

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRA-S-2847-SB-2014(O&M)
Date of Decision: 11.08.2023

Gurwinder Singh and another

..... Appellants

Versus

State of Punjab

..... Respondent

CORAM : HON'BLE MR. JUSTICE HARPREET SINGH BRAR

Present: Mr. Simranjeet Singh Sarwara, Advocate and
Ms.Khushika Setia, Advocate for the appellants.

Mr.Iqbal Singh Maan, DAG, Punjab.

HARPREET SINGH BRAR, J.

1. The present appeal has been preferred against the judgment of conviction and order of sentence dated 06.06.2014 passed by Special Court, Sahibzada Ajit Singh Nagar (Mohali) in FIR No. 48 dated 11.04.2013, under Section 15 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as 'the NDPS Act' for short), registered at Police Station Sadar Kharar, whereby the appellants have been convicted for the commission of offence punishable under Section 15(c) of the NDPS Act and have been sentenced to undergo rigorous imprisonment for a period of 10 years each with a fine of Rs. 1,00,000/- each and in default of payment of fine, to further undergo rigorous imprisonment for a period of six months each.

FACTUAL BACKGROUND

2. Brief facts of the prosecution case are that on 11.04.2013, ASI

Avtar Singh (Investigating Officer) along with ASI Harminder Singh and other police officials were patrolling the area of Nayashehr. At about 10.00 p.m. he received a secret information that appellants/accused were bringing poppy husk from Rajasthan on a truck bearing No. PB-11-AL-8425 to be supplied in different parts of State of Punjab and they were coming towards Kharar from Banur side and if a check point was laid on Landran-Kharar road, they could be apprehended with the poppy husk. Since the information was trustworthy, an offence punishable under Section 15 of the NDPS Act was made out against the appellants/accused and a *ruqa* (Ex.P18) was sent to the police station through HC Rakesh Kumar on the basis of which FIR (Ex.P9) was recorded.

3. The Investigating Officer laid a check point and intercepted the said truck and the appellants/accused were found present in the truck. The Investigating Officer informed them of their option to get their truck searched in the presence of either a Gazetted Officer or a Magistrate. Both the appellants/accused separately opted to be searched in the presence of a Gazetted Officer. The dissent memos were prepared for both the appellants/accused (Ex P-11 and Ex P-12) on which their thumb impressions and signatures were placed. Information was sent to Harbans Singh, DSP(Headquarters), Mohali who reached the spot. The appellants/accused reposed confidence in the DSP and separately gave consent to get searched in his presence. Consent memos (Ex. P-3 and Ex. P-4) were prepared and the same were signed and thumb marked by the appellants/accused. The truck was searched and two plastic bags containing poppy husk were recovered from the rear seat of the cabin of the truck. Two samples weighing 250 grams each were separated and the remaining contraband in both bags was

weighed and the same came out to be 29.5 kg each. The sample parcels and the bulk parcels were sealed with seal bearing impression 'AS' and 'HS'. Form 29 was prepared at the spot. Appellants/accused were arrested vide arrest memos Ex.P14 and Ex. P16. After completion of usual formalities of investigation, challan was presented in Court against the appellants/accused.

4. After making due compliance of the provisions of Section 207 Cr.P.C., charges were framed against the appellants/accused to which they pleaded not guilty and claimed trial.

5. The prosecution, in order to prove its case, examined eight prosecution witnesses and closed its evidence.

6. Appellants/accused examined five witnesses in their defence.

7. After hearing arguments of both the sides and perusing the evidence on record, the trial Court convicted and sentenced the appellants/accused as stated above.

CONTENTIONS

8. Learned counsel for the appellants contends that the case of the prosecution is based upon evidence which has many glaring discrepancies and violation of Sections 50 and 52-A of the NDPS Act is apparent on the record. The representative samples were drawn on 12.04.2013 and the samples were deposited only on 23.04.2013 after a delay of 11 days which has not been explained by the prosecution. Learned counsel for the appellants further contends that the details of the FIR were mentioned on the recovery memo which is admittedly made much prior to sending of *ruqa* (Ex.P18) through special messenger HC Rakesh Kumar for the registration of the formal FIR (Ex.P9). It is not discernible from the record as to why

'FIR No. 48' was mentioned on the recovery memo which was prepared

much prior to the registration of the FIR. Moreover, HC Rakesh Kumar was neither cited as a witness nor examined. No explanation is forthcoming as to why an independent witness was not joined either at the time of recovery of the alleged contraband or during investigation. Learned counsel for the appellants also referred to the discrepancies with regard to the arrival of DSP and the arrangement of the scale for weighing the alleged recovered contraband. The statements of the witnesses are incompatible on the above aspect.

Learned counsel for the appellants further assailed the impugned judgment of conviction on the ground that the scale used for weighing the seized contraband was only capable for weighing up to 10 kg which was duly proved by the defence examined DW4-Surinderjit Singh, Inspector, Legal Metrology (Weight and Measures), Punjab at Mohali. Learned counsel for the appellants further contends that the defence has duly proved on record that the tower location of the mobile phone of the appellants and the police party was not of the same place at the relevant time.

