET SINGH BRAR

Present: Mr. K.B.S Mann, Advocate
for the appellant.

Mr.Iqbal Singh Maan, DAG, Punjab.

HARPREET SINGH BRAR, J.

1. The above mentioned appeal has been directed against the judgment of conviction and order of sentence dated 16.10.2013 passed by Special Court, Sri Muktsar Sahib, in FIR No. 79 dated 12.07.2011, under Section 22 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as 'the NDPS Act' for short), registered at Police Station Lambi, vide which the appellant has been convicted and sentenced to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs. 1,00,000/- for the commission of offence punishable under Section 22 of the Act and in default of payment of fine, he was further ordered to undergo rigorous imprisonment for a period of 01 year.

FACTUAL BACKGROUND

2. Brief facts of the case are that on 12.07.2011, ASI Kabul Singh (investigating officer) along with HC Sukhjit Singh was patrolling the area of village Killianwali towards village Lohara. The police party spotted the accused carrying a plastic bag in his left hand at the bridge of the canal in the area of village Lohara. The accused was stopped on suspicion of him being in possession of intoxicating substances. He was informed of his legal right to be searched before a Gazetted Officer or a Magistrate. The accused reposed faith in the investigating officer and a consent memo was prepared on which thumb impression of the accused was placed. The same was attested by HC Sukhjit Singh and HC Tarsem Singh.

A search of the bag was conducted and 3kg of Charas was recovered. A sample of 20g was separated and both the parcels were sealed bearing with the impression 'KS'. A *ruqa* was sent to the police station for the registration of the FIR. An arrest memo was prepared and the accused was arrested. Both the recovery memo and the arrest memo bear the thumb impression of the accused.

Thereafter, at the police station, the parcels were presented to ASI/SHO Iqbal Singh who further sealed both the parcels and added a seal bearing impression 'IS' on it. The SHO took the case property in possession vide memo attested by the investigating officer. The case property was produced before the Illaqa Magistrate who separated 20g of Charas as representative sample and placed his own seal bearing impression 'HA' on the parcel. The case property was then deposited with MHC Pritpal Singh who handed it over to HC Lekh Raj for depositing the same in the office of

the Chemical Examiner Punjab, Chandigarh.

3. After complying with the provisions of Section 207 Cr.P.C., charge was framed against the accused for the commission of offence punishable under Section 22 of the Act, to which the accused did not plead guilty and claimed trial.

4. In order to prove its case, prosecution examined as many as five witnesses. Accused in their defence examined HC Surjit Singh.

5. After hearing arguments of both sides and perusing the evidence on record, the trial Court convicted and sentenced the appellant/accused as discussed above.

CONTENTIONS

6. Learned counsel for the appellant has relied upon a Division Bench judgment of the Himachal Pradesh High Court in **Nagender Shah vs. State of H.P. 2010(4), RCR (Criminal) 194** and the order passed by this Court in **CRM-22440-2017 in CRA-D-163-DB-2017, Varinder Kumar vs. State of Punjab**. On the basis of these decisions, learned counsel for the appellant contends that as per Ex.P11, the report of the Chemical Examiner, the percentage of resin content in the sample is 24%. As such, the seized contraband from the appellant cannot be termed as 'charas'. He has drawn the attention of the Court towards para 25 of the judgment passed in **Nagender Shah's case (supra)** which is reproduced hereasunder:-

“30. According to Parikh's Textbook of Medical Jurisprudence, Forensic Medicine and Toxicology, in the case of bhang it is 15 per cent, in the case of ganja it is about 25 per cent and in the case of Charas it is between 25 and 40 per cent. When the percentage of tetrahydrocannabinol in the sample stuff is not indicated in the report nor had any test been conducted to

ascertain whether the stuff was Charas, that is to say resin, or some other preparation of cannabis, it cannot be said that the stuff was in fact Charas. As regards cystolithic hair, these being the fibre of cannabis plant, are bound to be present in all the products of cannabis. It is quite likely that the samples were only of bhang, i.e. the dried leaves of cannabis plant, which is also supposed to contain 15 per cent concentration of tetrahydrocannabinol. Possession of only the leaves or the seeds of cannabis plant is no offence, because it is only the Charas, ganja or mixture, as defined in Section 2(iii) of the Act, which is an offence, under Section 20 of the Act. Leaves and seeds of cannabis plant are not included either in the definition of Charas or ganja and are rather specifically excluded from the definition of ganja, unless accompany the flowering and fruiting tops of the plant.”

