

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

CRA-S-1185-SB-2006 (O&M)

Reserved on : 14.12.2023

Date of Decision: 22.01.2024

Mohan Singh

....Appellant

VERSUS

State of Punjab

....Respondent

CORAM:- HON'BLE MR. JUSTICE KARAMJIT SINGH

Present: Ms. Tanu Bedi, Advocate,
for the appellant.

Mr. Rozer Kumar Aggarwal, AAG, Punjab.

KARAMJIT SINGH, J.

Present appeal has been filed by the appellant-accused against the judgment and order dated 13.7.2005 whereby the appellant was convicted and sentenced to imprisonment for a period of 10 years and to pay fine of Rs.1 lakh and in default of payment of fine, to further undergo rigorous imprisonment for a period of one year under Section 15 of NDPS Act in criminal case having FIR No.120 dated 4.11.2003 under Section 15 of NDPS Act, Police Station Goindwal Sahib by the Court of Judge, Special Court, Amritsar.

2. Brief facts of the case of the prosecution are that on 4.11.2003, the police party headed by PW4-ASI Jatinderjit Singh was on patrolling duty and the said police official received a secret information that the appellant was indulging in sale and purchase of poppy husk in the area of his village Khawaspur and if raid is conducted at the house of the appellant, he could be apprehended along with large quantity of poppy husk. Independent witness Inderjit Singh son of Tarlok Singh was associated in the police party and then they raided the house of the appellant. At that time, the appellant was

found sitting on two gunny bags in the Courtyard of his house and he was

sewing the mouth of the *gunny* bags. PW4-ASI Jatinderjit Singh apprised the appellant that he was suspected to be possessing poppy husk in *gunny* bags and further informed the appellant of his legal right to get effect search before him or some Gazetted Officer or Magistrate. On this, the appellant told the said police official that search of bags be conducted by some Gazetted Officer and to this effect, non-consent memo Ex.PC was reduced into writing which was thumb marked by the appellant and attested by HC-Harjinder Singh and independent witness Inderjit Singh. PW4-Jatinderjit Singh sent wireless message to PW2-Jaswinder Singh DSP, Halqa Goindwal Sahib who reached the spot and disclosed his identity as a Gazetted Police Officer to the appellant and the appellant reposed confidence in him vide consent memo Ex.PA which was thumb marked by the appellant and attested by the aforesaid witnesses and was also signed by PW2-Jaswinder Singh DSP. Then under the supervision of PW2, search of two *gunny* bags was conducted by PW4 and poppy husk was found in both the bags. Two samples of 250 grams each of poppy husk were separated from each bag and the remaining bulk of poppy husk on weighment in each bag came out to be 39 kg 500 grams. The aforesaid 4 samples and the remaining bulk contained in two *gunny* bags were converted into 6 separate parcels which were sealed by PW2-Jaswinder Singh-DSP with his seal bearing impression 'JS' and also by PW4-ASI Jatinderjit Singh with his separate seal bearing impression 'JS'. Separate sample seal impressions were also prepared and after use, PW2 kept his seal with himself while PW4 handed over his seal to HC Harjinder Singh. The entire case property was taken into possession vide recovery memo Ex.PB which was also attested by the aforesaid witnesses. PW4 prepared *ruka* Ex.PD and dispatched the same to Police Station, upon the

MHC Jaspal Singh. PW4 also prepared rough site plan of the place of recovery and the accused was formerly arrested vide memo Ex.PF and statement of PWs were also recorded. On return to the police station, PW4 produced the accused and the entire case property before PW3-SI/SHO Dalbir Singh who after verifying the facts of the case, appended his seal bearing impression 'DS' on the entire case property and then the case property was deposited in a double lock while the appellant was sent to police lock up. On the next day, the accused and the entire case property was produced before Illaqa Magistrate who after checking the case property, signed the same and on return to the police station, the case property was again kept in a double lock. Sealed sample parcels were sent for their analysis to the office of Chemical Examiner through PW1-Constable Sukhchain Singh. After completion of investigation, challan was presented against the appellant.

