

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

CRA-S-1602-SB-2005

Date of decision: 12.02.2015

Harwinder Singh

..... Appellants

Versus

State of Punjab

..... Respondent

CORAM : HON'BLE MR. JUSTICE DARSHAN SINGH

1. Whether Reporters of the local papers may be allowed to see the judgment ? Yes
2. To be referred to the Reporters or not ? Yes
3. Whether the judgment should be reported in the Digest ? Yes

Present: Mr.Amit Sharma, Advocate for the appellant.

Mr.Dilsher S. Mann, Assistant Advocate General
for the State of Punjab.

DARSHAN SINGH, J.

The present appeal has been preferred against the judgment dated 09.07.2005, passed by the learned Judge, Special Court, Amritsar, vide which appellant Harwinder Singh has been held guilty and convicted for the offence punishable under Section 21 of the Narcotic Drugs and Psychotropic Substances Act (here-in-after called the 'Act') and the order of sentence of the even dated, vide which he was sentenced to undergo rigorous imprisonment for a period of 10 years and to pay a fine of

Rs.1,00,000/-, in default of payment of fine, to further undergo rigorous imprisonment for a period of one year.

2- The brief facts giving rise to this prosecution are that on 06.09.2002, SI Rajbir Singh, SHO Police Station Sadar, Amritsar along with his fellow police officials was present at Chowk Gumtala bye-pass, in connection with Nakabandi. ASI Dilbag Singh along with other police officials also joined him. Two separate parties were formed. Nakabandi was conducted on the road coming from the side of Fatehgarh Churian by the police party, headed by PW1 SI Rajbir Singh and the police party headed by Jagir Singh along with ASI Dilbag Singh conducted the Nakabandi at Gumtala road. At about 12:30 a.m., a Zen Maruti car bearing registration No.PB-46-8393 came from the side of Fatehgarh Churian. The car was signalled to stop. It stopped at a distance of about 15-20 yards from the police party. Four persons came out of the said car and ran towards different directions. Appellant Harwinder Singh was apprehended by the police party headed by PW1 SI Rajbir Singh and Dilbag Singh was apprehended by the police party headed by SI Jagir Singh. A small weighing scale and weights were recovered from the car in which the accused were travelling. The names of the persons, who had escaped, were disclosed as Gurinder Singh and Baldev Singh. The appellant was told that the Investigating Officer suspected that he was carrying some narcotic substance and his search was to be conducted. It was further told to him that he can get himself searched from him or in the presence of a Gazetted Officer or a Magistrate. The accused-

appellant opted to be searched in the presence of a Gazetted Officer. Accordingly, PW3 Ravinder Kumar Bakshi, DSP (Head Quarter), Amritsar was informed over a wireless and was requested to arrive at the spot. Non-consent memo of the accused was prepared. DSP Ravinder Kumar Bakshi arrived at the spot within 15-20 minutes. He introduced himself to the accused and told that it is suspected that he is carrying some narcotic substance and his search is to be conducted. He can get himself searched in his presence or in presence of a Magistrate. The accused reposed confidence upon the DSP and opted to be searched in his presence. The consent memo Ex.PA was reduced into writing to this effect. The search of the accused was conducted by SI Rajbir Singh under the supervision of PW3 DSP Ravinder Kumar Bakshi and from the right side pocket of the pants worn by the accused, the smack wrapped in glazed paper was recovered. Two samples of five grams each were drawn and remaining smack on weight came to 390 grams. The remaining smack was put in a plastic bag. The sample parcels and the parcel containing the remaining smack were sealed by the Investigating Officer and the DSP with their seals bearing impressions 'RS' and 'RK'. The incriminating articles were taken into possession vide memo Ex.PB. The Investigating Officer sent the Ruqa Ex.PG to the Police Station. On the basis of which, the formal FIR Ex.PG/1 was registered. He also prepared the site plan of the place of recovery and the accused was arrested.

3- On returned to the police station, the case property was kept by him in the double lock. Accused was detained in the lock up. On

the next day, the case property along with the accused was produced before the learned Illaqa Magistrate, Amritsar and, thereafter, it was again kept in safe custody by SI Rajbir Singh.

