

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

Crl. Appeal-S No.1132-SB of 2015 (O&M)

Date of Decision: May 29, 2015.

Zile Singh

.....APPELLANT.

VERSUS

State of Haryana

.....RESPONDENT.

CORAM:- HON'BLE MR. JUSTICE SURINDER GUPTA

Present: Mr. Gaurav Mohunta, Advocate
for the appellant.

Mr. P.S. Sullar, D.A.G. Haryana.

SURINDER GUPTA, J.

Appellant Zile Singh was convicted for the offence punishable under Section 20(b) of Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act) and sentenced to undergo rigorous imprisonment for five years and to pay a fine of ₹40,000, in default thereof, to undergo further imprisonment for a period of two years.

2. As per the prosecution case, Sub Inspector Ram Chander of Police Station Sadar Gohana was present at Bus Stand of village Bichpari, where he received a secret information that appellant Zile Singh was habitual of selling charas and was present near the watercourse. The informer apprised the police party that appellant was selling charas at that time also

and if a raid is conducted, charas can be recovered from him. On receipt of secret information, police party immediately rushed towards village Bichpari and on indication of the informer, apprehended the appellant. The appellant was apprised of the suspicion of Investigating Officer about some contraband in his possession and served with notice Ex.PA which reads as follows:-

“You may be in possession of charas or some other intoxicant for which your search is to be conducted. You can get yourself searched by me or some other gazetted police officer or some other gazetted officer”.

3. Vide opinion Ex.PB, appellant opted for his search to be conducted before some civil gazetted officer.
4. On message, Sanjay Bishnoi, Tehsildar, Gohana reached the spot. He verified the facts of the case. After conducting search of SI Ram Chander, he asked him to search the appellant. From the right side pocket of pant of appellant, charas wrapped in glaze paper was recovered which on weighing, came to be 500 grams. A sample of 50 gms of charas was separated and sealed with the seal of Investigating Officer. The remaining charas was also put in a parcel and sealed with seal 'RC' and was taken into possession vide recovery memo Ex.PC, ruqa Ex.PD was sent to Police Station Sadar Gohana, whereupon formal FIR Ex.PD/1 was recorded by Head Constable Ramesh Chand. Rough site plan (Ex.PE) of place of recovery was prepared. The sealed parcels along with the appellant were later on produced before Sub Inspector/SHO Vijender Singh, who also fixed

his own seal bearing impression 'VS' on the sealed parcels. The sample was later on sent to Forensic Science Laboratory, Haryana, Madhuban and found to be that of charas vide report (Ex.PG).

5. On completion of investigation, challan against the appellant was presented in the Court. After completion of required formalities and finding a prima facie case for the offence punishable under Section 20(b) of NDPS Act, the appellant was charge-sheeted to which he pleaded not guilty and claimed trial.

6. In support of its case, prosecution examined SI/SHO Vijender Singh as PW1, Head Constable Dharam Singh as PW2, ASI Parvesh Kumar as PW3, Sub Inspector Ram Chander, Investigating Officer as PW4, Constable Nain Pal PW5, Head Constable Ramesh Chander PW6 and Shri Sanjay Bishnoi, Tehsildar, Gohana as PW7.

7. On completion of prosecution evidence, statement of appellant under Section 313 Cr.P.C. Was recorded, wherein he refuted the allegations levelled against him and pleaded his false implication. He did not examine any witness in defence.

8. During the course of arguments, the defence counsel raised following points before the trial Court:-

- (i) the prosecution case suffers from material discrepancies;
- (ii) SI Ram Chander being complainant, was not entitled to investigate the case;
- (iii) no independent witness was joined during investigation of the case; and

(iv) the provisions of Section 50 NDPS Act were not complied and the offer of search given to the appellant suffered from material discrepancy to the effect that he was not apprised to get himself searched before a Magistrate.

9. All the above contentions raised by learned defence counsel were discarded by the trial Court.

10. Learned counsel for the appellant while reiterating the above arguments, has argued that in this case there is non-compliance of Section 42 NDPS Act as the secret information received by Investigating Officer was not reduced into writing and no information was sent to the Senior Officer. There is delay of 18 days in sending the samples, which has not been explained.

