

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRA-S-3179-SB-2013 (O&M)

Date of decision: 11.11.2017

Buta Singh

... Appellant

Vs.

State of Punjab

... Respondent

CORAM: HON'BLE MR. JUSTICE ARVIND SINGH SANGWAN

Present: Mr. P.S. Sekhon, Advocate and
Ms. Aditi Girdhar, Advocate for
Ms. Gurpal Kaur Dulat, Legal Aid Counsel
for the appellant.

Mr. Amandeep S. Gill, Sr. DAG, Punjab.

ARVIND SINGH SANGWAN, J.

Present appeal has been filed challenging the judgment of conviction and order of sentence dated 05.09.2013 vide which the appellant was convicted under Section 22 of the Narcotic Drugs and Psychotropic Substance Act, 1985 (for short 'NDPS Act') and sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.1 lac. In default of payment of fine, it was further ordered that he will undergo R.I. for one more year.

Before referring to the facts, it may be noticed that the present appeal was admitted vide order dated 23.09.2013 and legal aid counsel was also appointed in this case, as the appellant is in judicial lockup since the date of his conviction i.e. 05.09.2013.

As per the custody certificate dated 27.10.2017 filed by learned State

counsel, the appellant has already undergone 03 years and 06 months of actual sentence and he is not involved in any such or similar case.

Brief facts of the case are that on 07.06.2016, SI/SHO Dalbir Singh along with other police officials, on an official jeep bearing registration No.PB-12F-0330, was going from Village Jhunir to Makhewala on patrol duty. When the police party reached near a telephone exchange in village Jhunir, a secret informer stopped them and told SI Dalbir Singh that one person namely Buta Singh son of Puran Singh, resident of Makhewala is in habit of selling intoxicant tablets and liquid i.e. Rexcof and he is coming from Makhewala to Jhunir for selling these intoxicant which he is carrying in a polythene bag and if a naka is held, large quantity of intoxicant tablets and Rexcof can be recovered from him. On the basis of secret information, a ruqa (information) was sent to police station through PHG Jagdev Singh for registration of case and directions were given to send the special report to senior officers. The naka (barricade) was held by SI Dalbir Singh along with other police officials on Jhunir-Makhewala road. One Ami Chand son of Lachhman Dass met the police party and he was joined by the police and they proceeded towards village Makhewala. When they reached near a cemented water channel, a person carrying a white polythene bag in his hand, in which intoxicant medicines and bottles were kept, was asked to stop, but he perturbed and tried to turn towards the fields. The police party apprehended him and he disclosed his name as Buta Singh son of Puran Singh. The white polythene bag was opened and intoxicant medicines were found in the same. On counting, the total number of tablets came out to be 22700 and out of those, 20 tablets were separated as sample. Similarly, on counting the bottles containing Rexcof, it came to 33 bottles and from these 33 bottles, one bottle was separated

as sample. Thereafter, the bulk parcel and samples were separately prepared and sealed by the Investigating Officer with seal impression 'DS'. The sample seal was prepared separately and after use, it was handed over to independent witness namely Ami Chand. The case property was also taken in possession by preparing separate recovery memo. The site was inspected and site plan was also prepared. Thereafter, statements of witnesses were recorded. The accused was arrested vide arrest memo and on receipt of report of FSL and completion of all other formalities, report under Section 173 of the Code of Criminal Procedure ('Cr.P.C.' for short) was submitted in the Court against the accused.

On submission of the challan, compliance of Section 207 Cr.P.C. was made and finding a prima facie case, charge under Section 22 of NDPS Act was framed against the accused, to which he pleaded not guilty and claimed trial. Thereafter, the case was committed to the Court for prosecution.

The prosecution in evidence examined only three witnesses. PW1 HC Gurdeep Singh who is a formal witness, stated that on 16.06.2010, he was posted in Police Station Jhunir and he tendered his affidavit Ex.PA and stated that the same may be read as part of his statement. In cross-examination, he stated that during the night of 16.06.2010, the sample remained with him and he stayed in police station, Mansa. He further stated that he did not know the police official with whom he deposited the sample and on his arrival, he reported his return to SHO/SI Dalbir Singh.

