

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

**CRA-S No.1906-SB of 2016 (O&M)
Decided on: 25.11.2017**

Makhan Singh

....Appellant

Versus

State of Punjab

....Respondent

CORAM: HON'BLE MR JUSTICE ARVIND SINGH SANGWAN

Present : Mr. Ishan Gupta, Advocate (Legal Aid Counsel)
for the appellant.

Mr. Jagmohan Ghumman, DAG, Punjab.

ARVIND SINGH SANGWAN, J. (Oral)

The present appeal has been filed challenging the judgment of conviction and order of sentence dated 17.09.2015 vide which the appellant was convicted under Section 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short 'the NDPS Act') and sentenced to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs.1,00,000/- and in default of payment of fine to further undergo rigorous imprisonment for a period of 02 years.

The present appeal was admitted on 17.05.2016 and the appellant is still in custody. This appeal is being pursued by the legal aid counsel through High Court Legal Services Committee. During the trial Court and after conviction, the appellant is in judicial custody since 17.09.2015 and is undergoing the sentence.

Brief facts of the case are that on 16.10.2010, ASI Didar Singh along with his co-officials was on patrol duty and while going from village Ram Nagar Bhathal towards village Mal Singh Wala, they reached near a bridge of a minor canal near bus-stand at Ram Nagar Bhathal, one person was seen sitting in the room of a bus stand and he was looking for something in a plastic bag. On seeing the police party, he stood up and on the basis of suspicion, he was apprehended by ASI Didar Singh and on asking, he disclosed his name as Makhan Singh and gave his complete address. ASI Didar Singh checked the plastic bag in which strips of intoxicated tablets and vials were lying visible. On search of said bag, 05 vials of Rexcof syrup each of 100 ML, 50 strips of phenotil tablets each strip containing 100 tablets i.e. total 5000 Phenotil tablets and 10 strips of Microlit tablets each strip containing 100 tablets i.e. total 1000 tablets were recovered. Since, the accused could not produced any permit or licence, the police party took out one vial of Rexcof syrup 100 ML, one strip of Phentotil tablets containing 100 tablets and one strip of Microlit tablets containing 100 tablets were separated as samples and separate parcels of the same were prepared and the remaining bulk was sealed. All these parcels were sealed by ASI Didar Singh with his seal bearing impression 'DS' and the sample of the seal was prepared separately. The seal was entrusted to ASI Gamdoor Singh and thereafter, the case was registered against the accused/appellant. The accused arrested and the investigation was initiated. At the spot, a rough site plan regarding place of recovery was prepared. The statements of witnesses were recorded and inventory memo was prepared. Thereafter, the accused – Makhan Singh along

with the case property was produced before the SHO, Police Station Boha and then, he was produced before the Illaqa Magistrate for initiating the proceedings under Section 52-A of the NDPS Act. On completion of investigation, the challan under Section 173 Cr.P.C. was presented and charges were framed against the accused/appellant to which he did not plead guilty and claimed the trial.

The prosecution examined 04 witnesses PW1 – HC Hardial Singh, PW2 – Investigating Officer, ASI Didar Singh (retired), PW3 – SI Harvinder Singh SHO, PW4 – ASI Gamdoor Singh.

PW1 – HC Hardial Singh tendered into evidence his affidavit Ex.PA and stated that on 26.10.2010 SI Harvinder Singh had handed over one sample parcel of Rexcof syrup, one sample parcel of Phenotil tablets and one sample parcel of Microlit tablets sealed with seal impression 'DS' and 'HS' along with sample seal for depositing the same in the office of FSL, Chandigarh. Then, he had deposited the sample parcels in the office of FSL, Chandigarh on 27.10.2010 with the seal intact after taking docket from the office of SSP, Mansa and handed over the receipt thereof to SHO Harvinder Singh. This witness has further stated that till the articles remained with him, the seal on the parcels remained intact and he did not allow anyone to tamper with the same.

