

IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH

279

CRA-S-2079-2019 (O&M)
Date of decision: 29.02.2024

BirjuPetitioner

Versus

State of PunjabRespondent

CORAM: HON'BLE MRS. JUSTICE MANJARI NEHRU KAUL

Present : Mr. J.S. Thakur Advocate
for the petitioner.

Mr. Amit Rana, Sr. DAG, Punjab.

MANJARI NEHRU KAUL, J.

1. The appellant is challenging judgment of conviction and order of sentence dated 16.05.2019 passed by learned Judge, Special Court, Jalandhar whereby he was convicted under Section 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, 'the NDPS Act') in case FIR No.292 dated 18.12.2014 under Section 22/61/85 of the NDPS Act registered at Police Station Rama Mandi, District Jalandhar.

BRIEF FACTS OF THE CASE

2. As per the case of the prosecution on 18.12.2015, ASI Satnam Singh along with other police officers noticed a man walking from the railway station side towards Qazi Mandi Chowk. Acting on suspicion, investigating officer ASI Satnam Singh intercepted him with the help of other police officers, who were with him at that time. The person identified himself as Birju son of Kesar Chand (hereinafter referred to as 'the appellant'). Since the investigating officer suspected

the appellant to be carrying some narcotic substances, he was informed of his right to get his search conducted in the presence of a Gazetted Officer or a Magistrate, however, the appellant reposed faith in the investigating officer and consented to be searched by him in which regard a consent memo (Ex.PB) was also prepared. Despite efforts, no independent witness was found available in the vicinity. Upon search of the appellant, intoxicant powder was discovered in the lower pocket of his jacket. Two samples of 05 grams each were drawn, sealed and labeled as 'SS' vide Ex.PX. Sample seal was prepared separately and the seal after use was handed over to Head Constable Dalwinder Singh. The case property including remaining 140 grams of intoxicating powder were then taken in police possession vide memo Ex.PC. The appellant failed to produce any licence or permit in support of the recovered substance. Consequently, a report was sent through Constable Gurwinder Singh for registration of FIR, Ex.PA. The appellant was arrested, searched and investigation carried out at the spot. After completion of the investigation and receipt of the FSL Report (Ex.PY), challan was presented and the appellant was charged for offence punishable under Section 22 of the NDPS Act, to which he pleaded not guilty and claimed trial.

2 (a). In support of its case, the prosecution examined 05 witnesses, including investigating officer ASI Satnam Singh, who stepped into the witness box as PW4 and PW5 Inspector Palwinder Singh. All incriminating circumstances and evidence appearing against the appellant during trial were put to him under Section 313 of the Cr.P.C., which he denied and pleaded innocence. The appellant in his

defence examined HC Salwinder Singh as DW1. Based on the evidence led during trial, the learned Trial Court convicted the appellant by concluding that the prosecution had proven its case beyond reasonable doubt. Consequently, the appellant was convicted and sentenced to undergo RI for 10 years and to pay a fine of Rs.1,00,000/- and in default of payment of fine to further undergo imprisonment for 10 months under Section 22 of the NDPS Act.

SUBMISSIONS OF THE LEARNED COUNSEL FOR THE APPELLANT

3. The primary argument addressed by learned counsel for the appellant hinges on the assertion that the entire process of seizure and sampling of the recovered contraband, was flawed. It was carried out in contravention of the mandatory provisions of Section 52A of the NDPS Act, as the prescribed procedure for drawing samples and seizure of the alleged narcotic substance was not followed. Thus, it raised a genuine and substantial doubt regarding the accuracy of the samples submitted for analysis, including raising questions about whether they even truly represented the seized contraband. Learned counsel has submitted that since there was non-compliance of the mandatory provisions of Section 52A of the NDPS Act, as the samples were concededly not drawn in the presence of the Magistrate, it cast a shadow of doubt on the authenticity of the prosecution's version. In support, learned counsel has placed reliance upon *Mangilal Vs. The State of Madhya Pradesh : 2023 LiveLaw (SC) 549 and Yusuf @ Asif Vs. State : 2023 LiveLaw (SC) 890*.

3 (a). It has been further submitted that despite the presence of many persons in the vicinity of the place where the appellant was

allegedly apprehended by the police, no independent witness from the public was joined during his search and alleged recovery of the contraband, which yet again created a dent in the case of the prosecution.

3 (b). Learned counsel while arguing further, vehemently contended that the abnormal delay of 04 days in sending the case property to the Forensic Science Laboratory (FSL), despite the alleged recovery having been effected on 18.12.2014, raised genuine concerns of tampering by the police. In addition, the Malkhana Munshi MHC Balbir Singh who was cited as prosecution witness was strangely not examined and given up as being unnecessary which further raised suspicion qua the police planting a false recovery of contraband upon him.

3 (c). Learned counsel lastly argued that even the mandatory provisions of Section 50 of the NDPS Act were not properly complied with, which further undermined the case of the prosecution, creating a serious dent qua its credibility.

SUBMISSIONS OF THE LEARNED STATE COUNSEL

4. Per contra, learned State counsel while vehemently opposing the submissions of the counsel opposite, has asserted that mere non-joining of an independent witness would not in any manner cast a shadow of doubt on the case of the prosecution. Further, a perusal of the deposition of all the prosecution witnesses, though official, came across as being trustworthy which was thus sufficient to nail the appellant in the instant case. It has further been contended that the contention of the learned counsel for the appellant that there had

been non-compliance of Section 50 of the NDPS Act, was devoid of any merit as an offer of search from a Gazetted Officer and Magistrate was given to the appellant who, however, vide separate consent memo Ex.PB instead reposed confidence in the investigating officer for getting himself searched.

