2023:PHHC:113462

CRA-S-2278-SB-2015

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

370 **CRA-S-2278-SB-2015**

Date of decision : 25.08.2023

Gurpreet Singh

....Appellant

V/s

State of Punjab

....Respondent

CORAM: HON'BLE MR. JUSTICE ARUN MONGA

Present: None for the appellant.

Mr. Amit Sharma, Advocate as Amicus Curiae

Mr. Mohit Thakur, AAG, Punjab.

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ARUN MONGA, J.

Appeal herein is against the judgment of conviction and order of sentence dated 05.02.2015, passed by learned Judge (*Ad hoc*), Special Court, Gurdaspur, in case bearing FIR No.07 dated 17.01.2011, registered under Section 22 of Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the Act') at Police Station, Civil Lines, Batala *vide* which the appellant was convicted and sentenced to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs.1,00,000/- and in default thereof, to further undergo rigorous imprisonment for 01 years.

2. Per prosecution version, on 17.01.2011, SI Balwinder Singh along with other police officials, was on routine patrolling, when appellant was seen walking. On seeing the police officials, he immediately stopped and sat down under a tree. He was apprehended on suspicion. He was made aware that he had legal right to be searched in the presence of a Gazetted Officer or a Magistrate. The appellant did not give his consent for either. Accordingly, dissent memo was prepared. Thereafter, Gurmit Singh, DSP City, came at the spot. After disclosing

his identity and getting the consent of appellant, the investigating officer conducted the search of appellant. A polythene bag having powder in it, suspected to be intoxicating salt, was recovered from right pocket of his trousers. Appellant was thus arrested at the spot. A written information/*ruqa* was sent to the police station. Formal FIR was registered. Out of the recovered powder, two samples of 10 grams each were taken out and put in plastic container. Both samples were sealed with the seals bearing impression 'GS' and 'BS'. The seal of the investigating officer after use was handed-over to HC Sardul Singh. Whereas, DSP kept his own seal with him. On receipt of chemical examiner report and after completing all the formalities of investigation, a report under Section 173 Cr.P.C. was prepared and presented in Court. Powder turned out to be intoxicant chemical-Dextropropoxyphene mixed with Paracetamol. Total weight of the intoxicant powder was 520 grams.

3. After complying with the provisions of Section 207 Cr.P.C., charge under Section 22 of the Act was framed against the appellant. He pleaded not guilty and sought a trial.

4. In order to prove its case, prosecution examined as many as six witnesses and closed its evidence.

5. Statement of appellant under Section 313 Cr.P.C. was recorded. He was confronted with all the incriminating circumstances as per prosecution evidence. He denied all of it and pleaded his innocence.

6. No evidence was led in defence by the appellant.

7. After appraisal of evidence, learned trial Court *vide* impugned judgment dated 05.02.2015, convicted and sentenced the appellant, as noted hereinabove.

8. Aggrieved, appellant has preferred the instant appeal.

9. Though appellant had engaged a counsel, but he did not appear on earlier occasions when matter was called for hearing. In the premise, Registry was asked to issue notice to learned counsel for the appellant. Needful was done. Yet, he chose not to appear. In the interest of justice, Mr. Amit Sharma, Advocate, who was present in Court, was requested to assist the Court as *Amicus Curiae*. He very graciously accepted the request of the Court.

10. Learned amicus curiae has emphatically contended that impugned order is unsustainable. He would argue that it is an admitted situation that there is non-compliance of mandatory provision of Section 52-A(2) of the Act. Even the procedural safeguards as mandated under the Act were not followed. No independent witness was joined. Prosecution failed to give any plausible explanation for the same. Learned Amicus urged further that there was delay of 12 days in sending the samples to FSL. There is thus every possibility of tampering with the same. There are major discrepancies and inconsistencies in the prosecution evidence and thus appeal deserves to be allowed. In support of his contention, he laboriously went through all the testimonies and other record of the trial court in course of his arguments. More of it later.

11. Per contra, learned State counsel has submitted that from the oral as well as documentary evidence on record, it has been fully established that appellant was found in conscious possession of 520 grams of intoxicant power i.e. Dextropropoxyphene and Paracetamol. Thus he has rightly been convicted.