PW2 – ASI Didar Singh, Investigating Officer of the case deposed on the line of the version given in the FIR and produced on record the recovery memo Ex.PB, personal search memo of accused – Makhan Singh Ex.PC, ruqa Ex.PD, FIR Ex.PE, rough site plan Ex.PF, arrest memo of accused Ex.PG, memo regarding handing over the case

property Ex.PH, report of the chemical examiner Ex.PX. This witnesses has also produced on record the bulk parcel of case property as Ex.MO-1.

PW3 – SI Harvinder Singh, SHO P.S. City – II Mansa, has deposed that on 16.10.2010, while posted as SHO, ASI Didar Singh has produced the accused along with the case property and the said parcels were sealed with the seal bearing impression 'DS' and after verifying the facts, he has found everything right and put his seal 'HS' and attested the sample seal chit Ex.PI and took the case property in his possession vide memo Ex.PH. Then, he sent the special report Ex.I to area DSP. On the next day i.e. 17.10.2010, he had produced the case property along with the accused before the Judicial Magistrate and inventory memo Ex.PJ and request Ex.PK for depositing the case property was made, on which the Judicial Magistrate passed the order Ex.PL to deposit the case property in judicial malkhana. This witness further stated that on 26.10.2010, he has sent the sample sealed parcels through HC Hardial Singh to FSL.

PW4 – ASI Gamdoor Singh who was a member of the police party also corroborated the testimony of PW2 – ASI Didar Singh regarding the investigation and the documentation done at the spot.

Thereafter, the statement of the appellant/accused under Section 313 of the Code of Criminal Procedure (in short 'Cr.P.C.') was recorded in which he denied all the incriminating evidence, however, he did not examine any witness in defence.

The trial Court, on appreciation of the evidence, vide judgment of conviction dated 17.09.2015 held the appellant/accused

guilty of offence punishable under Section 22 of the NDPS and vide separate order of sentence dated 17.09.2015 sentenced him to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs.1,00,000/-.

Counsel for the appellant has argued that it is a case where the provisions of Section 50 of the NDPS Act have been totally ignored and no offer was made to the accused person to be searched either before the Gazetted Officer or before a Magistrate as per the mandatory provisions of Section 50 of the NDPS Act. It is further submitted that in cross-examination, PW2 – ASI Didar Singh has admitted that neither any independent witness was joined and nothing was recovered from the personal search of the accused. It is argued on behalf of the appellant that once the personal search of the accused was done in connection with a case under the NDPS Act, the mandatory provisions of Section 50 of the NDPS Act have been completely ignored.

Counsel for the appellant has relied upon the statement of PW2 – ASI Didar Singh where he has specifically stated that the personal search of the accused was made and search memo Ex.PC was prepared. Similar is the statement of PW4 – ASI Gamdoor Singh as this witness has also nowhere stated that at any point of time, the accused was informed his right to be searched before a Gazetted Officer or a Magistrate. In support of his contentions, counsel for the appellant has relied upon the judgment ***“Vijaysingh Chandubha Jadeja vs State of Gujarat”***, 2010(4) RCR (Criminal) 911, where the Hon'ble Supreme Court in paras 21 and 22 has held as under:-

“21. We shall now deal with the two decisions,

referred to in the referral order, wherein "substantial compliance" with the requirement embodied in Section 50 of the Narcotic Drugs And Psychotropic Substances Act has been held to be sufficient. In Prabha Shankar Dubey (supra), a two Judge bench of this Court culled out the ratio of Baldev Singh's case (supra), on the issue before us, as follows:-

"What the officer concerned is required to do is to convey about the choice the accused has. The accused (suspect) has to be told in a way that he becomes aware that the choice is his and not of the officer concerned, even though there is no specific form. The use of the word "right" at relevant places in the decision of Baldev Singh case seems to be to lay effective emphasis that it is not by the grace of the officer the choice has to be given but more by way of a right in the "suspect" at that stage to be given such a choice and the inevitable consequences that have to follow by transgressing it."

