

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRM-A-1705-2019(O&M)
Date of Decision: 01.02.2023

State of Punjab

.....Appellant

versus

Rajesh Kumar @ Bunty and another

.....Respondents

CORAM: Hon'ble Mr. Justice G.S.Sandhawalia
Hon'ble Ms. Justice Harpreet Kaur Jeewan

Present: Mr. Naveen Singh, Sr.DAG, Punjab
for the appellant.

Mr. Naveen Batra, Advocate
for the respondents.

Harpreet Kaur Jeewan, J.

1. State has filed the application under Section 378(3) Cr.P.C seeking leave to appeal, challenging the findings of acquittal recorded by the learned Judge Special Court, Roopnagar dated 19.01.2019 whereby the respondent Rajesh Kumar and Amandeep Singh were acquitted of the charge framed against them in FIR No.172 dated 16.11.2017 registered under Section 22 of Narcotic Drugs & Psychotropic Substances Act, 1985(herein after referred to as“NDPS Act“) at Police Station Nangal.

2.1 Prosecution story in brief is that on 16.11.2017 ASI Inderpal Singh (PW-6) alongwith the other police officials were

present near NFL Factory, Nangal in connection with patrol duty. At about 7:30 PM a motorcyclist came from Nangal side and on seeing the police party the motorcyclist tried to slip away but he was apprehended by the police party on the basis of suspicion. On inquiring he revealed his name as accused Rajesh Kumar @ Bunty. ASI Inderpal Singh (PW-6) suspected that he was carrying some intoxicating substance, therefore, his search was conducted after informing him of the rights under Section 50 of the NDPS Act. As the accused reposed faith in ASI Inderpal Singh, therefore, his personal search was conducted which led to the recovery of one polythene packet from the right pocket of his pant, which was found containing 100 grams of intoxicant powder. The same was taken into possession after procuring a parcel and FIR was got registered initially against the accused Rajesh Kumar @ Bunty.

2.2 During interrogation on 17.11.2017 accused Rajesh Kumar @ Bunty had disclosed that he had procured the said intoxicant powder from accused Amandeep Singh @ Ammu as such the said accused was nominated in the present case and raid was conducted at his house. Accused Amandeep Singh @ Ammu was also informed of his right under Section 50 of the NDPS Act that his search could be conducted in front of a Magistrate or a Gazetted Officer who could be brought at the spot however, he also reposed faith in ASI Inderpal Singh. As such his search was conducted which also led to recovery of one polythene packet from the right pocket of his trouser and which contained 40 grams of intoxicant

powder. The packet was taken into possession by preparing a sealed parcel. As per the report of Forensic Science Laboratory, the contents of the intoxicant powder were found to be *Diphenoxylate Hydrochloride*. On completion of the investigation, Challan was presented against both the accused under Section 22 of the NDPS Act.

2.3 After presentation of the Challan, copies of the documents under Section 207 Cr.P.C were supplied to the accused. *Prima facie* case was made out against the accused, charge was framed against them under Section 22 of the NDPS Act to which they claimed trial.

2.4 Prosecution examined the Investigating Officer ASI Inderpal Singh (PW-6), ASI Narinder Singh (PW-3) (recovery witness), SI Pawan Kumar (PW-10) (SHO) and the formal witnesses ASI Baljinder Singh (PW-1), ASI Joginder Singh (PW-2), MHC Gurmail Chand PW-5, HC Jaswinder Singh (PW-8) and HC Niranjn Singh (PW-9). The incriminating evidence appearing against the accused was put to them in the statements under Section 313 Cr.P.C. However, they denied the allegations and pleaded innocence and they also stated that false recovery has been planted against them. In the defence evidence they have examined Talwinder Singh (DW-1) who has stated that on 16.01.2017 he was present at the house of the accused Amandeep Singh @ Ammu and he was forcibly taken away by the police party who came to his house. He inquired about the reason from the police party and they told that Amandeep Singh @

Ammu was called by the SHO and he would be released after inquiry. Rahul (DW-2) in his defence had stated that Rajesh Kumar @ Bunty was known to him and on 15.11.2017 at about 1:30 PM he was arrested from his shop and at that time he was present there when he was forcibly taken away from his shop.

3. The Trial Court acquitted the accused/respondents by observing that ASI Inderpal Singh (PW-6) is the Investigating Officer as well as the complainant while relying upon the decision of the Hon'ble Supreme Court in ***Mohal Lal vs. State of Punjab;2018(4) R.C.R (Criminal) 101*** wherein it was held that the prosecution of the accused stood vitiated on that account.

