



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

747

CRA-S-2461-SB-2007 (O&M)

Date of decision: 02.04.2025

Rajinder Singh

....Appellant

Versus

State of Haryana

....Respondent

CORAM: HON'BLE MR. JUSTICE HARPREET SINGH BRAR

Present: None for the appellant.

Mr. Harkesh Kumar, AAG, Haryana.

HARPREET SINGH BRAR J. (Oral)

1. The instant appeal is preferred against the judgment and order of sentence dated 29.11.2007 passed by learned Sessions Judge, Fatehabad in FIR No.244 dated 10.05.2006 registered at Police Station Sadar, Fatehabad, under Section 15 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as 'the NDPS Act'), whereby the appellant was convicted and sentenced to undergo rigorous imprisonment for a period of two years with a fine of Rs.5,000/- and in default of payment of fine, to further undergo simple imprisonment for a period of one month.

FACTUAL BACKGROUND

2. The facts of the prosecution case, tersely put, are that on 10.05.2006, a police party headed by PW-7 Ram Kumar, ASI was on patrolling the area and was present at village Kukrawali. While crossing the house of the appellant-accused, who was previously known to the



police, the police party saw him sitting near two jute bags in his courtyard. Seeing the police party, the appellant ran away. Ram Kumar, ASI, with the help of other police officials, tried to apprehend him but he succeeded in running away. Subsequently, Ram Kumar, ASI, summoned the *chowkidar* of the village. On the basis of suspicion, the abovementioned jute bags were checked. A total of 35 Kgs of Poppy Husk was recovered- 20 kg from one bag and 15 kg from another. Samples were taken and all the parcels were sealed with seal having impression 'RK' and were taken in possession vide recovery memo (Ex.P8). Thereafter, Ram Kumar, ASI sent a *ruqa* (Ex.P5) to the police station for registration of FIR(supra).

3. The appellant-accused was arrested by Ram Kumar, ASI on 10.08.2006, when he was already confined in Central Jail, Bhiwani. He was brought to Fatehabad and two days later, on 12.08.2006, he was produced in the Court along with the case property. On completion of investigation, the final report under Section 173 Cr.P.C. was prepared and subsequently, charges were framed against the appellant for an offence punishable under Section 15 of the NDPS Act. The appellant pleaded not guilty and claimed trial.

4. In order to prove its case, prosecution examined as many as seven witnesses. All the incriminating evidence was put to the appellant and his statement under Section 313 Cr.P.C. were recorded, wherein he pleaded false implication. However, the appellant did not lead any evidence in his defence. After minutely scrutinizing all the material



available on the record, the learned trial Court held the appellant guilty and sentenced him as discussed above.

CONTENTIONS

5. Since there is no representation on behalf of the appellant, the contentions are culled out from the paperbook. A perusal of the same indicates that the impugned judgment has been assailed on the ground that the appellant was not apprehended from the place of occurrence but was produced 03 months after the alleged incident. There is nothing available on the record that connects the appellant to the alleged occurrence as no efforts were made by the police to conduct a test identification parade. The appellant has solely been implicated because the police claimed to know him. Further, the conscious possession of the appellant over the gunny bags has not been proved. Merely because the said jute bags were recovered from his courtyard, the appellant cannot be said to be in their conscious possession. Moreover, no independent witness was joined in the investigation and the entire prosecution case is totally based upon the testimony of official witnesses. Furthermore, there is no evidence, except for the statement of the *chowkidar* of the village, that could prove that the said house from where the contraband was recovered belongs to the present appellant. However, the prosecution has failed to examine the said *chowkidar*. Lastly, ASI Ram Kumar, acted as both the complainant as well as the investigating officer, while he was required to hand over the investigation to a second investigating officer to ensure fairness.



6. On the other hand, learned State counsel argues that learned trial Court has passed a well-reasoned judgment based on correct appreciation of evidence available on record and as such, no interference by this Court is warranted. Additionally, there is nothing on record to suggest that the appellant may have been falsely implicated.

