

CRA-S-4450-SB-2016

245 IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH

CRA-S-4450-SB-2016

Reserved on: February 02, 2024

Pronounced on: February 26, 2024

Manpreet Singh alias Kaka

...Appellant

Versus

State of Punjab

...Respondent

CORAM: HON'BLE MR. JUSTICE HARPREET SINGH BRAR

Present: Mr. Sandeep Verma, Advocate
for the appellant

Mr. Sandeep Kumar, DAG Punjab

HARPREET SINGH BRAR, J. (ORAL)

1. The instant appeal is preferred against the judgment of conviction and order of sentence dated 27.01.2016 passed by learned Judge, Special Court, Moga in FIR No. 42 dated 11.05.2012 registered at Police Station Sadar, Moga, under Section 15(c) of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as 'the NDPS Act' for short), whereby the appellant was convicted and sentenced to undergo rigorous imprisonment for a period of ten years with a fine of Rs. 1,00,000/- and in default of payment of fine, to further undergo rigorous imprisonment for a period of two years.

FACTUAL BACKGROUND

2. The facts of the prosecution case, tersely put, are that on 11.05.2012, a police party headed by PW4-Inspector Satpal Singh

(Investigating Officer) was on patrolling duty at the Mahesari Sandhuana bus stop, when they received secret information that the appellant-accused is standing outside his house with a large quantity of poppy husk in his possession to sell it to customers. Information being reliable, a *ruqa* was sent to the police station on the basis of which a formal FIR was registered against the appellant-accused. The police party joined one Nirmal Singh as an independent witness and proceeded to conduct a raid at the disclosed place where the appellant-accused was found sitting on two jute bags. PW1- HC Gurjant Singh, who knew the appellant from earlier, identified him. Upon seeing the police party, the appellant fled from the spot, leaving the contraband behind. The police party inspected the bags and found poppy husk. One sample of 250 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 Investigating Officer with his seal bearing the impression 'SS'. Sample seal impression on Form no. 29 was prepared separately. The weight of each plastic bag came out be 34 kgs and 750 grams (70 kg in total including the samples). After completion of necessary formalities, the entire case property along with sample seal was taken into police possession. On return to the police station, the Investigating Officer produced the entire case property before SI/SHO Manjit Singh who affixed his his seal bearing the impression 'MS' on it and took it for safekeeping. The appellant was formally arrested on 25.07.2012.

3. On completing the investigation, *challan* was presented against the accused. In compliance with the provisions of Section 207 Cr.P.C, copies of the *challan* were supplied to the appellant-accused free of cost. 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 eight witnesses. All the incriminating evidence was put to the appellant and his statement under Section 313 Cr.P.C. was recorded wherein he pleaded false implication. However, the appellant did not lead any evidence in his defence.

5. After minutely scrutinizing the evidence led by the prosecution and going through the record of the case, the learned trial Court held the appellant guilty and sentenced him as discussed herein above.

CONTENTIONS

6. Learned counsel for the appellant assails the impugned judgment on the ground that the learned trial Court has failed to appreciate that the alleged recovery was effected on the basis of secret information, however, report as required under Section 42(1) and (2) of the NDPS Act was not sent by PW4-Investigating Officer. Moreover, there is an inordinate delay of 4 days in sending the sample to the FSL which remains unexplained. It was further argued that the appellant was not apprehended at the time of the alleged recovery as he had managed to abscond from the spot. He was formally arrested

only after a period of 14 days i.e. on 25.07.2012 on directions from this Court. Critically, no test identification parade was conducted at the time of his arrest, which makes the prosecution case suspicious. Furthermore, there are major discrepancies in the statements of the witnesses, for instance a perusal of the testimony of the PW-4-Investigating Officer, Inspector Satpal Singh, reveals that the registration number of the official vehicle is mentioned as PB-29-B-8308 instead of PB-29-G-8308. Similarly, the weight of the contraband is mentioned as 34 kg and 500 grams as opposed to 34 kg and 750 grams. Such gaps in the testimonies go to the root of the case and thus vitiate the trial. Finally, the independent witness, namely Nirmal Singh, was not examined during trial and no cogent reason was given by the prosecution for not doing so.

7. On the other hand, learned State counsel argues that merely because the independent witness was not examined, it does not take away from the veracity of the depositions of the official witnesses which do not suffer from any serious infirmities. The discrepancy in the deposition of the PW4-Investigating Officer was merely a clerical error and does not impact the prosecution case as the testimony of PW6-SI Manjit Singh and the order of the Magistrate (Ex. P13), manifestly mentions the weight of the bags as 34 kgs and 750 grams each. He further contends that although there was a delay in sending the samples to the FSL, the samples were accounted for and not tampered with.

The Investigating Officer had handed over the case property including the

samples to the SHO for safekeeping. Hence, 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

8. Having heard the parties at length and after perusing the record with their able assistance, it transpires that a raid was conducted on the basis of secret information and 70 kg of poppy husk was recovered from the disclosed spot. It is pertinent to note that on seeing the police, the appellant-accused ran away from the spot, only to be formally arrested two weeks later.

9. The FIR was registered on the basis of secret information however, the Investigating Officer has neither reduced the same into writing in compliance of Section 42 of the NDPS Act nor sent a report regarding the same to his immediate superior officer. A perusal of the site plan (Ex. P8) indicates that the alleged contraband was recovered from the road in front of the appellant's house i.e. a public place. Further, the depositions of the Investigating Officer, namely Satpal Singh (PW-4) and ASI Balkar Singh (PW-5) reveal that the police party did not enter the house of the appellant and thus no search was conducted inside the premises. Therefore, the argument of learned counsel for the appellant with regard to non-compliance of Section 42 of the NDPS Act is misconceived as the same will not be applicable in case of

recovery from a public place rather, in the facts and circumstances of the case, Section 43 of the NDPS Act would be applicable.

