

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

**Crl. Appeal No.S-2314-SB of 2003**

Date of Decision: 09.09.2015

Sheo Ram

.....Appellant

Versus

State of Haryana

....Respondent

**BEFORE :- HON'BLE MRS. JUSTICE DAYA CHAUDHARY**

- 1. Whether reporters of local newspapers may be allowed to see the judgment ? (Yes/No)**
- 2. To be referred to reporters or not ? (Yes/No)**
- 3. Whether the judgment should be reported in the Digest ? (Yes/No)**

Present:- Ms. Anju Arora, Advocate  
for the appellant.

Mr. Baljinder Singh Virk, D.A.G., Haryana  
for the respondent-State.

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**DAYA CHAUDHARY, J.**

The present appeal has been filed by the accused-appellant, namely, Sheo Ram to challenge the judgment of conviction and order of sentence in case FIR No.547 dated 09.08.2000 registered under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (here-in-after referred to as the Act) at Police Station NIT Faridabad.

The FIR, in question, was registered on the basis of secret information. The police party headed by Kuldeep Singh, Inspector/SHO of Police Station NIT, Faridabad was on patrol duty on 09.08.2000 where Rishi Pal, ASI (PW-4) met him. When they were talking with each other, a secret information was received against the accused. As informed, the accused was seen coming from the side of Village Anangpur with contraband and he was holding a bag in his right hand. He was

apprehended on the basis of suspicion. He was given a notice and also the option to be searched in presence of gazetted officer or the Magistrate. Thereafter, the search was conducted and the contraband was found to be containing 4.5 kgs. of Charas, which was separated by preparing two samples of 50 grams each and the remaining material was taken into possession. Rough site plan was prepared and the statements of witnesses were recorded. The case property along with the samples was deposited with MHC. On receipt of report of Forensic Science Laboratory, the contents of sample were found to be that of *Charas*. The accused was challaned and thereafter, the charge sheet was filed against him to which he pleaded not guilty and opted to face trial.

The prosecution examined as many as eight witnesses. Statement of accused was recorded under Section 313 Cr.P.C., wherein, he claimed false implication. The defence counsel examined Parshant Chakraworty, Assistant Director as DW-1 and Dr. Nimmi Lawrence as DW-2. On appreciation of evidence available on record, the trial Court found that the prosecution has been able to prove the charge against accused beyond reasonable doubt and as such, he was convicted for offence punishable under Section 20 of the Act and was sentenced to undergo rigorous imprisonment for a period of 10 years with a fine of Rs. one lac vide judgment dated 03.11.2003.

The said judgment of conviction and order of sentence dated 03.11.2003 is subject matter of challenge in the present appeal.

Learned counsel for the appellant submits that there is a violation of Section 50 of the NDPS Act. Learned counsel further submits that no option, whatsoever, was given to the accused appellant to be searched in presence of Magistrate, whereas, the option was necessary to be given to the accused to be searched in presence of Gazetted Officer or

the Judicial Magistrate. The recovery was made on the basis of secret information which shows that the accused-appellant has falsely been implicated in the case. It was a busy place and no independent witness was joined at the time of recovery. Even nowhere, it has been mentioned that the independent person refused to join the recovery proceedings. Learned counsel also submits that the secret information was not reduced into writing, whereas, the Investigating Officer was required to record the same in writing and it was necessary to be sent to the senior officers. Not only there is a violation of Section 50 but of Section 42 of the Act as well. It is also the argument of learned counsel for the appellant that there are serious discrepancies and contradictions in the statement of witnesses. As per statement of DW-1, the accused was picked up from his place of working and his presence in the factory has been proved from the statement of DW-2. Learned counsel also submits that the recovery was effected from various pockets but only two samples were sent. The case property was never produced before the Magistrate.

Learned counsel for the appellant has also relied upon the judgments of Hon'ble the Apex Court in cases ***Vijaysinh Chandubha Jadeja vs State of Gujarat 2011 AIR (SC) 77***, ***Kishan Chand vs State of Haryana 2013(2) SCC 502*** and judgment of this Court in case ***Nachhattar Singh vs State of Haryana 2014(1) RCR (Criminal) 490***, in support of his contentions.

Learned counsel for the respondent-State opposes the submissions made by learned counsel for the appellant and submits that the judgment of conviction is based on proper appreciation of evidence. The contradictions and discrepancies in the statements of prosecution witnesses are immaterial and minor, which normally occurs due to lapse of time. Learned counsel for the respondent-State also submits that the

alleged recovery was effected from the bag and keeping in view the quantity, it cannot be a case of false implication.

Heard the arguments of learned counsel for the parties and have also carefully gone through the record of the case.