However, while gauging whether or not the stated requirements of Section 50 had been met on facts of that case, finding similarity in the nature of evidence on this aspect between the case at hand and Joseph Fernandez (supra), the Court chose to follow the views echoed in the latter case, wherein it was held that searching officer's information to the suspect to the effect that "if you wish you may be searched in the presence of a gazetted officer or a Magistrate" was in substantial compliance with the requirement of Section 50 of the Narcotic Drugs And Psychotropic Substances Act. Nevertheless, the Court indicated the reason for use of expression "substantial compliance" in the following words :

"The use of the expression "substantial compliance" was made in the background that the searching officer had Section 50 in mind and it was unaided by the interpretation placed on it by the Constitution Bench in Baldev Singh case. A line or a word in a judgment cannot be read in isolation or as if

interpreting a statutory provision, to impute a different meaning to the observations."

It is manifest from the afore-extracted paragraph that Joseph Fernandez (supra) does not notice the ratio of Baldev Singh (supra) and in Prabha Shankar Dubey (supra), Joseph Fernandez (supra) is followed ignoring the dictum laid down in Baldev Singh's case (supra).

*22. In view of the foregoing discussion, we are of the firm opinion that the object with which right under Section 50(1) of the Narcotic Drugs And Psychotropic Substances Act, by way of a safeguard, has been conferred on the suspect, viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. 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 Narcotic Drugs And Psychotropic Substances 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. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision. As observed in **Re Presidential Poll, (1974)2 SCC 33**, it is the duty of the courts to get at the real intention of the Legislature by carefully attending to the whole scope of the provision to be construed. "The key to the opening of every law is the reason and spirit of the law, it is the animus imponentis, the intention of the law maker*

expressed in the law itself, taken as a whole." We are of the opinion that the concept of "substantial compliance" with the requirement of Section 50 of the Narcotic Drugs And Psychotropic Substances Act introduced and read into the mandate of the said Section in Joseph Fernandez (supra) and Prabha Shankar Dubey (supra) is neither borne out from the language of sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in Baldev Singh's case (supra). Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf. We also feel that though Section 50 gives an option to the empowered officer to take such person (suspect) either before the nearest gazetted officer or the Magistrate but in order to impart authenticity, transparency and creditworthiness to the entire proceedings, in the first instance, an endeavour should be to produce the suspect before the nearest Magistrate, who enjoys more confidence of the common man compared to any other officer. It would not only add legitimacy to the search proceedings, it may verily strengthen the prosecution as well."

It is, thus, submitted that the very object of Section 50 of the NDPS Act is to provide a safeguard which has been given to a suspect and to keep a check on misuse of power and to avoid harm to innocent persons and to minimise the allegations of planting or foisting a false case by the law and enforcement agencies. Counsel for the appellant has further argued that from the affidavit of PW1 Ex.PA, it is apparent that Form No.29 was not sent to FSL and in cross-examination of PW2, it is clearly admitted that Form No.29 was not deposited and

therefore, the link evidence is missing. It is further submitted that the case property, when produced before the Magistrate, vide order dated 17.10.2010, a specific direction was given to PW3 – SI Harvinder Singh, SHO for depositing the case property in judicial malkhana. The operative part of the said order reads as follows:-

*“...Inventory so prepared is certified as correct.
Case property is handed over to SI Harvinder Singh SHO,
P.S. Boha for its safe custody in judicial malkhana.*

*Sd/-
JMIC/Duty Magistrate
Budhlada.
17.10.2010.”*

It is, thus, submitted that a specific direction has been given vide Ex.PL that the entire case property including the sample seal parcels were to be deposited in the judicial malkhana. However, PW3 – SI Harvinder Singh, in his cross-examination has stated as under:-

“Case property of NDPS remained with me about ten days. It remained in my personal almirah in my custody in my office.”

