

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

211

CRM-A-2880-2019

Date of Decision: 08.2.2023

State of Haryana

... Applicant

Versus

Kuldeep Singh

... Respondent

**CORAM: HON'BLE MS. JUSTICE RITU BAHRI
HON'BLE MRS. JUSTICE MANISHA BATRA**

Present: Mr. Pawan Girdhar, Additional Advocate General, Haryana,
for the applicant-State.

MANISHA BATRA, J.

1. The present application has been filed by the applicant-State for grant of leave to file appeal against the judgment of acquittal dated 18.05.2019 as pronounced in favour of the respondent-accused Kuldeep Singh in NDPS case No.11 of 2017 titled as *State v. Kuldeep Singh* registered vide FIR No.519 dated 28.12.2016 at Police Station Sadar Dadri under Section 20 of the Narcotics Drugs and Psychotropic Substances Act, 1985 (hereinafter to be mentioned as “N.D.P.S. Act”).

2. Broad contours of the case as set up by the prosecution are that on 28.12.2016 a police party headed by ASI Makhan Singh was present at T-point, Village Dudhwa Road, Adampur Daddi, when a secret information was received that the accused Kuldeep Singh who was engaged in the business of selling sulfa (charas) was standing near a tyre puncture shop outside his village with a Hero Splendor make motorcycle and if raided immediately, he could be apprehended with sulfa. Believing the secret information to be true, ASI Makhan Singh along with other police officials immediately proceeded towards the spot wherein the

accused was found sitting on a Hero Splendor motorcycle with a black coloured polythene in his hand. On noticing the police party, he at once stood but was apprehended. Notice under Section 50 of N.D.P.S. Act was given to him by ASI Makhan Singh. He gave reply to the notice expressing desire to get his search conducted in the presence of some Gazetted Officer and on this Suresh Kumar, DSP Charkhi Dadri was telephonically informed and called. He reached at the spot and search of the accused was conducted in his presence. Charas was found kept in the polythene bag which was carried by the accused. On weighing, it measured to be 3 kilograms. Two samples of 50 grams each were taken. The samples and the remainder were sealed by ASI Makhan Singh and DSP Suresh Kumar and were taken into custody. The motorcycle which was not having any number plate was also taken into possession. Tehrir was sent to the Police Station for registration of case. The accused was interrogated by the Investigating Officer ASI Prem Kumar who was called at the spot. The case property was deposited in the Malkhana. After completion of necessary investigation proceedings, challan under Section 173 Cr.P.C. was presented for the trial of the accused.

3. Copies of challan were supplied to the accused free of cost. On finding a prima facie case for commission of offence punishable under Section 20 (ii) (c) of N.D.P.S. Act, the respondent-accused was charge-sheeted accordingly to which he pleaded not guilty and claimed trial.

4. To substantiate its case, the prosecution examined as many as 10 witnesses. **PW-1** Constable Rajbir deposed about joining the investigation on 28.12.2016 and about the steps taken during the course of investigation. He proved Ex.P-2 notice under Section 50 of N.D.P.S. Act;

Ex.P-3 reply of accused to the said notice; Ex.P-4 memo of recovery and

Ex.P-5 Tehrir. **PW-2** Inspector Jagram deposed about preparing report Ex.P-6 under Section 52 of N.D.P.S. Act on 29.12.2016 on receiving samples and remainder of case property from ASI Prem on that day and also proved Ex.P-7 to Ex.P-10. **PW-3** ASI Anil Kumar deposed about recording statements of two police officials on 18.01.2017. **PW-4** DSP Suresh Kumar deposed about going to the spot on the relevant night on receipt of telephonic call from ASI Makhan Singh and about conducting search of the accused in his presence and about recovery of charas from him. He identified his signatures on memo Ex.P-4. **PW-5** EHC Anand Parkash tendered affidavit Ex.PW5/A submitting therein that the case property and samples were deposited in the Malkhana under his charge on 28.12.2016 and further that on 06.01.2017, one sealed parcel containing charas was handed over by him to Constable Rajni for depositing the same with FSL Sunaria in an intact condition. **PW-6** Constable Rajni tendered affidavit Ex.PW6/A submitting therein that on 06.01.2017, EHC Anand Parkash had handed over one sealed parcel containing 50 grams of charas to her and she deposited the same with FSL Sunaria on the same day in an intact condition. **PW-7** ASI Sunita deposed about registering formal FIR Ex.P-11 on receipt of Tehrir Ex.P-5 and about making endorsement Ex.P-12 on the same. **PW-8** ASI Makhan Singh deposed about the factum of receiving secret information and then about rushing towards the spot along with other police officials and about the factum of recovery of 3 kgs of charas from the accused besides taking other steps during the course of investigation as conducted by him. Apart from the documents already proved in evidence, he proved Ex.P-13 memo of taking of motorcycle in custody. **PW-9** HC

