

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

CRA-S-1392-SB-2004 (O&M)
Date of decision : 21.08.2015

Jagtar Singh

...Appellant

V/S

State of Punjab

...Respondent

CORAM: HON'BLE MR. JUSTICE JITENDRA CHAUHAN

Present: Mr. Gurcharan Dass, Advocate with
Mr. Hardev Singh Kaler, Advocate
for the appellant.

Mr. Luvinder Sofat, AAG, Punjab

JITENDRA CHAUHAN, J. (Oral)

1. The present appeal is directed against the judgment of conviction dated 12.05.2004 and order of sentence dated 13.05.2004, passed by the Court of learned Special Judge, Ferozepur, whereby, the accused/appellant has been convicted for the commission of crime punishable under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter called as 'the Act') and sentenced him to undergo rigorous imprisonment for a period of four years and to pay a fine of Rs.2,000/- or in default of payment thereof, to further undergo imprisonment for three months.

2. Brief facts of the case in hand, as recorded in the opening para of the impugned judgment, are reproduced as under:-

“2. The prosecution case, in brief, is that on
09.08.1997, ASI Parminder Singh, Incharge Police Post

Bahav Wala, along with other police officials was present at Bus adda Rajpura in connection with nakabandi duty when a Scooter made Vespa bearing registration No.PB-53-1990 was seen coming from the side of Matili, which was being driven by Jagtar Singh accused and Ravi Kumar accused was sitting on the Pillion seat. ASI Parminder Singh, who is the Investigating Officer in this case, stopped the Scooter on the basis of suspicion and asked them that he suspects some intoxicating material in the Dicky of the scooter and search is to be taken and whether the accused want to give search in the presence of some Magistrate of Gazetted Officer or from Investigating Officer, on which both the accused stated in one voice that Investigating Officer would recover the article in their possession and as such tendered no objection if search is taken by the Investigating Officer. Thereupon, consent memo, Ex.P-1 was prepared to this effect. Thereafter Investigating Officer took search of the scooter and recovered opium wrapped in a glazed paper and contained in a Jhola from the dicky of the scooter on which the accused were coming. The Investigating Officer arranged weighing material and separated two samples each weighing 10 grams and prepared their parcel and remaining opium was weighed and found to be 1.980 Kgs. and its separate parcel was prepared. Thereafter, Investigating Officer sealed all the parcels with his seal bearing impression 'PS' and took the same into possession alongwith Jhola and scooter vide recovery memo, Ex.P-3, which was attested by HC Panjab Singh and sample seal Ex.P-2 was separately prepared. As the accused were found in possession of opium without any permit, therefore,

Investigating Officer sent ruqa Ex.P-5 to the police station on the basis of which formal FIR Ex.P-6 was registered. Investigating Officer prepared rough site plan Ex.P-7 of the place of recovery. Currency notes of Rs.100/- were recovered from 'jamatalashi' of accused Jagtar Singh and currency notes of Rs.10/- were recovered from the 'jamatalashi' of accused Ravi Kumar and the same were taken into possession vide memo Ex.P-4. Both the accused were arrested in this case and grounds of arrest were intimated to them and memo Ex.P-8 was prepared to this effect. Investigating Officer recorded statements of the witnesses at the spot and after completion of investigation at the spot. Investigating Officer went to Police Station Sadar, Abohar and handed over the case property including sample parcels and sample seal to SHO Sandeep Kumar, who further sealed the case property and samples with his seal bearing initials 'SK' and took the same into possession vide memo Ex.P-9 which was attested by the Investigating Officer. Sample parcel of this case was sent to the Chemical Examiner, Bathinda for analysis, who vide report Ex.P-12 declared the contents of sample parcels as 'opium' and after completion of investigation challan against the accused was presented in the court of Illaqa Magistrate, who committed the case to the Court of Sessions for trial and the same was received in this Court by entrustment/transfer.