4- On the transfer of SI Rajbir Singh, the case was taken over by PW4 Inspector Baldev Singh. The sample parcel was sent to Forensic Science Laboratory, Chandigarh for examination. On receipt of the report of FSL Ex.PH and on completion of the investigation, report under Section 173 Cr.P.C. was presented in the Court.

5- The accused-appellant was also charge sheeted for the offence punishable under Section 21 of the Act by the learned trial Court, to which he pleaded not guilty and claimed trial.

6- In order to substantiate its case, prosecution examined as many as four witnesses.

7- When examined under Section 313 Cr.P.C., accused-appellant pleaded that on 02.09.2002, he along with Dilbag Singh went to their house from the work and near Gagga building, SI Rajbir Singh and other police officials took him therefrom and a false case was planted upon him. Nothing was recovered from him. In defence evidence, the accused examined Rampal Sharma, Translator to the Court of Shri M.S. Chauhan, Additional Sessions Judge, Amritsar as DW1. He proved the statement of accused Ex.DB recorded by learned Additional Chief Judicial Magistrate, Amritsar. Accused also examined Kanwar Vijay Partap Singh, Commandant, 7th Battalion, P.A.P. Jalandhar as DW2, who proved his inquiry report Ex.DW2/1.

8- On appreciating the evidence on record and contentions raised by learned counsel for the parties, the learned trial Court held guilty and convicted the appellant for the offence punishable under Section 21 of the Act and was sentenced as mentioned in the upper part of the judgment.

9- Aggrieved with the aforesaid judgment of conviction and order of sentence, the appeal has been preferred.

10- I have heard Mr.Amit Sharma, Advocate, learned counsel for the appellant, Mr.Dilsher S. Mann, learned Assistant Advocate General for the State of Punjab and have meticulously gone through the record.

11- Initiating the arguments, learned counsel for the appellant contended that the appellant has been falsely implicated in this case. The Investigating Officer has not associated any independent witness to corroborate the official version. The non-joining of the independent witness renders the prosecution case doubtful. To support his contentions, he relied upon **Randhir Singh Vs. State of Haryana, 2010(2) RCR (Criminal) 388.**

12- He further contended that there were number of police officials armed with arms. It is not believable that two persons would have been able to escape. The version of the prosecution that two of the accused escaped from the spot further renders the version of the prosecution case doubtful as the theory of running away of two accused in the presence of such number of the armed police officials is not

believable. To support his contentions, he relied upon **Shashi Atwal and another Vs. State of Punjab 2011(2) RCR (Criminal) 660.**

13- He further contended that as per the prosecution version, the seal after use was handed over to ASI Gurbax Singh. But said Gurbax Singh has not been examined nor any reason has been given for his non-examination. The non-production of the witness of seal is fatal to the prosecution case.

14- He further contended that the Investigating Officer has not collected any evidence about the ownership of the car in question and to establish any link between the appellant and the said car.

15- He further contended that the Investigating Officer has also not complied with the provisions of Section 52A of the Act.

16- He further contended that the recovery in this case is alleged to have been effected from the personal search of the appellant. The mandatory provision of Section 50 of the Act was required to be complied with strictly. The Investigating Officer has alleged that he has prepared the memo vide which the appellant exercised his option for his search in the presence of the Gazetted Officer but the said memo is not available on the record, which shows that no such option was given to the accused and there is also no evidence that the accused had opted for his search in the presence of Gazetted Officer. Moreover, there is no evidence on record to establish that the appellant was made aware of his legal right for his search in the presence of Gazetted Officer or a Magistrate. The memo Ex.PA has been fabricated later on as it contained

all the particulars of the case. In the instant case, the mandatory provisions of Section 50 of the Act have been violated, which renders the conviction vitiated. To support his contentions, he relied upon cases **Man Bahadur Vs. State of H.P. 2008(4) RCR (Criminal) 563, Vijaysinh Chandubha Jadeja Vs. State of Gujrat 2010(4) RCR (Criminal) 911, Narcotics Central Bureau Vs. Sukh Dev Raj Sodhi 2011(3) RCR (Criminal) 370, State of Delhi Vs. State Avtar 2011(4) RCR (Criminal) 191, Nirmal Singh Pehlwan @ Nimma Vs. Inspector, Customs, Customs House, Punjab 2011(3) RCR (Criminal) 831 and Manoj Kumar Vs. State of Haryana 2014(2) RCR (Criminal) 811.**