receipt of secret information and about joining the investigation and further about attesting memos Ex.P-2, Ex.P-3 & Ex.P-13. **PW-10** ASI Prem Kumar deposed about conducting further investigation in the matter and testified in support of the prosecution case. He proved Ex.PW-10/A rough site plan of the place of occurrence and PW10/B memo of arrest of the accused, PW10/C memo of disclosure statement of accused Ex.PW10/D report prepared by him under Section 57 of N.D.P.S. Act, Ex.PW10/E application moved by him before the Magistrate for preparing inventory and Ex.PW10/F certified copy of order dated 29.12.2016 passed by the Magistrate.

5. Statement of accused was recorded under Section 313 of Cr.P.C. He pleaded false implication and claimed himself to be innocent. No evidence in defence had been adduced by him.

6. The learned trial Court after appreciating the evidence on record held that the prosecution had failed to prove its case as against the accused beyond doubt and acquitted him of the charges as framed against him. Feeling aggrieved, the applicant-State has filed this application seeking grant of leave to file appeal against the judgment dated 18.05.2019.

7. Mr. Pawan Girdhar, Additional Advocate General, Haryana appearing for the applicant-State while challenging the impugned judgment of acquittal submitted that the findings as given by learned trial Court were not sustainable in the eyes of law and were liable to be set aside. The learned trial court did not apply its judicious mind. There was overwhelming evidence on record to prove that the respondent-accused was found to be in conscious possession of 3 kg of charas without having any licence or permit issued by proper authority to possess the same. There was

no lacuna in the procedure adopted by the complainant and the Investigating Officer in the proceedings as conducted. Rather all due procedure had been followed. The learned trial Court did not pass a speaking order. The findings as given were perverse. Hence, it was urged that the application for grant of leave deserve to be allowed and the respondent-accused was liable to be held guilty and convicted.

8. We have given our thoughtful considerations to the contentions as raised by learned counsel for the applicant and have minutely scrutinized the material available on record in the form of record of learned trial Court which had been summoned for reference in these proceedings.

9. Since the applicant has sought leave to file appeal against the judgment of acquittal, therefore, before proceeding further and adverting to the arguments raised by his counsel, it would be useful to review the approach to be adopted while deciding the appeal against acquittal by the trial Court. In **Chandrappa and others v. State of Karnataka**, (2007) 4 SCC 415, the Hon'ble Apex Court had observed that it could not be forgotten that in case of acquittal, there is a double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person should be presumed to be innocent unless he is proved to be guilty by a competent Court of Law. Secondly, the accused having secured an acquittal, the presumption of his innocence is certainly not weakened but reinforced, reaffirmed and strengthened by the trial Court. In **Atley v. State of U.P.**, AIR 1955 SC 807, the approach of the Appellate Court while considering a judgment of acquittal was discussed and it was observed that unless the

Appellate Court comes to the conclusion that the judgment of acquittal was

perverse, it should not set aside the same. In **Aher Raja Khima v. State of Saurashtra**, AIR 1956 SC 217, it was observed that for the High Court to take a different view on the evidence “there must also be substantial and compelling reasons for holding that the trial Court was wrong”. In **Ramesh Babulal Doshi v. State of Gujarat**, 1996 SCC (CrL.) 972, the Hon'ble Apex Court while speaking about the approach of the Appellate Court while considering an appeal against the order of acquittal of accused observed that while speaking in judgment over acquittal, the First Appellate Court is required to seek an answer to the question whether the findings of the trial Court are culpably wrong, manifestly erroneous and demonstrably unsustainable. If the Appellate Court answers the above questions in the negative, the order of acquittal should not be disturbed. In **Chandrappa's case** (Supra) the Apex Court after referring to a catena of judgments, culled out the following general principles regarding the powers of the Appellate Court while dealing with an appeal against an order of acquittal in the following words:-

- i) An Appellate Court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.
- ii) The Code of Criminal Procedure puts no limitation, restriction or condition on exercise of such power and Appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and law.
- iii) An Appellate Court, must bear in mind that in case of acquittal, there is double presumption in favour of the accused.
- iv) If two reasonable conclusions are possible on the basis of

the evidence on record, the Appellate Court should not disturb the finding of acquittal recorded by the trial Court.