3. The trial Court framed charge under Section 15 of NDPS Act against the appellant, to which, he did not plead guilty and then the case was fixed for prosecution evidence.

4. In order to prove its case, the prosecution examined PW4-ASI Jatinderjit Singh who deposed with regard to receipt of secret information and recovery of two bags each containing 40 Kg of poppy husk from the possession of the appellant in the presence of PW2-Jaswinder Singh DSP and he proved non-consent memo Ex.PC, consent memo Ex.PA, recovery memo Ex.PB, *ruka* Ex.PD, FIR Ex.PD/1, rough site plan Ex.PE and arrest memo Ex.PF. He also proved report of Chemical Examiner Ex.PG. PW2-Jaswinder Singh DSP deposed that on 4.11.2003, he was posted as DSP, Halqa Goindwal Sahib and on that day, he received wireless message from

where the police party headed by the aforesaid police official along with the accused was present; that the appellant reposed confidence in him vide memo Ex.PA and then the contents of two *gunny* bags which were lying in the Courtyard were checked and on inspection, poppy husk was found in both the bags. Two samples of 250 grams each were separated from each bag and the remaining bulk on weighment in each bag was found to be 39 kg 500 grams. Then all the samples and two bags containing remaining bulk were converted into parcels which were sealed by him with his seal bearing impression 'JS' and the investigating officer also sealed the said parcels with his separate seal bearing impression 'JS'. The sample seal impressions of the used seals were also prepared at the spot and then entire case property was taken in to possession by the police vide memo Ex.PB which was also attested by him. PW3-SI/SHO Dalbir Singh deposed that on 4.11.2003, he was posted as SHO, Police Station Goindwal Sahib and on that day, the appellant along with the entire case property was produced before him and after checking the entire case property, he appended his seal bearing impression 'DS' on the same and then the case property was kept in a double lock. On the next day, the entire case property was produced before the Illaqa Magistrate and on return to the police station, the case property was again deposited in a double lock. On 12.11.2003, he got prepared docket from the office of SSP, Tarn Taran and on 13.11.2003, 4 sealed sample parcels along with sample seals and docket were handed over to PW1-Constable Sukhchain Singh with direction to get deposit the same in the office of Chemical Examiner, Punjab, Chandigarh.

5. PW1-Constable Sukhchain Singh deposed that on 13.11.2003, he was posted in Police Station Goindwal Sahib and on that day, SHO-

sample seals and docket and he deposited the same in the office of Chemical Examiner, Punjab, Chandigarh on the same very day. The prosecution gave up PW-Inderjit Singh being won over by the appellant and PW-HC Harjinder Singh, PW-SI Nachhattar Pal Singh and PW-Constable Joginder Singh being unnecessary witnesses and finally, Additional PP closed the prosecution evidence.

6. The appellant was examined under Section 313 Cr.P.C. and the entire incriminating evidence was put to him which was denied by him. The appellant took plea of false implication and innocence. The appellant had not led any evidence in his defence.

7. After hearing the State counsel and the defence counsel, the learned trial Court found the appellant guilty and convicted and sentenced the appellant to imprisonment and to pay fine as has been detailed in the first paragraph of this judgment.

8. Being aggrieved, the appellant filed the present appeal.

9. I have heard the counsel for the appellant and the State counsel and gone through the entire record of this case.

10. Counsel for the appellant has come up with a plea that in the present case, alleged recovery of contraband was effected in violation of the mandatory provisions of Section 42 of NDPS Act. She has submitted that as per prosecution version, PW4 received secret information but the same was not reduced into writing nor copy thereof was sent to the superior officer by the investigating officer immediately after receipt of the said secret information. Thus, there was total non-compliance of the mandatory provisions of Section 42 of NDPS Act and the appellant deserves acquittal on this sole ground. In support of her contention, counsel for the appellant

Karnail Singh v. State of Haryana (2009) 8 SCC 539, **Sukhdev Singh v. State of Haryana** (2013) 2 SCC 212, **Darshan Singh v. State of Haryana** (2016) 14 SCC 358 and **Dharamvir Parshad v. State of Bihar** (2020) 12 SCC 492.

