

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

1. CRA-S No.1184-SB of 2016

Amandeep Singh
... Appellant

Versus

State of Punjab
... Respondent

2. CRA-S No.1232-SB of 2016

Manoj Kumar @ Sabbi
... Appellant

Versus

State of Punjab
... Respondent

Date of decision: 20th April, 2024

CORAM: HON’BLE MRS. JUSTICE MANJARI NEHRU KAUL

Present: Ms. Nidhi, Advocate
Amicus Curiae for the appellants.
Mr. Navdeep Singh, Dy. Advocate General, Punjab
for the respondent/State.

MANJARI NEHRU KAUL, J.

1. The appellants in both the appeals detailed hereinabove, have challenged the judgment and order dated 21.01.2016 passed by the Court of learned Judge, Special Court, Fatehgarh Sahib vide which they were convicted under Section 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as, ‘the Act’) and sentenced to undergo rigorous imprisonment for a period of

ten years and to pay a fine of ₹1.00 lakh each, in default of payment of fine to pay to further undergo rigorous imprisonment for one year.

2. Since both these appeals emanate from a common judgment of conviction and order of sentence, they are thus being taken up together for disposal by way of this common judgment.

3. Learned Amicus Curiae appearing on behalf of the appellants has contended that the impugned judgment, on the face of it, is inherently flawed and deserves to be set aside, as the trial Court had erred in discarding crucial evidence on record. She has additionally, inter alia contended as follows:

- (i) That as per the case of the prosecution, the appellants were apprehended near Canal Rest House, Khamano, a public thoroughfare, and neither any information was sent to any superior officer by the police party nor any independent witness was joined to corroborate the case of the prosecution, significantly undermining its credibility.
- (ii) That there was a violation of the mandatory provisions of Section 50 of the Act as neither the personal search of the accused was carried out nor was the alleged recovery affected from the accused in presence of a Magistrate or a Gazetted Officer. Rather, the manner in

which the entire recovery proceedings were conducted, it created a serious dent in the case of the prosecution.

- (iii) That the handling of the samples by the police officials and the failure to draw them in the presence of a Magistrate constituted non-compliance with the provisions of Section 52A of the NDPS Act.
- (iv) The withdrawal of the samples by the police party even before it reached the Magistrate was clearly violative of the provisions of Section 52A of the Act.

In support, learned counsel has placed reliance upon '**Yusuf @ Asif vs. State**' 2023 LiveLaw SC 890, wherein Hon'ble the Supreme Court held that in such like cases where there had been non-adherence to the provisions of Section 52A of the NDPS Act, conviction of an accused was liable to be set aside.

- (v) That the trial Court failed to appreciate that the Investigating Officer was required to draw samples from all the seized bottles which were allegedly recovered from the possession of the appellants. However, it was a matter of record that only two bottles each out of the 60 seized bottles of Recodex (35 bottles recovered from appellant Manoj Kumar @ Sabbi and 25 bottles recovered from appellant Amandeep Singh)

had been drawn as sample parcel. Additionally, only one bottle out of the 60 bottles of Recodex allegedly recovered was sent to the Forensic Science Laboratory (FSL) for examination. Not only this, neither any batch number nor the name of the manufacturer was mentioned, coupled with the fact that all the recovered bottles were not even sent to the FSL; remaining recovered bottles of Recodex in the circumstances, would thus be kept at the same pedestal as the samples which had been sent to the FSL.

(vi) That despite the alleged recovery having been affected on 05.04.2010, there was a significant delay of more than seven days in sending the samples to the FSL, which were dispatched only on 13.04.2010.

(vii) That the trial Court failed to appreciate that the seal after use remained with the police officials, raising a serious concern about potential tampering. Furthermore, the illegible impression on the seal exacerbated doubts.

4. Learned Amicus Curiae thus, vehemently argued that in the aforementioned facts and circumstances, serious doubts were cast on the case of the prosecution. Even if it was assumed that some narcotic substance had been recovered from the appellants, the contents of a

single bottle sent to the FSL thus suggesting some narcotic substance would only classify the alleged recovery as falling under non-commercial quantity. Consequently, a prayer has been made for acceptance of the instant appeals and setting aside of the impugned judgment and order.