10. On applying the above enunciated principles of law to the peculiar facts and circumstances of the present case and on a careful appraisal of evidence produced on record, we are of the opinion that the application does not deserve to be allowed and no case has been made out for grant of leave to appeal to the applicant-State. The respondent-accused had been charge-sheeted on the allegations that on 28.12.2016, he was found in conscious possession of 3 kgs of charas for which he could not produce any permission and licence. The contraband and the motorcycle on which the respondent was present at the time when he was apprehended, had been seized by a police party headed by PW-8 ASI Makhan Singh.

11. On analyzing the evidence produced on record, the learned trial Court recorded findings of acquittal of the respondent by observing that there was non-compliance of mandatory provisions of Sections 42 and 52 of N.D.P.S. Act on the part of the prosecution, the statements of police witnesses were contradictory on material points and further that a lacuna had been created due to delay in sending the samples of the contraband to the laboratory. On scrutinizing of the record, we are of the opinion that the findings as to non-compliance of provisions of Section 52 of N.D.P.S. Act were not correctly made by learned trial Court. Section 52 only deals with the procedure to be adopted by arresting officer after arrest of a person under Sections 41 to 44 of the N.D.P.S. Act and, therefore, there could not be stated to be any non-compliance of this provision on the part of the investigating agency. In fact, it was Section 52-A of the N.D.P.S. Act which was relevant for the purpose. This section had been inserted by the

Amendment Act of 1989 and was further amended by Act 16 of 2014. It deals with disposal of seized narcotic drugs and psychotropic substances and provides a procedure for drawing the sample and certifying of the same by the Magistrate. Infact, it was in reference to this provision that the learned trial Court had observed that since, no sample had been drawn before the concerned Magistrate hence, the provisions of the N.D.P.S. Act were not complied. The learned trial Court had relied upon the judgment of Hon'ble Apex Court cited as **Union of India v. Mohanlal and another**, 2016 (1) Law Herald (SC) 237 in this regard and had held that since the process of drawing samples was not undertaken in the presence of Magistrate, hence, the trial was liable to be vitiated. In our opinion, in **Mohanlal's** case (Supra), nowhere the issue that non-compliance of Section 52-A of N.D.P.S. Act would render the investigation vitiated, was taken up and hence, the learned trial Court committed an error in holding that since the representative sample had not drawn before the Magistrate hence, investigation/trial was liable to be vitiated. In this regard, reference can also be made to the observations made by High Court of Kerala in **Pavithran v. State of Kerala**, 2018 (1) KLT 517 wherein the Investigating Officer had not moved the learned Magistrate under Section 52-A of the N.D.P.S. Act. It was held that **Mohanlal's** case (Supra) nowhere revealed that issue as to whether there was non-compliance of Section 52-A of the N.D.P.S. Act, would render the investigation vitiated and it was held that mere fact that Investigating Officer had not moved the learned Magistrate under Section 52-A of the N.D.P.S. Act will not in any way affect the case of the prosecution. Reliance can further be placed upon **Okafor Chukwuka**

High Court that sampling of an illicit substance could not be held to be invalid only for the reason that samples had been allegedly drawn on the spot. Hence, we are inclined to hold that the circumstance that the representative sample was not taken before the Magistrate, was not such which entitled the respondent-accused to be given benefit of acquittal.

12. Proceeding further and coming to Section 42 of N.D.P.S. Act. As observed by learned trial Court, there was non-compliance of this provision of law on the part of the investigating agency. In our opinion, the observations made by learned trial Court on this point are well reasoned and do not warrant any interference. The provisions of Section 42 are mandatory in nature. A reading of this provision pre-supposes that if an authorized officer has reason to believe from personal knowledge or information received by him that some person is dealing in narcotic or psychotropic substance, he should ordinarily take down the information in writing except in cases of urgency which are set out in the section itself. Section 42 (2), is categorical that the information if taken down in writing shall be sent to the superior officer forthwith. In **Karnail Singh v. State of Haryana**, 2009 (5) RCR (Criminal) 515, the Hon'ble Apex Court observed that the compliance with the requirement of Sections 42 (1) and 42 (2) with regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer but in special circumstances involving emergent situation, the recording of the information in writing and sending a copy thereof to the officer superior may get postponed by reasonable period i.e., after the search, entry and seizure. It was further observed that while total non compliance of requirements of provisions of Section 42 is impermissible, delayed