11. Another plea taken by the counsel for the appellant is that in the present case, there was also violation of the provisions of Section 52-A of the NDPS Act as no inventory certified by the concerned Illaqa Magistrate was prepared and that even during trial, no such inventory, photographs or case property was produced or proved.

12. Counsel for the appellant has further argued that the entire case is based on the depositions of police officials; that as per prosecution version, independent witness-Inderjit Singh was associated during the recovery proceedings but the prosecution did not examine said independent witness by simply saying that he was won over by the appellant. It has been further argued that seals which were used for sealing of the case property, throughout, remained with the police officials and the sample parcels were not sent to the office of the Chemical Examiner within the stipulated period of 72 hours of the recovery as per instructions issued by NCB; that thus, in the present case, the prosecution has failed to prove to the hilt that the case property/samples remained intact from the point of recovery till samples reached the office of Chemical Examiner.

13. Counsel for the appellant has further argued that in view of above, the prosecution has miserably failed to prove its case against the appellant and thus, the appellant deserves to be acquitted in the present case.

14. State counsel, while supporting the impugned judgment and order, has submitted that the entire recovery proceedings were conducted in

further submitted that recovery in the present case was effected on the basis of secret information; that it has come on record that after receipt of secret information, independent witness-Inderjit Singh was associated in his police party by the investigating officer and then the house of the appellant was raided where the appellant was found present in the Courtyard and two *gunny* bags were also found lying there on which the appellant was sitting. On the basis of the non-consent memo Ex.PC, Gazetted Police Officer namely PW2-DSP Jaswinder Singh was called at the spot and the appellant reposed confidence in the said Gazetted Officer as is evident from consent memo Ex.PA; that the contents of the aforesaid bags were examined by the Investigating Officer in the presence of the said Gazetted Police Officer and on checking, both the bags were found to be containing poppy husk. State counsel has further contended that there is further evidence available on record that two samples of 250 grams each of poppy husk were separated from each of the bag and the remaining bulk on weighment in each bag came out to be 39 kg 500 grams and the said 4 samples and the remaining bulk contained in 2 bags were sealed by PW2 and PW4 with their respective seals having impressions 'JS' and the said seal impressions were also appended on Form M-29 and the entire case property was taken into possession by the police vide memo Ex.PB, which also bears attestation of PW2 and PW4. State counsel has further submitted that in order to prove link evidence, the prosecution examined PW1 and PW3 and it stands fully proved that aforesaid 4 sealed samples reached the office of Chemical Examiner in their intact condition and on analysis, they were found to be that of poppy heads as per the report of Chemical Examiner Ex.PG.

15. State counsel has further argued that the case property was destroyed as per provisions of Section 52-A of the NDPS Act after getting

order in this regard from the Court of Sub Divisional Judicial Magistrate, Tarn Taran which is dated 3.1.2004.

16. I have considered the submissions made by the counsel for the parties.

17. Firstly, I am taking up the plea taken by the counsel for the appellant with regard to violation of the mandatory provision of Section 42 of NDPS Act. As per testimony of PW4, he received secret information against the appellant on 4.11.2003 and thereafter, the police party headed by PW4 raided the house of the appellant and recorded non-consent memo Ex.PC of the appellant and then PW4 sent wireless message to local DSP and on receipt of the said message, PW2 Jaswinder Singh DSP posted at Goindwal Sahib reached the spot and the appellant reposed confidence in PW2 vide consent memo Ex.PA and thereafter, entire recovery proceedings were conducted under the supervision of PW2. Admittedly, upon receiving the secret information, it was not reduced into writing by the Investigating Officer nor it was communicated to his senior officer immediately after its receipt before raiding the house of the appellant.

