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

CRA-S-532-SB-2015 (O&M)
Date of Decision:- 28.07.2023

Hardip Singh @ Deep

...Appellant

Versus

State of Punjab

...Respondent

CORAM:- HON'BLE MR. JUSTICE HARPREET SINGH BRAR

Present: Mr.Joginder Pal Devgan, Advocate
for the appellant.
Mr.Iqbal Singh Mann, DAG, Punjab.

Harpreet Singh Brar, J.

1. This appeal has been preferred against the judgment of conviction and order of sentence dated 08.01.2015 passed by learned Additional Sessions Judge, Tarn Taran, in FIR No.124 dated 28.12.2012, under Section 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the 'NDPS Act') whereby the appellant has been convicted and sentenced to rigorous imprisonment for a period of 10 years under Section 22 (c) of the NDPS Act with a fine of Rs.1,00,000/- and in default of payment of fine, to further undergo rigorous imprisonment for a period of one year.

FACTUAL BACKGROUND

2. The factual matrix of the prosecution case is that on 28.12.2012, a police party headed by ASI Lakhbir Singh was patrolling the area of village Alipur, Ratta Gudda, etc and had just reached ahead of Ratta Gudda when they noticed one person coming carrying a polythene bag. On seeing the police party, he threw away the polythene bag and tried to move backwards. The police party apprehended him and after disclosing his identity, he handed over the polythene bag to the Investigating Officer and confessed that there were intoxicating tablets in it. On checking, 08 packets of Microlit tablets, each packet containing 100 tablets, were recovered. The recovered contraband was put in a plastic container and was sealed with the seal bearing impression 'LS' and the sealed parcel was taken into possession vide memo Ex.PI. Form 29 was also filled at the spot. Thereafter, a *ruqa* was sent to the police station on the basis of which a formal FIR was registered. After completion of the usual formalities of investigation, the challan was presented against the accused/appellant.
3. After making due compliance of the provisions of Section 207 Cr.P.C., a prima facie case for the commission of offence punishable under Section 22 of the NDPS Act was made out. The accused/appellant was charge-sheeted to which he pleaded not guilty and claimed trial.
4. In order to prove its case, the prosecution examined three witnesses and closed its evidence.
5. Accused, in his defence evidence, examined only one witness namely Sadhu Singh, his father.

6. Learned trial Court after examining the evidence adduced on file and hearing arguments of both sides, convicted and sentenced the accused-appellant in the manner as stated above.

CONTENTIONS

7. Learned counsel for the appellant has invited the attention of the Court to the testimony of Investigating Officer ASI Lakhbir Singh (PW3) who duly admitted to the area of recovery being a thoroughfare with residential houses around. It was argued that in spite of it being a public place, no independent witness has been joined in the investigation. It was highlighted that Lakhbir Singh (Investigating Officer), who has conducted the entire investigation, is also the complainant in this case which is contrary to law.

Further, there is a delay of five days in sending the sample for chemical examination where the same should have been deposited within the prescribed period of 72 hours. Hence, the delay in depositing the sample is fatal to the case of the prosecution as there is every possibility of tampering with it. In view of the above, the learned counsel for the appellant has prayed for acquittal of the appellant.

8. On the other hand, learned State counsel has supported the case of the prosecution by arguing that the appellant was found in possession of 08 packets of Microlit tablets, each packet containing 100 tablets, from him. He further argued that all the procedural safeguards provided under the Act were duly complied with. The appellant was found in possession of a huge quantity of Microlit tablets which falls within 'commercial quantity' and the prosecution has proved its case beyond a reasonable shadow of doubt.

Hence, the learned State counsel has prayed for dismissal of the present appeal.

OBSERVATION AND ANALYSIS

9. This Court has heard learned counsel for the parties and perused the record with their able assistance. A perusal of the record reveals that the appeal was admitted on 04.02.2015 and that the appellant has already undergone an actual sentence of 03 years 07 months and 21 days.

10. A perusal of the *ruqa* (Ex.P-2) and FIR (Ex.P-3) would indicate that the appellant is alleged to have possessed 08 packets of Microlit tablets, each packet containing 100 tablets, and the same were converted into a bulk sample. The FSL report (Ex.P-10) indicates that the sample contained two different drugs having different weight. The examination report reads as follows:-

“Description(a) :- Whitish coloured circular shaped compressed tablet having engraved JACKSON on one side and smooth on other side, packed in polyplastic packet.

Opinion:- Contents of all the parcels under reference have been analyzed separately by Chemical analysis & on the basis of analysis, the various ingredients along with quantity found present in these have been described below as per analysis report.

Identification(a)	Diphenoxylate & Chloride	Positive
	Atropine Sulphate	Positive
	Av. Wt/tab	0.080 gm
	Assay For Diphenoxylate Hcl	2.42 mg/tab

Description(b): Whitish coloured circular shaped
compressed tab having engraved ‘MICRON’ on one side and
smooth on other side.

Identification(b)	Diphenoxylate & Chloride	Positive
	Atropine Sulphate	Positive
	Av.Wt/tab	0.074 gm
	Assay For Diphenoxylate Hcl	2.59 mg/tab

Final Report contents of the sample-(As per the observation made by the Analyst.)