7. Learned counsel for the appellant has vigorously argued that according to the report of Chemical Examiner, the seized contraband from the appellant is not ‘charas’.

8. Learned counsel for the appellant has pointed out various shortcomings in the case of the prosecution. According to PW1-HC Sukhjit Singh, the scales for weighing the recovered contraband were arranged from neighbouring village Lohara whereas, as per the prosecution case, the recovery of the contraband is made from the road which connects village Killianwali and Lohara. The time of recovery is 4.00 p.m. and the police party remained at the spot for four hours. Learned counsel for the appellant asserts that in spite of recovery from a busy road, no independent witness was joined. PW1-HC Sukhjit Singh, has admitted in his cross examination that it is correct that the place of recovery is a thoroughfare and the public

was passing from there but he could not tell the names of those persons to whom the investigating officer had asked to become witnesses. He has further assailed the case of the prosecution on the ground that there is a 7 days delay in dispatching the sample to the office of the Chemical Examiner and that the prosecution has not been able to prove that till the sample was dispatched, it remained in the safe custody. It has further been pointed out that there is a total non-compliance of Section 50 of the NDPS Act as the investigating officer himself has made the alleged recovery without informing the appellant of his legal right to be searched before a Gazetted Officer or a Magistrate. He further argues that the investigating officer himself is the complainant. As such, the entire investigation stands vitiated and he prays for acquittal of the appellant.

9. Per contra, learned State counsel has supported the case of the prosecution by arguing that the conscious possession of the seized contraband has been duly proved and that all the procedural safeguards provided under the NDPS Act have been duly complied with. Even the compliance of Section 52-A of the NDPS Act was also made. The case property was produced before the concerned Magistrate and a representative sample was also drawn in his presence.

OBSERVATION AND ANALYSIS

10. This Court has heard learned counsel for the parties and has perused the record with their able assistance.

11. Evidently, as per the report of the Chemical Examiner (Ex.P11), the content of tetrahydrocannabinol(THC) in the resin was found to be 24%.

A Division Bench of the Himachal Pradesh High Court in **Sunil Vs. State of**

Himachal Pradesh, 2011(5) RCR (Criminal) 726, after taking into consideration the definition of cannabis as provided under Section 2(iii) of the NDPS Act, acquitted the appellant on the ground that the percentage of tetrahydrocannabinol(THC) was not mentioned in the report of the Chemical Examiner, since the determinative factor for arriving at a conclusion that the recovered contraband falls within the definition of Bhang, Ganja or Charas is the percentage of THC in it i.e. 15% in the case of Bhang, upto 25% in Ganja and between 25-40% in the case of Charas. A Full Bench of the Himachal Pradesh High Court in **State of H.P. vs. Mehboon Khan, 2014(2) RCR(Criminal) 447**, on reference by the Division Bench in this regard, has considered the various decisions on this issue and while holding that the Division Bench of the Himachal Pradesh High Court has erred in taking into consideration the percentage of THC, observed as follows:-

“ xxxx

c. In view of the detailed discussion hereinabove, the Division Bench while deciding Sunil's case supra has definitely erred in taking note of the percentage of tetrahydrocannabinol in three forms of cannabis i.e. Bhang, Ganja and Charas and hence, concluded erroneously that without there being no reference of the resin contents in the reports assigned by the Chemical Examiners in those cases, the contraband recovered is not proved to be Charas, as in our opinion, the Charas is a resinous mass and the presence of resin in the stuff analyzed without there being any evidence qua the nature of the neutral substance, the entire mass has to be taken as Charas.

d. There is no legal requirement of the presence of particular percentage of resin to be there in the sample and the presence of the resin in purified or crude form is sufficient to

hold that the sample is that of Charas. The law laid down by the Division Bench in Sunil's case that 'for want of percentage of tetrahydrocannabinol or resin contents in the samples analyzed, the possibility of the stuff recovered from the accused persons being only Bhang i.e. the dried leaves of cannabis plant, possession of which is not an offence, cannot be ruled out', is not a good law nor any such interpretation is legally possible. The percentage of resin contents in the stuff analyzed is not a determinative factor of small quantity, above smaller quantity and less than commercial quantity and the commercial quantity. Rather, if in the entire stuff recovered from the accused, resin of cannabis is found present on analysis, whole of the stuff is to be taken to determine the quantity i.e. smaller, above smaller but less than commercial and commercial, in terms of the notification below Section 2 (vii a) and (xxiii a) of the Act.