11. Learned State counsel has argued that the police party was not present in the police station but it was present at Bus Stand of village Bichpari and it immediately rushed to the place where the appellant was present and indulging in sale of narcotic substance. In these circumstances, non-compliance of Section 42 NDPS Act is not made out. The Investigating Officer has specifically stated that no one was willing to join the investigation at the spot and it is usually seen that the people avoid becoming police witness against their co-villager or against the person indulging in anti-social activities. The reason for this is quite obvious as they always want to avoid the feeling of insecurity for themselves or for their family. The contradictions referred in this case are quite immaterial and have been rightly discarded by the trial Court. About the delay of 18 days in sending the

samples, learned State Counsel has argued that the samples were received intact in the office of FSL, Madhuban and delay in no manner has caused any prejudice to the appellant. On non-compliance of Section 50 NDPS Act, learned State counsel has argued that the appellant was apprised of his right to get himself searched before some police or civil gazetted officer, however, in the memo (Ex.PA), the word 'Magistrate' is missing but the Magistrate is also a civil gazetted officer and the search of the appellant was also conducted before a Magistrate, as such, the provisions of Section 50 NDPS Act were duly complied with and the appellant has not been put to any prejudice due to non mentioning of word 'Magistrate' in the offer memo (Ex.PA).

12. To deal with the respective submissions of learned counsel for the appellant and learned State counsel, the points raised are discussed as follows:-

Contradictions in the statements of prosecution witnesses:

13. The contradictions pointed out in the statements of prosecution witnesses are that PW2 Head Constable Dharam Singh had deposed that they received the secret information at about 2.30 PM and reached the spot within 15 minutes while SI Ram Chander PW4 had stated that they reached Bus Stand of village Bichpari at about 03.30 PM and received secret information after 15 minutes. PW2 Dharam Singh stated that Constable Suresh Kumar was sent to village to bring some respectable persons to the spot, who returned and informed that nobody from the village was ready to join the investigation, while SI Ram Chander PW4 had deposed that Constable

Suresh was sent to the village to bring Sarpanch, Chowkidar or Lamberdar only but he on return informed that they were not available in the village. PW2 HC Dharam Singh stated that they remained at the spot upto 07.45 PM while SI Ram Chander PW4 had stated that they returned from the spot at about 07.00 PM. The above discrepancies were rightly discarded by the trial Court terming the same as minor discrepancies. The material fact is that the appellant was apprehended on 11.10.2003. The discrepancies about the time when the secret information was received and when the accused was apprehended are not material discrepancies which go to the root of the case or render the testimony of the prosecution witnesses unworthy of reliance. Such type of discrepancies do occur in the statements of the prosecution witnesses and I find no reason to differ with the view taken by the trial Court.

SI Ram Chander being complainant was not entitled to investigate the case.

14. S. 51 of the N.D.P.S. Act provides as follows:

"51. Provisions of the Code of Criminal Procedure, 1973 to apply to warrants, arrest, searches and seizures.-The provisions of the Code of Criminal Procedure, 1973 (2 of 1974) shall apply, in so far as they are not inconsistent with the provisions of this Act, to all warrants issued and arrested, searches and seizures made under this Act."

15. In *State of Punjab v. Balbir Singh (AIR 1994 SC 1872)*,

Hon'ble Supreme Court observed as follows:

"Consequently the provisions of the Cr.P.C. shall be applicable in so far as they are not inconsistent with the NDPS Act to all warrants, searches, seizures or arrests

made under the Act. But when a Police Officer carrying on the investigation including search, seizure or arrest empowered under the provisions of the Cr.P.C. comes across a person being in possession of the narcotic drugs or psychotropic substances then two aspects will arise. If he happens to be one of those empowered officers under the NDPS Act also then he must follow thereafter the provisions of the NDPS Act and continue the investigation as provided thereunder. If on the other hand, he is not empowered then the obvious thing he should do is that he must inform the empowered officer under the NDPS Act, who should thereafter proceed from that stage in accordance with the provisions of the NDPS Act."

16. The position of law, which emerges from the judgment of **Balbir Singh's case (supra)** is that it is only the empowered officer who can conduct the investigation and if an empowered officer comes across a person begin in possession of the narcotic drug or psychotropic substances and had made the search, seizure and arrested the accused under the Act then he can proceed with the investigation. It is not necessary, as per the view taken by the Hon'ble Supreme Court that some other officer should proceed with the investigation and the person, who has made the search or seized the article or arrested the accused or lodged the report, becomes disentitled to carry on the further investigation. The officer who has seized the article, arrested the accused and lodged the report, can be said to be a 'complainant' only in a technical sense.

17. In view of the above settled proposition of law, this argument of learned counsel for the appellant that case of the prosecution suffers on this

account is also without any merit and this argument was also rightly rejected by the trial Court.