OBSERVATIONS AND ANALYSIS

7. Having heard learned State counsel and after thoroughly perusing the record of the case, it transpires that 35 Kgs of Poppy Husk was recovered from two jute bags lying in the courtyard of the appellant. Allegedly, the appellant was seen sitting on the said jute bags however, it is pertinent to note that on seeing the police, he ran away from the spot, only to be formally arrested 03 months later.

8. The appellant was found to be lodged in Central Jail, Jind and was only formally arrested on 10.08.2006 in the present case. In spite of the fact that the appellant was not arrested from the spot along with the contraband, no test identification parade was conducted to ascertain his identity merely because PW-7 ASI Ram Kumar, expressed his ability to identify the appellant as he knew him prior to the incident.

Section 54A of Cr.P.C. reads as follows:

54A. Identification of person arrested.--

Where a person is arrested on a charge of committing an offence and his identification by any other person or persons is considered necessary for the purpose of investigation of such offence, the Court, having jurisdiction may, on the request of the officer in charge of a police station, direct the person so arrested to subject himself to identification by any person or persons in such manner as the Court may deem fit:



Provided that, if the person identifying the person arrested is mentally or physically disabled, such process of identification shall take place under the supervision of a Judicial Magistrate who shall take appropriate steps to ensure that such person identifies the person arrested using methods that person is comfortable with:

Provided further that if the person identifying the person arrested is mentally or physically disabled, the identification process shall be videographed.

9. While conducting test identification parade is not mandatory, the identity of the appellant could have been conclusively established on the statement of an official witness alone, as he is an interested party. Allowing such an approach to continue unchecked would amount to bestowing unbridled power upon the police to implicate anyone, without needing to prove the same which would further cause serious prejudice to an accused. Moreover, no witnesses from the appellant's neighborhood were examined in order to establish the occurrence of the alleged event as well as the presence of the appellant on the alleged spot at the time of recovery. As such, the identity of the appellant is not conclusively proved.

10. A perusal of the Lower Court Record reflects that the prosecution has failed to put forth any material on record that would support the ownership of said house in the name of appellant. Neither the *chowkidar* of the village nor any other witness has been produced and examined by the prosecution before the learned trial court to even attempt to establish the ownership. The appellant was seen fleeing from the spot, as such, his mere presence is hardly sufficient to prove conscious possession. The Hon'ble Supreme Court in *State of Punjab*



vs. Balkar Singh and another, (2004) 3 SCC(Criminal) 582, speaking through Justice K.G. Balakrishnan, observed as under:

"....the presence of the respondents at the place from where the bags of Poppy Husk were recovered itself was taken as possession of these bags by the police. In fairness, the police should have conducted further investigation to prove that these accused were really in possession of these articles. The failure to give any satisfactory explanation by the accused for being present on that place itself does not prove that they were in possession of these articles. Though the respondents raised a plea before the sessions Court, the same was not considered by the Sessions Judge in the manner in which it should have been considered. We do not think that the High Court erred in holding that there was no evidence to prove that the respondents were in conscious possession of the Poppy Husk recovered by the police. The prosecution failed to discharge its obligation to prove the possession of the Poppy Husk by the respondent.

Reliance in this regard can also be placed on the judgments rendered by the Hon'ble Supreme Court in **Avtar Singh vs. State of Punjab AIR 2002 Supreme Court 3343** and this Court in **Sukhdev Singh alias Sukha vs. State of Punjab , 2006(1) RCR (Criminal) 4 (P&H)** and **Bikkar Singh vs. State of Punjab, 2006(3) RCR (Criminal) 16 (P&H)**.

11. Curiously, even though it has been alleged that the contraband was recovered from the courtyard of the house of appellant, no mention of the presence of any of his family members has been made in the FIR or in the final report. Further, as per the statement of PW6- Tarsem Singh, Head Constable, there was no one at home during recovery of said contraband. On the contrary, PW7- ASI Ram Kumar,



had stated that appellant's wife was present at home. Apart from this there are several contradictions in the testimonies of the prosecution witnesses, particularly PW6 and PW7, regarding the descriptions of house and its location. The learned trial Court has erroneously ignored these discrepancies which go to the root of case and raises serious doubt on the version of prosecution.

