

**226 IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CRM-A-1627-MA-2018 (O&M)
Date of decision: 22.02.2024

State of Haryana

....Petitioner

Versus

Kuldeep @ Jivi

...Respondent

CORAM: HON'BLE MR. JUSTICE HARPREET SINGH BRAR

Present: Mr. Vikas Bhardwaj, AAG, Haryana
for applicant-appellant

HARPREET SINGH BRAR, J.

CRM-28149-2018

This is an application under Section 5 of the Limitation Act, 1963 seeking condonation of delay of 44 days in filing the accompanying application under Section 378(3) of the Code of Criminal Procedure, 1973 (hereinafter 'Cr.P.C.').

For the reasons mentioned in the application, the same is allowed and the delay of 44 days in filing the said application is condoned.

CRM-A-1627-MA-2018

1. The present application is preferred under Section 378(3) of the Cr.P.C. against the judgment of acquittal dated 13.03.2018 passed by learned Special Judge, Kaithal, in FIR, bearing no. 260, dated 19.10.2016, under Section 21 of The Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter 'NDPS Act', for brevity), registered at Police Station Cheeka, Kaithal.

2. Briefly, the facts are that on 11.05.2012, a police party headed by PW2-ASI Ramesh Kumar (Investigating Officer) was on patrolling duty at Siwan. When they reached Udham Singh Chowk they received secret information that the respondent-accused has come near the cremation ground, Cheeka with a large quantity of smack in his possession to sell it to customers. Information being reliable, a notice under Section 42 of the NDPS Act was prepared and sent to superior officers. The police party proceeded to conduct a raid at the disclosed place, where the respondent-accused was seen riding a motorcycle. Subsequently, he was overpowered and apprehended. Notice under Section 50 of the NDPS Act was given to the respondent-accused and was made aware of his legal right to be searched in the presence of a Gazetted Officer or a Magistrate. He showed his willingness to be searched by a Gazetted Officer. Dissent memo was accordingly prepared (Ex. PC). PW6-DSP, Sultan Singh came to the spot. During this period, one Mehar Singh, who was present at the spot was requested to become an independent witness and join the police party, however, he refused owing to some legitimate compulsion. Under the supervision of the DSP, the investigating officer conducted a search of the person of the respondent-accused, whereupon a brown polythene containing smack was recovered from the right pocket of the respondent-accused's pants. The weight of the contraband came out to be 55 grams. Two samples of 5 grams each were drawn from the contraband and converted into two sample parcels. The two sample parcels and the bulk parcel were sealed by the Investigating Officer with his seal bearing the impression 'RK'. The DSP affixed his one seal. Sample seals were prepared and taken into police possession along with the case property. Rough site plan of the place of recovery was prepared and the respondent-accused was arrested. A ruqa was sent to the police station on the

basis of which a formal FIR was registered against the respondent-accused. On return to the police station, the Investigating Officer produced the entire case property before SHO Ranbir Singh who affixed his seal. Case property was deposited with MHC.

3. The learned State counsel inter-alia contends that the learned Trial Court recorded an erroneous finding with respect to the non-compliance of Sections 42 and 50 of the NDPS Act, on the basis of which the respondent-accused was held not guilty. A perusal of the notice presented under Section 50 (Ex. PB) of the NDPS Act to the respondent-accused, apprising him of his legal right to be searched before a Gazetted Officer or Magistrate, as well as the dissent memo (Ex. PC) subsequently recorded, reveals that Section 50 of the NDPS Act was substantially complied with. The Gazetted Officer in the present case i.e. PW6-DSP was called in compliance of provisions of Section 50 of the NDPS Act, as the respondent accused wanted his search to be conducted in the presence of a Gazetted Officer. The purpose of the search being conducted under Section 50 of the NDPS Act in the presence of a Magistrate or a Gazetted Officer after ensuring their presence at the place of recovery is to safeguard the rights of the accused so that he is not implicated in a false case.