3. *On 29.01.1998, the appellant-accused was charge-sheeted under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985, to which they pleaded not guilty and claimed trial.*

4. *In order to prove its case, the prosecution*

examined PW1 Constable Suresh Kumar, PW2 ASI Parminder Singh, PW3 Inspector Sandeep Kumar, PW4 HC Panjab Singh, PW5 Ahlmad Bansi Ram and thereafter, the learned Additional P. P. for the State closed the prosecution evidence after tendering report of chemical Examiner, Ex.P-12. During pendency of the case, accused Ravi Kumar absented from the court and his presence could not secured and he was declared proclaimed offender vide detailed order dated 24.02.2003.

5. When examined under Section 313 of the Code of Criminal Procedure, accused, Jagtar Singh, denied all the incriminating allegations appearing in the prosecution evidence and claimed to be innocent and contended that he has been falsely implicated in this case though no recovery was effected from him. Accused took opportunity to produce evidence in defence, but closed his defence evidence without examining any witness.”

3. After hearing the Public Prosecutor for the State, the Counsel for the accused, and after going through the evidence on record, the trial court convicted and sentenced the accused/appellant, as stated hereinbefore.

4. Feeling aggrieved against the judgment of conviction and the order of sentence passed by the Trial Court, the instant appeal was filed by the accused/appellant which was admitted on 13.08.2004.

5. Custody certificate has been filed in the Court, is taken on record. As per the custody certificate the petitioner has undergone 11 months and 9 days of actual sentence.

6. Learned counsel for the appellant/accused contends that the

findings recorded by the trial court while convicting the appellant were erroneous and against record. He submits that nowhere in the ruqa Ex.P5, it has been mentioned by the Investigation Officer that the appellant or Ravi Kumar had disclosed their names and addresses to him on an enquiry being made by him in the circumstances, it is not clear as to how the Investigating Officer knew the name and address of the appellant. It is further submitted that without opening up the dicky of the alleged scooter how the Investigating Officer knew that there was some narcotic substance in the dicky of the scooter also remains to be unexplained. Section 50 of the NDPS is mandatory provision and its non compliance vitiates the recovery. No independent witness was joined by the Investigating Officer. The alleged scooter from which the recovery had been shown by the Investigating Officer to have been effected was not owned by the appellant and the owner of the scooter was not cited as a witness nor examined by the prosecution to prove the connecting evidence.

7. On the other hand, the learned State counsel submits that recovery of 2 Kgs. of opium was effected from the possession of the appellant and PW4 HC Panjab Singh was a witness of recovery, who had fully supported and corroborated the statement of Investigating Officer. He further contends that the case against the appellant is fully proved on the file and the accused be convicted and sentenced according to law.

8. I have heard the learned counsel for the parties and perused the record on the file.

9. There is non-compliance of Section 50 of the NDPS Act. It is

submitted that the Hon'ble Supreme Court in "**Gurjant Singh alias Janta Vs. State of Punjab**", 2013(4), R.C.R. (Crl.), page 874 has held as under:-

"Narcotic Drugs and Psychotropic Substances Act, Sections 50 and 42 – Police party headed by Inspector of Police accosted tractor trolley and noticed 3 gunny bags lying on the tractor – The Inspector felt that some incriminating substance was kept in those bags – In such a case provisions of Sections 42 and 50 are required to be complied with – Conclusion of trial court and High Court that provision of Section 42 and 50 were not applicable was erroneous and set aside."

Para 16 and 17 of this judgment read as under:-

"16. If the ratio of the said decision had been properly understood, the flaw committed by the trial court and as confirmed by the High Court in our considered opinion would not have arisen. The distinct feature in the case on hand was that on the date of occurrence i.e. on 04.04.1996 at 00.15 AM, the police party headed by P.W. 6, accosted a tractor trolley coming from the side of village Ugrahan, which was stopped by him and that when the driver after stopping the tractor tried to escape was apprehended by the police team. The most crucial aspect of the case was that P.W. 6 noticed three gunny bags lying in the tractor of the appellant and felt that some incriminating substance was kept in those gunny bags. P.W. 6, therefore, took the view that before effecting search of the gunny bags, the necessity of affording an opportunity to the appellant to conduct the search in the presence of a Gazetted Officer or a Magistrate was imperative. In other words, after noticing three gunny

bags, P.W.6, as an investigating officer, felt the need to invoke the provisions of Section 50 and thereby provide an opportunity to the appellant for holding any search in the presence of a Gazetted Officer or a Magistrate. When once P.W.6 could assimilate the said legal requirement as stipulated under Section 50 of the NDPS Act, we fail to understand as to how principle No.1 in paragraph 25 of the decision reported in Balbir Singh (supra) could be applied. Unfortunately, the trial Court failed to understand the said principle set out in Balbir Singh (supra) in the proper perspective while holding that neither Section 42 nor Section 50 was attracted to the facts of this case.