PW2 ASI Gurdip Singh stated on the lines of the allegations made in the FIR. It was stated that after the accused was apprehended by the police, 20 tablets were separated and converted into a parcel and remaining tablets i.e. 22680 tablets were also sealed in a separate parcel. Similarly, a sample was

drawn from Rexcof bottles and sample as well as the residues were sealed separately. This witness further stated that all the parcels were sealed by Investigating Officer under his seal impression 'DS'. Samples seal chit was prepared and the seal after use was handed over to the independent witness Ami Chand. The case property was taken in possession vide recovery memo Ex.PB, which was attested by him and Ami Chand. A rough site plan was also prepared and on personal search of the accused, Rs.450/- were recovered and a personal search memo Ex.PC was prepared at the spot, which was also attested by him and Ami Chand and was also signed by the accused. Later on, the accused was arrested vide arrest memo Ex.PD and the same was also signed/attested by the witness and accused.

In cross-examination, this witness has stated that *"Investigating Officer did not ask the accused for availing his right to be searched before a Gazetted Officer or a Magistrate"*. This witness further stated that the place of recovery was near a cotton field and the entire writing work was done by the Investigating Officer at the spot till 9.30 PM. This witness further stated as *"the tablets were recovered in loose form and on the liquid bottles, Rexcof was written. The sample was drawn at 6.00 PM. Form No.29 was filled at the spot"*. This witness further stated that *"case property was kept by SHO Dalbir Singh in his possession"*.

PW3 Inspector Dalbir Singh also stated on the lines of the allegations made in the FIR and stated that after apprehending the accused, the samples were drawn and samples as well as bulk parcels were sealed with his seal impression 'DS'. Samples seal chit Ex.P1 was prepared. The seal after use was handed over to Ami Chand and the case property with samples seal chit was

taken in possession vide memo Ex.PB attested by the witness. Rough site plan Ex.PG, inventory report Ex.PH and request Ex.PJ were prepared at the spot. This witness further stated that after recording the statement of witnesses, the accused was arrested vide memo Ex.PD and on his personal search, Rs.450/- were recovered vide memo Ex.PC. It is further stated that on 08.06.2010, he produced the accused alongwith case property before Judicial Magistrate vide inventory report Ex.PH and request Ex.PJ, on which the Court passed the order Ex.PK. He deposited the bulk parcels in judicial malkhana and kept the samples with him. On 16.06.2010, he had sent the samples of the case to the office of FSL, Chandigarh through HC Gurdeep Singh and the same was deposited in FSL, Chandigarh in intact form on 17.06.2010 and the receipt was handed over to him. The report of Chemical Examiner Ex.PL was received and thereafter, challan was presented. This witness further proved the bulk parcel MO1.

In cross-examination, this witness stated that *“the accused was not informed regarding Section 50 of NDPS Act, volunteered that as the Rexcof syrup was apparent on the bottles, which were in transparent polythene”*. It was further stated that nothing was written on the intoxicant tablets and on counting of the tablets and bottles, recovery memo Ex.PB was prepared. This witness further stated that *“I got my seal back after 4 days and no entry was made in this regard. FIR No. has been mentioned on each memo with same pen and ink”*. This witness denied the suggestion that FIR was registered first and recovery was made thereafter. This witness further stated that *“I do not remember that if I conducted any inquiry against Sanjeev Kumar regarding selling the intoxicant tablets. It is wrong to suggest that accused filed a complaint against him and Sanjeev Kumar”*. He further deposed that he informed DSP from the spot regarding

recovery and stated that he did not know who filled Form No.29 and denied the suggestion relating to defence set up by the accused that the accused was falsely implicated in this case, as he has filed a complaint against him before the SSP.

The Public Prosecutor vide its statement dated 13.05.2013 gave up independent witness Ami Chand, on the basis of request made by the police Mark A and closed the prosecution evidence. Thereafter, the statement of the accused under Section 313 Cr.P.C. was recorded in which he denied all the incriminating evidence against him and thereafter, the case was fixed for defence evidence.

In the defence, the accused examine DW1 Ranjit Singh and DW2 Bhola Singh, who were Sarpanch and Panch of Village Makhewala as accused Buta Singh was also resident of the same village. They deposed that about three years ago, Buta Singh had given an application before SSP, Mansa against Sanjiv Kumar son of Megh Raj alleging that he was in the habit of selling intoxicants with the connivance of SHO, Jhunir. SHO Dalbir Singh had inquired that application by visiting Village Makhewala and SHO told the accused Buta Singh that this complaint is against him and threatened him. After five or six days, Buta Singh was arrested in a false case. In cross-examination, both these witness denied that they are deposing falsely.

