

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRA-S-1147-SB-2012 (O&M)

Decided on: 23.09.2017

Raju Juneja

.... Appellant

Versus

State of Punjab

..... Respondent

CORAM: HON'BLE MR. JUSTICE ARVIND SINGH SANGWAN

Present: Mr. Sanyam Malhotra, Advocate
for the appellant (Legal Aid Counsel).

Mr. K.S. Aulakh, DAG, Punjab.

ARVIND SINGH SANGWAN, J (ORAL)

Custody certificate of the appellant is taken on record.

The accused-appellant Raju Juneja has faced the trial in FIR No.128 dated 14.10.2010 under Section 22 of the NDPS Act, registered at Police Station Division No.3, Jalandhar.

The brief facts of the case are that on 14.10.2010, ASI Subhash Chander, Police Station Division No.3, alongwith the officials was present at Kishanpur Chowk, Jalandhar where accused Raju Juneja was seen coming on a motorcycle No. PB-06-C-8347 coming from the side of Lamma Village. On seeing the police party, he tried to turn back and ran away, but on suspicion he was nabbed. He was interrogated and the ASI, on suspicion that he was carrying some intoxicant, searched him. The accused was apprised of his right to opt for his search before some Magistrate or Gazetted Office, however, he reposed confidence in him and opted to be searched by him as per the consent memo (Ex. P-1) prepared at the spot.

Thereafter, the personal search of the accused was conducted by the said

ASI, which led to the recovery of 260 gms of intoxicant powder wrapped in a polythene bag kept in the right pocket of his trouser. Two samples of 5 gms each was separated and two separate parcels were prepared and the residue was put in another third container and thereafter the sample was also sealed with mark SC and the third parcel was also sealed. The seal was thereafter handed over to the HC Ramesh Kumar. Motorcycle was also taken in possession. Thereafter, the FIR was registered under Section 22 of the Narcotic Drugs and Psychotropic Substances Act (in short 'NDPS'). Later on, the investigation was completed and report under Section 173 Cr.P.C. was submitted before the Court and charge under Section 22(c) of the Act was framed against the appellant-accused.

In the prosecution evidence, PW-1 Gurinder Singh-constable was examined, who tendered his affidavit Ex.PW-1/A. This affidavit relates to depositing of the sample. In cross-examination, this witness stated that he has only taken the samples to FSL.

PW-2 ASI Subhash Chander, the Investigating Officer deposed on the line of the contents of the FIR. This witness proved that the samples were sealed and a chit Ex.P-2 pasted on CFSL form Ex.P-3 and the seal was handed over to HC Ramesh Kumar. The case property was taken into possession vide memo Ex.P-4 and the motorcycle was taken in possession vide memo Ex.P-5. This witness further stated that he has sent ruqa Ex.P-6 to the police station on the basis of which FIR Ex.P-7 was registered against the accused by ASI Surjit Singh. This witness further proved the site plan Ex.P-8, memo of arrest-cum-intimation memo Ex.P-9 and disclosure statement Ex.P-11. This witness further stated that he prepared the sample of his seal on chit Ex.P12 which was pasted on CFSL form and on

15.10.2010, he had taken the case property from MHC and it was produced before the Judicial Magistrate alongwith the accused by moving applications Ex.P-13 and Ex.P-14, which were authenticated by the Judicial Magistrate vide Ex.P-13/A and Ex.P-14/A. Thereafter, the case property was redeposited with MHC Nirmal Singh and the report of Chemical Examiner was proved as Ex.P-15. In cross-examination, this witness stated that they were five members of the police party and before sending the ruqa, only a consent memo was prepared, again stated that recovery memo was also prepared before that and remaining documents were prepared after sending the intimation. This witness stated that before conducting the personal search, an offer was given to the accused.

PW-3 HC Ramesh Kumar stated that he was one of the member of the police party alongwith ASI Subhash Chander and in his presence, the accused has reposed confidence in ASI Subhash Chander and opted his search vide consent memo Ex.P-1 and thereafter ASI Subhash Chander conducted the search of the accused in his presence. Thereafter, the other formalities were done as stated by PW-2 ASI Subhash Chander.

PW-4 HC Nirmal Singh submitted his affidavit Ex.PW-4/A regarding sending the CFSL form Ex.P-3, sample of seal Ex.P-2 and Ex.P-12.

PW-5 Inspector Surinder Pal stated that on 14.10.2010, he was posted as SHO and ASI Subhash Chander produced before him the accused Raju Juneja alongwith two sample parcels and one bulk parcel of narcotic powder. He prepared sample impression of the seal Ex.P-12 on CFSL form Ex.P-3 and deposited the same with MHC Nirmal Singh. Thereafter, the evidence of the prosecution was closed and the statement of the accused

under Section 313 Cr.P.C. was recorded, in which the accused denied all the incriminating evidence against him and pleaded that a false case is registered against him.

The trial Court, thereafter vide its judgment of conviction dated 10.02.2012 held the appellant guilty of offence under Section 22(c) of the Act and vide order of sentence dated 10.02.2012, awarded him 10 years rigorous imprisonment and to pay a fine of Rs.1,00,000/- and in default of payment of fine, he shall further undergo rigorous imprisonment for a period of one year under Section 22(c) of the Act.

Learned counsel for the appellant, who has been appointed by the High Court Legal Services Authority submitted that the appellant, as per custody certificate filed in the Court today by learned State counsel, the appellant has already undergone approximately 7 years of actual sentence out of 10 years rigorous imprisonment awarded by the trial Court and as per the custody certificate, in other cases/FIRs, he has also been either acquitted or he has undergone the sentence.