compliance is satisfactory explanation about the delay and will be acceptable compliance of Section 42 and may be countenanced. In the present case on going through the material as well as evidence produced on record, it is revealed that PW-8 ASI Makhan Singh who was the complainant as well as the first investigating officer of the case had not made compliance of provisions of Section 42 of N.D.P.S. Act at all. He had acted on the basis of a secret information received by him that the accused was dealing in narcotic drug. It was not his version that he could not take down the information in writing and send that to his superior officer as there was any fear of whisking away of the contraband or of the respondent-accused. He even did not send such information at a later stage to his immediate official superior. Neither any explanation was rendered by him in this regard. In **Rajender Singh v. State of Haryana**, 2011 (3) R.C.R. (Criminal) 856 the Hon'ble Apex Court vide relying upon the ratio of law as laid down in *Karnail Singh's* case (Supra) had set aside the conviction of an accused under Section 18 of the N.D.P.S. Act as though the recovery of opium was made by the Sub Inspector of Police on receipt of secret information but the said information was neither recorded in writing nor any written information was sent to superior officer as required under Section 42 (2). As in the present case, the provisions of Section 42 of the N.D.P.S. Act were not proved to have been complied by ASI Makhan Singh complainant and first investigating officer, therefore, we have no hesitation to hold that the respondent-accused could not be convicted due to non-compliance of this provision.

13. It is noteworthy that there are some other material lacunas in the case of the prosecution. There was delay of 8 days in sending the sample

to the laboratory which had not been satisfactorily explained. Then, the statements of police witnesses with regard to deposit of sample and case property in the Malkhana are also inconsistent. PW-5 EHC Anand Parkash Malkhana Moharir deposed that the case property was deposited in the Malkhana on 28.12.2016 at 7:00/8:00 PM but PW-10 contradicted him by saying that they had reached at the Police Station Sadar Dadri at about 11:30 PM on 28.12.2016 and then handed over the case property to Inspector/SHO Jagram at that time. PW-8 ASI Makhan Singh deposed that the case property was weighed and then the weighing machine was returned at about 10:30 PM. This contradiction in the statement of witnesses with regard to time of deposit of case property cannot be stated to be minor and has assumed in greater importance in view of the fact that their statements are not corroborated by any independent and disinterested evidence. The statements of these witnesses are contradictory on one more material point with regard to taking out of the sample from the custody of PW-5 EHC Anand Parkash Malkhana Moharir. PW-5 EHC Anand Parkash stated that after deposit of the case property in the Malkhana on the night of 28.12.2016, only one sample had been taken out and handed over to PW-6 Constable Rajni on 06.01.2017 for depositing the same with FSL Sunaria. He emphatically stated during his cross-examination that from 28.1.2016 till 06.01.2017, the narcotic substance was not taken out from the Malkhana and it had remained intact in his custody. His statement to this effect falsifies the version of the prosecution as per which, as on 29.12.2016, an application was moved by SI Shamsheer Singh for preparing the inventory of the case property before Duty Magistrate, Charkhi Dadri and for issuance of certificate under Section 52 of the N.D.P.S. Act by him. As per the

prosecution case, the sealed parcel containing samples and remainder were shown to the concerned Magistrate who has passed order Ex.PW10/F certifying that the inventory of the abovementioned parcel was prepared before him by SI Shamsheer Singh and seals on the parcels were found to be intact and visible. If the case property or its samples were not taken out from the Malkhana from the night of 28.12.2016 till 06.01.2017 then what was shown to the concerned Magistrate has remained unanswered and this fact has created a serious dent in the story of the prosecution, the benefit of which certainly goes to the respondent-accused as a doubt has reasonably been created that whatsoever was shown to the Magistrate was not the case property of this case.

14. Taking these circumstances into consideration, we are of the opinion that the learned trial Court had rightly appreciated the evidence produced on record and committed no error in acquitting the respondent. On reading of entire material, we find that there is no perversity in the findings recorded by learned trial Court and there is no compelling reason to interfere with its judgment. Accordingly, it is held that no ground has been made out to grant leave to appeal to the applicant. Finding no merit in the application, the same is dismissed.

(RITU BAHRI)
JUDGE

(MANISHA BATRA)
JUDGE

08.02.2023
manju

Whether speaking/reasoned
Whether reportable

Yes/No
Yes/No