DW3 HC Gurtej Singh No.701/Mansa, PS Jhunir brought the summoned record i.e. DDR register and proved the entry No.21 dated 16.06.2010, which was in the handwriting of ASI Gurdeep Singh. As per this entry, Constable Gurdeep Singh has taken two sample parcels to FSL in FIR No.59 and one sample in FIR No.60. This entry was proved as Ex.D1 and the entry No.28 dated 18.06.2010 vide which Constable Gurdeep Singh returned to police station was proved as Ex.D2.

DW4 Constable Ram Singh stated that he has brought the summoned record and has seen the application against Sanjiv Kumar @ Kala son of Megh Ram, resident of Jhunir, moved by some unknown person, attested copy of the same was proved as Ex.DW4/A, the statement made by Sanjiv Kumar in the inquiry as Ex.DW4/B, panchayatnama as Ex.DW4/C and inquiry report, attested copy of which was produced as Ex.DW4/D and attested copy of final inquiry report as Ex.DW4/E. Thereafter, the appellant-accused closed his evidence on 27.08.2013 by tendering an FIR Ex.DX in his defence.

The trial Court, thereafter vide impugned judgment of conviction dated 05.09.2013 held the appellant guilty for the offence under Section 22 of NDPS Act and vide order of sentence dated 05.09.2013, awarded 10 years R.I. with a fine of Rs.1 lac which is under challenge in this appeal.

Learned counsel for the appellant has argued that the appellant has been falsely implicated in the present FIR, for the reasons that one anonymous complaint Ex.DW4/A was submitted before SSP, Mansa against one Sanjiv Kumar and SHO, Jhunir, i.e. PW3 which, on inquiry was found to be made by the appellant and it has come in the evidence of DW1 and DW2 Sarpanch and Panch of the village that PW3 Inspector Dalbir Singh, 5-6 days prior to registration of FIR, had come to their village and threatened Buta Singh that he has filed the complaint against him. It is also submitted that the inquiry was conducted by the DSP and inquiry report is Ex.DW4/D and final inquiry report is Ex.DW4/E and therefore, PW3 SHO Dalbir Singh was nursing a grudge against the appellant for filing a complaint against him. In this regard, it is also submitted that the said witness PW3 Inspector Dalbir Singh has totally denied that any complaint was made against him and inquiry was conducted, which further show that this

witness is even trying to conceal the factual position, which is proved on record.

On merits, it is submitted that it is admitted case of the prosecution, from a perusal of the FIR and the statement of two prosecution witnesses PW2 ASI Gurdip Singh as well as PW3 Inspector Dalbir Singh that at no point of time, any offer under Section 50 of the NDPS Act was made to the appellant-accused to be searched either before a Magistrate or a Gazetted Officer and in fact it is a case where it is clearly admitted by the prosecution witnesses that they have not made any such offer at any point of time either in writing or orally. Counsel for the appellant has further referred to the statement of these two witnesses where they have stated that the personal search of the appellant was also made vide recovery memo Ex.PB. Regarding the personal search of the appellant, in which Rs.450/- were recovered, it is submitted that once the personal search of the appellant was made by the police party, in the investigation of a case under NDPS Act, mandatory provisions of Section 50 were totally ignored. Counsel for the appellant has relied upon **Vijaysingh Chandubha Jadeja Vs. State of Gujarat, 2011 (1) SCC 609**, wherein it has been held as under: -

"We are of the opinion that the concept of "substantial compliance" with the requirement of Section 50 of the NDPS 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.”

It is also submitted that it has been held by the Hon’ble Supreme Court in **State of Rajasthan Vs. Parmanand and another, 2014 (2) RCR (Criminal) 40** that where apart from a bag carried out by an accused, his personal search was also made, Section 50 of NDPS Act will have an application. The operative part of the judgment is reproduced below: -

“Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application. In this case, respondent No.1 Parmanand’s bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of respondent No.2 Surajmal was also conducted. Therefore, in light of judgments of this Court mentioned in the preceding paragraphs, Section 50 of the NDPS Act will have application.