*The Sample contains (a) Diphenoxylate Hcl
(b) Diphenoxylate Hcl.”*

11. The case set up by the prosecution in FIR (Ex.P-3) with regard to recovery of 08 packets of ‘MICROLIT’ tablets containing 800 tablets, is totally contradictory to the report of FSL. The Chemical Examiner has found and described two different drugs, having distinct name and weight from each other. The evidence led by the prosecution is scanty and not supported by the FSL report (Ex.P-10) which, as such, does not establish the prosecution claim of the alleged contraband having been recovered from the possession of the appellant in the specified manner on the said date and time. The contents of the sample received and examined by the Chemical Examiner are incompatible with the alleged recovery and totally incongruous. In the opinion of this Court, such mismatch completely suffocates the case of the prosecution.
12. Another glaring omission in the case of the prosecution is the total non-compliance of Section 52-A of the NDPS Act. The same is reproduced 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.

13. While interpreting the provisions of Section 52-A of the NDPS Act, a two Judge of the Hon'ble Supreme Court in **Union of India vs. Mohan Lal, 2016(1) R.C.R (Criminal) 858**, speaking through Justice T.S. Thakur, held as follows:-

“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”.

14. On further scrutiny of the evidence led by the prosecution, it is revealed that the mandatory provisions of Section 50 of the NDPS Act have not been complied with. The alleged contraband was recovered and personal search of the appellant was also conducted vide personal search memo (Ex P-8). Once the personal search is conducted along with the recovery of the

alleged contraband, Section 50 of the NDPS Act becomes applicable and it becomes obligatory on the Investigating Officer to produce the appellant before the nearest Magistrate. The procedural safeguards provided under Section 50 of the Act are not empty formalities. It is well settled proposition that the Investigating Officer is bound to follow the procedural safeguards rigorously in view of the stringent punishment provided under the NDPS Act. The above omission on the part of the Investigating Officer makes the judgment of the Hon'ble Supreme Court in **Arif Khan @ Agha Khan vs. State of Uttarkhand, 2018 (2) RCR (Crl.) 931** applicable to the appellant. A perusal of the record indicates that no offer was made under Section 50 of the NDPS Act to the appellant to have the search conducted before a Gazetted Officer or a Magistrate. As such the argument raised by learned State counsel that the recovery was made from the polythene bag and not from the person of the appellant is liable to be rejected. Reliance in this regard is placed upon the judgment of a two Judge Bench of the Hon'ble Supreme Court in **State of Rajasthan vs. Parmanand and others, 2014(5) SCC 345**, wherein, speaking through Justice Ranjana P. Desai, the following was held:-

“15. Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application. In this case, respondent No.1 Parmanand's bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of respondent No.2 Surajmal was also conducted. Therefore, in light of judgments of this Court

mentioned in the preceding paragraphs, Section 50 of the NDPS Act will have application.”

It is not disputed that the search was not carried out in the presence of a Gazetted Officer or a Magistrate and, therefore, the judgment in **Vijaysinh Chandubha Jadeja vs. State of Gujarat, 2005(12) SCC 574** would come into play.

15. While it is not necessary that non-joining of independent witness would prove fatal to the case of the prosecution, in the instant case, neither any effort was made to associate an independent witness nor any explanation is forthcoming from the Investigating Officer for not doing so. A two Judge Bench of the Hon’ble Supreme Court in **Kishan 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.

16. Further, FIR No. 124 was registered on 28.12.2012 and the sample was dispatched to Chemical Examiner on 02.01.2013 after the delay of 5 days which amounts to a violation of the Standing Order No.1 of 1988 sated 15.03.1988 issued by the Narcotics Control Bureau, which mandates sending of the sample to the 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, 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.

17. A perusal of the *ruqa* (Ex P-2) would show that PW-3, ASI Lakhbir Singh is the complainant and in spite of that, he has investigated the case, which vitiates the entire investigation. The case of the appellant is covered by the decisions of the Hon'ble Supreme Court in **Mohan Lal vs. State of Punjab AIR 2018 SC 3853**, **Megha Singh vs. State of Haryana 1996 (11) SCC 709** and **State by Inspector of Police, Narcotic Intelligence Bureau, Madurai, Tamil Nadu vs. Rajangam 2010(15) SCC 369** where the Hon'ble Supreme Court has reaffirmed that when the arrest and search is made by the complainant, he should not involve himself with the investigation of the case. Such an officer leading the investigation would forthrightly raise questions as to the fairness and impartiality of the said investigation process.

18. There are gaping holes and missing links in the case of the prosecution and the evidence led by it has many inconsistencies. As such, the prosecution has not been able to knit the circumstances together to lay a hypothesis pointing towards the guilt of the accused beyond a reasonable shadow of doubt.

CONCLUSION

19. In view of the above discussion, the aforesaid appeal is allowed. The judgment of conviction and order of sentence dated 08.01.2015 passed by learned Additional Sessions Judge, Tarn Taran is set aside. The appellant, namely Hardip Singh @ Deep is acquitted of the charges framed against him. His bail bonds and surety bonds stand discharged.

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

21. 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.

28.07.2023
sd

(HARPREET SINGH BRAR)
JUDGE

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