17. *On the other hand even according to the prosecution, namely, the investigating officer himself, i.e. P.W.6, a search was required after apprehending the appellant along with the tractor and the gunny bags and such search had to be necessarily conducted in accordance with Section 50 of the NDPS Act. It was further the case of the prosecution that such a step was pursued by calling upon the appellant to exercise his opinion and after affirmatively ascertaining whether he wanted any search to be conducted in the presence of the Gazetted officer, only then P.W.3 was summoned, in whose presence the search operation was held. Therefore, the conclusion of the trial Court in having held that Sections 42 and 50 were not applicable to the case on hand was a total misunderstanding of the legal provisions in the light of the facts placed before it and consequently the conclusion arrived at for convicting the appellant was wholly unjustified.”*

So in such a situation, the provisions of sections 42 and 50 of the

Act were required to be complied with, which have not been complied with in this case.

10. ASI Parminder Singh did not apprise the appellant and other accused about their right to be searched before a Gazetted Officer or a Magistrate. Thus, the mandatory provisions of section 50(1) have not been complied with. It has been so held in the case of “Suresh and others Vs. State of Madhya Pradesh, 2013(1) R.C.R. (Crl.), , the relevant paras of this judgment are reproduced below:-

“11. The above Panchnama indicates that the appellants were merely asked to give their consent for search by the police party and not apprised of their legal right provided under section 50 of the Narcotic Drugs and Psychotropic Substances Act to refuse/to allow the police party to take their search and opt for being searched before the Gazetted Officer or by the Magistrate. In other words, a reading of the Panchnama makes it clear that the appellants were not apprised about their right to be searched before a Gazetted Officer or a Magistrate but consent was sought for their persona search. Merely asking them as to whether they would offer their personal search to him, i.e., the police officer or to Gazetted Officer may not satisfy the protection afforded under Section 50 of the Narcotic Drugs and Psychotropic Substances Act as interpreted in Baldev Singh’s case. Further a reading of the judgments of the trial Court and the High Court also show that in the presence of Panchas, the SHO merely asked all the three appellants for their search by him and they simply agreed. This is reflected in the Panchnama. Though in Baldev Singh’s case, this Court has not expressed any opinion as to whether the provisions of Section 50 are mandatory or directory but “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. In Vijaysinh Chandubha Jadeja's case (supra), recently the Constitution Bench has explained the mandate provided under sub-section (1) of section 50 and concluded that it is mandatory and requires strict compliance. The Bench also held that 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 illicit article from the person of the accused during such search. The concept of substantial compliance as noted in Joseph Fernandez (supra) and Prabha Shankar Dubey (supra) were not acceptable by the Constitution Bench in Vijaysinh Chandubha Jadeja, accordingly, in view of the language as evident from the panchnama which we have quoted earlier, we hold that, in the case on hand, the search and seizure of the suspect from the person of the appellants is bad and conviction is unsustainable in law.

12. We reiterate that sub-section (1) of Section 50 makes it imperative for the empowered officer to "inform" the person concerned about the existence of his right that if he so requires, he shall be searched before a gazetted officer or a Magistrate, failure to do so vitiate the conviction and sentence of an accused where the conviction has been recorded only on the basis of possession of the contraband. We also reiterate that the said provision is mandatory and requires strict compliance".

Hon'ble Supreme Court in the aforesaid case Suresh and others (supra) has held that sub-section (1) of Section 50 makes it imperative for the empowered officer to inform the person concerned about the existence

of his right that if he so requires, he shall be searched before a Gazetted officer or a Magistrate and failure to do so vitiate the conviction and sentence of the accused where the conviction has been recorded only on the basis of possession of contraband. The Hon'ble Supreme Court has held that this provision i.e. section 50(1) NDPS Act is mandatory and requires strict compliance.

