

IN THE HIGH COURT OF PUNJAB & HARYANA, CHANDIGARH

CRA-S-2732 -SB of 2017 (O&M)

Date of Decision: September 12, 2017

Randeep Singh @ Gola

.....Appellant

Versus

State of UT Chandigarh

.....Respondent

Coram: Hon'ble Mr. Justice Arvind Singh Sangwan

Present: Mr.Amit Sharma, Advocate
for the appellant.
Mr.Amarjit Virk, APP
for UT Chandigarh

Arvind Singh Sangwan, J.

This appeal is filed against the judgment of conviction dated 5.6.2017 and order of sentence dated 6.6.2017 passed by the Judge Special Court, Chandigarh vide which the appellant was convicted under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'the Act') and sentenced to undergo rigorous imprisonment for a period of one year along with a fine of ₹ 10,000/- and further to undergo one month rigorous imprisonment in default of payment of fine.

Appeal was admitted and the lower Court record was requisitioned. As per the custody certificate filed in the Court, appellant-accused has already undergone three months of actual sentence out of one year rigorous imprisonment awarded by the trial Court.

Brief facts of the case, as per the version given in the FIR,

are that on 28.10.2015, Assistant Sub Inspector-Vidyanand was present near the light point of Dadu Majra, Chandigarh. At about 7.30 p.m., one person was seen going towards village Dadu Majra and on seeing the police party, he immediately turned back. On suspicion, he was apprehended. He tried to throw a polythene bag by taking it out from the right side pocket of his trousers. His right hand was caught by the Police in which he was carrying the said polythene and, on checking, heroin wrapped in polythene was found for which he could not produce any permit or licence. Upon weighing the contraband at the spot itself with an electronic scale, it was found to be seven grams, out of which, one sample of two grams was drawn and was sealed in a separate polythene. Similarly, the remaining contraband was also sealed separately. Both parcels were sealed with the seal "RS" and taken into police possession. Later on, the seal was handed over to Constable-Palvinder Singh. Test memo was prepared and, thereafter, a ruqa was sent to the Police Station through Constable-Vikas for registration of the FIR.

After completion of the entire investigation, challan was presented and the charges against the appellant-accused were framed on 3.8.2016 under Section 21 of the Act.

In order to prove, the prosecution case, PW1 Head Constable Harabans Singh, appeared and produced Register No. 19 to prove the true copies of entries Exhibit P1 with regard to deposit of sealed case property in the malkhana by Inspector-Ranjodh Singh on 28.10.2015 and also with regard to production of case property along with the sample and inventory before the Illaqa Magistrate on 29.10.2015. He also proved the handing

over of one sample parcel of two grams heroin along with sample to Constable Suresh Pal on 30.10.2015 for depositing the same in CFSL and exhibited the case property as Exhibit MO1 and Exhibit MO2.

Similarly, PW2, Constable-Suresh Pal deposed about deposit of the sample parcels of two grams with CFSL on 30.10.2015 vide a receipt which was handed over to MMHC Harbans Singh.

PW3, Constable-Palvinder Singh, who is the recovery witness, stated that on 28.10.2015, he along with Assistant Sub Inspector-Vidyanand and Constable-Vikas Kumar was on patrol duty and was present near light point of Dadu Majra, when at about 7.30 p.m., the appellant was seen going towards Dadu Majra and, on suspicion, he was apprehended and he tried to throw a polythene bag by taking it out from right side of his pocket of his trousers but his right hand was caught by them along with the polythene and, on checking, heroin weighing seven grams was found which was weighed with an electronic scale and one sample of two grams was drawn and was put into separate polythene and the remaining five grams was put into the same polythene. Both the parcels were sealed with the seal "RS" at two places and were taken into possession vide seizure memo Exhibit P2. He also proved the test memo prepared at the spot Exhibit P3 and, thereafter, the sample of seal was handed over to him. Subsequently, a ruqa, Exhibit P4 was sent by Assistant Sub Inspector- Vidyanand through Constable-Vikas and upon sending a message for sending the second Investigating Officer at the spot to whom parcels along with accused and other documents were handed over vide Exhibit P5 and Assistant Sub Inspector- Naveen Kumar arrested accused vide memo Exhibit P6. This

witness also deposed that rough site plan Exhibit P4 was prepared and, after completion of the investigation at the spot, Assistant Sub Inspector-Naveen Kumar produced the accused along with the case property before Inspector-Ranjodh Singh, who after verifying the factum of recovery fixed his seal "RS" and deposited the same including the seal in malkhana through MMHC- Harbans Singh.

PW3 Assistant Sub Inspector-Naveen Kumar, who was the second Investigating Officer, deposed that the accused along with the case property was produced before him by the first Investigating Officer and on completion of proceedings at the spot, he produced the accused and the case property with the documents, prepared at the spot, before the Station House Officer. Inspector-Ranjodh Singh, who after verifying the facts, fixed the seal "RS" along with its attestation and deposited case property with MMHC- Harbans Singh. He also deposed that on 29.10.2015, the sealed parcels along with sample seal were produced before Ms.Pamelpreet Grewal, Judicial Magistrate First Class along with attested inventory. This witness also proved the facts, Exhibit P12 to Exhibit P14 and CFSL report Exhibit P15 along with scaled site plan Exhibit P16. The case property was also produced during his evidence.