e. xxxxxx

f. We are also not in agreement with the findings recorded by the Division Bench in Sunil's case that "mere presence of tetrahydrocannabinol and cystolithic hair without there being any mention of the percentage of tetrahydrocannabinol in a sample of charas is not an indicator of the entire stuff analyzed to be charas" for the reason that the statute does not insist for the presence of percentage in the stuff of charas and mere presence of tetrahydrocannabinol along with cystolithic hair in a sample stuff is an indicator of the same being the resin of cannabis plant because the cystolithic hair are present only in the cannabis plant. When after observing the presence of tetrahydrocannabinol and cystolithic hair, the expert arrives at a conclusion that the sample contains the resin contents, it is more than sufficient to hold that the sample is of charas and the view so expressed by the expert normally should be honoured and not called into question. Of course, neutral material which is not obtained from cannabis plant cannot be treated as resin

of the cannabis plants. The resin rather must have been obtained from the cannabis plants may be in 'crude' form or 'purified' form. In common parlance charas is a hand made drug made from extract of cannabis plant. Therefore, any mixture with or without any neutral material of any of the forms of cannabis is to be considered as a contraband article. No concentration and percentage of resin is prescribed for 'charas' under the Act."

12. In view of the pronouncement of the full Bench of Himachal Pradesh High Court in **Mehboon Khan** (supra), the issue involved with regard to the percentage of THC is settled and it is made clear that the nature of contraband has to be seen as per the definition provided under Section 2(iii) of the NDPS Act. The said Section is reproduced as follows:-

"Section 2 (iii) cannabis (hemp) means

(a) charas, that is, the separated resin, in whatever form whether crude or purified, obtained from the cannabis plant and also includes concentrated preparation and resin known as hashish oil or liquid hashish;

(b) ganja, that is, the flowering of fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops), by whatever, name they may be known or designated; and

(c) any mixture, with or without any neutral material, of any of the above forms of cannabis or any drink prepared therefrom;"

13. A perusal of the definition of Section 2(iii)(a) of the NDPS Act clearly indicates that charas is the resin in whatever form, whether crude or purified, obtained from the cannabis plant. The legislature in its wisdom has not provided any distinction between crude, purified or liquid concentrated form. As such, the different percentage

of the resin would not be the determinative factor for holding that the seized contraband is not charas.

14. Further, a perusal of Form 29 (Ex.P6) indicates that the sample was dispatched on 18.07.2011 whereas the recovery was made on 12.07.2011. The sample was admittedly dispatched beyond the prescribed period of 72 hours as envisaged in the Standing Order No.1 of 1988 dated 15.03.1988 issued by the Narcotics Control Bureau.

15. Another conspicuous fact which is discernible from Ex.P6 is that the sample which was sent for chemical analysis was sealed with the impressions 'IS' and 'KS' of the seals of PW5-ASI Iqbal Singh and PW2-ASI Kabul Singh respectively. Statement of PW5-ASI Iqbal Singh further reveals that the appellant was produced along with the entire case property in the Court of the concerned Magistrate and one representative sample weighing 20g of charas from the bulk parcel was separated and the representative sample was sealed with the seal of the Court bearing impression 'HA' and the seal of the investigating officer bearing impression 'KS'. A perusal of Ex.P19, the order passed by the learned SDJM, Malout on 13.07.2011, also indicates that the representative sample weighing 20g was taken in the Court and same had been signed and sealed with the seal of the Court bearing impression 'HA' along with the seal of the investigating officer bearing impression 'KS' whereas a perusal of Form 29 (Ex.P6) shows that the sample which was taken at the spot, was sent to Chemical Examiner and it did not bear the seal of the Court bearing impression 'HA' and that of the investigating officer 'KS'. Rather, it bore the impression of the seal of

ASI Iqbal Singh-PW5 and ASI-Kabul Singh-PW2 which shows that the representative sample drawn in the presence of the concerned Magistrate was not sent to the Chemical Examiner. It is not merely an empty formality to draw the representative sample in the presence of the Magistrate. Such lapse would tantamount to non-compliance of Section 52-A of the NDPS Act. A three Judge Bench of the Hon'ble Supreme Court in **Tofan Singh vs. State of Tamil Nadu, 2021(1) RCR(Criminal) 1**, speaking through Justice R.F. Nariman, has held as follows:-

“57. On the basis of the reasoning and discussion above, the following conclusions arise:

xxxx

(4) That there is indeed need to protect society from criminals. The societal intent in safety will suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it does not exist. The answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously inviting action against the concerned official so that the laxity on the part of the investigating authority is curbed. In every case the end result is important but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of judicial process may come under cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for law and may have the effect of unconscionably compromising the administration of justice. That cannot be permitted. An accused is entitled to a fair trial.

