

CRM-A-11-MA-2015

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IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH

CRM-A-11-MA-2015

Date of Decision: 19.03.2024

State Chandigarh Administration, Chandigarh

...Applicant-Appellant

Versus

Ajay Kumar

...Respondent

CORAM: HON'BLE MR. JUSTICE HARPREET SINGH BRAR

Present: Mr. J.S. Toor, A.P.P., U.T. Chandigarh

Harpreet Singh Brar, J. (Oral)

1. The present application is preferred under Section 378(3) of the Cr.P.C. against the judgment of acquittal dated 09.07.2014 passed by learned Special Court, Chandigarh in FIR No. 470 dated 03.11.2010 registered under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter 'NDPS Act') at Police Station Sector 39, Chandigarh.

2. Briefly, the facts are that on 03.11.2010, the police party headed by SI Surinder Kumar was patrolling the area of Government High School, Sector 56, Chandigarh when the respondent-accused was seen coming, with a yellow bag in his hand. With the assistance of a passer-by, the respondent was apprehended on suspicion. Thereafter, the yellow polythene bag carried by the respondent was searched and 500g of *charas* was recovered from the same. Two samples weighing 50g each were drawn from the bulk and kept in a plastic container and converted into a parcel which was further sealed with the initials 'KS.' SI Surinder Kumar took all the three sealed parcels (two sample parcels and one bulk parcel) in possession vide recovery memo which was signed by witnesses. A *ruqa* was sent through Constable Satish Kumar for lodging of the FIR in the matter. Information was also sent to the Operation Cell to send a

second Investigating Officer, pursuant to which SI Jasbir Singh arrived at the spot. The accused was arrested and his personal search was conducted. Subsequently, the three parcels were handed over to Inspector Janak Singh, who affixed his seal 'JS' on them and deposited the said parcels with the *malkhana*. The parcels were then handed over to SI Jasbir Singh by MMHC, who produced them before the Magistrate. Thereafter, the samples were sent to CFSL for examination.

3. The prosecution examined 8 witnesses to prove its case. Statement of the respondent-accused under Section 313 Cr.P.C. was recorded wherein he pleaded false implication and claimed innocence. However, the accused did not lead any evidence in his defence. On assessing all the material available on record, the learned trial Court acquitted the respondent-accused vide impugned judgment dated 09.07.2014.

4. Having heard the learned State counsel and after perusing the record with his able assistance, it transpires that admittedly, personal search of the respondent-accused was conducted without giving notice under Section 50 of the NDPS Act. Therefore, the case in hand is a case of composite search, meaning thereby, along with the bag/vehicle/receptacle, the person of the accused was also searched, making Section 50 of the NDPS Act applicable to the proceedings. A two Judge Bench of the Hon'ble Supreme Court in **State of Rajasthan v. Parmanand and another (2014) 5 SCC 345**, speaking through Justice Ranjana P. Desai has held as under:

"15. Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application. In this case, Respondent 1 Parmanand's bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of Respondent 2 Surajmal was also conducted. Therefore, in the light of the judgments of this Court

mentioned in the preceding paragraphs, Section 50 of the NDPS Act will have application."

5. There also appear to be material discrepancies in the case of the prosecution as initially it was claimed that samples of 50g of the alleged contraband were drawn, however, in their respective cross-examinations, PW2-SI Surinder Kumar, first Investigating Officer as well PW7-Inspector Jasbir Singh have specifically admitted that 2g of samples were drawn. Moreover, PW4-HC Sukhchain Singh had testified that the sealed parcels were produced before Ms. Palwinderjit Kaur, JMIC, Chandigarh whereas, PW7-Inspector Jasbir Singh deposed that they were produced before Mr. Ranjiv Kumar, JMIC, Chandigarh. Finally, PW2-SI Surinder Kumar had stated that he did not pass any information regarding arrest of the respondent but his mother was informed when she came to the spot herself, which contradicts the stand taken by PW7-Inspector Jasbir Singh who had claimed to have informed the mother of the respondent regarding his arrest from the police station.

6. Furthermore, the alleged recovery took place on 03.11.2010, however, the samples were deposited with the FSL on 10.11.2010 i.e. after a delay of 7 days. 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.”

The case of the respondent-accused 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.

7. A perusal of the record also indicates that no independent witness was joined in the investigation. It is settled law that non-examination of an independent witness is not fatal for the case of the prosecution but in the instant case neither any effort was made to associate any independent witness nor any explanation is forthcoming for not doing so. 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*** has acquitted the accused holding 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.

8. 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.

9. In view of the facts and circumstances of the case, this Court finds that learned State counsel 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.

19.03.2024

Ajay Goswami

(HARPREET SINGH BRAR)
JUDGE

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