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IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

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Date of Decision: 04.09.2023

State of Haryana

....Appellant.

Versus

Virender and another

...Respondents.

CORAM: HON'BLE MR. JUSTICE DEEPAK SIBAL
HON'BLE MRS. JUSTICE SUKHVINDER KAUR

.....

Present: Ms. Tanisha Peshawaria, DAG, Haryana.

Mr. Rahul Deswal, Advocate
for the respondents.

Sukhvinder Kaur, J.

1. Appellant-State of Haryana has preferred the instant application under Section 378(3) Cr.P.C. seeking leave to appeal against judgment dated 25.02.2019, pertaining to FIR No.998 dated 30.10.2016, under Section 15 of NDPS Act, registered at Police Station Jhajjar, passed by learned Special Judge, Jhajjar, vide which the respondents/accused-Virender and Jinkan Verma @ Amit have been acquitted.

2. The factual scenario, as highlighted by the prosecution, is that on 30.10.2016, SI Shamsheer Singh alongwith HC Mukesh, HC Baljeet, HC Naresh, Constable Amarjeet and Constable Amit were present in Government vehicle bearing No.HR-63C-5417 in front of Jahansara Bagh Stadium gate in connection with patrolling and crime detection duty. The police vehicle was being driven by Constable Krishan Kumar. Then an

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arcane tip off was received by SI Shamsheer Singh that one Eicher Canter bearing No.HR-55W-0524 which had been parked at Camelgarh turn, Jahajjar, was loaded with bags of poppy husk and its driver Amit hailing from UP was about to leave alongwith truck for Delhi and if a raid would be conducted immediately then he could be apprehended alongwith the poppy husk. Thereafter Shamsheer Singh alongwith the police party left for the above said place and found that said Eicher Canter was standing at Camelgarh turn and two persons were sitting in the same. On enquiry, the driver of the canter disclosed his name as Jinkam Verma @ Amit son of Dukhharan and the other person disclosed his name as Virender son of Ram Kishan. Then a joint notice under Section 50 NDPS Act was served upon both the accused and both the accused expressed their desire to be searched in the presence of some Gazetted Officer. Thereafter, Rajiv Kumar (HPS) DSP City Jhajjar was called there who reached there after 20 minutes and ordered for conducting search of vehicle and the accused. Search of accused persons was conducted by SI Shamsheer Singh. When the tarpin cover was removed then 52 bags of poppy husk and 140 drums of chemical were found loaded in the vehicle. The said 52 bags were taken into police possession and samples were drawn separately which were sealed by the DSP with his seal bearing impression 'RK'. SI handed over the seal to HC Baljeet Singh. The total quantity of poppy husk came to 12 quintals and 74 Kgs. Case under Section 15 of NDPS Act was registered against the accused persons after getting verified the case property from DSP headquarter. The accused persons were arrested. Initially the investigation was conducted by SI Shamsheer Singh and thereafter by ASI Mukesh Kumar. Site plan of the

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place of recovery was prepared. After the completion of investigation and after receiving of FSL report, the Challan under Section 173 Cr.P.C. was prepared and submitted in the Court against the accused persons.

3. Copies of the report under Section 173 Cr.P.C. along with relevant documents were supplied to the accused free of cost. Charge under Section 15 of the Act was framed against the accused persons to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution has examined 13 witnesses i.e. Sub Inspector Shamsheer Singh as PW1, Nasib Singh as PW2, Amit Vinayak as PW3, HC Baljeet as PW4, SI Dayachand as PW5, HC Naresh Kumar as PW6, EASI Kuldeep Singh as PW7, Constable Ashwani as PW8, SI Satbir Singh as PW9, Rajiv Kumar DSP as PW10, Constable Subhash as PW11, Pardeep Kumar Copyist as PW12 and ASI Mukesh Kumar as PW13.

5. Thereafter, statements of the accused under Section 313 Cr.P.C. were recorded in which the incriminating circumstances appearing against them in the prosecution evidence were put to them, to which they denied and pleaded their false implication. In their defence the accused examined Deepak Kumar, Manager, Aggarwal Hospital as DW1.

6. After concluding the trial, the trial Court acquitted both the accused and aggrieved by the said decision, the appellant-State has filed the present application for leave to appeal against acquittal of accused Virender and Jinkan Verma @ Amit.