5. Learned State counsel, on the other hand, has controverted the submissions and prayer made by learned Amicus Curiae, by submitting:

- (i) That the appellants were apprehended by the police party on suspicion; on their search the following recovery was affected from them:

Manoj Kumar @ Sabbi : 35 bottles of Recodex

Amandeep Singh : 25 bottles of Recodex

- (ii) That regarding the non-compliance of the provisions of Section 50 of the Act, recovery of contraband was affected from a basket attached to the right side of the motorcycle, on which both the appellants were riding, and from a bag which accused Amandeep Singh was carrying. No personal search of the appellants was carried out; moreover, the appellants were duly informed of their statutory right to be searched in the presence of a Gazetted Officer, however, they reposed confidence in the police party, as is evident from the

consent memos Ex.PA and Ex.PB. Despite there not being any independent witness, all the prosecution witnesses supported the case of the prosecution in its entirety, thereby undermining the arguments raised by the learned Amicus Curiae that non-joining of the independent witness discredited the version of the prosecution.

- (iii) That although only two bottles of Recodex out of the entire recovery affected from the appellants were sent to the FSL, the FSL report confirmed the presence of 'Codeine Phosphate' in the samples so sent. Thus, the learned trial Court had rightly inferred that the remaining bottles, not sent to the FSL, also would have contained the same substance.
- (iv) That mere delay in sending the samples to the FSL would not warrant any adverse inference against the appellants as it was received in an intact condition by the FSL. Furthermore, regarding the argument of illegible impression on the seals, prosecution witnesses testified that it had been on account of fire which had erupted in the judicial Malkhana, as a result of which the case property lying there had been affected.

(v) That no doubt, the samples were not drawn in the presence of a Magistrate, however, after the samples were extracted, the sealed case property was presented before the Magistrate concerned.

6. Learned State counsel has, thus, contended that the case of the prosecution was proved beyond reasonable doubts against the appellants and thus, the impugned judgment and order could not be faulted with.

7. I have heard learned counsel for the parties and perused the relevant material on record.

8. Case of the prosecution in brief maybe noticed as thus:

On 05.04.2010, at about 5.15 PM police officials headed by ASI Balwinder Singh chanced upon the appellants while the latter were riding their motorcycle, who, upon noticing the Police, the appellants turned their two-wheeler towards Khamanon Kamli. On the basis of suspicion, appellants were stopped by the police party near canal rest house, Khamanon department, who then disclosed their names as Manoj Kumar @ Sabi (driver) son of Roop Kumar and the pillion rider disclosed his name as Amandeep Singh son of Avtar Singh. The investigating officer ASI Balwinder Singh duly gave an offer to the appellants to get their search effected by a Gazetted Officer or a Magistrate, however, the appellants reposed confidence in the ASI and also got their consent memos (Ex.PA) and (Ex.PB) recorded and

signed. Thereafter, the basket (tockry) affixed on the right side on the motorcycle was searched from which, the recovery of 35 bottles of Recodex was effected and on search of the bag carried by Amandeep Singh, 25 bottles of Recodex were recovered. As per the provisions of NDPS Act, two bottles out of the 35 bottles recovered and two bottles out of the 25 bottles recovered of Recodex were separated from the recovered contraband. The samples after being separated and the bulk, were then converted into parcels and duly sealed by IO with his seal of "BS". Sample chit (Ex.PC) was separately prepared, recovered contraband was taken into police possession vide recovery memo (Ex.PD) and the motorcycle no. PB-49-7112, was also taken as case property as per memo (Ex.PG). Thereafter, ruqa (Ex.PE) was sent to the police station concerned on the basis of which FIR (Ex.PF) came to be registered against the appellant by ASI Ajaib Singh. Both the accused were arrested and the information about the arrest was duly communicated vide arrest memos Ex.PH and Ex.PI. On return to the police station, ASI Balwinder Singh produced both the accused as well as the entire case property to SI Kamaljit Singh, SHO, who then, verified the facts and quantum of recovery from the accused further affixing his seal of "KS" on the case property and sample chit EX.PC. On 13.04.2010, only two bottles out of the 60 bottles of Recodex recovered bearing seal impression BS/KS, were sent to FSL. Thereafter, challan was presented and prosecution in its favour

examined the following 6 witnesses PW1- ASI Balwinder Singh, PW2- ASI Manjit Singh, PW3- ASI Harbhajan Singh, PW4- Inspector Kamlajit Singh, PW5-Ajit Singh, PW6- ASI Nirmal Singh. Subsequently, statement of the accused under section 313 was recorded and all the incriminating material was put to him. On the basis of the evidence led and material produced, the appellants were convicted and sentenced to undergo imprisonment which already stands detailed in the opening para of this order.