17- He further contended that in fact, the appellant was illegally confined by the police on 02.09.2002 and, thereafter, he was falsely implicated in this case on 06.09.2002. He contended that the appellant has moved a complaint to the Punjab Human Rights Commission and inquiry was conducted by DW2 Kanwar Vijay Partap Singh, Commandant, 7th Battalion, P.A.P. Jalandhar, who had given his report Ex.DW2/1, which totally falsifies the prosecution version. Even the statement of the appellant was recorded by the learned Additional Chief Judicial Magistrate, Amritsar. Thus, he contended that the conviction of the appellant has been wrongly recorded by the learned trial Court.

18- On the other hand learned Assistant Advocate General for the State of Punjab contended that the recovery was effected in the odd hours of the night. So, at the time the joining of the independent

witness cannot be expected. There is no reason to disbelieve the testimonies of the police officials. He contended that the statement of PW1 SI Rajbir Singh is fully corroborated from the statement of PW3 Shri Ravinder Kumar Bakshi, Deputy Superintendent of Police, under whose supervision the search has been conducted which lead to the recovery of 400 grams smack from the possession of the appellant. He further contended that the non-examination of ASI Gurbax Singh is not fatal to the prosecution case as the case of the prosecution is fully supported by the statement of PW3 Ravinder Kumar Bakshi, a Gazetted police officer. He further contended that there is no violation of Section 50 of the Act. The accused opted for his search in the presence of the Gazetted Officer, so PW3 DSP Ravinder Kumar Bakshi was called at the spot. DSP Ravinder Kumar Bakshi also served the memo Ex.PA upon the accused, making him aware of his legal right for his search in the presence of the Gazetted Officer or the Magistrate. So, there is complete compliance of Section 50 of the Act. He further contended that the defence plea raised by the appellant does not inspire any confidence. Thus, he pleaded that there is no infirmity in the conviction of the appellant recorded by the learned trial Court.

19- I have duly considered the aforesaid contentions.

20- Admittedly, as per the case of the prosecution the recovery in this case is alleged to have been effected on the basis of personal search of the appellant i.e. from the right pocket of his pants. So, the prosecution was required to comply with the mandatory provisions of

Section 50 of the Act.

21- Section 50 of the Act reads as under:-

"50. Conditions under which search of persons shall be conducted. - (1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior."

22- The aforesaid provisions show that it is the duty of the authorised officer i.e. the Investigating Officer to comply with the

requirements of Section 50 of the Act as a first step to begin with the search of the person of the suspect. The compliance at any subsequent stage shall not cure the initial defect.

23- As the provisions contained in the Act are penal in nature, all requirements laid down therein must be complied with strictly. A larger Bench of Hon'ble Apex Court in case **Vijaysinh Chandubha Jadeja Vs. State of Gujrat** (supra) has laid down that failure to comply with the provisions of Section 50 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. In case **Narcotics Central Bureau Vs. Sukh Dev Raj Sodhi** (supra), the Hon'ble Apex Court has laid down that the provisions of Section 50 of the Act are mandatory and must be strictly construed. In case **State of Delhi Vs. Ram Avtar** (supra), the Hon'ble Supreme Court has laid down that where the provisions of Section 50 of the Act are not complied with, the accused cannot be convicted for the illegal possession of the contraband and it cannot be held that even if the recovery is in violation of Section 50 of the Act, the accused should be held guilty of unlawful possession of the contraband. It was further laid down in this authority that when a safeguard or a right is provided, favouring the accused, the compliance thereof should be strictly construed and the theory of 'substantial compliance' would not be applicable to such situations, provided particularly where the punishment provided is very harsh and is likely to cause serious prejudices against the

suspect. In case **Nirmal Singh Pehlwan @ Nimma Vs. Inspector, Customs, Customs House, Punjab** (supra), the Hon'ble Apex Court held that the provisions of Section 50 of the Act are mandatory and strict compliance was called for and any deviation therefrom would vitiate the prosecution. Thus, in view of the consistent ratio of law laid down in the cases referred above, the provisions of Section 50 of the Act are mandatory in nature. The prosecution is required to strictly comply with the requirements of Section 50 of the Act and any contravention thereof will vitiate the prosecution and conviction. No conviction can be recorded on account of illegal possession of contraband where the mandatory provisions of Section 50 of the Act have been violated.

