

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

**CRA-S-1026-SB of 2004
Date of Decision : 30.9.2015**

Jagdish Singh alias Disha

.....Appellant

Versus

State of Punjab

.....Respondent

CORAM:- HON'BLE MR. JUSTICE GURMIT RAM

Present: Mr. Imran Farooqi, Advocate for
Mr. D.S. Pheruman, Advocate for the appellant.

Mr. A.S. Klar, AAG, Punjab.

GURMIT RAM, J.

Vide this appeal the above-said appellant Jagdish Singh alias Disha has challenged the judgment and order of sentence dated 15.4.2004 passed by the learned Special Judge, Amritsar in criminal case bearing FIR No.53 dated 27.3.2003, Police Station 'A' Division, Amritsar, vide which the appellant (accused) was held guilty for the offence punishable under Section 21 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (in short – the Act) and convicted thereunder with the sentence as detailed below:-

“Rigorous imprisonment for a period of six months along with a fine of Rs.1,000/-. In default of payment of fine, to further undergo rigorous imprisonment for fifteen days”.

2. The case of the prosecution, in nutshell as put forth before

the learned trial Court was that on 27.3.2003, ASI Shivdarshan Singh, Incharge, Police Post, Maqboolpura, Police Station 'A' Division, Amritsar along with other police officials was present in the area of twin crossing, New Golden Avenue, in connection with patrolling and checking of bad elements. On seeing the police party, one *Sikh* gentleman who was standing by the side of *rehries* ran towards New Golden Avenue and he was apprehended by the police on the basis of suspicion. In the meantime, one Baljit Singh alias Billa son of Lakhbir Singh, resident of Gali No.8, Krishna Nagar, Amritsar met the police and he was joined in the police party. During interrogation, the above-said person told his name as Jagdish Singh @ Disha, the present appellant, who was holding a bag of small size in his right hand, which was checked as usual. During its search, smack wrapped in a glazed paper was recovered, out of which 5 gms. were taken out as a sample and the remaining was found to be 5 gms. on weighment. The sample smack and the residue smack were put into different plastic *dabbis*, the parcels of which were prepared by sealing the same with the seal of 'SS' and the same were taken into police possession. Sample seal was prepared separately. Seal after use was handed over to said private witness Baljit Singh by the Investigating Officer. The accused could not produce the licence for keeping the above-said narcotics in his possession. So, ruqqa was sent to the police station, on the basis of which the instant case was registered. Accused was formally arrested in this case after disclosing him the grounds of his arrest. Personal search of the accused was also conducted and a memo in this regard was prepared. Site-plan of the place of recovery was prepared.

On returning to the police station, the case property along with the accused was produced before the SHO Police Station 'A' Division, Amritsar. On completion of investigation and on receipt of report of the Chemical Examiner, challan in this case was presented before the Court of Special Judge, Amritsar.

3. Compliance of the provisions of Section 207 of Cr.P.C. was made.

Since a case under Section 21 of the Act was found to have been made out against the appellant (accused), he was charge-sheeted accordingly by the learned trial Court, to which, he pleaded not guilty and claimed trial.

4. During trial, the prosecution examined four PWs in all to prove its version against the accused.

5. Then the accused was duly examined as per the provisions of Section 313 of Cr.P.C. Entire incriminating evidence as brought on the file against him during trial of the case was put to him, which was denied by him entirely. Further he pleaded his innocence and took the plea that nothing was recovered from him and that he had been involved in this case falsely. He did not lead any evidence in his defence.

6. The learned trial Court after hearing the learned counsel for both the parties and going through the record as well held the accused guilty under Section 21 of the Act and convicted him thereunder accordingly vide the impugned judgment and order of sentence.

7. Appellant being not satisfied with the impugned judgment and order of sentence has come up in the instant appeal before this Court,

notice of which was given to the respondent – State. Trial Court record was also requisitioned.

8. I have heard the learned counsel for the appellant, learned State counsel and have also gone through the record with their able assistance.

