

CRA-S-4682-SB-2015
Date of decision: 09.02.2024

...APPELLANT

V/S

...RESPONDENT

CORAM: HON'BLE MR. JUSTICE HARPREET SINGH BRAR

Present: Mr. Arun K. Bakshi, Legal Aid Counsel with
Mr. Deepak Aggarwal, Advocate
for the appellant.

Mr. Sandeep Kumar, DAG, Punjab.

HARPREET SINGH BRAR J. (ORAL)

This appeal is preferred against the judgment of conviction and order of sentence dated 10.08.2015 passed by Learned Judge, Special Court, Bathinda in FIR No.93 dated 29.08.2012 registered at Police Station City Rampura, Bathinda, under Section 22 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as 'the NDPS Act' for short), whereby the appellant/accused has been 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 one year.

FACTUAL BACKGROUND

2. Succinctly, the facts of the prosecution case are that on 29.08.2012, police party was driving from Rampura to Kothe Kapah Wale, in a private vehicle, in order to patrol the streets. When the police personnel reached near the bridge of a small canal in Kothe Kapah Wale, they spotted the

appellant-accused coming towards the vehicle from the opposite direction. The appellant was allegedly carrying a transparent plastic bag in his right hand and upon spotting the police party, tried to flee from the spot. A chase ensued and the Investigating Officer, ASI Gurjant Singh (PW-4), managed to nab the appellant with the help of other police officials. During enquiry, he disclosed his name as Jasvir Singh. In the meantime, one Rajinder Singh, son of Jora Singh, resident of village Mehraj, who was present at the spot of the incident, was made the independent witness. On suspicion that the appellant was in possession of some contraband, the police proceeded to inform the appellant of his right under Section 50 of the NDPS Act, to get his search conducted in the presence of a Magistrate or a Gazetted Officer. However, the appellant reposed his confidence in the investigating officer and allowed him to carry out the search. Resultantly, the consent memo of the appellant was prepared, which was duly signed by him (Ex. P1). The investigating officer, upon inspecting the plastic bag in the appellant's possession, found 23/4 bottles of intoxicant liquid containing Codeine Phosphate and 34 strips of Spasmo Proxyvon amounting to 272 capsules, for which, the appellant could not furnish any licence or permit. The contraband was taken into possession vide memo (Ex.P3). Form No.29 was also filled at the spot. One sample of 180 milliliters was drawn from the intoxicant liquid. Similarly, one strip of Spasmo Proxyvon (each strip containing 8 capsules) was taken as sample. The two sample parcels and the two bulk parcels were sealed by the Investigating Officer, ASI Gurjant Singh (PW-4) with his seal bearing the impression 'GS'. 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. In the meantime, ASI Gurjant Singh prepared the rough site plan of the place of recovery and recorded the statements of the witnesses

under section 161 of Cr.P.C.

3. On completing the investigation, challan was presented against the accused. Copies of the challan were supplied to the 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 22 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 four 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. In order to substantiate his claim, the appellant examined two witnesses, DW-1 Paramjit Singh and DW-2 Gurpreet 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 Rajinder Singh was not examined during trial and no cogent reason was given by the prosecution for doing so.

7. Learned counsel for the appellant has further averred that the sample was allegedly taken on 29.08.2012 but the same was sent to FSL for chemical examination on 13.09.2012 i.e., after a delay of 15 days and the said delay remains unexplained. Also, as per the Standing Instruction of Narcotics Control Bureau, CFSL Form no. 29 is supposed to be prepared at the spot of seizure, however, a perusal of CFSL Form no. 29 shows that it bears the FIR number. Moreover, the recovery memo bears the FIR number as well. This is a highly irregular since the FIR was lodged later in time, only on the basis of a

Ruqa sent to the police station from the place of occurrence after completion of all necessary formalities, including filling out the said form and the recovery memo. Lastly, learned counsel has also argued that there are major discrepancies in the statements of the witnesses. One glaring instance is the testimony of the Investigating Officer, ASI Gurjant Singh (PW-4) which reveals that there is no mention of handing over of sample seal to HC Mander Singh (PW-2), along with the sample parcel, which was entrusted to HC Mander Singh by ASI Gurjant Singh to be deposited in FSL, Chandigarh. Such gaps in the testimonies go to the root of the case and thus vitiate the trial.

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. With regard to the omission on the part of the Investigating Officer, it was averred that the affidavit tendered by HC Mander Singh clearly shows that there is a specific mention regarding handing over of sample seal along with the sample parcel and Form No. 29. Thus, the gap in the testimony of the Investigating Officer is of no consequence. He further contended that although there was a delay of 15 days in sending the sample to the laboratory, the samples were accounted for and not tampered with. 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 gross 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 not drawn before the learned Sub Divisional Judicial Magistrate. Only the Inventory Report with the two bulk parcels and two sample parcels was tallied. Further, vide order dated 30.08.2012, the Magistrate directed only the bulk parcels to be deposited in the NDPS Godown, Bathinda and no directions were issued with respect to the sample parcels drawn at the site of the occurrence. Thus, the samples 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 are not drawn by the Magistrate or even when they are drawn, they are sent for safekeeping to the Malkhana/NDPS Godown instead of chemical examination. This lapse on the part of the investigation team 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."