It is now necessary to examine whether in this case, Section 50 of the NDPS Act is breached or not. The police witnesses have stated that the respondents were informed that they have a right to be searched before a nearest gazetted officer or a nearest Magistrate or before PW-5 J.S. Negi, the Superintendent. They were given a written notice. As stated by the Constitution Bench in Baldev Singh, it is not necessary to inform the accused person, in writing, of his right under Section 50(1) of the NDPS Act.

His right can be orally communicated to him. But, in this case, there was no individual communication of right. A common notice was given on which only respondent No.2 – Surajmal is stated to have signed for himself and for respondent No.1 – Parmanand. Respondent No.1 Parmanand did not sign.”

It is next submitted on behalf of the appellant that while drawing the sample, only 20 tablets were separated from the alleged recovery of total 22700 tablets, which were in loose form and no proper procedure as per Standing Order No.1/89 dated 13.06.1989 issued by Govt. of India regarding drawing of sample, has been followed. Counsel for the appellant has relied upon **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 tablets 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 Diazepam in 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 non-commercial. 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, as all the loose tablets were

not mixed together to make it a uniform bulk for the purpose of drawing the sample. It is also argued that out of total recovery, only 20 tablets were separated as sample parcel, which do not represent the entire bulk.

It is next contended that it has come in the statement of PW3 Inspector Dalbir Singh that when he presented the case property before the Judicial Magistrate, the Court passed the order Ex.PK for depositing the parcels in the malkhana, however, he only deposited the bulk parcel. Thus from 07.06.2010 till 16.06.2010 i.e. for a period of 09 days, he kept the sample parcels with him and has never deposited the same in the malkhana.

It is also submitted by learned counsel for the appellant that it has come in the statement of this witness that at the time of sealing the sample, seal impression 'DS' was handed over to independent witness Ami Chand and after 04 days, the same was returned to him i.e. for a period of about 06 days prior to sending the sample to FSL. Therefore, the seal was available with PW3 Inspector Dalbir Singh, hence, there is every possibility that the seal of the sample parcels was tampered by him.

Counsel for the appellant has further submitted that an important link of the prosecution evidence is independent witness Ami Chand, before whom the alleged recovery was made and to whom the seal was handed over before sealing the bulk parcels as well as the sample seal, was never produced by the prosecution and was given up and therefore, once the appellant has taken a specific defence that PW3 has acted in a manner that he wanted to settle his personal score with the appellant on account of filing of a complaint against him as well as one Sanjiv Kumar, no reliance can be placed on the statement of PW3 in the absence of corroboration of independent witness. In this regard, counsel for

the appellant has placed reliance on a judgment of this Court in **Harjinder Singh Vs. State of Punjab, 2016 (1) RCR (Criminal) 197**, wherein this Court held as under: -

*“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.”*

It is also submitted on behalf of the appellant that since the secret information was not reduced into writing, it amounts to non-compliance of Section 42(a) of NDPS Act and therefore, learned counsel for the appellant has relied upon judgment of the Hon’ble Supreme Court in **State of Rajasthan Vs. Jag Raj Singh @ Hansa, 2016 (3) RCR (Criminal) 539**, wherein it has been held as under: -

*“A Constitutional Bench of this Court in **State of Punjab Vs. Baldev Singh, 1999 (3) RCR (Criminal) 533: (1999) 6 SCC 172**, had occasion to consider the provisions of the NDPS Act and several earlier judgments of this Court. The Constitution Bench noticed that the earlier judgments in **Balbir Singh’s** case has found approval by three Judges Bench in **Saiyad Mohd. Saiyad Umar Saiyed and others Vs. The State of Gujzarat (supra)** and a discordant note was*

struck by two Judges Bench in State of Himachal Pradesh Vs. Pirthi Chand and another, 1996 (2) Rcr (Criminal) 759 : (1996) 2 SCC 37. The constitutional Bench approved the view of this Court in Balbir Singh's case that there is an obligation on authorized officer under Section 50 to inform the suspect that he has right to be informed in the presence of the Gazetted Officer. It was held by Constitution Bench that if search is conducted in violation of Section 50, it may not vitiate the trial but that would render the recovery of illicit articles suspect and vitiates the conviction and sentence of the accused. What is said about non-compliance of Section 50 is also true with regard to non-compliance of Section 42 of the Act."