24- In the instant case, there is a clear violation of the mandatory provisions of Section 50 of the Act. As per the provisions of Section 50 of the Act, it is the duty of the Authorised Officer/ Investigating Officer to make aware the accused of his right and afford option to him for his search before any Gazetted Officer or the Magistrate. So, it is at the stage of apprehension of the accused by the Investigating Officer suspecting the accused to be in possession of the contraband to comply with the mandatory provisions of Section 50 of the Act. PW1 SI Rajbir Singh, the Investigating Officer of the case, has stated that he asked the accused that there is suspicion that he is in possession of some narcotic material and his search is to be conducted. He also apprised accused of his right of search from him, any Gazetted Officer or a Magistrate and the accused told that his search be conducted

in the presence of a Gazetted Officer and its memo was prepared, he further deposed that but there is no memo on the file. In case **Man Bahadur Vs. State of H.P.** (supra), the Hon'ble Supreme Court has laid down that although such communication itself may not necessarily be made in writing but as far as possible, such communication should be made in the presence of some independent and respectable person witnessing the arrest and search. It is not the case of the prosecution in the present case that communication was not reduced into writing, rather it is the specific case of the prosecution that the Investigating Officer had reduced into writing the memo with respect to the exercise of option of his search by the appellant in the presence of a Gazetted Officer. But no such memo has been placed on record. SI Rajbir Singh, the Investigating Officer of the case has categorically stated that there is no memo on the file. He has not even produced any such memo on record even during his statement, which shows that actually no such memo was ever prepared by the Investigating Officer. As already mentioned, it is not the case of the prosecution that the communication regarding the search of the accused in the presence of a Gazetted Officer or Magistrate was orally conveyed to him. Moreover, there is no independent corroboration to such communication on this point rather there is only the solitary statement of SI Rajbir Singh and he has taken a categorical stand that such communication was reduced into writing in the shape of a memo which has not been produced on record. Thus, in the absence of such memo the prosecution has not been able to establish the compliance of Section 50

of the Act at the level of the Investigating Officer.

25- It has been projected that when PW3 Mr.R.K. Bakshi, DSP (Head Quarter), Amritsar reached at the spot as a result of option exercised by the appellant, he again apprised the accused of his legal right to be searched before Magistrate or a Gazetted Officer and accused reposed faith in him and consent memo Ex.PA was prepared by him, which was signed by accused and attested by SI Rajbir Singh and ASI Gurbax Singh. But this memo Ex.PA appears to be fabricated document. Admittedly, this memo was prepared before taking the search of the accused and even the registration of the case. Surprisingly, in the memo Ex.PA the FIR number, date, offence and name of the police station are mentioned in the same ink and sequence. It is highly improbable and unbelievable that even before taking the search of the appellant, it came to the knowledge of PW3 DSP RK Bakshi that the appellant was having the contraband in his possession and he was even aware of the nature of such contraband as even the specific offence i.e. Section 22 of the Act has been mentioned in the memo Ex.PA. The mentioning of all these particulars in the memo Ex.PA clearly shows that the same has been fabricated later on just to show the compliance of Section 50 of the Act. Thus, the memo Ex.PA cannot be relied at all. In these circumstances there is total non-compliance of Section 50 of the Act which vitiate the prosecution and conviction.