In "Ashok Kumar Sharma Vs. State of Rajasthan, 2013(1) Apex Court Judgments, page 652", the Hon'ble Supreme Court noticed as under:-

"Narcotic Drugs and Psychotropic Substances Act, 1985, S.50 Provision is mandatory – Accused must be made aware of the existence of his right to be searched before a Gazetted Officer or a Magistrate – Opinion given to accused of search before Magistrate or Gazetted officer – The fact that accused has a right to be searched before a Gazetted Officer or a Magistrate not made known to him – Amounts to non compliance with the mandatory provision - Vitiates the entire proceedings – Conviction and sentence set aside."

Nowhere in the consent memo Ex.P1, ASI Parminder Singh informed the appellant and the other accused that they have a right to be searched before a Gazetted Officer or a Magistrate.

In the consent memo, ASI Parminder Singh has mentioned that whether the accused wanted their search from some Magistrate or Gazetted Officer or from him (i.e. investigating officer). The Hon'ble Supreme Court in the case of **"Beckdan Abdul Rahiman Vs. Stata of Kerala"** reported as **2002(2) R.C.R. (Crl.)**, page 385 has held as under:-

"Narcotic Drugs and Psychotropic Substances Act,

1985, Section 50 – Search and seizure – Investigating officer asked the accused “whether I should search him in the presence of senior officers or Gazetted Officer” – Held provisions of Section 50 not complied with – Accused required to be apprised by giving him option to search being made in presence of gazetted officer or the Magistrate – Conviction set aside”

Another authority on this point cited is “Kalayath Nass Vs. State of Kerala, AIR 2000 (Supreme Court), page 733”, wherein it has been held as under:-

“Narcoctic Drugs and Psychotropic Substances Act (61 of 1985) – Requirements of – Accused not informed of his right to be searched before gazette officer or Magistrate – Non-compliance with S. 50 – Prejudice caused – Search, vitiated – Fact, that accused did not make a request, on his own does not dispense with requirement of compliance with S.50”

11. Joint Offer to the appellant and his co-accused

(a) As per consent statement Ex.P1, ASI Parminder Singh did not afford a separate and clear option to each of the accused regarding their search before a Gazetted Officer or Magistrate. In “Paramjit Singh Vs. State of Punjab”, reported as 1997(1) R.C.R. (Crl.), page 293 (Punjab and Haryana), it has been held as under:-

“A. Narcoctic Drugs and Psychotropic Substances Act, 1985, Sections 50 and 15 – Recovery of contraband from two accused persons – Option to be searched before Gazetted Officer or Magistrate has to be given to each accused individually and not jointly”

Para 9 of the said judgment is reproduced below:-

“9. Both Jaspal Singh officer-in-charge of Police Station PW-2 and Rabi Singh ASI PW-1 stated that appellants were told that the trolley to be searched and if they lie, it can be done in presence of a Gazetted officer or a Magistrate. Both reposed confidence in the Investigating Officer. In the peculiar facts it is difficult to believe that such an offer had been given. Not only no independent witness was present but it is difficult to believe that offer was given jointly and the answer also given in a similar manner. Necessarily, the offer must be given to each of the accused individually that if he likes the services of a Gazetted officer or a Magistrate can be procured. It has not been done. It makes one conclude that the said assertion of the prosecution was make-belief rather than genuine. It is, therefore, difficult to hold that there was compliance of the provisions of sub-section (1) of Section 50 of the Act.”

In “Jaswant Vs. State of Haryana” reported as 1998(2) R.C.R. (Crl.) page 384, it has been held as under:-

“A. Narcotic Drugs and Psychotropic Substances Act, 1985, Sections 50 and 15 – Seizure of poppy husk from two accused persons – Offer of search before Gazetted Officer or Magistrate given to them jointly and not individually – Offer is not valid under Section 50 – Offer must be given to each accused individually.”