A conviction resulting from an unfair trial is contrary to our concept of justice. The use of evidence collected in breach of the safeguards provided by Section 50 at the trial, would render the trial unfair.”

16. Neither the MHC Pritpal Singh, in-charge of the Malkhana where the bulk and the sample was kept, was produced as a witness nor Register No. 19 was produced to establish the safe custody of the sample till it reached the Chemical Examiner. As such, the possibility of tampering cannot be ruled out. Reliance in this regard is place on **Narcotics Control Bureau vs. Ajmer Kumar and another, 2016 ILR (HP) 1090** and **Jitendra Singh Rathore vs. State of U.P., 2014(5) RCR(Criminal) 462** wherein on the basis of above lapse, the accused were acquitted.

17. The sample was dispatched beyond the period of 72 hours from the date of recovery. As such, the case of the appellant is fully covered by the ratio of law laid down in **Union of India vs. Bal Mukund and others, 2009(2) RCR (Criminal) 574** and **State of Rajasthan vs. Gurmail Singh, 2005(2) RCR(Criminal) 58** with regard to delay in sending the sample to the Chemical Examiner resulting in the acquittal of the accused.

18. Admittedly, a sample of 20g of charas was drawn whereas the Standing Order No.1 of 1988 makes it mandatory that a minimum of 24g should be drawn as sample for chemical examination. Relevant provision of the Standing Order No. 1 of 1988 is reproduced hereasunder:-

“Quantity of different drugs required in the sample – The quantity to be drawn in each sample for chemical test should be 5 grams in respect of all narcotic drugs and psychotropic substances except in the cases of Opium Ganga and

Charas/Hashsish where a quantity of 24 grams in each case is required for chemical test. The same quantities should be taken for the duplicate sample also.”

19. The procedure prescribed in the Standing Order is required to be mandatorily adhered to. 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, 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.”

20. A perusal of the record shows that the contraband was recovered from a plastic bag which the accused was carrying in his left hand alongwith his personal search. The Hon’ble Supreme Court in **State of Rajasthan vs. Parmanand and another 2014(2) RCR (Criminal) 40**, has categorically held that Section 50 of the NDPS Act will be applicable

mandatorily in cases where personal search is conducted alongwith recovery of contraband. The communication of the right of the accused to be searched before a Gazetted Officer or a Magistrate is not ceremonial. Hence, the communication has to be made individually, in an unambiguous manner. Joint communication of the said right would defeat the purpose of Section 50 of the NDPS Act. The communication of the right must be made to the accused even if it is of little significance to him as he should not suffer for the want of knowledge of the same.

A Larger Bench of five Judges of the Hon'ble Supreme Court in **Vijaysinh Chandubha Jadeja vs. State of Gujarat, 2010(4) RCR(Criminal) 911**, has held that an endeavour must be made to produce the accused before the nearest Magistrate at the first instance to bestow impartiality, authenticity, transparency and creditworthiness to the prosecution case as the Magistrate commands more confidence of the public than a police officer. Mere enquiry by the police officer in this regard will not serve the purpose of the mandate of Section 50 of the NDPS Act. The accused must be made aware that it is his legal right to be searched before a Gazetted Officer or a Magistrate.

21. Recently, a two Judge Bench of the Hon'ble Supreme Court in **Mangilal vs. The State of M.P., Crl. 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 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.”

22. It is settled law that non-examination of an independent witness is not fatal to 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. 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.

CONCLUSION

23. In view of the above discussion, the aforesaid appeal is

allowed. The judgment of conviction and order of sentence dated 16.10.2013 passed by Special Court, Sri Muktsar Sahib are set aside. Appellant namely Shiv Nath is acquitted of the charges framed against him. His bail bonds and surety bonds stand discharged.

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

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

(HARPREET SINGH BRAR)
JUDGE

28.07.2023
sunita

Whether speaking/non speaking	:	Yes/No
Whether reportable/non reportable	:	Yes/No