12. Furthermore, a perusal of the impugned judgment indicates that although an independent witness i.e. the *chowkidar* was joined in the investigation, he was not examined during trial. The Hon'ble Supreme Court in ***Krishan Chand Vs. 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. The Hon'ble Supreme Court in ***Gorakh Nath Prasad Vs. State of Bihar, 2018(1) R.C.R. (Criminal) 108*** has acquitted the accused while holding that the case of the prosecution cannot be said to be proved when it is entirely based upon the statements of the official witnesses.

13. Another glaring omission in the investigation of the case is the non-compliance of Section 52-A of the NDPS Act. The safeguard provided under Section 52-A of the NDPS Act is in furtherance of Article 21 of the Constitution of India, which guarantees a fair and impartial investigation. The representative sample were not drawn before the Magistrate, which is required in the compliance of section 52-A of NDPS Act. Further still, as per the instructions issued vide



Standing Order No. 1 of 1988 dated 15.03.1988 by the Narcotics Control Bureau, representative sample of any contraband after seizure and deposit in the Malkhana or with the concerned SHO, is required to be sent to Chemical Examiner within 72 hours. A perusal of Ex.P-11 Chemical Examiner's report along with the statement of PW7- ASI Ram Kumar indicates that the sample was drawn on 10.05.2006 and it was sent to the Chemical Examiner on 14.05.2006 which was received in his office on 15.05.2006. As such, there is a delay of five days in sending the samples to the Chemical Examiner. As per the prescribed procedure, representative sample of any contraband after seizure and deposit in the Malkhana or with the concerned SHO is required to be sent to Chemical Examiner within 72 hours as per instructions issued vide Standing Order No. 1 of 1988 dated 15.03.1988 by the Narcotics Control Bureau. A further scrutiny of the evidence reveals that after drawing the sample on 10.05.2006, it is not discernible who was the custodian of the same till 14.05.2006 and further deposited it on the next day i.e. 15.05.2007 in the office of the Chemical Examiner. Neither the concerned MHC was produced as a witness nor Register No. 19 was produced to establish the deposit of the samples in safe custody which was necessary to be produced to rule out the possibility of any tampering. Further Reliance in this regard can be made on **Narcotics Control Bureau vs. Ajmer Kumar and another, 2016 ILR (HP) 1090** and **Jitender Singh Rathore vs. State of U.P. 2014 (4) RCR (Criminal) 462** wherein on the basis of the above lapse, accused were acquitted.



14. Even Form 29 was not filled at the spot which was required to be verified by the Magistrate along with inventory and the representative samples were also required to be drawn in the presence of the concerned Magistrate as mandated under Section 52A of the Act. The case of the appellant is fully covered by the ratio of law laid down in ***Union of India vs. Bal Mukund and others, 2009(2) RCR (Criminal) 574***. As such, there is a clear non-compliance of Section 52A of the Act as also the guidelines issued by a two Judge Bench of the Hon'ble Supreme Court in ***Union of India vs. Mohan Lal, 2016 (1) R.C.R. (Criminal) 858***, speaking through Justice T.S. Thakur, which are reproduced here as under:-

“20. To sum up we direct as under:

(1) No sooner the seizure of any Narcotic Drugs and Psychotropic and controlled Substances and Conveyances is effected, the same shall be forwarded to the officer in-charge of the nearest police station or to the officer empowered under Section 53 of the Act. The officer concerned shall then approach the Magistrate with an application under Section 52A(ii) of the Act, which shall be allowed by the Magistrate as soon as may be required under Sub-Section 3 of Section 52A, as discussed by us in the body of this judgment under the heading 'seizure and sampling'. The sampling shall be done under the supervision of the magistrate as discussed in paras 13 and 14 of this order.”