Non-joining of independent witness:-

18. Learned counsel for the appellant has argued that the independent witnesses from the public were available nearby but were not joined in the investigation. He has relied upon the observations in case of ***Swaroop Singh Vs. State of Haryana 2014(2) RCR (Criminal) 571*** and ***Ajaib Singh Vs. State of Punjab 2014(1) DC (Narcotics) 457***.

19. In the case in hand, the police party was present at the Bus Stand, Bichpari and on receipt of secret information, immediately rushed to the spot, where the appellant was allegedly selling the narcotics. One Head Constable was sent to nearby village to call an independent witness but he returned empty handed and told that nobody was willing to join the investigation. The prosecution version is supported not only by the Investigating Officer but also by Head Constable Dharam Singh PW2 and Tehsildar Gohana Mr. Sanjay Bishnoi PW7.

20. The observations about the independent witness made in the cases referred by learned counsel for the appellant are not applicable to the facts and circumstances of the present case. In case of ***Swaroop Singh Vs. State of Haryana (supra)***, independent witness was joined but not examined. Keeping in view the fact that seal was handed over to him and in view of other material discrepancies in prosecution case, the benefit of acquittal was allowed to the convict. In case of ***Ajaib Singh Vs. State of Punjab (supra)*** this Court, while looking into the aspect of non-joining of independent

witness, had discarded the prosecution case on other material factors and not for non-joining of independent witness only. Relevant observations in para 8 and 9 in that case are reproduced as follows:-

“8. The non-joining of independent witness is not such a circumstance which reflect on the prosecution story or is a fact which render the official witnesses totally unreliable. In this case the police party had joined Garja Singh as independent witness. He has not been examined in this case and was given up as having been won over by the appellant. Inspector Randeep Singh while appearing as PW-5 has stated regarding the joining of Garja Singh as follows :-

“Before the arrival of DSP, Garja Singh had come and he was joined by us. However, when I recorded the statement of accused, Garja Singh was not present.”

9. Statement of appellant recorded by the police before the arrival of DSP is Ex.PD vide which he was given option for his search before a gazetted officer or a Magistrate. The perusal of this memo shows that it bears the signatures of Garja Singh as witness. If Garja Singh was not present when the statement of appellant Ex.PD was recorded, his signatures on this memo creates further suspicion regarding the whole conduct of investigation in this case. The non-joining of independent witness from the nearby locality may not affect the case of the prosecution but the fact that the prosecution has shown the presence of an independent witness, who as per the Investigating Officer was not available at the time of recording the memo Ex.PD, totally shatters the prosecution version in this case.”

21. The recovery in this case was effected in the presence of

Tehsildar Sanjay Bishnoi, who has stepped into witness box as PW7 and fully supported the prosecution case and nothing could be brought out in his cross-examination to shatter the prosecution story. His testimony, being a Magistrate as well as responsible gazetted officer carries weight of an independent witness and cannot be discarded on the mere ground that the prosecution has failed to examine any independent witness. It was also disclosed in the statement of prosecution witnesses that attempts made to join the independent witness could not bear any fruit as nobody was willing to join the police party. Otherwise, it is usually found that independent witnesses avoid joining the police party for the reasons that nobody wants to invite wrath of a co-villager or a dealer in narcotics as for everyone it is the peace and security of himself and his family members, which is of paramount importance.

22. The Hon'ble Division Bench of this Court in the case of ***Ramesh Kumar Versus State of Punjab, 2013(4) RCR (Criminal) 320***, has observed that the testimony of official witnesses cannot be discarded until it is proved that they have any animus or hostility against the accused for his false implication. While discussing the question of non-joining of the independent witnesses, it was observed that they are averse to join the police and depose in favour of prosecution as they are afraid of the fact that joining the police and deposing in favour of the prosecution may expose them to serious consequences. Hon'ble Division Bench in para 21 of the judgment observed as follows:

“21. It was held by the Hon'ble Supreme Court

of India in *Ajmer Singh v. State of Haryana, 2012(2) RCR (Criminl) 132: 2010(2) Recent Apex Judgments (R.A.J.) 13: 2010(2) JT 175*; though in cases like the case in hand, independent evidence is required, but accused cannot be acquitted merely because no independent witness produced. Hence conviction was upheld inter alia on said ground. So, the contention raised by the learned counsel for the appellant to the effect that evidence of PW-5 (HC Sham Lal) and PW-7 (ASI Jai Kishan) cannot be relied upon for want of corroboration by the evidence of independent witness, is repelled, in view of the judgment (supra).”