PW5, Assistant Sub Inspector-Vidyanand being the complainant, an eye witness of the recovery from the appellant-accused has also deposed on the same lines as that of PW3 Palvinder Singh, Constable.

PW6 Inspector- Ranjodh Singh deposed that on 28.10.2015, the accused along with sealed parcels and documents were produced before him by the Second Investigating Officer and after verifying the facts, he had

put his seal "RS" in token of its attestation on each of the parcels and deposited the same with MMHC- Harbans Singh. The case property Exhibit MO1 to MO5 were produced during his evidence and he identified the same.

Thereafter, the statement of the appellant-accused was recorded under Section 313 of the Code of Criminal Procedure in which he pleaded false implication and claimed trial. Subsequently, in his defence evidence, he examined DW1 Head Constable-Harparamjit Singh, who proved the record of DDR No.63 dated 28.10.2015 as Exhibit DW1/1. This witness deposed that, as per the record, Assistant Sub Inspector- Naveen Kumar had handed over to him the case property in FIR No.442 of 2015 including one Skoda Car having registration No. PCT-32 deposited by Assistant Sub Inspector- Naveen Kumar vide Exhibit DW1/2. He further deposed that, as per his record, there is no entry in register No. 2 pertaining to laying of any Naka at light point of Village Dadu Majra, Chandigarh on 28.10.2015.

The learned trial Court vide its judgment dated 5.6.2017 held the appellant guilty of offence punishable under Section 21 of the Act for illegal possession of seven grams of heroin without having any permit or licence and, vide order of sentence dated 6.6.2017, sentenced him to undergo one year rigorous imprisonment with a fine of ₹10,000/-.

Learned counsel for the appellant as well as learned counsel appearing for the Union Territory, Chandigarh are ad idem that since the appellant is undergoing imprisonment, the appeal may be decided finally as the lower Court record has already been received.

Learned counsel for the appellant has argued that the alleged recovery of seven grams heroin is marginally above the small quantity i.e. five grams and there is no compliance of Section 50 of the Act as neither in the FIR nor in the statement of First Investigating Officer, PW5 Assistant Sub Inspector- Naveen Kumar, it is mentioned that the accused was given an offer to be searched before the Gazetted Officer or the Magistrate. Learned counsel for the appellant has referred to the statement of PW5 wherein cross-examination, he has deposed as under:-

“When the accused took out the polythene bag from his pocket, it was in his fist. I have not given any notice to the accused under the Narcotic Drugs and Psychotropic Substances Act, 1985. I have not allowed the accused to throw the polythene packet and I opened his fist and had taken back the polythene packet”

It is, thus, submitted on behalf of the appellant that, in fact, contraband was recovered from the fist of the appellant and, therefore, it being personal search of the appellant, the mandatory provisions of Section 50 of the Act, are not complied with. It is further submitted by the learned counsel for the appellant that the witness PW3 Palvinder Singh further deposed that as per the prosecution version, police party has laid down a Naka (barrier) and, therefore, there was no such Narcotic Test Kit with the police party and the alleged recovery of seven grams of heroin, as mentioned in recovery memo, is without any basis. Learned counsel referred to the statement of PW3 where he has stated that Assistant Sub Inspector Vidyanand was not having any Narcotic Test Kit. Similarly, Assistant Sub Inspector -Vidyanand, in his cross examination, also stated

that the Drug Detection Kit was consisting weighing machine, weights and scale etc. and, therefore, it is submitted that the recovery from the appellant is highly suspicious.

Learned counsel for the appellant has further argued that it has come in the statement of PW5 that after the appellant was apprehended, the polythene packet was taken from the hands of the appellant and recovery memo Exhibit P2 was prepared at the spot and, thereafter, he had sent a ruqa to the Police Station for registration of the FIR. Learned counsel for the appellant submitted that a perusal of the recovery memo, Exhibit P2 shows that it bears the FIR number at the top and, therefore, this document was prepared later on, after the registration of the FIR. Learned counsel for the appellant, in support thereof, has cited **Didar Singh @ Dara vs. The State of Punjab** 2010(3)RCR(Criminal) 337 wherein in identical circumstances, this Court has held as under:-

“29. There is another infirmity on the record which further creates a doubt about the entire prosecution case. As per the prosecution, at the time of the recovery, various documents were prepared. Those documents are Ex.PA, Ex.PB, Ex.PC, Ex.PD, Ex.PE and Ex.PF. All these memos bear the FIR number of the case. It is admitted case of the prosecution that when these documents were prepared, the FIR was not registered and FIR No. was not available as the same was registered later on, on the ruqa sent by the police. It has not been explained how all these memos contained the FIR number, which was not existing at the time when these memos were prepared. In *Ajay Malik & Ors. v. State of U.T.*,

Chandigarh, 2009(3) RCR (CrI.) 649, this Court while dealing with similar situation has observed that two inferences could be drawn from such situation, i.e., either the FIR was registered prior to the alleged recovery of the contraband or number of FIR was inserted in the document after its registration. But in both situations, it seriously reflects upon the integrity of the prosecution version. While relying upon several other decisions, it was held that such serious lapses in the prosecution case create a doubt to the prosecution theory.