In another judgment of this Hon’ble Court titled “Nimma Ram Vs. State of Punjab, 1999(2) R.C.R. (Crl.), page 449” wherein it has been held as under:-

“Narcoctic Drugs and Psychotropic Substances Act, 1985, Sections 50 and 15 – Recovery of Poppy husk – Joint statement of all the three accused recorded by Investigating Officer that they wanted to give search in presence of a Gazetted Officer – Joint statement is not permissible – Section 50 thus not complied with which was mandatory – Cannot be believed that all the accused unanimously and with one voice and at the same time will make the statement before the Investigating Officer that they would like to give search in presence of Gazetted Officer – Conviction set aside”.

In “Pal Singh Vs. State of Haryana, 1999(4) R.C.R. (CrI.), page 664”, it has been held as under:-

“Narcoctic Drugs and Psychotropic Substances Act, 1985, Sections 50 and 15 – Joint statement – Recovery of poppy husk – Accused opted to give search in presence of Gazetted Officer – Their joint statement to this effect recorded by Investigating Officer- Joint statement not valid under Section 50 – Conviction of accused set aside. 1998(2) RCR (CrI.) 384, 1997(1) RCR (CrI) 293(DB) and 1992(2) RCR 449.”

In all these four judgments of this Court, it has been held that option to be searched before a Gazetted Officer or a Magistrate is to be given to each accused individually and not jointly. Thus, this Court is of the considered opinion that there is no compliance of Section 50(1) NDPS in the instant case.

12. The fact that accused reposed confidence in the investigating officer, cannot be believed as no independent witness was joined at the time of the offer.

13. (a) Ex.P3 is the recovery memo dated 9.8.1997, prepared by ASI Parminder Singh. There are no signatures on this recovery memo either of Jagtar Singh (appellant) or Ravi Kumar, co-accused. Thus, this recovery memo Ex.P3 cannot be said to be prepared at one and the same time when other documents were prepared leading to the inference that the same were prepared later on.

(b) There is another point so far as recovery memo Ex.P3 is concerned. It is submitted that recovery memo bears “FIR No.82 dated 9.8.1997 under sections 18/61/85 of NDPS Act, P.S. Sadar Abohar”. This recovery memo Ex.P3 is a document ought to have been prepared before the lodging of FIR and in as such situation the mention of FIR in the very first line is suggestive of the fact that the proceedings have not been conducted by the Investigating Officer as per procedure and clearly appears to be a manipulation in the document. Hon’ble Supreme Court in the case of “State of Orissa Vs. Sitansu Sekhar Kanungo” , reported as 2003(1) Judicial Reports (Crl.), page 534 has held as under:-

“Narcoctic Drugs and Psychotropic Substances Act, 1985, Sections 21 & 57 – Evidence Act, 1872, Section 3 – Seizure list – Ought to have been prepared before the lodgement of the FIR and as such question of mention of the FIR No. in the seizure list would not arise at all – Indication of the case number in the seizure list has resulted that seizure lists cannot but be ascribed to be a manipulation in the document which is not permissible under the law (para 4)”.

In para 4 of this judgment it has been held as under:-

“4..... The doubt which sprang up as regards the seizure

lists, admittedly cannot be brushed aside. The seizure lists ought to have been prepared before the lodgement of the FIR and as such question of mention of the FIR No. in the seizure lists would not arise at all. But in the contextual facts, the indication of the case number in the seizure list has resulted in the submission of the learned advocate for the defence before the High Court as also before this Court that this extra noting on the seizure lists cannot but be ascribed to be a manipulation in the document which is not permissible under the law....”

This judgment has been relied upon by this Hon’ble Court in CRA-S 25-SB of 2004 titled “Dilbagh Singh Vs. State of Punjab” decided on 10.9.2014 and relying upon this judgment “State of Orissa Vs. Sitansu Sekhar Kanungo” and that of Gurjant Singh’s case, 2013(4) R.C.R. (Criminal), page 874 (judgment No.3), this Hon’ble Court has been pleased to acquit the appellant in the said appeal.

