

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRA-S No.1909 SB of 2009 (O&M)

Date of decision : January 28, 2015

Karam Singh @ Karma & another,

..... Appellants.

v.

State of Punjab,

..... Respondent

CORAM : HON'BLE MR. JUSTICE AJAY TEWARI

Present : Mr. Vipul Jindal, Advocate
for the appellants.

Mr. Deepak Garg, AAG Punjab

- 1. Whether Reporters of Local Newspapers may be allowed to see the judgment ?**
- 2. To be referred to the Reporters or not ?**
- 3. Whether the judgment should be reported in the Digest ?**

Ajay Tewari, J (Oral)

This appeal has been filed against the judgment/order of the trial Court dated 22.07.2009, vide which the appellants have been convicted under Section 21 of the NDPS Act, and sentenced them to undergo RI for ten years each and to pay a fine of ₹ 1 lac each, in default of payment of fine to undergo further RI for one year each.

Brief facts are that a secret information was received by SI Balbir Singh that the appellants were notorious smugglers dealing in fake currency and smuggled drugs and at the time of information, it was

disclosed that they were waiting for consignment of fake currency and heroin near Chatiwind chowk in the area of police station 'C' Division, Amritsar, and if a raid was conducted, they could be apprehended with the contraband. SI Balbir Singh informed the Superintendent of Police (Narcotics), constituted a team and organized a naka. On seeing the police party, the appellants tried to escape but were overpowered. They were informed that they had a right to be searched either by a Magistrate or by a Gazetted Officer and, on their expressing trust in a Gazetted Officer, DSP Rajpal Singh from Narcotic Cell was associated. From two bags being carried out by the appellants, 1 kg of heroin each was recovered. They were sent for trial and having been convicted are before this Court.

Counsel for the appellants has argued that the joint offer made to the appellants regarding option of being searched by a Magistrate or a Gazetted Officer does not meet the parameters of Section 50 of the NDPS Act (for short 'the Act'). In this connection, he has relied upon a decision of the Hon'ble Supreme Court in State of Rajasthan v. Parmanand and another, 2014(2) RCR (Criminal) 40, wherein it was held as follows :-

“14. In our opinion, a joint communication of the right available under Section 50(1) of the NDPS Act to the accused would frustrate the very purport of Section 50. Communication of the said right to the person who is about to be searched is not an empty formality. It has a purpose. Most of the offences under the NDPS Act carry stringent punishment and, therefore, the prescribed procedure has to be meticulously followed. These are minimum safeguards available to an accused against the possibility of false involvement. The communication of this right has to be clear, unambiguous and individual. The accused must be made aware of the existence of such a right. This right would be of little significance if the beneficiary thereof is not able to exercise it for want of knowledge about its existence. A joint communication of the right may not be clear or unequivocal. It may create

confusion. It may result in diluting the right. We are, therefore, of the view that the accused must be individually informed that under Section 50(1) of the NDPS Act, he has a right to be searched before a nearest gazetted officer or before a nearest Magistrate. Similar view taken by the Punjab & Haryana High Court in Paramjit Singh and the Bombay High Court in Dharamveer Lekhrum Sharma meets with our approval. It bears repetition to state that on the written communication of the right available under Section 50(1) of the NDPS Act, respondent No.2 Surajmal has signed for himself and for respondent No.1 Parmanand. Respondent No.1 Parmanand has not signed on it at all. He did not give his independent consent. It is only to be presumed that he had authorized respondent No.2 Surajmal to sign on his behalf and convey his consent. Therefore, in our opinion, the right has not been properly communicated to the respondents. The search of the bag of respondent No.1 Parmanand and search of person of the respondents is, therefore, vitiated and resultantly their conviction is also vitiated.”

Counsel for the appellants has further argued that once SI Balbir Singh himself was the informant/complainant, it was incumbent on the superior officer to have marked the inquiry to another Officer. For this proposition, he has relied upon the decision of the Hon'ble Supreme Court in State by Inspector of Police, Narcotic Intelligence Bureau, Madurai, Tamil Nadu vs Rajangam, 2010(15) SC 369, wherein it was held as follows:-

“8. The short question which falls for consideration of this Court is whether P.W.6 who registered the crime could have investigated the case or an independent officer ought to have investigated the case.