23. In the case of *Sumit Tomar versus State of Punjab, 2013(1) SCC 395*, Hon’ble Supreme Court on the point of non-examination of independence witness joined by the police, has observed as follows:

“In view of the above discussion, we hold that though it is desirable to examine independent witness, however, in the absence of any such witness, if the statements of police officers are reliable and when there is no animosity established against them by the accused, conviction based on their statement cannot be faulted with. On the other hand, the procedure adopted by the prosecution is acceptable and permissible, particularly, in respect of the offences under the Narcotic Drugs and Psychotropic Substances Act.”

24. In view of what has been discussed above, non-joining of independent witness is not a circumstances, which can be given weightage in the facts and circumstances of this case.

Delay in sending the samples to Forensic Science Laboratory

25. The sample in this case was sent to the chemical examiner after 18 days of the recovery. The seals were intact when the samples were received in the office of FSL. The delay of 18 days in sending the sample is immaterial or not fatal to the case of prosecution. Hon'ble Supreme Court in the case of ***Jarnail Singh Vs. State of Punjab* 2011 (3) SCC 521**, has observed that the delay of 12 days in sending the sample is not fatal to the case of the prosecution. HC Ramesh Chander, with whom the case property was deposited by SI Ram Chander, while appearing as PW6, has stated that he kept the case property intact during the period it remained in his possession. He was not even cross-examined on this point by the defence counsel. Constable Nain Pal, who had taken the sample to the office of chemical examiner, while appearing as PW5 has stated by way of his affidavit Ex.PF that he kept the sample intact during the period it remained in his custody.

26. In view of the above circumstances the delay in sending the samples to the chemical examiner pales into insignificance and the argument of learned counsel for the appellant, in this respect, is rejected.

Non-compliance of Section 42 NDPS Act.

27. The provisions of Section 42 NDPS Act relates to the contraband kept concealed in a building, conveyance or enclosed place. Reference can be made to ***Krishan Kanwar (Smt.) Alias Thakuraeen Vs. State of Rajasthan* 2004(2) SCC 608**.

28. Section 42 (2) NDPS Act applies to the information received by the police qua one of three places mentioned in Section 42 (1) (a) NDPS Act.

The information relating to a person carrying a narcotic at a public place, does not fall within the scope of provisions of Section 42 NDPS Act, as such, non-compliance of the same in this case is not fatal to the prosecution case.

29. Learned counsel for the appellant has referred to the observations of Hon'ble Supreme Court in case titled as ***Rajender Singh Vs. State of Haryana, 2011(3) R.C.R. (Criminal) 856***, wherein non-compliance of provisions of Section 42 (1) and (2) NDPS Act was held as impermissible. In that case, the information related to the search of contraband in the shed used for storing fodder in the farmhouse of the accused. The recovery was also effected after opening the lock of the fodder room. In the instant case, the recovery was effected from the appellant at a public place near the watercourse. This contention of learned counsel for the appellant raised in this appeal is, as such, rejected.

Non-compliance of Section 50 NDPS Act

30. It is here that the prosecution has failed to meet with the mandatory requirements of Section 50 NDPS Act, which lays down the manner in which search of the person of accused suspected of carrying some contraband is to be effected. Perusal of the notice (Ex.PA) served upon the appellant under Section 50 NDPS Act shows that he was apprised that he can opt for his search to be conducted by the Investigating Officer SI Ram Chander, some gazetted police officer or some other gazetted officer.

31. Here a question which arises for consideration is as to whether the above option is sufficient compliance of provisions of Section 50 NDPS Act. A Constitution Bench of Hon'ble Supreme Court in case of ***Vijaysinh***

Chandubha Jadeja Vs. State of Gujarat, 2011(1) SCC 609 examined the scope and width of the provisions of Section 50 NDPS Act and observed as follows:-

“16. At this juncture, we must state that the issue before us in terms of the referral order is not about the applicability of Section 50 of the NDPS Act per se but 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 by the learned counsel regarding the applicability of the rigors of Section 50 of the NDPS 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 NDPS Act, the Constitution Bench in ***Baldev Singh (supra)*** considered the provisions of Section 41 as well. It observed as under :-

'8. Section 41 of the NDPS Act provides that a Metropolitan Magistrate or a Magistrate of the First Class or any Magistrate of the Second Class specially empowered by the State Government in this behalf, may issue a warrant for the arrest of and for search of any person whom he has reason to believe to have committed any offence punishable under Chapter IV. Vide sub-section (2) the power has also been vested in gazetted officers of the Departments of Central Excise, Narcotics, Customs, Revenue Intelligence or any other department of the Central Government or of the Border Security Force, empowered in that behalf by a general or special order of the State Government to arrest any person, who he has reason to believe to have committed an offence punishable under Chapter IV or to search any person or conveyance or vessel or building etc. with a view to seize any contraband or document or other article which may furnish evidence of the commission of such an offence, concealed in such building or conveyance or vessel or place.'