Counsel for the appellant has submitted that it is in the evidence of the prosecution that there was no batch number or name of manufacturer with regard to 33 bottles of Rexcof and therefore the sample was not properly drawn with regard to said recovery. In support thereof, he has placed reliance upon **Gaunter Edwin Kircher Vs. State of Goa, AIR 1993 SC 1456**, wherein the Hon'ble Supreme Court has held 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.

In reply, learned State counsel has submitted that non-examination of the independent witness is not fatal to the prosecution version, as the appellant has joined the independent witness, however, the same was given up as won over by the accused. With regard to the arguments regarding non-compliance of Section 42(a) of NDPS Act, it is submitted that provisions of Section 42 (a) of NDPS Act apply in a case relating to recovery of a vehicle or a building and not a person. It is further submitted that the bulk parcel was duly deposited in the judicial malkhana in compliance of the order of the Judicial Magistrate and there is no allegation that seal of the sample parcels was tampered with. It is also submitted that it is not proved on record that the application Ex.DW4/A was given by the appellant against PW3 Inspector Dalbir Singh and there is no plausible defence put up by the appellant-accused.

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

- (i) The trial Court has completely ignored the defence evidence led by the appellant and has failed to evaluate the prosecution evidence in the light of defence set up by the appellant. The appellant has set up a defence that a complaint was lodged with the SSP, Mansa that one Sanjiv Kumar, in collusion with SHO, Police Station, Jhunir, is involved in the selling of intoxicants. The appellant has proved on record the complaint Ex.DW4/A, the inquiry report conducted on the same by DSP as Ex.DW4/D and final report Ex.DW4/E. Both the defence witnesses DW1 and DW2, Sarpanch and Panch have stated that PW3 Inspector Dalbir Singh, SHO, PS, Jhunir had come to the village 5-6 days before registration of the FIR and had threatened the appellant, for the reason that the appellant has filed the said complaint against him and immediately thereafter, the appellant was implicated in the present FIR. In the light of this defence set up by the appellant, the evidence of the prosecution, if examined minutely, proves the conduct of PW3 Inspector Dalbir Singh SHO that he has not acted and followed procedure in accordance with law.
- (ii) The statement of PW3 Inspector Dalbir Singh, on careful scrutiny, clearly make out a case that provisions of Section 50 of NDPS Act were not at all followed. This witness has clearly admitted that he has not informed the accused regarding his right under Section 50 of NDPS Act. This witness has further stated that the samples were sealed with seal impression 'DS' which was handed over to independent witness Ami Chand. However, after 04 days, the seal was taken back i.e. 06 days prior to sending the sample parcels, both

the seal and parcel were in custody of this witness. This witness has also stated that since the time of recovery i.e. 07.06.2010 till deposit of the sealed sample parcels with FSL on 17.06.2010, it remained in his custody and it was never deposited in the malkhana of police station, despite the order of Judicial Magistrate Ex.PK. This raises a serious doubt about the procedure adopted by PW3 Inspector Dalbir Singh, as he kept the seal as well as the sealed sample parcels with him for 11 days and never deposited the same in judicial malkhana. This witness has further stated that he has conducted the personal search of the appellant-accused and vide recovery memo Ex.PC, Rs.450/- were recovered. Since the personal search was made during the investigation of an NDPS case, non-compliance of Section 50 of NDPS Act has made the prosecution case highly doubtful specially in view of the fact that the appellant has set up a clear defence, which is proved from the statements of independent witnesses DW1 and DW2 that about one week prior to registration of FIR, the appellant has lodged a complaint with SSP, Mansa that PW3 Inspector Dalbir Singh, SHO, PS, Jhunir along with Sanjiv Kumar are indulged in sale of intoxicants.

- (iii) The prosecution has examined only three witnesses, out of which PW1 HC Gurdeep Singh is a formal witness, who has deposited the sample parcel to FSL. However, there is no explanation given by him that why the sample was not deposited on the same day, as this witness has stated that after obtaining the sample on 16.06.2010, he stayed in police station, Mansa on 16.06.2010 and deposited the same

with FSL on 17.06.2010.