3.1 Learned Trial Court further observed that the recovery was effected from the pocket of the pants of the accused persons. However, relying upon the decision of the Hon'ble Supreme Court in ***Arif Khan @ Agha Khan vs. State of Uttarakhand; 2018(2) RCR(Criminal) 931(SC)*** wherein it was observed that none of the prosecution witnesses was Gazetted Officer or Magistrate and the accused was not taken before any other Gazetted Officer or Magistrate in order to effect the search of the accused, the trial court observed that mandatory provisions of Section 50 of NDPS Act were violated which is fatal to the prosecution case.

3.3 Learned Trial Court also observed that there are various contradictions in the testimony of the prosecution witnesses, hence their statement cannot be relied upon and the prosecution story was found doubtful.

4. Learned State counsel has submitted that the respondents-accused have been acquitted by the learned Judge, Special Court, primarily on the ground that ASI Inderpal Singh who is the Complainant has also conducted the investigation. The reliance was placed upon the *Mohan Lal's case(supra)* but the decision in the said case has been over-ruled by the Constitution Bench of the Hon'ble Supreme Court in *Mukesh Singh vs. State (Narcotic Branch of Delhi)*; 2021(1)SCC (Crl.) 356.

4.1 The learned State counsel has further submitted that reliance upon *Arif Khan's case(supra)* was also misplaced by the learned Trial Court as there was no violation of Section 50 of the NDPS Act. It has been established that offer was given by the Investigating Officer to the respondents-accused in compliance of the provisions of Section 50 of the NDPS Act but they reposed confidence in the Investigating Officer. Consent Memo of the accused has been proved. With regard to the discrepancies referred by the learned Trial Court, it was submitted that unnecessary weightage to minor contradictions and discrepancies, which usually occur in the statement of prosecution witnesses when recorded after lapse of time should not have been given. It was submitted that recovery has been proved from the respondents hence, they are liable to be convicted.

5. On the other hand, learned counsel for the respondents has referred to the reasons recorded by the learned Trial Court and submitted that respondents have been rightly acquitted.

6. We have considered the aforesaid submissions and perused the paper book.

7. As per the evidence on record, the police party had prior information before the accused-respondent was apprehended. The Investigating Officer had even informed the SHO regarding said secret information. However, the FIR was not lodged and no effort has been made for joining any independent witnesses. PW-6 ASI Inderpal Singh who is the Investigating Officer has stated in his examination-in-chief that on 16.11.2017 ASI Narinder Singh (PW-3) received the secret information. He informed the SI Pawan Kumar SHO and he (PW-6) reached the spot. ASI Narinder Singh (PW-3) has also corroborated this fact in his examination-in-chief. As per the statement of PW-3 and PW-6 the accused was apprehended at 7:30 pm. PW-3 has stated in the cross-examination that place of Naka is a busy road. About 2-3 motor cycles and vehicles were passing on the road when the accused had tried to return. In the cross-examination he has categorically stated that SHO had given the information to the Senior Officer. All these facts indicate that the police had prior information and sufficient time to join independent witness but no efforts were made for joining an independent witness.

8. We have also observed that the alleged recovery from the accused Amandeep Singh @Ammu was effected next day on 17.11.2017 when the police party went to his house after disclosure statement was made by his co-accused Rajesh Kumar @ Bunty. By that time the police party had sufficient time to join an independent

witness while going to the house of accused-Amandeep Singh @ Ammu. There is nothing on record that Investigating Officer had made any such effort to join an independent witness even at that time.

9. We have also observed that neither the recovery from respondent-Rajesh Kumar @ Bunty was effected in the presence of a Gazetted Officer nor any Gazetted Officer was called at the spot, nor for the alleged recovery which took place on the next day from the house of Amandeep Singh-respondent, any Gazetted Officer was taken along.

10. Apart from this, there are material contradictions in the statement of Prosecution witnesses some of which have been rightly pointed out by the learned Trial Court. *Firstly*, ASI Narinder Singh (PW-3) who allegedly received the secret information has stated in his examination-in-chief that he informed Pawan Kumar SHO (PW-10) regarding the secret information. In the cross-examination he has also stated that the IO and SHO has informed senior officers. However, when the SI SHO Pawan Kumar appeared as PW-10 he has stated in his cross-examination that no secret information was received in this case and nobody had told him regarding the secret information. *Secondly*, after the alleged recovery from accused-Rajesh Kumar @ Bunty on 16.11.2017, as per the statement of the Investigating Officer, his seal (having impression 'IP') was handed over to ASI Narinder Singh and in the cross-examination he has stated that the seal was returned to him on third day i.e.18.11.2017

and specially he has stated that he was having only one seal and there was no other seal with him. In such circumstances, it becomes highly improbable as to how he had again put his seal on 17.11.2017 when the alleged recovery was effected from accused-Amandeep Singh @ Ammu.