It is, thus, submitted that the investigation in this case is tainted as neither the provisions of Section 50 of the NDPS Act were complied with nor despite the direction of the Judicial Magistrate/Duty Magistrate vide Ex.PL to submit the case property including the sample seal parcels in judicial malkhana dated 17.10.2010, were followed.

It is, thus, apparent that from 17.10.2010 til 27.10.2010 when the sample seal parcels were handed over to FSL, Chandigarh, it remained in possession of PW3 in gross violation of the order passed by the Judicial Magistrate/Duty Magistrate. Counsel for the appellant

has further submitted that while drawing the samples out of total 50 strips of Phenotil, one strip was separated and out of 10 strips of Microlit tablets, again one strip was separated and out of 05 vials of Rexcof syrup, one vial was separated and sealed as a sample parcel.

Counsel for the appellant has further argued that as per the report of the FSL Ex.PX, it is apparent that on all the 03 samples, there was no mark of any manufacturer, date of manufacturing or its expiry or composition given and, therefore, the samples which were separated do not represent the entire bulk allegedly recovered from the appellant. Reliance has been placed by counsel for the appellant on the judgment **“Gaunter Edwin Kircher vs State of Goa”**, AIR 1993(SC) 1456 passed by the Hon'ble Supreme Court. The operative part of the said judgment reads as under:-

“Then the other ingredient that has to be satisfied is whether the substance found in possession of the appellant was intended for his personal consumption and not for sale or distribution. No doubt as the Section lays down the burden is on the appellant to prove that the substance was intended for his personal consumption. As to the nature of burden of proof that has to be discharged depends upon the facts and circumstances of each case. Whether the substance was intended for personal consumption or not has to be examined in the context in which this exception is made. In the instant case the accused though in general has taken a plea of denial but his examination under Section 313 Cr. P.C. by the Magistrate reveals that there was such a plea namely that it was meant for his personal consumption. In the judgment of the trial court it is noted that the accused made an, application on 23.3.90 stating that the piece said to have been recovered from him was

less than 5 gms. and not 12 gms. as alleged and that the application was written and signed by the appellant himself. The prosecution case itself shows that he was having this substance in a pouch alongwith a chillum (smoking pipe) and smoking material. The averments made by the appellant in the application and as extracted by the trial court would themselves show that it was meant for his personal consumption. The above surrounding circumstances under which it was seized also confirm the same. The appellant is a foreigner and as a tourist appears to have carried this substance for his personal consumption. We are aware that the menace of trafficking in narcotic drugs and psychotropic substance has to be dealt with severely but in view of the provisions of Section 27, we are unable to hold that the small quantity found with the appellant was not meant for his personal consumption and that on the other hand it was meant for sale or distribution. Therefore, the appellant is liable to be punished as provided under Section 27 of the Act. From the records it appears that the appellant has been in jail for more than three years but that may not be relevant since the sentence prescribed under Section 27 is only six months. We are only just mentioning it as a fact. In the result the conviction of the appellant under Section 20(b) (ii) of the Act and sentence of 10 years R.I. are set aside. Instead he is convicted under. Section 27 of the Act and is sentenced to undergo 6 months' R.I. and to pay a fine of Rs. 1 lac in default of payment of which to further undergo 6 months' R.I. Subject to the above modifications, the appeal is disposed of.”

In view of the aforesaid submission, it is prayed on behalf of the appellant that the appeal may be allowed and the impugned judgment of conviction and order of sentence may be set aside.