18. Sub-section 2 of Section 42 was amended with effect from 2.10.2001. Undoubtedly, recovery in the present case was effected after coming into force of the aforesaid amendment. Un-amended provision of Sub Section 2 of Section 42 of NDPS Act reads as under : -

“42. Power of entry, search, seizure and arrest without warrant of authorisation--

(1) X X X

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall forthwith send a copy thereof

to his immediately official superior.”

After amendment of this sub section, word, “forthwith” stood amended by the words, “within 72 hours”. The amended provision of sub-section 2 of Section 42 of NDPS Act reads as under : -

“42. Power of entry, search, seizure and arrest without warrant of authorisation--

(1) x x x

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediately official superior.”

19. So, in light of the aforesaid amended provision of Section 42(2) of NDPS Act, the officer concerned was to sent intimation regarding receipt of secret information to the superior officer within 72 hours from the time of receipt of information. In the given circumstances, as it is evident that in the present case, after raiding the house of the appellant, PW4 sent wireless message to his superior officer (PW2) and further copies of the FIR were also sent to the superior officers within the aforesaid statutory period of 72 hours, this Court is of the view that there was adequate or substantial compliance of the provision of Section 42 of NDPS Act. Only total non-compliance with requirements of Section 42 of NDPS Act is impermissible. Delayed compliance with satisfactory explanation about the delay (if any) as is in the present case is acceptable compliance with Section 42 of NDPS Act as has been held by Hon'ble Supreme Court in **Karnail Singh's** case (supra) and **Sukhdev Singh's** case (supra).

20. The another plea taken by the counsel for the appellant is

regarding violation of provision of Section 52-A of NDPS Act which is

relating to drawing of samples and disposal of seized contraband. Section 52-A of NDPS Act reads as follows:-

“1[52A. Disposal of seized narcotic drugs and psychotropic substances.-- 2[(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 3[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 3[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 3[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 3[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 4[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 5[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.]

21. Section 52-A of NDPS Act is a very important provision. Narcotic Drugs and Psychotropic Substances are vulnerable to misuse. When huge quantities of contraband are seized, it is not possible to keep them safely in the malkhanas and there may be a chance of pilferage or the narcotic substances falling in wrong hands. Therefore, the aforesaid Section 52-A was inserted in NDPS Act. The Hon'ble Supreme Court in ***Union of India Vs. Mohan Lal (2016) 3 SCC 379*** while enumerating scope of Section 52-A of NDPS Act held that there is no provision in the NDPS Act that mandates taking of samples at the time of seizure. The Hon'ble Supreme Court further observed as follows:-

“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.”

22. Recently, Hon’ble Supreme Court in **Simranjit Singh v. State of Punjab**, 2023 SCC Online SC 906, while placing reliance upon its earlier decision in **Mohan Lal's** case (supra) held that mandate of Section 52-A of the NDPS Act was not complied with and consequently, acquitted the accused while making the following observations :

*“10. Hence, the act of PW-7 of drawing samples from all the packets at the time seizure is not in conformity with the law laid down by this Court in the case of **Mohanlal**. This creates a serious doubt about the prosecution's case that substance recovered was a contraband.*

11. Hence, the case of the prosecution is not free from suspicion and the same has not been established beyond a reasonable doubt. Accordingly, we set aside the impugned judgments insofar as the present appellant is concerned and quash his conviction and sentence.”

23. Admittedly, in the present case, the seals used by the prosecution witnesses remained in possession of the police officials. PW2-Jaswinder Singh DSP kept his seal with him while PW4-Jatinderjit Singh ASI handed over his seal after use to HC Harjinder Singh who was not examined by the prosecution during the trial. Even SHO/SI who appeared in the witness box as PW3 kept his seal with him after its use. PW2 and PW4 have not specifically deposed that at the time of recovery, Form M-29 was also prepared or that sample seal impressions were affixed on the same. Both these PWs simply stated that separate sample seal impressions were prepared. Further, in this case, the prosecution has also failed to prove that any inventory was prepared and got certified from the Magistrate concerned,

Act. Further, nothing is there on the record to prove that any representative sample was separated and photographs were taken in presence of the Magistrate concerned on 05.11.2003, when the case property was produced before him, as per the mandate of Section 52-A of NDPS Act. The prosecution also failed to produce on record any application submitted to the Magistrate for the purpose of certifying the correctness of the inventory so prepared or that any photographs of the case property were taken and certified by the Magistrate as true. Thus, the prosecution is unable to prove that any representative sample was drawn from the bulk in presence of the Magistrate, as per the provision of Section 52-A of NDPS Act.