The judgment of conviction has been challenged mainly on the ground that no independent witness was joined being a busy place and there is non-compliance of mandatory provisions of Section 42 and 50 of the Act. There are serious contradictions and discrepancies in the statement of prosecution witnesses, which makes the prosecution case doubtful. The secret information was not reduced into writing and no intimation was sent to superior officers. It is also the argument of learned counsel for the appellant that as per statement of defence witnesses, even the presence of the appellant at the place of occurrence was doubtful as he was picked up from his place of working.

On perusal of statements of prosecution witnesses, the contradictions and discrepancies are apparent. PW-1 Inspector Raj Pal has admitted in cross-examination that Village Anangpur was half a kilometre from the place of occurrence. Constable Ram Tej reached the police station at 6.45 p.m and distance between the place from where constable Ram Tej came was 8 kilometres from the police station. Similarly PW-2 Ashok Kumar, Draftsman has stated that the place of occurrence was a very busy road and SOS hospital was also nearby. He has stated that he was not aware about the distance as to whether it was 3 kilometres or 4 kilometres from the hospital. PW-3 M. Ravi Kiran, S.P. Security has stated in his statement that the distance from SOS Hospital to the place of occurrence was about 9 kilometres. He has also stated that no person from SOS hospital was summoned to join the investigation. He has also admitted in his cross examination that the secret information was not

reduced into writing and no intimation was sent to the senior officers. He has also shown his ignorance regarding the name of staff, who did the weighment and about the weight of the contraband. It has also mentioned mentioned in his statement that the seal of SHO was ring-type. It has also been admitted that there is no mention qua option of the Magistrate. He inquired from I.O with regard to not giving of any notice qua Magistrate who told that civil officer includes Magistrate. It has also been admitted that no specific offer was given to be searched in presence of Magistrate. Similarly, Rishi Pal, ASI while appearing as PW-4 has stated that only option was given to be searched in presence of gazetted officer or police. He has also admitted that no notice under Section 50 of the Act was served upon the appellant in presence of ASP. Ramesh Chand-constable has stated that the special report was being delivered to the Illaqa Magistrate, S.P., DSP and IG and it was delivered to Illaqa Magistrate at 7.00 p.m at his residence. Investigating Officer Kuldip Singh, while appearing as PW-8, has stated that the appellant was holding a bag in his right hand. It has also been admitted in cross-examination that Anangpur Chowk was a public thoroughfare and there was traffic on that road. He has also admitted that he did not reduce the secret information into writing. It has also been admitted by him that he did not send any written intimation to any senior officer. It has also been admitted that he did not give any written notice to independent person to join the recovery proceedings and no action was taken under Section 187 IPC. The Investigating Officer has also shown his ignorance about the number of packets, where, the contraband was kept.

Parshant Chakraworty, Assistant Director (Administration),  
SOS Children's Village of India, New Delhi while appearing as DW-1 has  
stated that the accused-appellant was arrested by the police on 05.08.2000

at 10.45 a.m from the Medical Centre, Anangpur and he was placed under suspension on that very day. It has also been admitted by him that the accused-appellant was posted as Watchman in Medical Centre, Anangpur. He had recognized the handwriting and signatures of Pardeep Singh on the letter of suspension, which was issued to the appellant.

Similarly, Dr. Nimmi Lawrence, Medical Officer, Herman Minor Medical Centre, SOS, Anangpur, while appearing as DW-2 has stated that the accused-appellant came on vehicle No.HR-51/A-7021 and there was an entry on the gate register to this effect. Thereafter, the appellant was taken away by the police on that very day and again, he was brought to the hospital in the same vehicle along with two more persons. One of them was Shishpal, who enquired as to why the police had come to the campus. It has also been mentioned by DW-2 that the police of Police Post Surajkund had taken search of the room of the hospital and he told the police that no room was specifically allotted to appellant—Sheo Ram. However, on making search, nothing was recovered from the possession of the accused from that place and thereafter, the police took away the appellant along with them on the evening of 05.08.2000. He had also admitted that letter dated 07.08.2000 was given to CMO about that incident on that day, which was forwarded to NCO Delhi on 08.08.2000 and on that very day, the appellant was placed under suspension from duty. He had also stated that no recovery was effected from Sheo Ram in his presence.

As per provisions of Section 42 of the Act, which are penal provisions and prescribe very harsh punishments for the offender, the question of substantial compliance of these provisions would amount to misconstruction of these relevant provisions. It is a settled position that the penal provisions, particularly with harsher punishments and with clear intendment of the legislature for definite compliance, is to be construed

strictly.