It is further submitted that since there was a delay of sending the samples to FSL and during the intervening period, the same was not deposited in the judicial malkhana and it remained in custody of PW3 – SI Harvinder Singh, SHO, the important link of the prosecution evidence is, thus, missing. Counsel for the appellant has further relied upon the judgment **“Harjinder Singh vs State of Punjab”**, 2016(1) RCR (Criminal) 197 wherein this Court has held as follows:-

“The recovery was effected on 11.08.2002 and the sample parcel was sent to FSL Laboratory on 21.08.2002. Thus, there was a delay of 10 days in sending the sample. As observed by the Division Bench of this Court in Parminder Singh Vs. State of Haryana, 2006 (4) Recent Criminal Reports (Crl.) 495 (DB), according to the Narcotic Control Bureau Instructions, the sample parcel should have been deposited within 72 hours with the Chemical Examiner. Herein, the prosecution has not given any explanation for withholding the sample for such a long time.”

Counsel for the appellant has also relied upon the judgment **“Jaswinder Singh and another vs State of Punjab”**, 2013(1) RCR (Criminal) 257, where this Court has held as under:-

“There is substance in the argument of the learned counsel for the accused-appellants that as per Standing Order No. 1/89 dated 13th June, 1989, issued by Government of India, Ministry of Finance (Department of Revenue), it has been made mandatory that two samples must be drawn from the recovered substance, failing which, the whole recovery procedure will be vitiated. It has been further provided in the circular that the quantity to be drawn in

each sample for chemical analysis should not be less than 5 gins, in case of poppy husk. Section II of Standing Order No. 1/89 reads as under:—

Section II General Procedure for Sampling, Storage, etc.

2.1. Sampling and classification, etc. of drugs. All drugs shall be properly classified carefully weighed and sampled on the spot of seizure.

2.2. Drawal of samples. All the packages/containers shall be serialy numbered and kept in lots for sampling. Samples from the narcotic drugs and psychotropic substances seized, shall be drawn on the spot of recovery, in duplicate, in the presence of search witnesses Panchas and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchnama drawn on the spot.

2.3. Quantity to be drawn for the sampling.— The quantity to be drawn in each sample for chemical test shall not be less than 5 grams in respect of all narcotic drugs and pyschotropic substances save in the cases of opium, ganja and charas (hanish) where a quantity of 24 grams in each case is record for chemical test. The same quantities shall be taken for the duplicate sample also. The seized drugs in the packages/containers shall be well mixed to make it homogeneous and representative before the sample (in duplicate) is drawn.

2.4. Method of drawl: (a) Single container/package. - In the case of seizure of a single package/container, one sample in duplicate shall be drawn. Normally, it is advisable to draw one sample (in duplicate) from each package/container in case of seizure of more than package/container.

2.5. (b) Bunch of packages/containers.— However, when the packages/containers seized together are

identical size and weight, bearing identical markings and the contents of each package give identical results on colour test by the drug identification kit, conclusively indicating that the packages are identical in all respects, the packages/containers may be carefully bunched in lots of 10 packages/containers except in the case of ganja and hashish (charas), where it may be bunched in lots of 40 such packages/containers. For each such lot of packages/containers, one sample (in duplicate) may be drawn.

2.6. Bunching for, (i) Hashish and ganja.— *Where after making such lots, in the case of hashish and ganja, less than 20 packages/containers remain, and in the case of other drugs, less than 5 packages/containers remain, no bunching would be necessary and no samples need to be drawn.*

2.7. (ii) Other Drugs.— *If such remainder is 5 or more in the case of other drugs and sub stances and 20 or more in the case of ganja and hashish, one more sample (in duplicate) may be drawn for such remainder pack age/container.*

2.8. Drawal of representative samples.— *While drawing one sample (in duplicate) from a particular lot, it must be ensured that representative sample in equal quantity is taken from each package/container of that lot and mixed together to make a composite whole from which the samples are drawn for that lot.*

2.9. Storage of samples-procedure.— *The sample in duplicate should be kept in' heat sealed plastic bags as it is convenient and safe. The plastic bag container should be kept in a paper envelope should may be sealed property. Such sealed envelope may be marked as original and duplicate. Both the envelopes should also bear the S. No. of the package(s)/container(s) from which the sample*

has been drawn. The duplicate envelope containing the sample will also have a reference of the test memo. The seals should be legible. This envelope along with test memos should be kept in another envelope which should also be sealed and marked secret-drug sample/Test memo', to be sent to the chemical laboratory concerned.