4. He further submits that as per the proviso to Section 42, if the empowered officer, who is the Investigating Officer-PW2 in this case, has reason to believe that search warrant or authorisation cannot be obtained without affording opportunity for the concealment of the evidence or the escape of the offender, he can carry out the arrest or search between sunset and sunrise after recording the grounds of his belief. Sub-section (2) of Section 42 further lays down that when such officer takes down any information in writing or records grounds for this belief under the proviso, he shall forthwith send a copy

thereof to his immediate official superior. In the present case, the Investigating Officer, upon receiving the secret information, recorded the same and sent a report under Section 42 of the NDPS Act to PW3-Inspector/SHO Ranbir Singh. The recording of the learned trial Court that Section 42 was violated as the report was not sent to the DSP is misconceived. The Investigating Officer is Assistant Sub-Inspector, while the SHO to whom the report was sent is an Inspector, making the latter the former's immediate official superior, thus fulfilling the mandate of Section 42 of the NDPS Act.

5. Having heard the learned State counsel and after perusing the record of the case with his able assistance, it transpires that the alleged recovery was effected on 19.10.2016 and the same was produced by the Investigating Officer (PW-2) before SHO Ranbir Singh (PW-3). Then the case property including the samples drawn on the spot were deposited in the Judicial Malkhana from 19.10.2016 to 26.10.2016, when they were sent for chemical examination. The case property was produced before the Ilaqa Magistrate on 20.10.2016, who directed that the samples drawn be deposited in the Judicial Malkhana for its safe custody. Hence, the samples were deposited with the FSL after the lapse of 7 days from seizure, in direct violation of the Standing Order No. 1 of 1988 dated 15.03.1988. 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 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. 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.”

6. On a careful reading of the deposition of the Investigating Officer, it is discovered that the Recovery Memo (Ex. PD) was completed first at 6:50 p.m. This was followed by the preparation of the ruqa (Ex. PE) which was sent through ECH Rajesh Kumar (PW-1) to the police station on the basis of which a formal FIR was registered against the respondent-accused. The time mentioned on the FIR, when the information was received at the police station is 7:32 p.m. However, a perusal of the recovery memo (Ex. PD) shows that it bears the FIR Number '260'. It is the case of the prosecution that ruqa was sent after preparing the dissent memo, conducting the search in front of the Gazetted Officer, and effecting the recovery from the person of the respondent-accused, which along with his motorcycle was taken into possession vide recovery memo (Ex. PD). 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 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 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.

7. 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, CrI. 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**.

8. Also vitally, a perusal of the impugned judgment indicates that although the accused was apprehended at a public place, the investigation team failed to join a single independent witness in the investigation when the recovery was effected from the accused. It is the testimony of the Investigating Officer that Udham Singh Chowk, Cheeka, is surrounded by many shops and is a busy place, and as such, 7-8 persons were asked to join the police party as an independent witness, yet no one agreed. This seems highly improbable. 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.

9. Lastly, there are some stark discrepancies in the testimonies of the official witnesses which go the root of the case. As per the examination-in-chief of the Investigating Officer (PW-2), he conducted the search of the respondent-accused, however, his cross-examination reveals that the respondent-accused himself took out the contraband from the right pocket of his trousers. Further, as per PW5-ASI Sukhrampal's deposition, the DSP directed him carry out the search of the respondent-accused, yet according to his statement, it was carried out by the Investigating Officer, for which no reason has been specified.

10. The power of the Appellate Court to unsettle the order of acquittal on the basis of re-appreciation of the evidence is subject to the settled law that where two views are possible and out of the two, one points towards the innocence of the accused, the view which favours the accused should prevail over the other pointing towards his guilt. Furthermore, the trial Court has the additional advantage of closely observing the prosecution witnesses and their demeanour, while deciding about the reliability of the version of prosecution witnesses. (**See H.D. Sundara and others Vs. State of Karnataka, Criminal Appeal No.247 of 2011 decided on 26.09.2023; Kali Ram v. State of H.P., 1973 (2) SCC 808 and Chandrappa and others v. State of Karnataka, (2007) 4 SCC 415**). A Division bench of this Court in the judgment passed in **State of Haryana Vs. Ankit and others** passed CRM-A No.3 of 2022 decided on 06.07.2023 has held that presumption of innocence further gets entrenched on the acquittal of accused by the trial Court.

11. In view of the facts and circumstances of the case, this Court finds that learned counsel for the applicant-appellant has failed to point out any perversity or illegality in findings recorded by the learned trial Court which warrants interference by this Court. As such, there is no merit in the present application and hence, the leave to appeal is denied.

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

(HARPREET SINGH BRAR)
JUDGE

22.02.2024
Neha

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