9. On the other hand, learned State counsel contends that Section 50 of the NDPS Act is not attracted in this case as the poppy husk was recovered from the cabin of the truck and minor discrepancies in the statements of witnesses are bound to occur with the passage of time. Learned State counsel further contends that the Investigating Officer has duly complied with all the provisions of the NDPS Act in conforming to the procedural safeguards provided therein. Further, the FSL report (Ex.P20) states that the contents of the sample parcels were found to be that of poppy husk and the defence has not been able to elicit anything substantial during the lengthy cross examination of the prosecution witnesses.

OBSERVATION AND ANALYSIS

10. This Court has heard learned counsel for the parties and has perused the record with their able assistance. The appeal was admitted on 10.07.2014.

11. There is a lapse on the part of the Investigating Officer to comply with the provisions of Section 52-A of the NDPS Act as the samples were not drawn in the presence of the Magistrate. The same is reproduced here as under:-

“52A. Disposal of seized narcotic drugs and psychotropic substances.

(1) The Central Government may, having regard to the hazardous nature, vulnerability to theft, substitution, constraint of proper storage space or any other relevant consideration, in respect of any narcotic drugs, psychotropic substances, controlled substances or conveyances, by notification in the Official Gazette, specify such narcotic drugs, psychotropic substances, controlled substances or conveyance or class of narcotic drugs, class of psychotropic substances, class of controlled substances or conveyances, which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time, determine after following the procedure hereinafter specified.

(2) Where any narcotic drugs, psychotropic substances, controlled substances or conveyances has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs, psychotropic substances, controlled substances or conveyances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs, psychotropic substances, controlled substances or conveyances

or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs, psychotropic substances, controlled substances or conveyances in any proceedings under this Act and make an application, to any Magistrate for the purpose of

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

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

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

(3) Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

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

12. A two Judge Bench of the Hon’ble Supreme Court in **Union of India vs. Mohan Lal, 2016 (1) RCR (Criminal) 858**, speaking through Justice T.S.Thakur, has held the following:-

“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”.

13. A perusal of the prosecution evidence further indicates that the mandate of Section 50 of the NDPS Act was not followed. The personal search of the appellants was also conducted along with the recovery of the poppy husk from the truck. As such, it becomes obligatory on the investigating officer to produce the appellants before the nearest Magistrate. The above lapse on the part of the Investigating Officer would make the judgment of the Hon’ble Supreme Court in **Arif Khan @ Agha Khan v. State of Uttarakhand, 2018(2) RCR (Crl.) 931** applicable to the appellants. Reliance in this regard is also placed upon the judgment of the Hon’ble Supreme Court in **State of Rajasthan v. Parmanand and another, 2014 (5) SCC 345** as well as **Vijaysinh Chandubha Jadeja v. State of Gujarat, (2005) 12 SCC 574**.

14. Another glaring omission in the case of the prosecution is that the representative samples were sent after a delay of 11 days to the Chemical Examiner. The FIR was registered on 11.04.2013, the samples were drawn on 12.04.2023 and the same were deposited with the Chemical Examiner on 23.04.2013. This delay amounts to violation of the Standing Order No.1 of 1988 dated 15.03.1988 issued by the Narcotics Control Bureau which mandates sending of sample to Chemical Examiner within 72 hours. The sanctity of the instructions contained in Standing Order No.1 of 1988 came up for consideration before the Hon’ble Supreme Court in **Noor Aga vs. State of Punjab and another, 2008 (16) SCC 417** and the Hon’ble Supreme Court categorically held that these statutory instructions are

mandatory in nature. This ratio of law was reiterated by Hon'ble Supreme Court recently in **Mangilal vs. The State of Madhya Pradesh, Crl. Appeal No. 1651 of 2023**, decided on 12.07.2023. The case of the appellant is also 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** on account of the sample being sent after the stipulated period of 72 hours.

15. PW5-ASI Avtar Singh, who is the Investigating Officer, has admitted in his cross-examination that place of recovery (Kharar-Landran road) is a busy road and there are residential and commercial establishments on the same. No explanation is forthcoming as to why independent witnesses were not joined. 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. Reference in this regard can also be made to the decision of a two Judge Bench of the Hon'ble Supreme Court in **Gorakh Nath Prasad vs. State of Bihar, 2018(1) RCR (Criminal) 108**.

16. A perusal of the *ruqa* (Ex.P18) would show that ASI Avtar Singh (PW5) is the complainant in the instant case and he has also conducted the investigation. As such, on this account, the entire investigation stands vitiated and makes the decision of the Hon'ble Supreme Court in **Mohan Lal v. State of Punjab, AIR 2018 SC 3853** and **Megha Singh vs. State of Haryana, 1996(11) SCC 709** applicable to the case of the appellants.

CONCLUSION

17. In view of the above discussion, the instant appeal is allowed. The judgment of conviction and order of sentence dated 06.06.2014 passed by Special Court, Sahibzada Ajit Singh Nagar (Mohali), is set aside as there are inconsistencies and discrepancies in the case of the prosecution and the link evidence is completely missing. The appellants namely Gurwinder Singh and Gurmej Singh are acquitted of the charge framed against them. Their bail bonds and surety bonds stand discharged.

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

19. 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

11.08.2023
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Whether Reasoned/Speaking : Yes/No
Whether Reportable : Yes/No