15. It is a well settled proposition that the representative samples must be drawn before the Magistrate as per the ratio laid down in ***UOI vs. Mohan Lal (supra)***. Recently, a two Judge Bench of the



Hon'ble Supreme Court in ***Mangilal vs. The State of M.P., 2023 SCC OnLine SC 862***, speaking through Justice M. M. Sundresh, while acquitting the accused, has observed that the mandate of Section 52-A of the Act has to be duly complied with. The following was observed:

“8. Before any proposed disposal/destruction mandate of Section 52A of the NDPS 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 and other connected matter 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. Non-production 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.”

16. Admittedly, Section 52-A of the Act was inserted by Act 2 of 1989 which came into force w.e.f. 29.05.1989. Section 52-A (2) (c) of the Act provides for drawing a representative sample of the seized contraband in the presence of a Magistrate. On the other hand, para 1.5 of the Standing Order No. 1 of 1988 requires that the samples of the seized contraband must be drawn on the spot of recovery in duplicate. Similar provision is provided in Standing Order No.1 of 1989 dated 13.06.1989. As such, *the Standing Orders cannot supersede the*



implication of Section 52-A of the Act. Further, the law is well settled that whenever there is a conflict between the Act and the instructions relating to the same subject matter, the Act would prevail but where the instructions supplement the Act, the former would have a binding force.

17. The sanctity of the statutory instructions contained in the Standing Orders issued by the Narcotics Control Bureau came up for consideration before the Hon'ble Supreme Court in **Noor Aga vs. State of Punjab, 2008 (16) SCC 417**, where a two Judge Bench, speaking through Justice S.B. Sinha, held as under:-

*“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 flouted 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.”

A comparison of the Standing Order No.1 of 1988 with Section 52-A (2) (c) of the Act shows that there there is a divergence with regard to drawing of the representative samples. Standing Order No.1 of 1988 provides for drawing of sample at the spot, whereas Section 52-A of the Act provides for drawing of sample in the presence of a Magistrate. Therefore, in the light of Act 2 of 1989, inserting



Section 52-A in the Act as well as the ratio of law laid down in ***UOI vs. Mohan Lal (supra)***, it is clear that as far as the manner in which representative samples are required to be drawn, the investigating agency is bound to follow the drill of Section 52-A of the Act. As far as the mode and time limit for dispatch of samples is concerned, para 1.13 of the Standing Order No. 1 of 1988 provides that samples must be dispatched to the laboratory within 72 hours of seizure to avoid any legal objection and this time limit.

18. In view of the ratio of law laid down by the Hon'ble Supreme Court in ***Noor Aga (supra)***, ***Bal Mukund (supra)*** and ***Mangilal (supra)***, the Investigating Officers are bound to follow the procedural safeguards provided under Standing Order No. 1 of 1988 and Standing Order No. 1 of 1989 as these are in addition to the procedural safeguards provided under the Act and the same further strengthen the procedural protection keeping in view the stringent punishment provided under the Act. These Standing Orders are mandatorily required to be adhered to as long as they do not override the provisions of the NDPS Act. Some of the relevant provisions of the Standing Order No. 1/88 are as follows:

“1. Quantity of different drugs required in the sample – The quantity to be drawn in each sample for chemical test should be 5 grams in respect of all narcotic drugs and psychotropic substances except in the cases of Opium Ganga and Charas/ Hashsish where a quantity of 24 grams in each case is required for chemical test. The same quantities should be taken for the duplicate sample also.



2. The seized drugs in the packages/containers should be well mixed to make it homogeneous and representative before the sample in duplicate is drawn.

3. When more than one sample is drawn, each sample should also be serially numbered and marked as S-1, S-2, S-3 and so on, both original and duplicate sample. It should carry the serial number of the packages and marked as P1, 2, 3, 4 and so on.

4. It needs no emphasis that all samples must be drawn and sealed in presence of the accused, Panchnama witnesses and seizing officer and all of them shall be required to put their signature on each sample.

