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IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH

CRA-S-2953-SB-2014
Date of Decision: February 02, 2024

Kuldeep Singh @ Dipi

.....Appellant

Versus

State of Punjab

.....Respondent

CORAM: HON'BLE MR.JUSTICE HARPREET SINGH BRAR

Present: Ms. Sumanjit Kaur, Advocate
for the appellant

Mr. Sandeep Kumar, DAG Punjab

HARPREET SINGH BRAR, J. (ORAL)

1. This appeal is preferred against the judgment of conviction and order of sentence dated 22.04.2014 passed by Learned Judge, Special Court, Mansa in FIR No. 19 dated 04.03.2013 registered at Police Station Sardulgarh, Mansa, under Section 15 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as 'the NDPS Act' for short), whereby the appellant has been convicted and sentenced to undergo rigorous imprisonment for a period of ten years with a fine of Rs. One Lac and in default of payment of fine, to further undergo rigorous imprisonment for a period of one year.

FACTUAL BACKGROUND

2. Succinctly, the facts of the prosecution case are that on 04.03.2013, a police party headed by Inspector/SHO Pritpal Singh, PW-3 (the investigating officer) was on patrolling duty. One person, namely Gurcharan Singh met them and was joined in the police party. When they reached near the sheller of Jagdish, MC, the appellant-accused was found sitting on a plastic bag/gatta in a vacant plot. The appellant had placed another plastic bag in front of him. The appellant on seeing the police party became hesitant. Noticing his dubious movements, the said SHO along with his team nabbed the appellant. During enquiry he disclosed his name as Kuldip Singh alias Dipi, son of Jit Singh, resident of Bhikhi. On suspicion that the appellant was in possession of some contraband, the police proceeded to inspect the bags and found poppy husk. The appellant reposed his confidence in the investigating officer and allowed him to carry out the search. Gurcharan Singh, who was accompanying the police party, was made the independent witness. A consent memo of the appellant was prepared which was duly signed by him in Punjabi. One sample of 100 grams was drawn from each of the two bags and converted into two sample parcels. The two sample parcels and the two bulk parcels were sealed by the SHO Pritpal Singh (PW-3) with his seal bearing the impression 'PS'. The weight of each plastic bag came out be 26 kgs (52.2 kgs in total including the samples) for which the appellant could not furnish any licence or permit. On personal search of the appellant, currency notes amounting to Rs. 30/- were recovered, which were taken into possession vide separate memo. After completion of necessary formalities of investigation, Ruqa (written information) was sent to the police station on the basis of which formal FIR was registered against the appellant-

accused.

3. On completing the investigation, challan was presented against the accused. Copies of the Challan was supplied to the accused/appellant free of cost in compliance with the provisions of Section 207 Cr.P.C. On finding a *prima facie* case against the appellant, charge under Section 15 of the NDPS Act was framed against him to which he pleaded not guilty and claimed trial.

4. In order to prove its case, prosecution examined as many as three witnesses. Statement of the appellant under Section 313 Cr.P.C. was recorded whereby all the incriminating evidence was put to him, but he pleaded false implication. However, the appellant examined one witness DW-1 Constable Chamkaur Singh in his defence.

5. Learned trial Court, on minutely scrutinising the evidence led by the prosecution and going through the record of the case, held the appellant guilty and convicted and sentenced him as discussed herein above.

CONTENTIONS

6. Learned counsel for the appellant has argued that the learned trial Court has failed to appreciate that the independent witness, namely Gurcharan Singh was not examined during trial and no cogent reason was given by the prosecution for doing so. He further contended that Gurcharan Singh is a stock witness of the police and has been shown as an independent witness in various other FIRs.

7. Learned counsel for the appellant has further averred that the sample was allegedly taken on 04.03.2013 but the same was sent to FSL for chemical examination on 13.03.2013 i.e. after a delay of 9 days and the said delay remains unexplained. Also, as per the Standing Instruction of Narcotics Control Bureau,

CFSL Form no. 29 was supposed to be prepared at the spot of seizure, however, neither such a form was filled out nor was it deposited with the MHC or sent to the FSL along with the samples. Lastly, learned counsel has also argued that the samples were mismanaged and tampered with, as is evident from the missing seal on the sample.

8. On the other hand, learned State counsel has argued that merely because the independent witness was not examined, does not take away any credence placed upon the depositions of the official witnesses. Also, the testimonies of the official witnesses do not suffer from any serious infirmities. He further contended that although there was a delay of 9 days in sending the sample to the laboratory, the samples were accounted for and not tampered with. The investigating officer PW-3, Pritpal Singh who effected the recovery was the SHO of the Police Station Sardulgarh. Hence, the case property was kept in his custody and therefore the question of non-compliance of Section 55 of the NDPS Act does not arise. The link evidence is complete and the learned trial Court has arrived at a guilty verdict on correct appreciation of material on record