10. On a careful reading of the deposition of the Investigating Officer, it is discovered that the Form No.29 as well as the recovery memo were completed first. This was followed by the preparation of the Ruqa which was sent through Constable Sukhraj Singh to the police station and it was recorded in the Ruqa that the FIR be registered and its number be intimated to the investigating officer. However, a perusal of the recovery memo (Ex. P3) and Form No.29 shows that they bear the FIR Number '93'. It is the case of the prosecution that Ruqa was sent after preparing the consent memo and filling out Form No.29 and the contraband was recovered from a transparent polybag and the same was taken into possession vide recovery memo (Ex. P3). The samples were drawn and other formalities were done at the spot. However, there is no explanation by any of the witnesses as to how the FIR number came to be reflected on the recovery memo and Form No.29 when admittedly the FIR was lodged later in time. The above aspect raises a serious suspicion on the investigation conducted by the investigating officer. In the absence of any reasonable explanation by the prosecution with regard to the reflection of the FIR number on Form No.29 as well as on the recovery memo, which, according to the case of the prosecution, was prepared at the first instance before registration of the FIR creates a serious dent in the story of the prosecution.

11. The Hon'ble Supreme Court in **Kamaljit Singh @ Pappu v. State of Punjab, 2020(14) SCC 9** dealt with a similar issue where the investigation was found to be suspicious on the ground that the FIR number was mentioned on the memos which were prepared much prior to the registration of FIR.

Similarly, this High Court has also discarded the investigation on the ground of mentioning of FIR number on the memos prepared during investigation prior to registration of the FIR. A reference is made to **Sunny alias Siti v. State of Punjab, Crl. Appeal No. 3730-SB of 2016** decided on 05.12.2022, **Netar Pal v. State of Haryana, 2010 (8) RCR (Criminal) 352** and **Kewal Singh v. State of Punjab 2018(4) RCR (Criminal) 580**.

12. 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.”

13. A perusal of the record indicates that the alleged recovery was effected on 29.08.2012 but deposited with the FSL on 13.09.2012 as indicated in the FSL report (Ex. PW 4/I). As such, there is an unexplained delay of 15 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.

14. In fact, PW4-ASI Gurjant Singh in his testimony has categorically admitted that the samples were retained by him in his custody. In his cross examination, it is further revealed that even after the arrival of the regular SHO at the concerned police station, the custody of the sample parcels was not handed over to him for safekeeping in a double lock. This further erodes faith in the prosecution's claim that the investigating officer neither tampered with the parcels nor allowed anyone else to do so. Merely because he guarantees that the case property was safe with him, the possibility of tampering cannot be ruled out. Ideally, the samples should have been deposited with the SHO or the Malkhana in the intervening period from the time of seizure to their arrival at the office of the Chemical Examiner. Yet in the instant case neither of the two were engaged. Thus, it can be safely inferred that the link evidence was completely missing. 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, the accused were acquitted. Such omission on the part of the Investigating Officer resulting in total non-compliance of Standing Order No. 1/88 *ibid.*, without any justification forthcoming would tantamount to a serious flaw in the investigation and this coupled with other defects, suffocates the prosecution case completely.

15. The Standing Order No. 1/88 dated 15.03.1988 further provides that the sample must be drawn and sealed in the presence of the accused,

witnesses and the seizing officer and all of them shall be required to put their signatures on each sample and further states that seized drugs in the packages/containers shall be well mixed to make it homogeneous before the representative sample (in duplicate) is drawn. A perusal of the recovery Memo (Ex. P3) indicates that the signature of the appellant was not obtained on the recovery memo. With respect to the capsules confiscated, only 1 strip out of 34 was taken as a sample without first homogenizing all the capsules in all the strips.

16. The Investigating Officer ASI Gurjant Singh (PW-4) 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.

17. Also vitally, 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, yet he was not examined during trial. It appears that he was merely joined to comply with the procedure that requires an independent witness to be joined in the investigation. 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

18. In view of the above discussion, it is held that the prosecution has miserably failed to prove its case beyond the shadow of reasonable doubt, and as such, the present appeal is allowed. The judgment of conviction and order of sentence dated 10.08.2015 passed by learned Judge, Special Court, Bathinda is set aside. The appellant, namely Jasvir Singh @ Vicky, is acquitted of the charges framed against him. His bail bonds and surety bonds stand discharged.
19. Pending miscellaneous application(s), if any, shall also stand disposed of.
20. 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.

February 09, 2024
manisha

(HARPREET SINGH BRAR)
JUDGE

- (i) Whether speaking/reasoned

Yes/No
- (ii) Whether reportable

Yes/No