11. In the present case the search was effected from the person of the accused. The Investigating Officer ASI Inderpal Singh (PW-6) has testified that the search of the pocket of the pant on right side of accused Rajesh Kumar @ Buntty led to the recovery of the polythene bag containing the intoxicant powder. With regard to the recovery from the accused Amandeep Singh @Ammu, he has also stated that when the police party reached the house of Amandeep Singh @ Ammu, accused Rajesh Kumar @ Buntty identified the accused Amandeep Singh @ Ammu and on search of his pocket of the pant on right side led to the recovery of polythene bag which was found containing a white colour powder. As per the prosecution witnesses before effecting the recovery from both the accused, they were informed that their search can be conducted in the presence of a Gazetted Officer or by a Magistrate but they reposed the confidence in the Investigating Officer.

12. In such circumstances, the question requires consideration as to whether compliance of Section 50 of the Act was made in true spirit or it was merely a technical compliance? In **Arif Khan's case(supra)** secret information was received that one person is travelling in a roadways bus carrying with him some contraband.

On the basis of the said information raiding party headed by the SHO spotted a person and the accused was asked by the police personnel of the raiding party as to whether he is in possession of contraband “charas“, the accused admitted having been in possession of charas. He was apprehended and he was informed that he has a legal right to be searched in the presence of a Gazetted Officer or Magistrate, to which he replied he has a faith on the raiding party and consented to be searched by them. While considering the question as to whether the search/recovery made by the police official from the appellant(accused) of the alleged contraband(charas) can be held to be in accordance with the procedure prescribed under Section 50 of the NDPS Act was considered by the Hon’ble Supreme Court in the said case and the following observations were made:-

“21. What is the true scope and object of [Section 50](#) of the NDPS Act, what are the duties, obligation and the powers conferred on the authorities under [Section 50](#) and whether the compliance of requirements of [Section 50](#) are mandatory or directory, remains no more res integra and are now settled by the two decisions of the Constitution Bench of this Court in [State of Punjab vs. BaldevSingh](#) (1999) 6 SCC 172 and [Vijaysinh ChandubhaJadeja](#) (supra).

22. Indeed, the latter Constitution Bench decision rendered in the case of [VijaysinhChandubhaJadeja](#) (supra) has settled the aforementioned questions after taking into considerations all previous case law on the subject.

23. Their Lordships have held in [VijaysinhChandubhaJadeja](#) (supra) that the requirements of [Section 50](#) of the NDPS Act are mandatory and, therefore, the provisions of [Section 50](#) must be strictly complied with. It is held that it is imperative on the part of

the Police Officer to apprise the person intended to be searched of his right under [Section 50](#) to be searched only before a Gazetted officer or a Magistrate. It is held that it is equally mandatory on the part of the authorized officer to make the suspect aware of the existence of his right to be searched before a Gazetted Officer or a Magistrate, if so required by him and this requires a strict compliance. It is ruled that the suspect person may or may not choose to exercise the right provided to him under [Section 50](#) of the NDPS Act but so far as the officer is concerned, an obligation is cast upon him under [Section 50](#) of the NDPS Act to apprise the suspect of his right to be searched before a Gazetted Officer or a Magistrate. (See also [Ashok Kumar Sharma vs. State of Rajasthan](#), 2013 (2) SCC 67 and [Narcotics Control Bureau vs. SukhDev Raj Sodhi](#), 2011 (6) SCC 392)

24. Keeping in view the aforementioned principle of law laid down by this Court, we have to examine the question arising in this case as to whether the prosecution followed the mandatory procedure prescribed under [Section 50](#) of the NDPS Act while making search and recovery of the contraband “Charas” from the appellant and, if so, whether it was done in the presence of a Magistrate or a Gazetted Officer so as to make the search and recovery of contraband “Charas” from the appellant in conformity with the requirements of [Section 50](#).

25. In our considered view, the evidence adduced by the prosecution neither suggested and nor proved that the search and the recovery was made from the appellant in the presence of either a Magistrate or a Gazetted Officer.