9. Learned counsel for the appellant has contended that there is violation of the provisions of Section 50 of the Act in this case on the part of the prosecution and as such the entire prosecution version as alleged is vitiated and the same cannot be accepted. Herein he has submitted that before conducting the search of the bag of the accused, he was not given any offer by informing him that he has a right for his search either before any Magistrate or any gazetted officer and as such on this ground, the prosecution case as alleged is legally defective. Then in this regard, it is further his submission that it is also a case of prosecution that after the alleged search of the bag of the appellant, the police party headed by ASI Shiv Darshan Singh had also conducted the personal search of the accused and in that eventuality, compliance of the provisions of Section 50 of the Act was mandatory which in the present case had not been made by the above-said police party. In support of his contention, he has referred to case law as laid down by Hon'ble Apex Court in **Vijaysinh Chandubha Jadeja Versus State of Gujarat, 2011(1) SCC 609**. In para No.16 of this authority, it was observed by the Hon'ble larger Bench of the Apex Court that at this stage, we must state that the issue before us in terms of the referral order is not about the applicability of Section 50 of the Act per se but it is confined to the scope and width of the expression

“if the person to be searched so requires” as figuring in sub-section (1) of the said Section. Therefore, we deem it unnecessary to evaluate the submissions made the learned counsel regarding the applicability of the rigours of Section 50 of the Act when a search of the suspect is conducted by an officer empowered under Section 41 of the said Act. We may, however, add that while considering the question of compliance with Section 50 of the Act, the Constitution Bench in **State of Punjab Versus Baldev Singh, 1999(3) R.C.R.(Criminal) 533** considered the provisions of Section 41 as well.

After analyzing the entire law on this point, Hon'ble Larger Bench of the Apex Court answered the above-said reference as under:-

We are of the firm opinion that the object with which right under Section 50(1) of the Narcotic Drugs and Psychotropic Substances Act, by way of a safeguard, has been conferred on the suspect, viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that so far as the obligation of the authorised officer under sub-section (1) of Section 50 of the Narcotic Drugs and Psychotropic Substances Act is concerned, it is mandatory and requires a strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search.

10. So far the case law **2011(1) SCC 609** cited supra is

concerned, it was relating to a case in which the alleged recovery of narcotics was effected from the personal search of the accused person, but in the case in hand, the alleged recovery of narcotics was made from the bag of the accused which he was holding in his right hand and not from his personal search. So this case law has no applicability to the case in hand.

11. Then the learned counsel for the appellant in support of his above contention has referred to another authority of Hon'ble Apex Court as laid down in **Myla Venkateswarlu Versus State of A.P., 2012(3) R.C.R.(Criminal) 72.** In this case as per its facts the alleged recovery of *ganja* was effected from the personal search of the appellant (accused). So principle laid down in this case law also cannot be attracted to the case in hand since in the present case the alleged recovery of smack was effected from the bag of the accused as above-said and not from his personal search.

12. On the other hand, learned counsel for the respondent – State has also strongly argued that the case in hand does not fall within the provisions of Section 50 of the Act, since no incriminating article was recovered from the accused during his personal search, rather the alleged recovery of narcotics was effected during the search of his bag which he was holding in his right hand. In support of his contention, he has relied upon an authority of Hon'ble larger Bench of the Apex Court as laid down in **State of Punjab Versus Baldev Singh** (supra). In para No.11 of this authority, the Hon'ble Apex Court after dealing with the above-said proposition at length has laid down as under:-

On its plain reading, Section 50 would come into play only in the case of a search of a person as distinguished from search of any premises etc. However, if the empowered officer, without any prior information as contemplated by Section 42 of the Act makes a search or causes arrest of person during the normal course of investigation into an offence or suspected offence and on completion of that search, a contraband under the Narcotic Drugs and Psychotropic Substances Act is also recovered, the requirements of Section 50 of the Act are not attracted.

In the case in hand also, the alleged recovery of narcotics was made per chance without any prior information.

13. Then the learned State counsel has also cited another authority of Hon'ble Apex Court titled as **Krishan Kumar Versus State of Haryana, 2014(3) R.C.R.(Criminal) 170**. In this case the alleged recovery of 5 kgs. of opium was effected from the bag of the accused. It was held that provisions of Section 50 of the Act will not apply in such a case. This section is applicable only where search of a person is involved.