12. I have heard rival contentions of learned counsels for the parties and have gone through the case file.

13. Learned Amicus has drawn my attention to the testimonies of the prosecution witnesses. PW-2, Balwinder Singh SI, no doubt, stated that after apprehending the accused, he had sent HC Bachittar Singh to look for a witness from public, but no one was ready to join with the police party. PW-7 Bachittar

Singh also stated that he was sent to bring some one from the public to join a witness, but no one consented or agreed for it. As against this, PW-6 Gurmit Singh DSP, who is stated to have supervised the search proceedings, admitted to the contrary in his testimony. He deposed that the place of recovery is a thoroughfare; he remained at the spot for about 3 hours and conceded that the police party did not try to join any independent witness. His candid admission shows that, in fact, no genuine and sincere effort was made to join anyone from the public. Be that as it may, given the aforesaid admission of PW-6 Gurmit Singh DSP, it is difficult to believe the explanation given by PWs Balwinder Singh SI and Bachittar Singh HC that they made any attempt to join any person from the public in the proceedings for the search of the accused and/or such person declined to be so associated. That, in turn, arises considerable doubt in the narrative of recovery of intoxicating substance from the accused. The alleged recovery rests entirely on the doubtful testimony of police officials.

14. Let us further analyze the prosecution evidence. Recovery of the intoxicating substance is stated to have been caused from the accused/appellant on 17.11.2011. As per testimony of PW-2 Balwinder Singh SI investigating officer, two samples were drawn from the recovery. Separate parcels of the samples from the substance were made on the spot. These were sealed with the seals of Balwinder Singh SI bearing letters 'BS' and of DSP Gurmit Singh bearing letters 'GS'. After use, the seal of DSP Gurmit Singh was handed over to HC Sardool Singh. On return to the Police Station, the parcels containing the samples and the bulk of the substance were handed over by Balwinder Singh SI to Parlad Singh SHO. The latter's deposition (as PW-5) is that, he had affixed his own seal bearing letters PS on the parcels and kept them in the double lock of *malkhana* of police station. Next day, on 18.01.2011, he (Parlad Singh-SHO) took the case property from the double lock and handed over the same to SI Balwinder Singh,

alongwith a request Ex PW-5/A for their production before the *Ilaqa* Magistrate. The learned Court after seeing the case property passed order Ex PW5/B. The said order dated 18.01.2011 shows that one bulk parcel along with two sample parcels were produced before the Court, each of which bore six seals, two each bearing the impression BS,GS and PS, respectively. On return to the police station, SI Balwinder Singh again deposited the case property with him (PW5 Parlad Singh SHO). The latter then kept the same in the double lock up of the police station *malkhana*. On 30.01.2011, PW5 Parlad Singh SHO took out the sample from the police station *malkhana* and handed over the same to HC Ashwani Kumar who obtained docket from the office of the SSP, Batala. He later deposited the sample parcel in the office of the Chemical Examiner, Kharar. In his cross-examination, he stated that he did not mention any *malkhana* number on the case property. On a specific question, his response was that he did not remember whether any entry was made in the register and, when was the case property taken out from the double lock for production in the court.

15. Furthermore, the prosecution did not produce/prove any of the entries in the *malkhana* register showing the deposit of case property by SHO Parlad Singh, or taking it out on next day for production in Court or its redeposit in the malkhana after it was produced in court and, lastly no register entry was produced even for the taking out of the sample parcel on 30.01.2011, for being given to Ashwani Kumar. The absence of these entries has thus left the chain of required link evidence incomplete, casting doubts over the same.

16. Pertinently, HC-Sardool Singh, a crucial witness, named in the list of prosecution witnesses, was given up by the prosecution. On the other hand, PW-6 Gurmit Singh DSP also remained silent as to when did he take his seal back from HC Sardool Singh. The sample parcel is stated to have been given by PW Parlad Singh SHO to PW-1 Ashwani Kumar HC on 30.01.2011, for deposit in the office

of the Chemical Examiner. It is difficult to rule a reasonable possibility of PW6 Gurmit Singh DSP having taken back his seal from HC Sardool Singh before deposit of the sample by the latter in the office of the Chemical Examiner on 31.01.2011. Statements of PWs Balwinder Singh and Parlad Singh do not show if, after use, their seals were entrusted to anybody. Obviously, their respective seals remained with them. Till deposit of the sample parcel in the office of the Chemical Examiner by PW Ashwini Kumar on 31.01.2011, PWs Balwinder Singh SI, Gurmit Singh DSP and Parlad Singh SHO thus had the opportunity of access to the sample parcels. The former two were directly concerned with the recovery and sample proceedings, while Parlad Singh was the SHO of the police station where FIR had been registered. They were police officials interested in the success of the case. None of them deposed affirmatively that the sample parcels were not tampered with, since the time of recovery till their deposit of the sample parcel in the office of the Chemical Examiner by PW Ashwini Kumar. It is, therefore, difficult to rule out the reasonable possibility of the sample parcel having been tampered with, by reusing of the seals by the aforesaid police officials during the interregnum from the date of recovery (17.01.2011) till the deposit of the sample parcel in the office of the Chemical Examiner on 31.01.2011.

17. That aside, there is nothing mentioned in the Chemical Examiner's report Ex. PX, that the seals of the sample parcel were tallied with the sample seals and were intact, when the sample parcel was received in his office/laboratory. No doubt, the report is admissible *per se*. However, relevant facts which ought to have been mentioned, but found missing, cannot be assumed and read into the prosecution case on the basis of conjectures and surmises.