7. We have heard Ms. Tanisha Peshawaria, Deputy Advocate General, Haryana, and Mr. Rahul Deswal, Advocate for the respondents and

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have also perused the record.

8. Learned counsel for the appellant has vehemently contended that the trial court has miserably failed to properly appreciate the facts of the present case in the right perspective and as this is a case of recovery of heavy commercial quantity of contraband from the accused, which itself rules out false implication. She has further contended that the prosecution has proved that all the mandatory provisions of NDPS Act had been followed by the police and the minor contradictions in the deposition of prosecution witnesses do not adversely effect the case of the prosecution. It has also been submitted that from the FSL report it has been proved that the recovered material was a contraband falling within the ambit of Section 15 of NDPS Act. The sending of samples beyond 72 hours to FSL is not fatal for prosecution when it has been proved that the concerned police official have deposited the case property in the intact condition. Section 50 of NDPS Act is applicable only on personal search and all the requirements of conducting the search were complied with. She has further contended that the evidence of prosecution is cogent and reliable and as huge recovery of poppy husk, which is much more than the commercial quantity was effected from the accused persons, so they are to be convicted as per law and has prayed that the present appeal may be allowed.

9. On the other hand, it has been contended by learned counsel for the respondents/accused that there were large number of discrepancies in the statements of the prosecution witnesses which has rendered the case of the prosecution doubtful. He has further contended that there was no proper compliance of Section 50 of NDPS Act, as no separate offer was given to

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the accused persons and only joint offer was made which was not permissible as per law. He has also submitted that there was a long delay in sending of the sample to the FSL which creates doubt regarding intactness of the samples and the case property. He has also contended that compliance of Section 52 (A) of the NDPS Act has not been made as the samples were drawn at the spot and not in the Court of the Illaqa Magistrate. He has contended that the trial Court has rightly acquitted the accused persons and the impugned judgment does not call for any interference.

10. Several safeguards have been provided under the Act and it has been made obligatory for the investigating agency and the prosecution to comply with these provisions. As NDPS Act provides for very stringent punishment if accused is found to have committed an offence under the same, so the prosecution is to prove its case against the accused beyond the shadow of reasonable doubt.

11. After having heard learned counsel for the State/ appellant and learned counsel for the respondents and having perused the judgment as well as the other relevant record, we are of the considered opinion that the prosecution was not able to prove its case against the accused beyond the shadow of reasonable doubt.

12. Adverting to the present case, from perusal of the evidence on record, it transpires that there are large number of glaring discrepancies in the statements of the prosecution witnesses. The prosecution witnesses are contradictory regarding the time when the police party left CIA staff and regarding the time when it reached at the spot. As per PW1-Shamsher Singh, the Investigating Officer, they left the CIA staff on 29.10.2016 at

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about 9.00 P.M. and reached at the spot at 11.30 P.M., whereas PW6-HC Naresh Kumar has stated that they had left the CIA staff at 6.00 P.M. and had reached at the spot at about 7.00 P.M and DSP reached at the spot at 9/9.30 P.M. and went back at about 1.30 A.M. Thus, both these prosecution witnesses differ regarding the time when they left CIA staff and when they had reached at the spot, which makes their presence at the place of recovery at the same time doubtful.

13. Another aspect which creates doubt regarding authenticity of the prosecution case is that two orders Ex.PW1/C and Ex.PW1/D were issued by the DSP. The trial Court has rightly observed that in the absence of cogent explanation regarding passing of these two orders by the DSP, it creates doubt that such type of orders might be in the routine manner which are kept ready by the police and it shows a casual approach by the DSP towards his duty. It also makes the presence of DSP at the place of alleged recovery doubtful.

14. The perusal of the prosecution evidence further reveals that the prosecution witnesses differ even regarding age and the wearing apparel of the secret informer, upon whose secret information the entire prosecution story has been built up. As per PW1, secret informer was about 50 years of age and was wearing Kurta Pajayma, whereas as per PW6, secret informer was about 30 years of age and was wearing pant and shirt. So, when the prosecution witnesses differ so much regarding his age and appearance, then it becomes doubtful if the police had actually come across some secret informer.

15. The perusal of the statements of the prosecution witnesses

further show that the prosecution witnesses are contradictory even regarding the place, where the canter, from which the recovery was allegedly effected was found parked and from where it was allegedly taken into possession. As per PW1-Shamsher Singh, the area from where the canter was taken into possession was surrounded by residential houses, whereas PW6 has deposed that no residential houses or buildings were existing at the said place.