24. As per prosecution version, recovery of poppy husk was effected on 4.11.2003 whereas the samples were sent to the office of Chemical Examiner on 13.11.2003. As per instructions issued by Narcotic Control Bureau vide Standing Order No.1 dated 15.3.1988, such samples are required to be sent to the Chemical Examiner within 72 hours of their seizure. This Court in **Malkiat Singh @ Kala v. State of Punjab**, 2009(1) RCR (Criminal) 353, while relying upon the judgment of Hon'ble Supreme Court in **State of Rajasthan v. Gurmail Singh** 2005(2) RCR (Criminal) 58 held that as there was unexplained delay of 5 days in sending the sample to the office of Chemical Examiner, the possibility of tampering with the same, until it reached the laboratory could not be ruled out. In the given circumstances, as in the instant case, the seals after use remained with the police officials, unexplained delay of 9 days in sending the samples in the present case beyond the stipulated period of 72 hours has definitely put dent in prosecution case. Further, from the perusal of the report of Chemical Examiner Ex.PG, it appears that 4 samples i.e. 2 samples from each bag

Investigating Officer to take the concerned samples to the laboratory while appearing in the witness box as PW1 stated that only one sample parcel was handed over to him on 13.11.2003 with direction to deposit the same in the office of Chemical Examiner, Punjab, Chandigarh. It being so, the prosecution has failed to prove beyond doubt that the samples which were separated at the spot of recovery, throughout remained intact, till they reached the office of Chemical Examiner.

25. From the perusal of the evidence led by the prosecution, it appears that two sealed bags containing remaining bulk of the case property were not produced during the trial. The prosecution has also not offered any explanation for non production of the aforesaid case property. The prosecution witnesses have not stated anything regarding destruction of the case property and even no such order passed by the Magistrate was tendered into evidence by the prosecution.

26. It must be borne in mind that severer the punishment, greater has to be the care taken to see that all the safeguards provided in a Statute are scrupulously followed. The Hon'ble Supreme Court in ***Mangi Lal v. State of M.P. 2023 SCC Online SC 862***, while acquitting the accused has observed that:-

“8. Before any proposed disposal/destruction mandate of Section 52A of the NPDS Act requires to be duly complied with starting with an application to that effect. A Court should be satisfied with such compliance while deciding the case. The onus is entirely on the prosecution in a given case to satisfy the Court when such an issue arises for consideration. Production of seized material is a factor to establish seizure followed by recovery. One has to remember that the provisions of the [NDPS Act](#) are both stringent and rigorous and therefore the burden heavily lies on the prosecution. Non-production of a physical evidence would lead to a negative inference within the meaning of

Section 114(g) of the Indian Evidence Act, 1872 (hereinafter referred to as the Evidence Act). The procedure contemplated through the notification has an element of fair play such as the deposit of the seal, numbering the containers in seriatim wise and keeping them in lots preceded by compliance of the procedure for drawing samples.”

27. In view of the settled position of law and the cumulative effect of the infirmities as discussed above, the prosecution has failed to prove its case against the appellant accused beyond shadow of reasonable doubt.
28. Consequently, the appeal is allowed. Judgment of conviction and order of sentence dated 13.7.2005 passed by Judge, Special Court, Amritsar are hereby set aside. The appellant is acquitted of the charge.
29. The appellant is on bail on account of suspension of his sentence vide order dated 31.8.2012. His surety stands discharged.

(KARAMJIT SINGH)
JUDGE

22.01.2024
Paritosh Kumar/yogesh

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