

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

CRA-S-5365-SB of 2014 (O&M)

Date of Decision: 14.02.2023

Pankaj Kumar

...Appellant

Versus

State of Punjab

...Respondent

CORAM: HON'BLE MR. JUSTICE DEEPAK GUPTA

Present:- Mr. Munish Puri, Advocate for the appellant.

Mr. R.S. Khaira, DAG, Punjab.

DEEPAK GUPTA, J.(Oral)

In NDPS Case No.03 (CIS No.NDPS/0000111/2014) arising out of FIR No.132 dated 26.12.2010 registered at Police Station Division No.2, Pathankot, accused Pankaj Kumar (now appellant) has been convicted by learned Special Judge, Pathankot under Section 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 vide judgment dated 05.11.2014. Vide separate order of even date, he has been sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of ₹1 lac with default sentence of three years imprisonment in case of non-payment of fine.

2. It is against the aforesaid judgment of conviction and order of sentence, this appeal has been filed.

3. As per prosecution case, on 26.12.2010, a Police party consisting of ASI Sukhdev Raj (PW1), Head Constable Mahavir Singh (PW2) and other police officials was present at the turning point of Truck Union, Pathankot, when accused was noticed coming from Patel Chowk on foot carrying a black coloured envelope in his right hand and who on seeing the police party, tried to retrace his steps. Due to suspicion, he was

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apprehended and on search of the polythene envelope carried by him, intoxicant powder was found. ASI Sukhdev Raj separated two samples weighing 10 grams each from the recovered powder. Remaining bulk powder on weighment was found to be 700 grams. Both samples of the bulk powder were put in separate plastic boxes and converted into samples. These were sealed with seal of 'SR' and after use, the seal was handed over to PW2 HC Mahavir Singh. Sealed parcels were taken into possession vide Memo Ex.PA. Ruqqa Ex.PB was sent to the Police Station resulting into the registration of formal FIR Ex.PB/1. On personal search of the accused, currency notes of ₹13,100/- and two mobile phones were found, which were taken into police possession and regarding which personal search memo Ex.PC was prepared. Site-plan was prepared. On reaching the Police Station, ASI Sukhdev Raj produced the accused and the sealed parcels of the case property to the Officer In-charge, namely, SI Dev Dutt Sharma PW4, who verified the seals and then affixed his own seal 'DD' on each parcel. Inventory report Ex.P1 was prepared. On 27.12.2010, SI Dev Dutt, In-charge Police Station handed over the sealed parcels of the case property along with the sample seals, form M-29 and inventory report along with application Ex.P2 to PW6 ASI Anil Kumar for production of case property before the Magistrate. Learned Magistrate after verifying the facts, certified correctness of the inventory and passed order Ex.P3. The case property was handed over back to ASI Dev Dutt Sharma, who kept the same in his safe custody. On 29.12.2010, one sealed parcel was entrusted to PHC Dilawar Singh (PW5) who deposited the said sample parcel on the next

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day with the Office of Chemical Examiner and returned the receipt to Officer In-charge of the Police Station. On 04.01.2011, remaining case property was deposited with judicial malkhana. Report of the Chemical Examiner Ex.PX was received and the sample on analysis was found to be Dextropropoxyphene Hydrochloride to the extent of 10.2%. On completion of investigation, final report under Section 173 Cr.P.C was presented in the Court.

4. Accused was charge-sheeted under Sections 21 and 22 of the NDPS Act. To prove the charges, prosecution examined six witnesses. PW1 Sukhdev Raj and PW2 HC Mahavir Singh proved the recovery drawing of the samples and preparing of the parcels, which were duly sealed and that the same were produced before the Officer In-charge. PW4 SI Dev Dutt Sharma verified that case property was produced before him and that after preparing inventory, its correctness was got verified from Illaqa Magistrate through ASI Anil Kumar PW6. PW6 corroborated him in this regard. To prove link evidence, prosecution relied upon PW3 PHC Soni Lal, who by way of affidavit Ex.PW3/A proved delivery of the special report, after registration of the FIR. PW5 Dilawar Singh PHC proved that he had received the sample parcel from Officer In-charge and that he had deposited the same in the Office of Chemical Examiner in intact condition.

5. Statement of the accused under Section 313 Cr.P.C was recorded in which he pleaded innocence and controverted the incriminating evidence appearing against him. However, no defence was produced.

6. After hearing both the sides, judgment of conviction and order of sentence were passed, as per the details given earlier.

7. Assailing the conviction, it is contended by learned counsel for the appellant that apart from alleged recovery of contraband, personal search of the accused was also taken and so, compliance of Section 50 of the NDPS Act was mandatory and in the absence thereof, accused deserved to be acquitted. Further contention is raised that prosecution case rests on the testimony of official witnesses and that no independent witness was examined. It is further contended that sample seals were not sent to FSL for the purpose of comparison and so tampering cannot be ruled out. Still further, it is argued that Form M-29 was not prepared at the spot and because of all these lacuna, accused- appellant deserves to be acquitted.

8. Refuting the aforesaid contentions and defending the impugned judgment of conviction, it is pointed out by learned State Counsel that it was a case of chance recovery and so, compliance of Section 50 of the NDPS Act was not necessary. Attention is further drawn towards the report of the FSL to contend that as per Chemical examiner report, the seals on the parcels were found to be intact and matching with the specimen seal impression, so, there was no question of tampering. It is further urged that examining the independent witness is not sine qua non to believe the official witnesses. With these submissions, prayer is made for dismissal of the appeal.