The three Judge Bench judgment of Hon'ble the Apex Court has held in ***Abdul Rashid Ibrahim Mansuri vs State of Gujarat 2000(1) RCR (Criminal) 611*** that compliance of Section 42 of the Act is mandatory and failure to take down the information in writing and sending the report forthwith to the immediate officer superior may cause prejudice to the accused.

Similarly, in three Judge Bench judgment titled as ***Sajan Abraham vs State of Kerala 2001(3) RCR (Criminal) 808***, it has been held that this provision is not mandatory and substantial compliance was sufficient. The Court further noticed that in case, there is a non-compliance of the provisions of Section 42 of the Act, it would adversely affect the prosecution case and to that extent, it is mandatory.

Similarly, while dealing with the requirement of complying with the provisions of Section 50 of the Act and keeping in view its mandatory nature, the Hon'ble Apex Court has held in case ***State of Delhi vs Ram Avtar alias Rama 2011(4) RCR (Criminal) 191***, which is as under :-

“26. The High Court while relying upon the judgment of this Court in Baldev Singh and rejecting the theory of substantial compliance, which had been suggested in Joseph Fernandez, found that the intimation did not satisfy the provisions of Section 50 of the Act. The Court reasoned that the expression “duly” used in Section 50 of the Act connotes not “substantial” but “exact and definite compliance.” Vide Ext. PW 6/A, the appellant was informed that a gazette officer or a Magistrate could be arranged for taking his search, if he so required. This intimation could not be treated as communicating to the appellant that he had a right under law, to be searched before the said authorities. As the recovery itself was illegal, the conviction and sentence has to be set aside.

27. It is a settled canon of criminal jurisprudence that when a safeguard or a right is provided, favouring the accused, compliance therewith should be strictly construed. As already held by the Constitution Bench in *Vijaysinh Chandubha Jadeja*, the theory of “substantial compliance” would not be applicable to such situations, particularly where the punishment provided is very harsh and is likely to cause serious prejudice against the suspect. The safeguard cannot be treated as a formality, but it must be construed in its proper perspective, compliance therewith must be ensured. The law has provided a right to the accused, and makes it obligatory upon the officer concerned to make the suspect aware of such right. The officer had prior information of the raid; thus, he was expected to be prepared for carrying out his duties of investigation in accordance with the provisions of Section 50 of the Act. While discharging the onus of Section 50 of the Act, the prosecution has to establish that information regarding the existence of such a right had been given to the suspect. If such information is incomplete and ambiguous, then it cannot be construed to satisfy the requirements of Section 50 of the Act. Non-compliance with the provisions of Section 50 of the Act would cause prejudice to the accused, and, therefore, amount to the denial of a fair trial.”

Hon'ble the Apex Court has held in ***Kishan Chand's*** case (supra) that when there is total and definite non-compliance of such statutory provisions, the question of prejudice loses its significance and it will *per se* amount to prejudice. It has further been held that these are inalienable, protective rights vested in a suspect and are incapable of being shadowed on the strength of substantial compliance. The purpose of these provisions is to provide due protection to a suspect against false implication and ensure that these provisions are strictly complied with. The Court has to examine the element of prejudice. It has also been held that

where the duty is absolute, the element of prejudice would be of least relevancy. Absolute duty coupled with strict compliance would rule out the element of prejudice where there is total non-compliance of the provisions.

On careful perusal of statements of prosecution witnesses, it appears that not only the contradiction is there regarding the time of occurrence but even regarding the presence of public persons and distance from the hospital and police station. It has been admitted by the Investigating Officer that the secret information was not reduced into writing and intimation was not sent to the higher officer. It has also come on record that after the alleged recovery, the Investigating Officer did not produce the accused and the case property before the Officer Incharge in terms of Section 55 of the Act. The Investigating Officer directly deposited the case property with the *malkhana* without bringing it to the notice of the incharge of the police station. Similarly, there is a non-compliance of Section 57 of the Act as the report under Section 57 of the Act was prepared but it was not sent to the superior officer. Even no such report has been proved on the file which shows that there is a non-compliance of Section 57 of the Act. It is also apparent from the statement of DWs that the appellant was arrested from his place of working as he was working as Watchman in the company, where his presence was proved. DW-1 and DW-2 have specifically stated in their statements that nothing was recovered from that place in spite of making of all efforts by the police officers, who were along with the appellant.

In view of the facts as mentioned above, it has been established that the prosecution has failed to prove its case beyond reasonable shadow of doubt.

Accordingly, the present appeal is allowed and the impugned judgment of conviction and order of sentence dated 03.11.2003 passed by

the Special Judge, Faridabad is set aside and the accused-appellant is acquitted of the charge. The appellant is stated to be on bail and as such, the bail bonds already furnished by him shall stand discharged.

09.09.2015  
**gurpreet**

(DAYA CHAUDHARY)  
JUDGE