Then in the case in hand also, it has come in the statement of PW1 ASI Shivdarshan Singh, the Investigating Officer as well as of PW3 HC Gurinder Singh that the alleged recovery of narcotics was made from the bag of the accused during its search.

14. In the light of above discussion, it is held that recovery of the case in hand does not fall within the provisions of Section 50 of the Act since it was not made from the personal search of the accused, but rather from his bag. Resultantly, the above contention of learned counsel for the appellant stands declined and disposed of accordingly.

15. Then it is also contended by learned counsel for the appellant that in the case in hand after the search of bag of the accused, his personal search was also conducted and due to this reason, provisions of Section 50 of the Act were required to be complied with. In support of his contention he has referred to memo Ex.PB which was prepared with regard to personal search of the accused which led to the recovery of currency notes of Rs.120/-. This fact of personal search of the accused is not denied by the learned State counsel. The learned counsel for the appellant in support of his above contention has referred to a case law as laid down by the Hon'ble Apex Court in **State of Rajasthan Versus Parmanand and another, 2014(2) Law Herald (SC) 913**. In this case also after the search of the bag of the accused, the personal search of the accused was also conducted. It was held that if the bag carried by the accused is searched and his person is also searched, then Section 50 of the Act is to be applicable.

16. In the case in hand, during the search of bag of the accused, the alleged narcotics weighing 10 gms. was recovered. Then during the personal search of the accused which was subsequent to the search of his bag, nothing objectionable was recovered from his possession. Had any objectionable substance (narcotic) been recovered during his personal search without giving him any offer as required under Section 50 of the Act, then in that eventuality, the entire process pertaining to his personal search and as well as the recovery, if any, would be vitiated due to non-compliance of the provisions of Section 50 of the Act. When nothing objectionable was recovered during the

personal search of the accused after the search of his bag etc., then the recovery of narcotics made from his bag cannot be said to be vitiated due to non-compliance of the provisions of said section. Moreover, so far as the personal search of the accused after the recovery of narcotics from his bag etc. is concerned, the same is done not under the provisions of NDPS Act. The said search of the person concerned is usually made under the relevant police rules i.e. Rule 26.3., Volume III, Punjab Police Rules, 1934 as applicable to Punjab State in order to ensure that he is not having any weapon or any other poisonous substance in his possession because in the police station, he is to be kept in lock-up till he is produced before the Court. If for instance he is having any weapon in his possession then he can cause any injury to the members of the police party to facilitate his escape from the police custody by using that weapon. If he has any poisonous substance in his possession when put up in lock up, then he may commit suicide by consuming the same. In both the eventualities, the interest of the police is at stake for the reason that if any person dies in the police custody then the concerned police officials are to face inquiries qua his death and even sometimes the trial of the case before the Court of law. If any accused succeeds to escape from police custody, then the officials concerned are to face disciplinary proceedings. In the case in hand, there is nothing on record to say that the alleged personal search of the appellant was conducted under the provisions of NDPS Act. So the case in hand is not squarely covered within the purview of the above-said case law.

17. Then all the witnesses examined by the prosecution were

official witnesses. There is neither any provision of law nor any precedent to examine any independent witness in order to corroborate the statements of official witnesses for the success of case of prosecution. There is nothing on the record to show that the witnesses examined by the prosecution during the trial of the case were either inimical to the accused or they had any other ulterior motive or consideration to secure his conviction. Herein learned State counsel has cited an authority of the Hon'ble Apex Court as laid down in **Kulwinder Singh and anr. Versus State of Punjab, 2015(6) SCC 674**. In this case, two independent witnesses were joined in the police party but they were not examined being won over by the accused, rather they appeared in the defence. In this authority, it was held as under:-

(i) The case of the prosecution cannot be rejected solely on the ground that independent witnesses have not been examined when, on the perusal of the evidence on record the Court finds that the case put forth by the prosecution is trustworthy.

(ii) When the evidence of the official witnesses are trustworthy and credible, there is no reason not to rest the conviction on the basis of their evidence.

(iii) What is necessary for proving the prosecution case is not the quantity but the quality of the evidence.