On merits, learned counsel for the appellant has submitted that there is a violation of provisions of Section 50 of the NDPS Act as it has come in the statement of the investigating officer PW-2 ASI Subhash Chander that an offer was made to the accused that he has right to his search before a Magistrate or Gazetted Officer, however, the accused reposed confidence in him and accordingly he was searched by a police official of the rank of ASI. Counsel for the appellant has submitted that in fact it has not come in the evidence of this witness that accused was informed about his right as per Section 56 of the Act that he should be searched either before a Magistrate or a Gazetted Officer and the consent

memo Ex.P-1 recording the consent of the accused that he has confidence in this witness, is not in compliance with the provisions provided under Section 50 of the NDPS Act, which are mandatory in nature.

Learned counsel for the appellant in support thereof has relied upon the judgment in **Myla Venkateswarlu vs. State of A.P.** 2012(3) RCR (Criminal) 72, wherein the Hon'ble Supreme Court has held as under:-

“7. On account of divergence of opinion between the two decisions of this court with regard to the dictum laid down by the Constitution Bench in Baldev Singh, another Constitution Bench in ***Vijaysingh Chandubha Jadeja v. State of Gujarat, 2010(4) R.C.R.(Criminal) 911 : 2010(6) R.A.J. 326 : (2011)1 SCC 609***, considered the question whether Section 50 of the Narcotic Drugs And Psychotropic Substances Act casts a duty on the empowered officer to inform the suspect of his right to be searched in the presence of a gazetted officer or a Magistrate, if he so desires or whether a mere enquiry by the said officer as to whether the suspect would like to be searched in the presence of a Magistrate or a gazetted officer can be said to be due compliance with the mandate of the said section. The Constitution Bench held that although Baldev Singh did not decide in absolute terms the question whether or not Section 50 of the Narcotic Drugs And Psychotropic Substances Act was directory or mandatory yet it was held that provisions of 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 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 Narcotic Drugs And Psychotropic Substances Act. The Constitution Bench noted that in Baldev Singh, it was clarified 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. The Constitution Bench reiterated the principles laid down by this court in Baldev Singh and added that the concept of substantial compliance with the requirement of Section 50 of the Narcotic Drugs And Psychotropic Substances Act is neither borne out from the language of Section 50(1) nor it is in consonance with the dictum laid down in Baldev Singh. Thus, it is no longer in dispute that strict compliance with the provisions of Section 50(1) of the Narcotic Drugs And Psychotropic Substances Act is necessary. We need to see whether evidence adduced in this case establishes that there was strict compliance of Section 50(1) of the Narcotic Drugs And Psychotropic Substances Act.”

It is, thus, submitted that there is a gross violation of Section 50 of the NDPS Act as the accused-appellant was deprived of his right to be searched in accordance with Section 50 of the Act. It is next contended on behalf of the appellant that it has come in the evidence of PW-1 Constable Gurinder Singh, who has tendered in his affidavit Ex.PW-1/A, that while submitting the sample of the contraband allegedly recovered from the

appellant, neither the seal nor form No.29 was sent to FSL alongwith the samples. Similar statement is made by PW-4 MHC Nirmal Singh in his affidavit Ex.PW-4/A. Counsel for the appellant has further referred to Ex.P-15, the report of FSL where there is no mention that alongwith the samples, the seal and form No.29 were sent. Therefore, it is submitted that the link evidence to prove that the samples which were drawn from the spot and the sample which was sent to the FSL for its examination is missing and is not proved. Counsel for the appellant, in support thereof has referred to the judgment of **Didar Singh @ Dara vs. The State of Punjab** 2010(3) RCR (Criminal) 337, wherein it is held that in the absence of a link evidence, the recovery from the accused is highly doubtful.

Lastly, the learned counsel for the appellant has argued that that since the appellant has already undergone about 7 years of actual sentence out of 10 years, the prosecution having failed to prove that the mandatory provisions of Section 50 of the NDPS Act were complied with, the impugned judgment passed by the trial Court may be set aside.

On the other hand, the learned State counsel has opposed the arguments and stated that as per the FSL report, the recovery of contraband, i.e. 'Diphenoxylate' from the appellant is proved and it falls in commercial quantity and, therefore, the trial Court has rightly convicted the appellant.

After hearing counsel for the appellant, I find merit in the present appeal. The mandatory provisions of Section 50 of the NDPS Act, are violated in the present case. The offer given to the appellant for search before a Magistrate by a Gazetted Officer is defective, more so the consent recorded by the Investigating Officer PW-2 Subhash Chander who deposed that the accused has shown confidence in him, is also defective as there is

no such provision under the Act that a non-gazetted officer, after obtaining such consent of an accused person can conduct the search and effect the recovery. The manner in which the samples were sealed and sent to FSL for its chemical examination, is also not done in accordance with the procedure laid down under the Act/Rules. Statements of PW-2 and PW-4 clearly show that alongwith the sample, the seal and form No.29 were not sent to FSL, therefore, the link evidence is missing.

However, considering the fact that out of 10 years, the appellant has already undergone actual sentence of 7 years and is still in judicial lockup, I find that the conviction of the appellant is not sustainable.

Accordingly, the appeal is allowed. The judgment of conviction dated 09.2.2012 and order of sentence dated 10.02.2012 are set aside. The appellant shall be released forthwith, if not required or convicted in any other case.

(ARVIND SINGH SANGWAN)
JUDGE

23.09.2017

Dinesh

Whether speaking/reasoned : Yes/No

Whether Reportable : Yes/No