

2024:PHHC:077662-DB



IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-A-835-2023(O&M)
Reserved on 30.04.2024
Pronounced on:30.05.2024

STATE OF PUNJAB ...Applicant
Versus
AFGAN BEG @ NIHTI & ORS ...Respondents

CORAM: HON'BLE MR. JUSTICE SUDHIR SINGH
HON'BLE MR. JUSTICE HARSH BUNGER

Present:- Mr. Dhruv Dayal, Additional A.G. Punjab.

SUDHIR SINGH, J.

The present application seeking leave to appeal is directed against the judgment dated 12.06.2019 passed by learned Special Court, Fatehgarh Sahib, whereby the respondents have been acquitted of the charges framed against them under Section 18 of Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred as 'the Act').

2. Vide order dated 06.03.2024, the Lower Court record was called for. The same was received on 30.04.2024.
3. As per the prosecution case, on 01.06.2016, the police party led by Investigation Officer PW1 Balwinder Singh, intercepted a swift car. The car attempted to flee but was stopped with the help of other officers. The driver, Gurveer Singh @ Harman Singh, along with passengers Major Singh @ Bittu, Bakhshih Singh @ Babbi, and Afgan Beg @ Nihti, were informed of suspicion of intoxicants and their right to be searched in the presence of the Magistrate or Gazatted Officer. With consent DSP – Karansher Singh arrived, and opium was

recovered from the two bags in the car, which was attested by DSP. Personal searches led to their arrest, with SI-Harneek Singh authenticating the case property at the police station.

4. On 02.06.2016, SI-Balwinder Singh presented the accused and case property to Illaqa Magistrate who sealed the property for depositing the same in the Malkhana. On 03.06.2016, accused Afgan Beg and Major Singh disclosed additional opium in their Skoda Car, leading to recovery under Section 27 of the Evidence Act. The samples were sealed on site and verified by the officiating SHO before deposition. On 04.06.2019, the Illaqa Magistrate verified the property and sent samples for analysis. On June 7, 2016, the samples were sent to FSL. With the completion of investigation, the challan was presented in the Court. The charges were framed against the accused to which they pleaded not guilty and claimed trial.

5. During trial, the prosecution examined thirteen witnesses, namely, PW1 SI-Balwinder Singh (investigating officer), PW2 SI-Harneek Singh (officiating SHO), PW3 ASI-Gurmeet Singh (recovery witness), PW4 ASI-Baljinder Singh (link evidence), PW5 HC Surjit Singh (sample carrier) and PW7 DSP-Karansher Singh (Gazetted officer) PW8 HC Baldev Singh, (Second recovery witness), PW9 Manjit Singh (Data Entry Operator), PW10 Manpreet Kaur (ownership of car bearing license plate PB-11-BU-7549), PW11 Paras Singh (owner of Skoda Car bearing license plate CH-03N-6475), PW12 Manjeet Singh (Junior Assistant at Licensing Authority, Fatehgarh Sahib) and PW13 C Sukhpreet Singh (proving FIR no. 88 against Accused Afgan Beg). In support of its case, the prosecution had also produced documentary evidence which are not repeated here in for the sake of brevity. The statements of accused/respondents

under Section 313 Cr.P.C. were recovered wherein entire incriminating evidence was put to them. However, they denied the same and pleaded false implication.

6. In defence evidence, the accused (respondent No.1) Afgan Beg has examined Taheer Ali as DW1 and produced the Photographs clicked through CCTV camera as Mark-D1 to Mark-D4. Accused also examined Gurdish Singh as DW2 and thereafter, closed defence evidence. The trial Court, after taking into consideration the rival contentions and evidence on record, acquitted the accused/respondents of the charges framed against them.

7. The grounds considered by the learned Trial Court for acquitting the Respondents are as under:-

- i) The prosecution agency has failed to follow the mandate of law in terms of Section 52-A of the Act.
- ii) There is no satisfactory explanation as to how the pre-trial proceedings were conducted by the Investigating Agency. No photography or videography of the proceedings of sampling procedure was conducted before the Illaqa Magistrate.
- iii) The process of sampling has not been followed properly by the Illaqa Magistrate, as per the mandate of law and guidelines laid down by the Hon'ble Supreme Court.
- iv) The inventory prepared cannot be treated to be a primary piece of evidence, as it suffers from inherent defects.
- v) Contraband was found in a Swift car which was registered in the name of Manjit Singh (PB-11-BU-7549) on 01.06.2016. However, the owner of the said

car was neither joined in the investigation nor produced as a witness in the Court, which casts a doubt on the case of the prosecution.

8. The learned State counsel, while assailing the judgment of acquittal has argued that as per the prosecution case, the recovery was made from the accused-respondents and four of them were formally arrested and thereafter, the case property was also deposited with MHC Malkhana of Police Station. It is further argued that both the sealed bulk parcels had been produced before the Illaqa Magistrate and a due procedure was followed by PW-1 Investigating Officer-Balwinder Singh, while dealing with the same. It is further argued that the recovery was effected pursuant to the disclosure statement made by the accused-respondents under Section 27 of the Evidence Act, and that there were no discrepancies in the procedure followed in the case. It is further argued that the recovery of contraband, having been proved to have been effected from accused-respondents, learned Trial Court was not justified in acquitting the accused of the charge framed against them.