18. All said and done, I am of the opinion that the prosecution has failed to produce complete and reliable chain of link evidence so as to obviate the reasonable possibility of the sample having been tampered with or replaced

between the time of alleged recovery and its deposit in the office of Chemical Examiner.

19. Deficiencies and inconsistencies in the evidence presented by the prosecution do not inspire confidence, as already discussed in the preceding paragraphs. One of the critical issue herein is the the unsatisfactory nature of the link evidence presented by the prosecution. Link evidence connects various elements of a case together and, in this context, it is very vital connection between seized articles and their subsequent handling.

20. Although the prosecution claimed that the seized powder was placed in the *malkhana* on a specific date, but the *Malkhana* register was not presented as evidence to support this claim. The absence of documentary evidence thus weakens the prosecution's case. Trial court could not have verified the authenticity and timing of the placement of the seized substance in the *malkhana*.

21. In the light of gaps in evidence, there is insufficient proof to convincingly establish that the seals on the sample parcels were the original seals affixed at the time of seizure. This becomes a critical issue as proper sealing is essential to maintaining the integrity of evidence. This weaknesses in the prosecution's case is very significant factor in favor of the appellant. Evidence presented by the prosecution is thus inadequate to establish guilt beyond a reasonable doubt in this case.

22. In my opinion, the prosecution infirmities were/are fatal to the case against appellant and the learned trial Court erred in ignoring them while recording a finding of conviction against the appellant.

23. Under Section 22(b) of the Act, the office attributed to the appellant (for the possession of 520 grams intoxicant powder) is punishable with rigorous imprisonment for a term up to ten years and with fine upto one lakh rupees. Considering the said stringent punishment for the offence, it was necessary to

apply the legal requirements for proof of charge equally rigorously in the case in hand.

24. A reference in this connection may be had to the decision rendered by Apex Court in *State of Rajasthan vs. Gurmail Singh*[1]. Relevant part of the said judgment reads thus:-

> *"3.We have perused the judgment of the High Court. Apart from other reasons recorded by the High Court, we find that the link evidence adduced by the prosecution was not at all satisfactory. In the first instance, though the seized articles are said to have been kept in the malkhana on 20th May, 1995, the Malkhana register was not produced to prove that it was so kept in the malkhana till it was taken over by PW-6 on June 5, 1995. We further find that no sample of the seal was sent along with the sample to Excise Laboratory, Jodhpur for the purpose of comparing with the seal appearing on the sample bottles. Therefore, there is no evidence to prove satisfactorily that the seals found were in fact the same seals as were put on the samples bottles immediately after seizure of the contraband. These loopholes in the prosecution case have led the High Court to acquit the respondent.*
> *4. We find no error in the judgment of the High Court.*
> *5. The appeal is, therefore, dismissed."*

25. In fairness to the learned *Amicus Curiae*, it is considered appropriate to notice and deal with his specific contention to the effect, on which he was rather over-emphatic, that the provisions of Section 52-A(2) of the Act have also been violated in the case. In support of this contention, he has relied upon the decision of the Apex Court in *Simranjit Singh vs. State of Punjab*[2]**.** In my opinion, the section *ibid,* provides for the procedure for the disposal of the narcotic drugs, psychotropic substances and controlled substances. There is no such question involved in the present case. Reliance on the section *ibid*, is thus not attracted here. With utmost respect to the Apex Court, it is apparent from the judgment *ibid*, that the relevant provisions pertaining to the initial search and seizure of intoxicant substances were not the subject matter before the Court at the time of passing the said judgment.

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[1] Criminal Appeal No.1179 of 1999, decided on 23.02.2005
[2] *2023 Live Law (SC) 570*

26. However, in the light of the observations and reasons recorded in the succeeding part of instant judgment, in my opinion, the inevitable conclusion is to accept the instant appeal. It is accordingly so ordered. As a consequence, the impugned judgment of conviction and order of sentence dated 05.02.2015 passed by the learned Special Judge (*Ad hoc*), Special Court, Gurdaspur are set-aside. The appellant, whose sentence was suspended *vide* order dated 27.05.2021, is acquitted of charge framed against him. His bail bonds and surety bonds stand discharged. Appellant, if in custody in present case, be set at liberty forthwith, if not required in any other case.

27. No order as to costs.

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

29. Before parting with the case, this Court records its deep appreciation for Shri Amit Sharma, Advocate the *Amicus Curiae*, who sincerely devoted his considerable time and energy and rendered *pro bono* valuable assistance in the Court's effort to arrive at the truth.

(ARUN MONGA)
JUDGE

August 25, 2023
Ajay

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