9. The learned counsel appearing for the accused submitted that the controversy involved in this case is no longer res integra. In Megna Singh v. State of Haryana (1996) 11 SCC 709, this Court has taken a categorical view that the officer who arrested the accused should not have proceeded with the investigation of the case. The relevant paragraph reads as under:

"4. We have also noted another disturbing feature in this case. P.W.3, Sri Chand, Head

Constable arrested the accused and on search being conducted by him a pistol and the cartridges were recovered from the accused. It was on his complaint a formal first information report was lodged and the case was initiated. He being complainant should not have proceeded with the investigation of the case. But it appears to us that he was not only the complainant in the case but he carried on with the investigation and examined witnesses under Section 161 Cr.P.C. Such practice, to say the least, should not be resorted to so that there may not be any occasion to suspect fair and impartial investigation."

10. The ratio of Megna's case has been followed by other cases. In another case in *Balasundaran v. State* 1999 (113) ELT 785 (Mad), in para 16, the Madras High Court took the same view. The relevant portion reads as under:

"16. Learned Counsel for the appellants also stated that P.W. 5 being the Inspector of Police who was present at the time of search and he was the investigating officer and as such it is fatal to the case of the prosecution. P.W. 5, according to the prosecution, was present with PWs 3 and 4 at the time of search. In fact, P.W. 5 alone took up investigation in the case and he had examined the witnesses. No doubt the successor to P.W. 5 alone had filed the charge sheet. But there is no material to show that he had examined any other witness. It therefore follows that P.W. 5 was the person who really investigated the case. P.W. 5 was the person who had searched the appellants in question and he being the investigation officer, certainly it is not proper and correct. The investigation ought to have been done by any other investigating agency. On this score also, the investigation is bound to suffer and as such the entire proceedings will be vitiated."

11. In this view of the legal position, as crystallized in Megna Singh's case (supra), the High Court was justified in acquitting the accused. We see no infirmity in the view which has been taken by the High Court in the impugned judgment."

Counsel for the appellants has further argued that Section 42 of the Act have been violated in the present case because in his testimony, Balbir Singh accepted that he did not send a written information to the SP

Narcotics Bureau but had only sent a verbal message. He has placed reliance upon the decisions of the Hon'ble Supreme Court in Nathu Lal v. Union Territory Chandigarh, Criminal Appeal No.1174 of 2010, decided on 20.9.2013, and State of Madhya Pradesh v. Abdul Ayub Khan, Criminal Appeal No.94 of 2007, decided on 7.4.2011. In Nathu Lal's case (supra), it was held as follows :-

“ In an endeavour to meet the challenge, we have been taken through the evidence of the witnesses by Mr. Ashok Kr. Thakur, learned counsel appearing for the respondent. He could not point out and we do not find any evidence which shows compliance of section 42(2) of the Act, even remotely. This being the position, the conviction and sentence of the appellant cannot be allowed to stand and is fit to be set aside on this ground alone.”

In Abdul Ayub Khan's case (supra), it was held as follows :-

“ A reading of the evidence of the Station Officer reveals that no written report had been sent to a superior police officer. The mandatory provisions of Section 42 (2) of the Act have thus been violated. Therefore, we are of the opinion that no interference is called for in this appeal which is accordingly dismissed.”

Counsel for the appellants has further argued that the above three fundamental flaws would straightway result in acquittal of the appellants, in view of the observations of the Hon'ble Supreme Court, extracted above.

Counsel for the respondent is not in a position to cite any contrary judgment/s.

In view of the authoritative pronouncements of the Hon'ble Supreme Court, extracted above, this appeal has to be allowed on all the three points raised by counsel for the appellants. Consequently, this appeal is allowed, the judgment/order dated 22.07.2009 is set aside and the

appellants are acquitted of the charges framed against them.

January 28, 2015

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**(AJAY TEWARI)
JUDGE**