OBSERVATIONS AND ANALYSIS

9. Having heard learned counsel for the parties and perused the paper-book with their able assistance, it transpires that the prosecution has made a glaring omission in the investigation of the case by not complying with Section 52-A of the NDPS Act. It is a well settled proposition that the representative samples must be drawn before the Magistrate. In the instant case, the samples were drawn before the learned Sub Divisional Judicial Magistrate, Sardulgarh, however, vide order dated 05.03.2012, he directed the representative samples to be deposited in the Judicial Malkhana, as opposed to sending them for chemical

examination. The sample sent to the FSL were those drawn on the spot, at the time of seizure and not the ones drawn by the Magistrate. The safeguard provided under Section 52-A is in furtherance of Article 21 of the Constitution of India which guarantees fair and impartial investigation. The entire purpose behind Section 52-A is defeated if the representative samples drawn by the Magistrate are sent for safekeeping to the Malkhana instead of chemical examination, which makes the prosecution case untenable. A two Judge Bench of the Hon'ble Supreme Court in ***Mangilal v. The State of M.P., 2023(3)R.C.R(Criminal) 703***, while acquitting the accused, has observed that the mandate of Section 52-A of the Act has to be duly complied with. Speaking through Justice M.M.Sundresh, the following was observed:-

"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."

10. Further, as per procedure prescribed in Standing Order No. 1 of 1988 dated 15.03.1988, representative sample of any contraband after seizure

and deposit in the Malkhana or with the concerned SHO is required to be sent to the FSL 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 v. State of Punjab and another, 2008 (16) SCC 417** and it was held that these statutory instructions are mandatory in nature and the following was observed:

*“32. Recently, this Court in **State of Kerala & Ors. v. Kurian Abraham (P) Ltd. & Anr. [(2008) 3 SCC 582]**, following the earlier decision of this Court in **Union of India v. Azadi Bachao Andolan [(2004) 10 SCC 1]** held that statutory instructions are mandatory in nature.*

Logical corollary of these discussions is that the guidelines such as those present in the Standing Order cannot be blatantly outed and substantial compliance therewith must be insisted upon for so that sanctity of physical evidence in such cases remains intact. Clearly, there has been no substantial compliance of these guidelines by the investigating authority which leads to drawing of an adverse inference against them to the effect that had such evidence been produced, the same would have gone against the prosecution.”

11. A perusal of the record indicates that the alleged recovery was effected on 04.03.2013 but deposited with the FSL on 13.03.2013 as indicated in the FSL report (Ex. PP). As such, there is an unexplained delay of 9 days in sending the sample to the Chemical Examiner, which further weakens the prosecution case. The case of the appellant is also covered by the ratio of law laid down in **Union of India v. Bal Mukund and others, 2009(2) RCR (Criminal) 574** and **State of Rajasthan v. Gurmail Singh, 2005 (2) RCR (Criminal) 58** on account of the sample being sent after the stipulated period of

72 hours.

12. In fact, PW3-SHO Pritpal Singh, in his testimony, has categorically admitted that the samples were retained by him in his custody from the date of seizure i.e. 04.03.2013 to 13.03.2013 when it was sent for chemical examination. Merely because he guarantees that the case property was safe with him, the possibility of tampering cannot be ruled out. Reliance in this regard can be made on *Narcotics Control Bureau v. Ajmer Kumar and another* 2016 ILR (HP) 1090 and *Jitendra Singh Rathore v. State of U.P.* 2014 (5) RCR (Criminal) 462 wherein on the basis of the above lapse accused were acquitted. Such omission on the part of the Investigating Officer with regard to total non-compliance of Standing Order No. 1/88 ibid. coupled with the delay and non-filing of Form 29 at the spot, as is the case here would tantamount to a serious flaw in the investigation and it suffocates the prosecution case completely. Crucially, PW-2, ASI Bhupinder Singh in his cross examination has categorically mentioned that the seals on both the bulk parcels are broken and not legible. This alone becomes a ground for acquittal.

13. The Investigating Officer-SHO Pritpal Singh (PW-3) is also the complainant of the case. The Hon'ble Supreme Court in *State by Inspector of Police, Narcotic Intelligence Bureau, Madurai, Tamil Nadu v. Ranjangam* 2010(15) SCC 369, has opined that since 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.

14. Furthermore, a perusal of the impugned judgment indicates that although an independent witness was joined in the investigation when the

recovery was effected from the accused, he was not examined during trial. Curiously, Gurcharan Singh was joined in the police party even before the alleged incident came to their knowledge. It appears that he was merely joined to comply with the procedure that requires an independent witness to be joined in the investigation. A perusal of the record indicates the Gurcharan Singh son of Mukund Singh has been joined as an independent witness in nine other FIRs (Ex. D1 to Ex. D9) lodged in Police Station Saldurgarh. Association of such a person in the instant FIR makes the prosecution case suspicious. The Hon'ble Supreme Court in *Krishan Chand v. 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 v. State of Bihar, 2018(1) RCR (Criminal) 108* had acquitted the accused and held 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.

CONCLUSION

15. In view of the above discussion, the present appeal is allowed. The judgment of conviction and order of sentence dated 22.04.2014 passed by learned Judge, Special Court, Mansa is set aside. The appellant, namely Kuldeep Singh @ Dipi, is acquitted of the charges framed against him. His bail bonds and surety bonds stand discharged.

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

17. The case property, if any, may be dealt with as per rules after the

expiry of period of limitation for filing the appeal(s). Record of the case be sent back to the Court below.

(HARPREET SINGH BRAR)
JUDGE

February 02, 2024
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Whether speaking/reasoned : Yes/No
Whether Reportable : Yes/No