(c) On this point, there is another judgment of the Hon’ble Delhi High Court titled “Mohd. Hashim Vs. State” reported as 2000(1) R.C.R. (Crl.), page 235, wherein head note ‘B’ reads as under:-

“B. Narcotic Drugs and Psychotropic Substances Act, 1985, Sections 15 and 18 – Recovery of smack – Rukka sent to Police Station – Documents prepared at the spot carried number of FIR – This gave rise to too inference that either FIR was recorded prior to recovery of contraband or number of FIR was inserted in these documents after registration – In both cases, it seriously reflected upon veracity of prosecution version and created doubt – Link evidence also missing – Conviction set aside.”

14. The recovery is shown to have been effected from the dicky of

a scooter bearing registration No.PB-53-1990 make Vespa. This scooter does not belong to the appellant. As per record, the scooter in question is owned by one Pardeep Kumar. In the judgment/sentence order dated 13.5.2004, the Judge, Special Court has held that the case property be disposed of according to the rules after the expiry of the period of appeal or revision. As the scooter is not in the name of the appellant, it cannot be connected with the appellant.

15. ASI Parminder Singh has written ruqa Ex.P5. ASI Parminder Singh has nowhere mentioned as to who disclosed the name of appellant Jagtar Singh or Ravi Kumar to him. In source it is mentioned in the ruqa Ex.P5 and FIR Ex.P6 with regard to the name and addresses of appellant and Ravi Kumar. A specific question was asked to him in this regard when ASI Parminder Singh appeared as PW2, who replied as under:-

“I do not know the accused before the alleged occurrence, nor the police party”

Admittedly, the appellants were not known to the Investigation Officer, ASI Parminder Singh, and the fact as to who furnished the details of the appellant to the Investigation Officer remained unexplained.

16. No independent witness was joined by the investigating officer though he had an ample opportunity for the same. As per the prosecution case, the policy party remained on the spot for about 6 to 7 hours and the place of recovery being a Bus Stand, where usually many persons remain present. The investigating officer in his statement has nowhere stated that he had made efforts to join some independent witness

on the spot of recovery. Thus non-making of efforts by the investigating officer to join some independent witness at the time of alleged recovery creates a doubt on the truthfulness of the prosecution story.

17. As per the prosecution case, the case property was produced before the Id. Illaqa Magistrate along with an application which was filed before the Court. The Judge Special Court has recorded in para 13 of the judgment that it is correct that prosecution could not prove the application which had been filed in the court of Illaqa Magistrate at the time of producing the case property nor the prosecution was able to prove the order passed by the Illaqa Magistrate on such an application. Thus, there is non-compliance of section 55 of the NDPS Act.

It appears that no recovery was effected from the appellant in the manner suggested by the prosecution leading to non production of the case property before the Illaqa Magistrate.

19. The alleged case property was recovered on 10.8.1997. The sample was sent to the Chemical Examiner, Bathinda on 14.8.1997 i.e. after 05 days after the alleged recovery. On delay, this Hon'ble Court in case of "Randhir Singh Vs. State of Haryana, 2010(2) R.C.R. (Crl.), page 388 has held as under:-

"Narcotic Drugs and Psychotropic Substances Act, 1985, Section 15 – Sample of contraband – Delay – Narcotic Control Bureau issued standing instructions No.1/88 dated 15.3.1988 – Clause 1.13 of said instructions states that sample must be dispatched to the laboratory within 72 hours of seizure – However, in instant case, samples were sent after 5 days – Prosecution has violated the instructions issued by Bureau –

Moreover, no explanation for late sending the samples – Held, accused deserves the benefit of doubt – Acquittal interalia on said ground – 2008(4) RCR (Crl.)440.”

The delay has not been satisfactorily explained in the affidavits.

20. The cumulative effect of above noticed circumstances makes the prosecution story doubtful. Consequently this appeal is allowed. The judgment of conviction dated 12.05.2004 and order of sentence dated 13.05.2004, passed by the Court of learned Special Judge, Ferozepur are, hereby, set aside and the accused-appellant is acquitted of the charge framed against him by giving him the benefit of doubt.

Bonds are discharged. Lower court record be returned.

(JITENDRA CHAUHAN)
JUDGE

21.08.2015

ashok

Whether referred to reporter? Yes/No.