10. A perusal of the record indicates that the alleged recovery was effected on 11.05.2012 and the same was produced by the Investigating Officer(PW-4) before SHO Manjit Singh (PW-6), who has categorically admitted that the samples were retained by him in his custody from 11.05.2012 to 15.05.2012, when they were sent for chemical examination. The case property was produced before the Ilaqa Magistrate on 12.05.2012, who directed the SHO to keep the same in his safe custody. Hence, the samples were deposited with the FSL after the lapse of 4 days from seizure, in direct violation of the Standing Order No. 1 of 1988 dated 15.03.1988, which would tantamount to a serious flaw in the investigation and suffocate the prosecution case completely. 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

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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. Furthermore, there is a glaring omission with respect to the compliance of Section 52-A of the NDPS Act. The case property was produced again before the learned Additional Chief Judicial Magistrate on 25.05.2012 for drawing of representative samples but after the FSL report (Ex. PX) was already received with respect to the samples drawn on the spot. Section 52-A of the NDPS Act does not serve a mere academic purpose, as by introducing the Magistrate in the chain of events, it advances the cause of fair and impartial investigation as guaranteed by Article 21 of the Constitution of India, since the police authorities do not enjoy the same degree of confidence amongst the public as do the Courts. Therefore, the intention behind Section 52-A of the NDPS Act is entirely defeated if the representative samples are drawn by the Magistrate but the same are not sent for chemical examination, which consequently 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. Nonproduction 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."

12. Admittedly, the appellant had fled from the spot after spotting the police party and was formally arrested on 25.05.2012. In spite of the fact that the appellant was not arrested from the spot alongwith the contraband, no Test Identification Parade was conducted to ascertain the identity of the appellant merely because PW1-HC Gurjant Singh expressed his ability to identify him as he knew him prior to the incident as he was already involved in another case filed under Section 307 of the IPC. Section 54A of the Cr.P.C. reads as follows:

"54A. Identification of person arrested.--

Where a person is arrested on a charge of committing an offence and his identification by any other person or persons is considered necessary for the purpose of investigation of such offence, the Court, having jurisdiction may, on the request of the officer in charge of a police station, direct the person so arrested to subject himself to identification by any person or persons in such manner as the Court may deem fit:

Provided that, if the person identifying the person arrested is mentally or physically disabled, such process of identification shall take place under the supervision of a Judicial Magistrate who shall take appropriate steps to ensure that such person identifies the person arrested using methods that person is comfortable with:

Provided further that if the person identifying the person arrested is mentally or physically disabled, the identification process shall be videographed.”

While conducting Test Identification Parade is not mandatory, this is not a case where identity of the appellant could have been conclusively established merely because an official witness, who is an interested party, claims to know him. Moreover, no witnesses from the vicinity or from the appellant's neighborhood were examined in order to identify the appellant or establish his presence on the alleged spot at the time of recovery. As such, neither the identity of the appellant is conclusively proved nor the matter of conscious possession has been adequately dealt with. Even if it was the appellant who was seen fleeing from the spot, his mere presence is hardly sufficient to prove conscious possession. The Hon'ble Supreme Court in ***State of Punjab v. Balkar Singh and another, (2004) SCC(Criminal) 838*** observed as under: -

"....the presence of the respondents at the place from where the bags of poppy husk were recovered itself was taken as possession of these bags by the police. In fairness, the police should have conducted further investigation to prove that these accused were really in possession of these articles. The failure to give any satisfactory explanation by the accused for being present on that

place itself does not prove that they were in possession of these articles. Though the respondents raised a plea before the sessions Court, the same was not considered by the Sessions Judge in the manner in which it should have been considered. We do not think that the High Court erred in holding that there was no evidence to prove that the respondents were in conscious possession of the poppy husk recovered by the police. The prosecution failed to discharge its obligation to prove the possession of the poppy husk by the respondent.

*This Court has followed this view expressed in Balkar Singh's case (supra), in number of cases e.g. **Sukhdev Singh alias Sukha v. State of Punjab , 2006(1) RCR (Criminal) 4 (P&H)** and **Bikkar Singh v. State of Punjab, 2006(3) RCR (Criminal) 16 (P&H)**. Even in **Avtar Singh v. State of Punjab 2002(4) RCR (Criminal) 180 : AIR 2002 Supreme Court 3343**, it was observed by the Hon'ble Supreme Court that though the persons were found sitting on the bags, but this alone would not be sufficient proof for they being in conscious possession of the contraband. Thus, the prosecution in the instant case was not able to prove the contraband was recovered from the exclusive conscious possession of the appellant."*

13. 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. This lapse on the part of the investigation team becomes even more prominent, given the accused was not apprehended at the spot. 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

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

14. In view of the above discussion, the present appeal is allowed. The judgment of conviction and order of sentence dated 27.01.2016 passed by learned Judge, Special Court, Moga is set aside. The appellant, namely Manpreet Singh alias Kaka, is acquitted of the charges framed against him. His bail bonds and surety bonds stand discharged.

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

16. 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 26, 2024

Ajay Goswami

Whether speaking/reasoned: Yes/No
Whether Reportable: Yes/No