9. We have heard learned counsel for the applicant-State and have also gone through the records of the case.

10. The following issues would arise for consideration by this Court:-

- “1. Whether the mandatory provisions of Section 52-A of the Narcotic Drugs and Psychotropic Substances Act, 1985, were duly complied with?
2. Whether the prosecution was able to complete the chain of evidence?

11. Firstly, it is pertinent to discuss the basic ingredients of Section 52-A of the Act. According, to Section 52-A of the Act, where any contraband has been seized and forwarded to the officer-in-charge of the nearest police station

or to the officer empowered under Section 53 of the Act, such officer shall prepare an inventory of the contraband, followed by the description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the contraband. Further, an application shall be made to any Magistrate for the purpose of certifying the correctness of the inventory so prepared or taking in the presence of such Magistrate, photographs of such drugs or substances or conveyances/certifying such photographs as true.

12. The learned trial Court, while discussing the evidence in details, has found that the Investigating Agency did not follow the mandate of law as regards the compliance of Section 52-A of the Act, and the said procedure was also not followed by the Magistrate, while conducting the sample drawing proceedings. It was found that there was no necessity for the Investigating Officer to draw the samples at the time of effecting seizure and the same is against the mandatory provisions of the Act. It was noticed that while appearing as PW-1-Investigating Officer in his cross-examination, admitted that the SHO did not prepare inventory of the recovered contraband either on 01.06.2016 or on 03.06.2016. It was further found that SHO-Harneek Singh, while appearing as PW-2 had deposed in his cross-examination that he had instructed the Investigating Officer orally to prepare the inventory of the contraband seized at the time of producing the accused in the Court. It was further found that from the order dated 02.06.2016 (Ex. PW1/31), it was clear that the process of drawing the samples had not been followed properly by the Illaqa Magistrate as per the mandate of law and the guidelines laid down by the Hon'ble Supreme Court in number of cases. It was found that all the case property should have been thoroughly mixed and standardized so that it becomes uniformly blended. From the blended mass of case property, two representative samples should then have been taken out

and drawn. It was further found that there was no reference in the order Ex. PW/31 that before drawing the sample parcels before the Illaqa Magistrate, the samples were mixed up with the entire case property and then representative samples were drawn.

13. It was further found by the learned trial Court that while appearing as PW-1-Investigating Officer, Balwinder Singh deposed that all the parcels were marked as A, A1 and A2 and sample parcels were prepared/marked as B, B1 and B2, but these marks on the parcels did not appear anywhere, and there was no mention regarding marks in the order dated 02.06.2016 (Ex. PW1/31). Additionally, it was found that there was infirmity and discrepancy in the statement of MHC ASI-Baljinder Singh who was examined as PW-4. The said witness had produced the entries contained in register No.19 having been maintained under his supervision as MHC of Police Station. The said witness in his cross-examination deposed that against entry at serial No.627 of register No.19 and against Sub-entry No.1, 3 and 6 dated 01.06.2016, there was no entry/reference about depositing the case property with police Malkhana after producing the case property before the learned Illaqa Magistrate.

14. The learned trial Court has further found that the CFSL form No.29, which is required to be filled up at the spot and attested by the witnesses, was neither prepared at the spot nor deposited with the case property making the case not only doubtful, but out rightly improbable and false. It was observed that when the additional samples had been drawn by learned Illaqa Magistrate, then it was incumbent upon the learned Illaqa Magistrate to prepare CFSL form No.29 at that time in the Court but it was not so done.

15. The Hon'ble Supreme Court in Yusuf @Asif Versus State, 2023 SCC OnLine SC 1328, has held that in the absence of any material on record to establish that the samples of the seized contraband were drawn in the presence of the Magistrate and that the inventory of the seized contraband was duly certified by the Magistrate, such seized contraband and the sample drawn would not be a valid piece of primary evidence and thus, the entire trial stands vitiated. It was held as under:-

“12. A simple reading of the aforesaid provisions, as also stated earlier, reveals that when any contraband/narcotic substance is seized and forwarded to the police or to the officer so mentioned under Section 53, the officer so referred to in sub-section (1) shall prepare its inventory with details and the description of the seized substance like quality, quantity, mode of packing, numbering and identifying marks and then make an application to any Magistrate for the purposes of certifying its correctness and for allowing to draw representative samples of such substances in the presence of the Magistrate and to certify the correctness of the list of samples so drawn.

13. Notwithstanding the defence set up from the side of the respondent in the instant case, no evidence has been brought on record to the effect that the procedure prescribed under sub-sections (2), (3) and (4) of Section 52A of the NDPS Act was followed while making the seizure and drawing sample such as preparing the inventory and getting it certified by the Magistrate. No evidence has also been brought on record that the samples were drawn in the presence of the Magistrate and the list of the samples so drawn were certified by the Magistrate. The mere fact that the samples were drawn in the presence of a gazetted officer is not sufficient compliance of the mandate of sub-section (2) of Section 52A of the NDPS Act.