18. Then it is also contended by learned counsel for the appellant that in the case in hand only one sample of smack was taken from the bulk and whereas as per the provisions of notification of Government of

India, two samples are required to be taken from the bulk and on this ground also, the prosecution version is not tenable due to non-compliance of the provisions of this notification. But it to note that in the case in hand, the alleged recovery of narcotics was merely of 10 gms. So if two samples weighing 5 gms. each were taken out from the alleged recovery, then nothing was to be left behind for producing in the Court as the case property. So in the light of the above peculiar facts of this case, it is difficult to hold that the case of prosecution is defective due to the non-compliance of the provisions of above-said notification of Government of India.

19. Then in this case the recovery was dated 27.3.2003 and the sample parcel was deposited in the office of Chemical Examiner on 2.4.2003 and as such there was a delay of six days in depositing the sample in the said office from the date of its recovery, which cannot be said to be fatal to the case of prosecution. On the back of the report of Chemical Examiner Ex.PH, there is an endorsement that seal of exhibit was intact on arrival and agreed with the specimen seal sent. So it is not a case in which it could be said that the contents of sample parcel were tampered with by anybody during the transit period till its depositing in the office of Chemical Examiner. Moreover, such a delay of six days in depositing the sample parcel in the office of Chemical Examiner seems to be natural as the police authorities are also to discharge many other functions such as maintenance of law and order, investigation of cases, to apprehend the criminals, to appear in the Court as witnesses and to produce the accused in the Court for the purpose of remand etc. etc.

20. So far the prosecution evidence is concerned, PW1 ASI Shivdarshan Singh, the Investigating Officer deposed about the recovery of the narcotics in question from the bag of the accused during its search which after necessary formalities was taken into police possession vide memo Ex.PA. Further he also proved the memo Ex.PB, which was prepared regarding the personal search of the accused, site-plan of the place of recovery Ex.PC, ruqqa Ex.PD, FIR Ex.PD/1 and the memo Ex.PE vide which accused was arrested. Then it was also in his statement that on returning to police station, he produced the accused as well as case property before SI/SHO Davinder Singh, who affixed his seal bearing impressions 'DS' on the case property as well as the sample seal.

The said Davinder Singh SI appeared as PW2. It was in his statement that on 27.3.2003, he was posted as SHO of Police Station, Ram Bagh and on that date, accused as well as the case property of this case were produced before him by ASI Shivdarshan Singh. He put his seal of 'DS' on the case property as well as on sample seal and took the same into his possession vide memo Ex.PG. On the next day, he produced the accused along with the case property before the Magistrate.

PW3 HC Gurinder Singh was one of the members of police party headed by ASI Shivdarshan Singh on the date of alleged recovery and the alleged recovery of narcotics was effected in his presence from the bag of the accused during its search. He also proved the recovery memo Ex.PA, personal search memo Ex.PB and case property Ex.P1.

PW4 Constable Manohar Lal took the sample parcel of this case and deposited the same in the office of Forensic Science Laboratory,

Chandigarh on 2.4.2003. His affidavit as a part of his statement was Ex.PJ.

21. In the light of above discussion, there is nothing on the record to make any kind of interference in the impugned judgment. So the impugned judgment holding the appellant guilty under Section 21 of the Act is upheld and the appeal stands dismissed.

22. Then it is also a fact that this case is pending since the year March, 2003. Since then a period of more than 13 years has already elapsed. So keeping in view these facts and the recovery of narcotics in question, the Court is of the opinion that the ends of justice in this case would squarely meet, if the appellant is awarded with the sentence of imprisonment he has already undergone. So the quantum of sentence regarding substantive sentence of imprisonment is modified accordingly. However, the impugned order qua the fine is upheld, so the appellant is directed to pay the amount of fine of Rs.1,000/- within twenty one days from today, if not paid earlier, failing which, he be taken into custody and put behind the bar for undergoing the sentence of simple imprisonment for 15 days due to non-payment of fine.

23. In view of the above, this appeal stands disposed of.

Intimation be sent to the quarter concerned for strict compliance.

30.9.2015
Brij

(GURMIT RAM)
JUDGE

1. To be referred to the Reporters or not? Yes
2. Whether the judgment should be reported in the Digest? Yes