4 (a). Concerning the non-compliance of Section 52A of the NDPS Act, learned State counsel has fairly conceded that the samples of the recovered contraband were not drawn in the presence of a Magistrate, however, it was argued that this alone would not in any manner vitiate the trial, particularly when the prosecution had been otherwise successful in establishing the guilt of the appellant beyond a reasonable doubt. It has, thus, been asserted by the learned State counsel that the learned Trial Court did not err in any manner while passing the impugned judgment which deserved to be upheld.

5. I have heard learned counsel for the parties and perused the relevant material on record.

FINDINGS OF THE COURT

6. The contention of the learned counsel for the appellant qua non-joining of independent witness and the delay of 04 days in sending the case property for examination before the FSL would not in any manner create any dent in the case of the prosecution as more often than not, the public is most reluctant to join such proceedings. If the deposition of the official witnesses comes across as being trustworthy, they can be safely relied upon. Further, in the instant case, no doubt there was a delay of 04 days in sending the samples to the FSL, however, it is a matter of record that the samples had been received in

an intact condition and the delay could not be termed as abnormally huge. Hence, these submissions of the learned counsel for the appellant are bereft of any merit.

7. However, this Court finds merit in the submissions made by learned counsel for the appellant with respect to the non-compliance of Section 52A of the NDPS Act. It would be relevant to reproduce Section 52A of the NDPS Act which reads as under:-

“52A. Disposal of seized narcotic drugs and psychotropic substances.--(1) The Central Government may, having regard to the hazardous nature, vulnerability to theft, substitution, constraint of proper storage space or any other relevant consideration, in respect of any narcotic drugs, psychotropic substances, controlled substances or conveyances, by notification in the Official Gazette, specify such narcotic drugs, psychotropic substances, controlled substances or conveyance or class of narcotic drugs, class of psychotropic substances, class of controlled substances or conveyances, which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time, determine after following the procedure hereinafter specified.

(2) Where any narcotic drugs, psychotropic substances, controlled substances or conveyances has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs, psychotropic substances, controlled substances or conveyances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs, psychotropic substances, controlled substances or conveyances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs, psychotropic substances, controlled substances or conveyances in any proceedings under this Act and make an application, to any Magistrate for the purpose of--

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such magistrate, photographs of such drugs, substances or conveyances and certifying

such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such magistrate and certifying the correctness of any list of samples so drawn.

(3) Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1972) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs, psychotropic substances, controlled substances or conveyances and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence.”

8. Thus, what flows from the reading of the aforementioned provisions of Section 52A of the NDPS Act is that the physical presence of a Magistrate is mandatory during procedures like certifying inventory or photographs so as to ensure fairness in investigation and compliance of the provisions of Section 52A of the NDPS Act are most crucial before disposal of the recovered contraband. Presence of a Magistrate as mandated under Section 52A of the NDPS Act would ensure proper supervision over the disposal and also establish these documents as primary evidence, with the burden of proof lying on the prosecution. Further, non-compliance with the procedural requirements outlined could lead to adverse inference under the Indian Evidence Act, 1872. Hon'ble the Supreme Court in ***Yusuf @ Asif's case (supra)*** has also categorically held that strict adherence to procedural requirements and guidelines would be crucial to ensure the integrity of the evidence and credibility of prosecution case under the NDPS Act.

9. It would also be most relevant to refer to ***Yusuf @ Asif's***

case (supra), wherein the Hon'ble Supreme Court has held as under:-

“15. In Mohanlal's case, 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. 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, it is apparent that the said seized contraband and the samples drawn therefrom would not be a valid piece of primary evidence in the trial. Once there is no primary evidence available, the trial as a whole stands vitiated.”

10. Similarly, Hon'ble the Supreme Court in **Union of India v.**

Mohanlal : (2016) 3 SCC 379 while dealing with the provisions of

Section 52A of the NDPS Act held that the provisions of this Section

explicitly specifies that upon seizing any contraband, it must be

forwarded to either officer incharge of the nearest police station or to

the authorised officer under Section 53 of the NDPS Act, who would

then be required to prepare an inventory as outlined in the provisions

and then submit an application to the Magistrate for various purposes :

(a) certifying the accuracy of the inventory (b) certifying the

authenticity of the photographs taken before the Magistrate and (c)

drawing representative samples in the presence of the Magistrate and

certifying the accuracy of the list of the samples submitted. Thus, it

leaves no manner of doubt that the process of drawing samples must

take place in the presence and under the supervision of the Magistrate, coupled with the fact that the entire procedure must be satisfied by the Magistrate, as correct.

11. Adverting to the case in hand, no evidence, much less cogent, has been presented by the prosecution to demonstrate adherence to the procedure outlined in Section 52A of the NDPS Act with respect to the seizure and collection of samples. There is no record whatsoever indicating preparation of an inventory much less any certification by a Magistrate. Merely drawing samples in the presence of a Gazetted Officer would not be enough to fulfil the requirements of Sub Section (2) of Section 52A of the NDPS Act. The failure on the part of the prosecution to provide primary evidence does without doubt create a serious dent in the case of the prosecution.

12. As a sequel to the above, the instant appeal deserves to be and is allowed and the impugned judgment of conviction and order of sentence dated 16.05.2019 is hereby set aside on account of the trial being vitiated due to non-compliance of the provisions of Section 52A of the NDPS Act. The appellant is acquitted of the charges framed against him. The appellant be set free forthwith.

29.02.2024

Vinay

(MANJARI NEHRU KAUL)
JUDGE

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