5. Samples must be dispatched to the Laboratory within 72 hours of seizure to avoid any legal objection.”

The above omission on the part of the investigating officer with regard to total non-compliance of section 52-A of NDPS Act, the instructions issued vide Standing Order No.1 of 1988 coupled with the delay and non-filling of Form 29 at the spot would tantamount to a serious flaw in the investigation and it suffocates the prosecution case completely.

19. Moreover, the entire investigation in the present case was conducted by PW7- ASI Ram Kumar, who was also the complainant in the present case. In fact, he alone is the reason for the implication of the appellant as he identified him based on previous knowledge. The Hon'ble Supreme Court in ***State by Inspector of Police, Narcotic Intelligence Bureau, Madurai, Tamil Nadu Vs. 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. Similarly, the Hon'ble Supreme Court in ***Megha Singh vs. State of Haryana 1996(11) SCC 709***, opined that the complainant who had intercepted the accused, recovered the arms and registered the case should have recused himself from the investigation as it raises doubts regarding the impartial nature of the investigation.

20. The Hon'ble Supreme Court in ***State of Gujarat v. Hon'ble Mr. Justice R.A. Mehta (Retd) 2013(3) SCC 1*** observed that the doctrine of bias is a leg of principles of natural justice and stems from the legal maxim *nemo debet esse judex in sua propria causa* - one shall not be the judge in his own case. If the circumstances are such that it would create a reasonable apprehension of bias in the minds of the onlookers, it is sufficient to invoke the doctrine of bias. The test for likelihood of bias and reasonable apprehension of bias are interchangeable and hence, the parameters for both can be construed to be similar.

21. A three Judge bench of the Hon'ble Supreme Court of India in ***Mohan Lal v. State of Punjab AIR 2018 SC 3853***, speaking through Justice Navin Sinha, made the following observations in this regard:-

“25. In view of the conflicting opinions expressed by different two Judge Benches of this Court, the importance of a fair investigation from the point of view of an accused as a guaranteed constitutional right under Article 21 of the Constitution of India, it is considered necessary that the law in this regard be laid down with certainty. To leave the matter for being determined on the individual facts of a



case, may not only lead to a possible abuse of powers, but more importantly will leave the police, the accused, the lawyer and the courts in a state of uncertainty and confusion which has to be avoided. It is therefore held that a fair investigation, which is but the very foundation of fair trial, necessarily postulates that the informant and the investigator must not be the same person. Justice must not only be done, but must appear to be done also. Any possibility of bias or a predetermined conclusion has to be excluded. This requirement is all the more imperative in laws carrying a reverse burden of proof.”

22. A three Judge bench of the Hon’ble Supreme Court in ***Varinder Kumar vs. State of Himachal Pradesh 2020(3) SCC 321***, speaking through Justice Navin Sinha, has further clarified the applicability of the ratio of law laid down in ***Mohan Lal (supra)*** in cases pending before the decision in this case and observed as follows:

“18. The criminal justice delivery system, cannot be allowed to veer exclusively to the benefit of the offender making it unidirectional exercise. A proper administration of the criminal justice delivery system, therefore requires balancing the rights of the accused and the prosecution, so that the law laid down in Mohan Lal (supra) is not allowed to become a spring board for acquittal in prosecutions prior to the same, irrespective of all other considerations. We therefore hold that all pending criminal prosecutions, trials and appeals prior to the law laid down in Mohan Lal (supra) shall continue to be governed by the individual facts of the case.”

CONCLUSION

23. In view of the above discussion, this Court is of the considered opinion that the prosecution has failed to prove its case beyond reasonable doubt. Accordingly, the present appeal is allowed and the judgment of conviction and order of sentence dated 29.11.2007

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passed by learned Sessions Judge, Fatehabad are hereby set aside. The appellant, namely Rajinder Singh is acquitted of the charges framed against him. His bail bonds and surety bonds stand discharged.

24. All the pending miscellaneous application(s), if any, shall also stand disposed of.

25. 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.

(HARPREET SINGH BRAR)
JUDGE

02.04.2025
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Whether speaking/reasoned:	Yes/No
Whether reportable:	Yes/No