17. In the above background, we shall now advert to the controversy at hand. For this purpose, it would be necessary to recapitulate the conclusions, arrived at by the Constitution Bench in Baldev Singh's case (supra). We are concerned with the following conclusions:-

57. (1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the person concerned of his right under sub-section (1) of Section 50 of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.

(2) That failure to inform the person concerned about the existence of his right to be searched before a gazetted officer or a Magistrate would cause prejudice to an accused.

(3) That a search made by an empowered officer, on prior information, without informing the person of his right that if he so requires, he shall be taken before a gazetted officer or a Magistrate for search and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act.

(4) xxxxxxxxxxxxxxxxxxxxxxxxx

(5) That whether or not the safeguards provided in Section 50 have been duly observed would have to be determined by the court on the basis of the evidence led at the trial. Finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of Section 50 and, particularly, the safeguards

provided therein were duly complied with, it would not be permissible to cut short a criminal trial.

*(6) That in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Section 50 are mandatory or directory, **but hold that failure to inform the person concerned of his right as emanating from sub-section (1) of Section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law.***

(7) That an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search.'

18. Although the Constitution Bench did not decide in absolute terms the question whether or not Section 50 of the NDPS Act was directory or mandatory yet it was held that provisions of sub-section (1) of Section 50 make it imperative for the empowered officer to "inform" the person concerned (suspect) about the existence of his right that if he so requires, he shall be searched before a gazetted officer or a Magistrate; failure to "inform" the suspect about the existence of his said right would cause prejudice to him, and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on

the basis of the possession of the illicit article, recovered from the person during a search conducted in violation of the provisions of Section 50 of the NDPS Act. The Court also noted that it was not necessary that the information required to be given under Section 50 should be in a prescribed form or in writing **but it was mandatory that the suspect was made aware of the existence of his right to be searched before a gazetted officer or a Magistrate, if so required by him. We respectfully concur with these conclusions. Any other interpretation of the provision would make the valuable right conferred on the suspect illusory and a farce.**”

32. Hon'ble Apex Court authentically observed that 'we have no hesitation in holding that in so far as the obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS 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.'

33. Perusal of the notice given under Section 50 NDPS Act as reproduced in para 2 reveals that this notice is short of compliance of the provisions of Section 50 NDPS Act which require to apprise the suspect of his right to get his search conducted before a gazetted officer of any of the department mentioned in Section 42 or nearest Magistrate. The mere fact that the gazetted officer i.e. Tehsildar, who was called at the spot to conduct the search also happened to be an Executive Magistrate, in no manner, fulfill

the lacuna left by the Investigating Officer.

34. As per observations of Hon'ble Supreme Court in case of ***Vijaysinh Chandubha Jadeja Vs. State of Gujarat(supra)***, the appellant was not informed about the existence of his right to get him searched before a Gazetted Officer or a Magistrate and this has caused prejudice to him, thereby rendering the recovery of narcotic from the possession of appellant as illicit.

35. In case of ***Abdul Rehiman Vs. State of Kerala 2002(4) SCC 229***, the search conducted before the gazetted officer or senior officer was held to be invalid compliance of provisions of Section 50 NDPS Act. It was held that the compliance of the provisions of Section 50 NDPS Act was mandatory and its non-compliance in true letter and spirit render the prosecution version that recovery of narcotic drug was effected from the appellant, as not in consonance with the dictum of Hon'ble Apex Court in case of ***Vijaysinh Chandubha Jadeja Vs. State of Gujarat (supra)*** and ***State of Punjab Vs. Baldev Singh 1999(3) RCR (Criminal) 533***.

36. Having failed to comply with provisions of Section 50 NDPS Act, in its true spirit, as discussed above, the recovery made from the person of appellant in this case was illicit and vitiate his conviction. This appeal has merits and the same is accepted. Judgment of conviction and order of sentence recorded by the trial Court is set aside. The appellant is acquitted of the charge framed against him.

May 29, 2015.
Sachin M.

(SURINDER GUPTA)
JUDGE