14. It is an admitted position on record that the samples from the seized substance were drawn by the police in the presence of the gazetted officer and not in the presence of the Magistrate. There is no material on record to prove that the Magistrate had certified the inventory of the substance seized or of the list of samples so drawn.

15. In *Union of India v. Mohanlal*, (2016) 3 SCC 379, the Apex court while dealing with Section 52A of the NDPS Act clearly laid down that it is manifest from the said provision that upon seizure of the

contraband, it has to be forwarded either to the officer-in-charge of the nearest police station or to the officer empowered under Section 53 who is obliged to prepare an inventory of the seized contraband and then to make an application to the Magistrate for the purposes of getting its correctness certified. It has been further laid down that the samples drawn in the presence of the Magistrate and the list thereof on being certified alone would constitute primary evidence for the purposes of the trial.”

16. The testimony of PW-1 Investigating Officer Balwinder Singh, PW-2 Harnek Singh and PW4-MHC ASI Baljinder Singh, is very vital. These witnesses are the most material witnesses of the case. However, as noticed above, there are huge contradictions in their testimony as regards the recovery of the contraband; its sampling and deposit in the Malkhana. There are material discrepancies in the prosecution case. Also, the mandate of equal representative of samples from each package or container, was not followed. Therefore, we find no infirmity in the finding recorded by the learned trial Court that there was no proper compliance in Section 52-A of the Act. The issue No.1 is decided accordingly.

17. Coming to issue No.2, it was found by learned trial Court that parcels drawn by the Illaqa Magistrate were not sent to the FSL for the purposes of analysis. PW5-HC Surjit Singh (sample carrier), in his testimony deposed that he had taken the sample parcels bearing impressions BS, KS and HS whereas, there is no reference of seal bearing impression JPS. On the basis of the FSL reports Ex. PW1/68 and Ex. PW1/69, it was found that the samples drawn by the Court, while preparing the inventory, were never sent to the FSL for chemical examination and that there was no explanation for such a lapse. It could not be proved on record that the recovery effected was deposited with MHC. Still further on the basis of the testimony of PW-3 ASI Gurmeet Kumar, who was a

recovery witness, it was found that the said witness deposed that the DSP retained his seal with him after use and that the Investigating Officer had handed over his seal to him. The said Gurmeet Kumar, further deposed that he had returned the seal to the Investigating Officer after 2/3 days. No independent witness were joined and the seals appended by the Investigating Officer as 'BS' and by DSP as 'KS' remained in possession of the police officers themselves and they were not deposited with the MHC before the samples could be delivered in the office of FSL for analysis. It was thus, found that the tampering with the samples could not be ruled out. It was further found that the owner of the swift car bearing registration No. PB-11- BU-7549, from which the alleged recovery of the contraband was effected was not examined as a witness and his exclusion creates a doubt about the access of the accused to the said vehicle.

18. From the aforesaid findings recorded by the learned trial Court, we find that the link evidence is completely missing in the present case. As noticed above, the parcels drawn by the Illaqa Magistrate were not sent to the FSL for the purpose of analysis. No receipt was proved on record regarding the deposit of the case property with the MHC. The seals put by SHO-Harnek Singh, Investigating Officer Balwinder Singh, had been retained by recovery witness- Gurmeet Kumar for 2/3 days and the owner of the swift car was not joined either in the investigation or by producing him in the Court as a witness. All these facts clearly show that the link evidence is completely missing in the instant case. We find that the trial Court has rightly acquitted the accused of the charge framed. Accordingly, while deciding issue No. 2, it is held that the prosecution has failed to complete the chain of evidence so as to connect the accused-respondents with the alleged recovery of the contraband.

19. It is noteworthy to mention that in a criminal appeal against acquittal, the appellate court scrutinizes if the lower court's finding is perverse. If not, the scope of appeal is limited as the presumption of innocence is reinforced by the lower court's decision. In the case of Ghurey LalVs. State of Uttar Pradesh,(2008) 10 SCC 450 in para no. 75, the Hon'ble Supreme Court reiterated the said view and observed as follows:

"75. The trial court has the advantage of watching the demeanour of the witnesses who have given evidence, therefore, the appellate court should be slow to interfere with the decisions of the trial court. An acquittal by the trial court should not be interfered with unless it is totally perverse or wholly unsustainable."

20. Thus, an order of acquittal is to be interfered with only for compelling and substantial reasons.

21. In view of the above, we do not find any illegality and perversity in the findings recorded by the trial Court. Accordingly, the present application is dismissed and leave to appeal is declined.

22. All pending applications (if any), shall also stand disposed of.

[SUDHIR SINGH]
JUDGE

[HARSH BUNGER]
JUDGE

30.05.2024
Himanshu

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