16. As per some of the witnesses, face of the canter was towards Jhajjar side, whereas the other witnesses have deposed it to be on the Bahadurgarh side. So trial Court has rightly held that it becomes doubtful as to whether the canter was taken into possession from Camelgarh road leading from Jhajjar to Bahadurgarh road. All the above said glaring discrepancies and contradictions existing in the statements of the prosecution witnesses have not been reconciled by the prosecution which has adversely effected the case of the prosecution.

17. In the present case, the samples were sent to CFSL, Sunariya. The recovery was allegedly effected on 29.10.2016 but the samples were sent to CFSL, Sunariya on 07.11.2016. The trial Court has thus rightly observed that there is long delay in sending the samples to CFSL, Sunariya, though the samples were required to be sent within the period of 72 hours. The above said delay in sending of the samples has not been explained. In **Ramji Singh Vs. State of Haryana 2007(3) RCR (Criminal), 452**, it has been held that as per the standing instructions issued by the Narcotics Control Bureau, the sample must be dispatched to the laboratory within 72 hours of its seizure to avoid any legal objections. In that case, the samples were forwarded to the Chemical Examiner, after 8 days of their seizure and

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this circumstance was held to be fatal to the prosecution case. So in the instant case also, when there is unexplained delay of about 10 days in sending of the samples and till sending of the samples the sample seal remained with the police, then possibility of the tampering with the sample cannot be ruled out, which is again fatal to the case of the prosecution.

18. As per provisions of Section 50 of the Act, before conducting the personal search of the accused, it is incumbent upon the Investigating Officer to apprise the accused of his legal right of his search being conducted in the presence of a Gazetted Officer or a Magistrate. But in the instant case in compliance of provision of Section 50 of the Act, joint notice was served upon both the accused persons though separate notice was required to be served upon each of the accused. In this context, the trial Court has rightly relied upon *State of Rajasthan Vs. Parmanand and another, 2014 (1) Law Herald (SC) 913*, wherein it has been held that accused must be served notice individually and not jointly. Serving the notice jointly is legally not valid and a joint communication of the right available under Section 50 of the Act to the accused would frustrate the very purpose under Section 50. So in the case in hand also, the proper compliance of Section 50 of the NDPS Act has not been made, when admittedly a joint notice was served upon both the accused.

19. As per provisions of Section 52-A of the NDPS Act, it is obligatory for the officer concerned to ensure that as soon as contraband is seized, he should approach the Magistrate for grant of permission to draw the representative samples in his presence, then enlist the same and correctness of the list of sample has to be certified by the Magistrate.

Reliance in this regard can be placed upon *Simranjeet Singh Vs. State of Punjab, 2023 Live Law (SC) 570*, wherein it has been held that the process of drawing of samples under Section 52-A of the NDPS Act has to be in the presence and under the supervision of the Magistrate. The entire exercise of collecting the sample must be certified by the Magistrate to be correct.

20. But when in the present case, from the statement of the prosecution witnesses and the relevant record, it is proved that the samples were not drawn before the Illaqa Magistrate but the same were drawn at the place of recovery itself, then obviously provisions of Section 52-A of the NDPS Act have not been properly complied with.

21. We do not find any substance in this contention of learned counsel for the appellant that as this is a case of recovery of heavy commercial quantity of the contraband from the accused which itself rules out false implication. Recovery of heavy commercial quantity of the contraband should not weigh the mind of Court, when the case of the prosecution is not proved against the accused persons beyond the shadow of reasonable doubt and when the depositions of the prosecution witnesses are riddled with doubts. The alleged heavy recovery of contraband itself does not prove the guilt of the accused, when the sufficient evidence is not there to prove the same.

22. The trial Court has thus rightly reached at the conclusion that the case of the prosecution is doubtful and it has failed to establish the charge levelled against the accused persons beyond the shadow of reasonable doubt and has rightly acquitted both the accused-Virender and Jinkan Verma @ Amit.

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23. In view of the above, no case is made out for grant of leave to appeal against acquittal of accused Virender and Jinkan Verma @ Amit. The application without having any merits stands dismissed and the leave to appeal is declined.

(DEEPAK SIBAL)
JUDGE

(SUKHVINDER KAUR)
JUDGE

04.09.2023

Komal

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