26- There is one another material aspect which also renders the prosecution case doubtful. As per the defence plea of the accused he

was illegally detained on 02.09.2002 along with one Dilbag Singh. They were apprehended near Gagga building by SI Rajbir Singh and other police officials. Nothing was recovered and thereafter this false case was planted upon him. In the defence evidence, he has examined Kanwar Vijay Partap Singh, Commandant, 7th Battalion, P.A.P. Jalandhar, the then S.P. City First, Amritsar, as DW2, who was directed by the Senior Superintendent of Police, Amritsar to hold an inquiry in the present case and during the said inquiry, he had recorded the statements of PW1 SI Rajbir Singh, ASI Gurbax Singh, the witness of recovery in this case and ASI Dilbag Singh. He proved the copy of the said inquiry report Ex.DW2/1. The learned trial Court has discard the inquiry report on the ground that the same was not put to the Investigating Officer and he has not been confronted with his statement recorded during inquiry. That lapse may have occurred on account of the negligence of the counsel for the accused but this fact is not disputed that DW2 Kanwar Vijay Partap Singh, a Senior Police Officer, has conducted the inquiry in this case and has given his report to the Senior Superintendent of Police, Amritsar. It is also not disputed that during that inquiry he has recorded the statement of SI Rajbir Singh, the Investigating Officer of this case, ASI Gurbax Singh, the witness of recovery but not examined in the present case and given up being unnecessary and one ASI Dilbag Singh. The said inquiry report has been given by the Senior Officer of Police Department posted in that very district. So, the said inquiry report is not a waste paper and can be taken into consideration.

27- As per the statements of the witnesses recorded in that case, entirely different version has been revealed. As per the contents of the inquiry report Ex.DW2/1, the accused was apprehended on 03.09.2002. His place of apprehension is totally different. No contraband was recovered from his personal search, rather 700 grams smack was recovered from a residential house. Three persons were present in that house. Out of those two persons had fled away and one old man, who was telling himself to be the Sarpanch of village Sakri was apprehended, who also later on gave a ditch to the police and slipped away. So, this inquiry report renders the version of the prosecution with respect to the date of apprehension of the accused and the recovery of the contraband from his possession extremely doubtful.

28- As per prosecution story, the Investigating Officer has entrusted his seal after use to ASI Gurbax Singh, who was also the witness to the recovery but said Gurbax has not been examined and was given up as unnecessary by the learned Additional Public Prosecutor vide his statement dated 11.03.2003. So, even the witness of the seal and recovery has not been examined which is another serious lacuna in the prosecution case.

29- As per the prosecution version, at the time of apprehension, the appellant was travelling in a Maruti Zen car bearing registration No.PB-46- 8393 and the said car was also taken into possession vide memo Ex.PD but no evidence has been collected by the Investigating Officer to establish any link between the present appellant

and the said car or its owner.

30- The non-examination of the witness of seal and the lapse on the part of the Investigating Officer to collect evidence about the ownership of the car may itself not be a ground to record acquittal but when these aspects are taken into consideration cumulatively with the violation of the mandatory provision of Section 50 of the Act, fabrication of the consent memo and the inquiry report Ex.DW2/1, these grounds also assume significance.

31- As per the Ruqa Ex.PG, two police party consisting 12 officials were holding the Nakabandi. It is alleged that two persons have escaped. The Investigating Officer has also admitted that some of the police officials were armed. So, the story projected by the Investigating Officer that two persons had escaped is also not believable in the presence of such a heavy police force consisting 12 police personnels and even some of them were armed which further creates doubt about the authenticity of the prosecution story. To support this view, reference can be made to **Shashi Atwal and another Vs. State of Punjab** (supra).

32- Thus, keeping in view my aforesaid discussion, there is total violation of the provisions of Section 50 of the Act, the consent memo Ex.PA has been fabricated, the witness of the seal and recovery has not been examined, no evidence has been collected with respect to the ownership of the car, the connection of the appellant with the owner of the said car, the inquiry report Ex.DW2/1 prepared by the Superintendent of Police, City First, Amritsar reveals totally different

facts and the story of the prosecution with respect to escape of the two accused is also not believable. Thus, the cumulative effect of all the circumstances discussed above renders the prosecution version extremely doubtful.

33- Consequently, the prosecution has failed to establish its case beyond shadow of reasonable doubt and appellant deserves the benefit of doubt. So, the conviction of the appellant recorded by the learned trial Court cannot be sustained in the eyes of law.

34- Resultantly, the present appeal is hereby allowed and conviction of the appellant and sentence awarded to him by the learned trial Court is hereby set aside. The accused-appellant stands acquitted of the charges. His bail bonds stand discharged.

Dated: 12.02.2015
sunil yadav

(DARSHAN SINGH)
JUDGE