3.0. Despatch of samples for testing - To whom to be sent.— *The seizing officers of the Central Governments Departments, viz., Customs, Central Excise, Central Bureau of Narcotics, Narcotics Control Bureau, Directorate of Revenue Intelligence, etc. should despatch samples of the seized drugs to one of the Laboratories of the Central Revenues Control Laboratory nearest to their offices depending upon the availability of test facilities. The other Central Agencies like BSF, CBI and other Central Police Organizations may send such samples to the Director, Central Forensic Laboratory, New Delhi. All State Enforcement Agencies may send samples of seized drugs to the Director/Deputy Director/Assistant Director of their respective State Forensic Science Laboratory.*

3.1 Preparation of inventory.— *After sampling, detailed inventory of such packages/containers shall be prepared for being enclosed to the panchnama. Original wrappers shall also be preserved for evidentiary purposes.*

Admittedly, one sample drawn from each of the bags vitiates the whole process of drawing the sample.”

Similar view has been taken by a Division Bench of this Court in **“State of Punjab vs Dharam Singh”, 2010 (3) RCR (Criminal) 94**, where it has been held as under:-

“As per story, 1850 tablets were recovered. Two samples, each of 25 tablets, were separated. One sample parcel of 25 tables was sent to the laboratory for report. As per report of the laboratory, Diazepam to the extent of

5 mg in each tablet was found. That means in 25 tablets, quantity of Diazepam was 125 mg. Loose tablets were recovered from the dabba carried by the respondent-accused in a plastic envelope. Question is whether the remaining tablets were containing 5 mg of Diazepamin each tablet or not. In case we presume that all the tablets, i.e., 1850 were containing 5 mg. of Diazepam per tablet, then as per quantity of Diazepam in each tablet, then as per quantity of Diazepam in each tablet, total recovery of Diazepam would be of 92.50 gm., which is noncommercial. Learned State counsel failed to convince how the remaining tablets are presumed to be of Diazepam to the extent of 5 mg per tablet, when tablets recovered were not in the form of strips.”

It is thus submitted that before drawing the sample, no proper procedure was followed by the Investigating Officer.

Counsel for the appellant has also placed reliance upon the judgment **“Union of India vs Mohanlal and another”, 2016(1) RCR (Criminal) 858**, where the Hon'ble Supreme Court while deciding the question “What are the circulars/notifications/directions/guidelines, if any, issued to competent officers to follow any specific procedure in regard to seizure of contraband, their storage and destruction? Copies of the same be attached to the report.”, has held as under:-

“11. Section 52-A(1) of the NDPS Act, 1985 empowers the Central Government to prescribe by a notification the procedure to be followed for seizure, storage and disposal of drugs and psychotropic substances. The Central Government have in exercise of that power issued Standing Order No. 1/89 which prescribes the procedure to be followed while conducting seizure of the contraband. Two subsequent standing orders

one dated 10.05.2007 and the other dated 16.01.2015 deal with disposal and destruction of seized contraband and do not alter or add to the earlier standing order that prescribes the procedure for conducting seizures. Para 2.2 of the Standing Order 1/89 states that samples must be taken from the seized contrabands on the spot at the time of recovery itself. It reads:

"2.2. All the packages/containers shall be serially numbered and kept in lots for sampling. Samples from the narcotic drugs and psychotropic substances seized, shall be drawn on the spot of recovery, in duplicate, in the presence of search witnesses (Panchas) and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchnama drawn on the spot."