26. It is the case of the prosecution and which found acceptance by the two Courts below that since the appellant (accused) was apprised of his right to be searched in the presence of either a Magistrate or a Gazetted Officer but despite telling him about his legal right available to him under [Section 50](#) in relation to the search, the appellant (accused) gave his consent in writing to be searched by the police officials (raiding party), the two Courts below came to a conclusion that the requirements of [Section](#)

[50](#) stood fully complied with and hence the appellant was liable to be convicted for the offence punishable under NDPS Act.

27. We do not agree to this finding of the two Courts below as, in our opinion, a search and recovery made from the appellant of the alleged contraband “Charas” does not satisfy the mandatory requirements of [Section 50](#) as held by this Court in the case of VijaysinhChandubhaJadeja (supra). This we say for the following reasons.”

13. It is well settled that heavy burden lies on the prosecution particularly where the offence is punishable with stringent sentence as under the NDPS Act. Although examination of the independent witness in all situations may not be imperative but in the present case the alleged recovery has been effected from two accused-respondents on separate dates. There was sufficient time with the police party to either join an independent witness or to take a gazetted officer along for compliance of the provisions of Section 50 of the Act. If on the first date, the gazetted officer could not have been called at the spot, there was no hitch with the investigating officer to conduct the search of the accused-respondent No. 2 Amandeep Singh especially when they had gone to his house on the basis of the disclosure statement of his co-accused. It is the case of the prosecution that even Amandeep Singh (respondent No. 2) had reposed confidence upon the investigating officer when he was informed of his right under Section 50 of the Act. There are major contradictions in the statements of the prosecution witnesses as referred above. In such circumstances, it is apparent that the recording of a consent statement of both the respondents accused was merely a sham compliance.

Hence, considering the ratio of the decision in **Arif Khan's** case (*supra*), the trial Court has rightly observed that there was no proper compliance of Section 50 of the Act.

14. In view of the aforesaid discussion, we have found that though the reason recorded by the trial court i.e. trial stands vitiated on account of the fact that complainant and Investigating Officer are the same person is not legally sustainable in view of the subsequent decision by Hon'ble Supreme Court in ***Mukesh Singh's case(supra)***. However, even otherwise in the present case, the prosecution has failed to prove the recovery of the contraband from the respondent/accused beyond shadow of doubt. The manner and place in which the investigation record was prepared is also doubtful.

15. Examining the evidence in the present case in order to ascertain as to whether the judgment and order of the learned Court below needs any interference, it would be appropriate to refer to the principles laid down by the Hon'ble Supreme Court of India while dealing with the appeals, particularly against the order of acquittal in **Sidhartha Vashisht @ Manu vs. State (NCT of Delhi)** 2010 AIR (SC) 2352. The said principles are reproduced as under:-

“13) The following principles have to be kept in mind by the Appellate Court while dealing with appeals, particularly, against the order of acquittal:

(i) There is no limitation on the part of the Appellate Court to review the evidence upon which the order of acquittal is found.

(ii) The Appellate Court in an appeal against acquittal can review the entire evidence and come to its own conclusions.

(iii) The Appellate Court can also review the Trial Court's conclusion with respect to both facts and law.

(iv) While dealing with the appeal preferred by the State, it is the duty of the Appellate Court to marshal the entire evidence on record and by giving cogent and adequate reasons set aside the judgment of acquittal.

(v) An order of acquittal is to be interfered only when there are "compelling and substantial reasons" for doing so. If the order is "clearly unreasonable", it is a compelling reason for interference.

(vi) While sitting in judgment over an acquittal the Appellate Court is first required to seek an answer to the question whether finding of the Trial Court are palpably wrong, manifestly, erroneous or demonstrably unsustainable. If the Appellate Court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the Appellate Court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities, it can reappraise the evidence to arrive at its own conclusion.

(vii) When the Trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of Ballistic Experts etc., the Appellate Court is competent to reverse the decision of the Trial Court depending on the materials placed.

16. While appreciating the evidence in the light of the said principles, we are of the considered opinion that there are material

contradictions in the testimony of prosecution witnesses. There is no independent corroboration, especially, when the investigating officer had sufficient time to join the independent witness. The compliance of Section 50 of the Act was merely on papers and despite having an opportunity and time, the search of the respondents was not carried out in the presence of a gazetted officer or the Magistrate. As such the respondents have been rightly given the benefit of doubt by the trial Court. Keeping in view the totality of these circumstances, no interference is called for in the findings of the acquittal by the trial Court.

17. Accordingly, the application for grant of leave to appeal is dismissed.

(G.S.Sandhawalia)
Judge

(Harpreet Kaur Jeewan)
Judge

01.02.2023

ShivaniKaushik

Whether speaking/reasoned:

Yes/No

Whether reportable:

Yes/No