- (iv) Even the statement of Investigating Officer PW2 ASI Gurdip Singh do not inspire much confidence. This witness has also stated that the sample parcel and bulk parcel were sealed with seal impression 'DS' and it was handed over to independent witness Ami Chand and with regard to compliance of Section 50 of NDPS Act, this witness clearly admitted that the Investigating Officer did not ask the accused to avail his right to be searched before Gazetted Officer or Magistrate. Therefore, from the statement of this witness also, it is proved that it is a case of complete non-compliance of Section 50 of NDPS Act. This witness has further admitted that the case property was kept by PW3 Inspector Dalbir Singh in his possession and has given no explanation that, despite the order of Judicial Magistrate Ex.PK, why the sealed sample parcels were not deposited in judicial malkhana.
- (v) It has also come in the evidence that there was no batch number, name of manufacturer or other details given on the bottles of Rexcof syrup and therefore, the sample of one bottle taken, was also not in accordance with the procedure laid down under the aforesaid standing order. In view of the judgment of this Court in **Harjinder Singh** (supra), the sealed sample cannot be held to be a representative parcel of the entire bulk allegedly recover from the appellant.
- (vi) In view of the judgment of Hon'ble Supreme Court in **Vijaysingh Chandubha Jadeja** (supra) and **Parmanand** (supra), it is mandatory for the prosecution to inform the accused person in writing about his

right under Section 50 (1) of NDPS Act, whereas in the instant case, there is total non-compliance, as even oral communication is not made.

- (vii) Because independent witness Ami Chand, to whom the sealed sample parcels with seal impression 'DS' were handed over, was given up by the prosecution and never examined. The non-examination of this witness is fatal to prosecution version in the present case in view of the defence set up by the appellant that he has been falsely implicated on account of lodging a complaint against PW3 and it was necessary to corroborate the version of PW3 by examining the independent witness.
- (viii) Even the manner, in which the samples were drawn, is not as per the standing Order No.1/89 issued by the Govt. of India, as it is the case of prosecution that the recovery of tablets were in loose form and no proper procedure for representing the bulk while drawing the samples was followed. In view of judgment of this Court in **Jaswinder Singh** (supra) and **Dharam Singh** (supra), the sample of 20 tablets drawn from the entire bulk cannot be held to be a proper, homogeneous and representative sample.
- (ix) It is also apparent on record from a bare perusal of Form No.29, which according to PW1 and PW2 was filled at the spot, bears no date of 07.06.2010 under the signatures of PW3 and rather it shows the date as 16.06.2010, i.e. the date when the same was sent to FSL, which raises a doubt that Form No.29 was filled at the spot or not. Though the samples seal slip is pasted with glue on this document at

the bottom and it has been signed by SSP, Mansa, but again no date is mentioned, on which date SSP, Mansa signed this document.

- (x) A perusal of Ex.PK, the order passed by the Judicial Magistrate on 08.06.2010, also do not show that the Magistrate has seen Form No.29 along with case property. The order is reproduced as below: -

“Case property in cloth bag containing intoxicants tablets & syrup bottles along with two sample parcel of syrup bottle & intoxicant tablets produced in the Court in intact condition sealed with seal bearing impression ‘DS’. The same are seen and verified by the undersigned. Case property be deposited in judicial malkhana & sample parcels be sent to the office of chemical examiner for chemical test.”

- (xi) It has also come in the statement of both the prosecution witnesses i.e. PW1 and PW2 that it was not a case of chance recovery. As per the version given in the FIR, both these witnesses received a secret information on the basis of which, a ruqa (information) was sent to the police station for registration of FIR and therefore, non-compliance of Section 50 of NDPS Act is fatal to the prosecution version.
- (xii) The trial Court, while convicting the appellant, has wrongly held that the provisions of Section 50 of NDPS Act were complied with, as the Investigating Officer himself was the SHO of police station and it has come in the evidence that he has kept the sealed parcel with him and has not deposited the same in judicial malkhana. It has also come in the evidence that he has sent the sealed parcels after a delay of about

11 days and therefore, the finding recorded by the trial Court that there is a compliance of Section 50 of NDPS Act, is erroneous. The trial Court has further ignored FIR Ex.DX dated 24.04.2013, vide which aforesaid Sanjiv Kumar was arrested in connection with an FIR under the NDPS Act.

For the reasons stated above, this appeal is allowed. The impugned judgment of conviction and order of sentence of even date i.e. 05.09.2013 are set aside. The appellant-accused is acquitted of the charge under Section 22 of NDPS Act and he shall be released forthwith, if he is not involved in any other case.

[ARVIND SINGH SANGWAN]
JUDGE

11.11.2017
vishnu

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