9. With respect to the arguments raised by learned Amicus Curiae regarding the alleged non-compliance of the provisions of Section 50 of the Act, this Court does not find any merit in the contentions. The contraband was recovered from a basket of the motorcycle driven by appellant Manoj Kumar @ Sabbi and from a bag carried by appellant Amandeep Singh, not as a result of their personal search. Furthermore, as per the settled law, the absence of an independent witness would not discredit the case of the prosecution; the credibility of the official witnesses is pivotal and in case it inspires confidence, it can be safely relied upon. However, it remains undisputed by the prosecution that only two bottles out of the 60 seized bottles of Recodex from the appellants, were sent to the FSL for examination, while rest of the recovered substance in the remaining bottles was destroyed. Additionally, there was no documentation

regarding the batch numbers or the other relevant details related to the recoveries effected.

10. It would be apposite here to refer to the following observations made by Hon'ble the Supreme Court in **Yusuf @ Asif's case (supra)**:

“13. Notwithstanding the defence set up from the side of the respondent in the instant case, no evidence has been brought on record to the effect that the procedure prescribed under subsections (2), (3) and (4) of Section 52A of the NDPS Act was followed while making the seizure and drawing sample such as preparing the inventory and getting it certified by the Magistrate. No evidence has also been brought on record that the samples were drawn in the presence of the Magistrate and the list of the samples so drawn were certified by the Magistrate. The mere fact that the samples were drawn in the presence of a gazetted officer is not sufficient compliance of the mandate of subsection (2) of Section 52A of the NDPS Act.

XXXX	XXXX	XXXX
XXXX	XXXX	XXXX

16. In the absence of any material on record to establish that the samples of the seized contraband were drawn in the presence of the Magistrate and that the inventory of the seized contraband was duly certified by the Magistrate, it is apparent that the said seized contraband and the samples drawn therefrom would not be a valid piece of primary evidence in the trial. Once there is no primary evidence available, the trial as a whole stands vitiated.”

11. A perusal of the FSL report Ex.PP in the present case, reveals that two parcels marked 1 and 2, each sealed with two seals, one from “BS” and the other from “KS”, purportedly containing intoxicant material were sent to the FSL. As per the case of the prosecution itself, the seal “BS” belongs to PW-1 SI Balwinder Singh and seal “KS” belongs to PW-4 Inspector Kamaljeet Singh, thus, prosecution itself has admitted that the samples sent to the FSL were not drawn in the presence of a Magistrate; as neither of the seal is of the Magistrate.

12. The prosecution failed to demonstrate as to how the remaining substances not sent to the FSL and which admittedly were not examined for their ingredients, could be assumed to contain specific narcotic substance, such as Codeine Phosphate. The manner in which the contraband was sampled, a crucial aspect in such like cases, raises a significant concern in the present case. Serious doubts arise regarding the manner in which the recovered contraband was sampled, particularly, considering the non-compliance with the provisions of Section 52A of the NDPS Act. The samples sent to the FSL by the police officials were admittedly not drawn in the presence of a Magistrate, which without doubt undermines the case of the prosecution. Furthermore, the prosecution witnesses provided no plausible, let alone convincing explanation as to why only two samples out of the seized contraband were sent for examination to the FSL. It is

evident, thus, that the Investigating Agency did not adhere to the provisions of the NDPS Act in the present case with respect to the sampling of the recovered contraband.

13. As a sequel to the above, this Court has no hesitation to observe that the prosecution failed to prove the case against the appellants beyond shadow of reasonable doubt, for which they deserve to be given the benefit of doubt. Both the appeals are allowed, the impugned judgment of conviction and order of sentence are set aside and the appellants acquitted of the charges.

(MANJARI NEHRU KAUL)
JUDGE

April 20, 2024
rps

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