9. Having considered submissions of both the sides, this Court does not find any merit in this appeal. It has consistently come in the

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testimony of PW1 and PW2 that police party was present for regular checking, when the accused was apprehended due to the suspicious activities and on search of the envelope carried by him, contraband was recovered. Thus, it is a case of chance recovery and so, in view of Section 50 (5) of the NDPS Act, it was not possible to take the accused to be searched to the nearest gazetted officer/ Magistrate. Police did not have any prior information regarding the presence of the accused and being a case of chance recovery as accused was perplexed at the sight of police party that the search was effected. As such, it is held that compliance of Section 50 of the NDPS Act in such circumstances was not mandatory.

10. As far as non-examination of independent witness is concerned, both PW1 and PW2 have been cross-examined at length but nothing could be elicited to disbelieve them. Their statements regarding the recovery are quite consistent with no material contradiction. Examination of an independent witness is not a sine qua non to believe the testimony of official witnesses, as it has been observed by Hon'ble Supreme Court in **State Govt. of NCT of Delhi Vs. Sunil 2001(1) RCR (Crl.) 56** that "court cannot start with the presumption that police records were untrustworthy and rather, as a proposition of law, presumption should be other way around and that official acts of the police are regularly performed is a wise principle of presumption and recognized even by the legislature.

11. In another case titled **Ravinder Vs. State of Maharashtra 2002(3) RCR (Crl.) 598**, the case was based on official witnesses. No

independent witness was examined. It was held by Hon'ble Supreme Court that official (police) witnesses cannot be discarded merely on the ground that they belonged to the police force and are either interested in the investigating or the prosecuting agency. It was held by Hon'ble Supreme Court further that prudence dictates that their evidence needs to be subjected to strict scrutiny and as far as possible corroboration of their evidence in material particulars should be sought. The desire of such witnesses to see the success of the case based on their investigation requires greater care to appreciate their testimony.

12. In another case titled **Sumit Tomar vs State of Punjab 2013(1) SCC 395**, Hon'ble Supreme Court of India on the point of non-examination of independent witness joined by the police, has observed as follows:

“In view of the above discussion, though it is desirable to examine independent witness, however, in the absence of any such witness, if the statements of police officers are reliable and when there is no animosity established against them by the accused, conviction based on their statement cannot be faulted with. On the other hand, the procedure adopted by the prosecution is acceptable and permissible, particularly, in respect of the offences under the Narcotic Drugs and Psychotropic Substances Act.”

13. Further, the report of the Chemical Examiner reveals that when the sample was received and analysed, it had two seals, one each of 'SR' and 'DD'. Both the seals were found intact and the same tallied with the specimen seal impression. The link evidence is duly proved by the testimony of PW1 ASI Sukhdev Raj, PW4 Dev Dutt Sharma and that of PW6 ASI Anil Kumar and PW5 PHC Dilawar Singh. No lacunae could be found regarding the link evidence. In this regard, Clause (4) of Section

52-A of the NDPS Act is relevant, which clearly provides as under:-

“(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 or psychotropic substances and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence.”

14. In the aforesaid circumstances, it does not affect the prosecution case, in case Form 29 was not filled in at the spot or in case the sample seal was not handed over to independent witness and rather, the seal was handed over to subordinate official. Reference in this regard is made to **Pardeep Kashyap Vs State of Haryana, 2014 (5) RCR (Criminal) 808**, wherein this High Court held that non-filing of Form 29 on the spot was only an irregularity and that it does not make whole case doubtful nor it was fatal to the case.

15. Apart from above, while dealing with the issue of non-preparation of CFSL form at the spot, it was observed by Hon'ble Supreme Court of India in **State vs Dilbagh 2004 (13) SCC 99** as follows:

“...Merely because no such form was prepared or sent does not in any way reflect on the fact that the sample which was extracted, was the sample which reached the Chemical Analyser with the seal intact. In this case, the prosecution has been careful enough to prove that the same sample was sent to the Chemical Analyser with the seal intact....”

16. Similar point was also dealt with in case of **Gurbachan Singh vs State of Punjab (CRA-S-1033-SB-2007** decided on 29.8.2014) by the Hon'ble High Court of Punjab & Haryana, Chandigarh, wherein it was observed as follows:

“The fact that form no.29 was not filled at the spot, does not affect the case of the prosecution at all. There is no rule of evidence or procedure that every document must be prepared at the spot of recovery. In case of Wazir Singh vs State of Haryana, 2010(1) RCR (CrL) 480, it was observed that non-filling up of the CFSL form at the time of recovery does not create any doubt about the recovery of contraband from the accused. In para 17 of the aforesaid judgment, it was observed as follows:

“Of course, it does not surface in the testimony of Maha Singh that the CFSL form was filled at the spot. It is pertinent to mention here that CFSL form is to be prepared for sending the same to the Laboratory along with the sample so that the laboratory can test the sample and give its result. Such document contains the details of the seals affixed on the samples, FIR number, date and place of seizure, date of deposit of samples and date of withdrawal of sample from the Malkhana.”

17. In view of above legal position, contentions that Form 29 was not prepared at the spot or that sample seals were not sent to FSL, have no merit.

18. No other point was urged.

19. Consequent to the above discussion, it is held that the appeal is devoid of any merit. As such, the same is hereby dismissed.

All the connected applications stand disposed of.

February 14, 2023
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(DEEPAK GUPTA)
JUDGE

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