Most of the States, however, claim that no samples are drawn at the time of seizure. Directorate of Revenue Intelligence is by far the only agency which claims that samples are drawn at the time of seizure, while Narcotics Control Bureau asserts that it does not do so. There is thus no uniform practice or procedure being followed by the States or the Central agencies in the matter of drawing of samples. This is, therefore, an area that needs to be suitably addressed in the light of the statutory provisions which ought to be strictly observed given the seriousness of the offences under the Act and the punishment prescribed by law in case the same are proved. We propose to deal with the issue no matter briefly in an attempt to remove the confusion that prevails regarding the true position as regards drawing of samples."

Lastly, it is submitted on behalf of the appellant that the appellant has already undergone approximately 02 years and 05 months of actual sentence during the trial and after conviction.

On the other hand, counsel for the State has submitted that

the trial Court has rightly convicted and sentenced the appellant vide order dated 17.09.2015. It is further submitted that it was a case of chance recovery and, therefore, the provisions of Section 50 of the NDPS Act are not mandatory. It is also submitted that the minor contradictions in the procedure adopted by the Investigating Officer are not relevant in view of heavy recovery made from the appellant, however, counsel for the State has not disputed the fact that the appellant has already undergone 02 years and 05 months of actual sentence.

After hearing counsel for the parties, I find merit in the present appeal on the following grounds:-

*A. Firstly, it is a case of complete violation of the mandatory provisions of Section 50 of the NDPS Act. Though, in the FIR, it is mentioned that during patrolling duty, the appellant was found in possession of the contrabands, however, it is apparent that his personal search was done and personal search memo Ex.PC was prepared at the spot, which show that during the investigation under the NDPS Act, while conducting the personal search of the accused, no offer was made to the accused informing him about his right to be searched either before a Gazetted Officer or a Magistrate and, therefore, it is a case of complete violation of Section 50 of the NDPS Act. In view of the judgment of the Hon'ble Supreme Court in **Vijaysingh Chandubha Jadeja's case (supra)**, the investigating agency has completely ignored the safeguard which has been provided under Section 50 of the NDPS Act to a suspect to avail his right to be searched before a Gazetted Officer or a Magistrate.*

B. The samples which has been drawn out of the alleged contraband recovered from the appellant is not in

*conformity with the procedure laid down in Standing Order No.1 of 1989. It has been held by the Hon'ble Supreme Court in **Union of India's case (supra)** that the Central Government in exercise of its powers has issued Standing Order No.1 of 1989 which prescribed the procedure to be followed while conducting seizure of the contraband. It is also held by this Court in **Jaswinder Singh's case (supra)** that where only one sample is drawn it vitiates the whole process of drawing the samples.*

C. It has come in the statement of PW1 who has produced his affidavit Ex.PA that Form No.29 was not handed over to him for handing over the same to FSL. Similar statement is made by PW2 where in his cross-examination, he has admitted that Form No.29 was not sent to the FSL along with the sample sealed parcels.

*D. It has also come in the statement of PW3 that despite the order of the Judicial Magistrate Ex.PL that the recovered articles be deposited in the judicial malkhana, the sample seal parcels remained in his custody from 17.10.2010 to 27.10.2010 and in view of the judgment **Harjinder Singh's case (supra)**, the delay in sending the sample without giving any explanation raises a doubt about the procedure adopted by the Investigating Officer.*

E. It is also to be noticed that the appellant has already undergone 02 years and 05 months of actual sentence and is not involved in any other case as per the information supplied by counsel for the State, on instructions from HC Sukhdev Singh.

In view of what has been discussed hereinabove and in view of the fact that the appellant has already undergone 02 years and 05 months of actual sentence; he is not a previous convict and is not facing trial in any other case, the present appeal is allowed and the appellant – Makhan Singh is ordered to be released forthwith, if not

required in any other case.

(ARVIND SINGH SANGWAN)
JUDGE

25.11.2017
yakub

Whether speaking/reasoned	Yes/No
Whether reportable:	Yes/No