Learned counsel for the petitioner has also referred to Ajay Malik and others vs. State of UT Chandigarh 2009(3)RCR(Criminal) 649, wherein this Court has held as under:-

26. On a roqqa sent under Ex. PH, the FIR was reported to have been registered under Ex. PU at 5.30 am on 14.12.03. The learned Senior Counsel, Sh. Cheema also pointed the DDR entries contained more information, such as the name of the father of one of the accused and the car number which had not been mentioned even in the FIR. Admittedly, several spot documents such as the search memo, recovery memos and the rough site plan prepared at the spot (Ex.PG, PH and PO) surprisingly contain reference to FIR No.235 dated 14.12.2003 and it is inconceivable as to how memos prepared at the spot could bear a reference to FIR No. which came to be registered later at 5.30 A.M. Two inferences could settle it: either the FIR was registered prior to the alleged recovery of contraband or the number of FIR was inserted in

these documents after its registration. In both the situations it seriously reflects upon the integrity of the prosecution version. Several decisions were cited across the bar to the effect that if the documents prepared at the spot contain mention of FIR, there was a serious doubt to the prosecution theory (***Lalji Shukla v. State (Delhi), 2000(1) RCR (Criminal) 305 (Delhi)*** ***Hashim v. State (Delhi), 2000(1) RCR(Criminal) 235 (Delhi)***, ***Ramesh Prakash v. State (Delhi), 2000(1) RCR(Criminal) 306 (Delhi)***, ***Kailash v. State of Delhi, 2000(3) RCR (Criminal) 330 : (2000 Crl. L.J. 2134)***). The FIR had been registered on 14.12.2003 at 5.30 A.M. and the copy of which is reached the Magistrate only the following day on 15.12.2003. Learned Senior Counsel appearing for the appellants points out that there was a delay in the dispatch of the FIR to the Magistrate, which was not properly explained. The FIR received on the following day, in my view, is not too long as to excite any suspicion. Even in the FIR it is stated that a special informer had informed that the accused persons were carrying opium and charas in their Lancer car and that he had also known that they used to bring charas and opium in plastic bags at their rented Kothi No. 2222, Sector 21. It is indeed surprising again that a matter that found a place even in the FIR of a persistent conduct of the accused in bringing and weighing bags of charas and opium and storing in Kothi No. 2222, Sector 21 found no action of the investigating officer right through the day till the evening

just before the sunset when the police was reported to have carried out a search at Kothi No. 2222, Sector 21. This is again another incredible and unsavoury act of the prosecution."

It is, thus, submitted, on behalf of the appellant, that both the PW3 and PW5 have categorically submitted that, after the appellant-accused was apprehended, recovery memo, Exhibit P2 was prepared at the spot and, thereafter, the test memo, Exhibit P3 was prepared and then the ruqa- Exhibit P4 was sent to the Police Station for registration of the FIR and, thus, it is highly doubtful that the recovery memo, which is prepared prior to the registration of the FIR, would mention FIR No. 442/2015 dated 28.10.2015 registered under Section 21 of the Act at Police Station 39, Union Territory Chandigarh.

It is next contended on behalf of the appellant that no independent witness was joined by the police party though it is prosecution case that the appellant was apprehended at a Police Naka on the light point which is one of the busiest parts of the city and many persons crossed the light point. It is also submitted that the appellant has produced a witness in his defence as DW1, Head Constable Harparmajit Singh, who had produced on record the memo Exhibit DW1/2 vide which Assistant Sub Inspector -Naveen Kumar had handed over the case property in the present FIR along with a Skoda Car having registration No. PCT-32. Learned counsel for the appellant has, thus, argued that it is not explained by the prosecution as to how this Car was recovered, in the present case as it was not mentioned either in the FIR or in the recovery memo. The operative part of this

document Exhibit DW1/1 read as under:-

“At 11.45 pm, I ASI along with my co-official with reference to rapat No. 52/48 after completing the investigation of FIR No. 442/15 dated 28.10.2015 under Section 21 NDPS Act Police Station 39 UT has come back to the Police Station. During investigation of the case, I have arrested accused- Randeep Singh @ Gola son of Kuljit Singh, resident of 4805/1, Sector 38 West, Chandigarh aged 27 years and got him medically examined from GH Sector 16 and have confined him in the Police station in proper condition. The case property vide memo was deposited in malkhana police Station 39 and all the conditions of arrest were completed and Skoda Car No. PCT-32 for verification was parked inside the police station. Senior Officers were also informed about the case. It is also submitted that in the cross-examination of this witness, it has not been clarified by the prosecution that whether this Car was not connected with the present case ”

It is, thus, submitted on behalf of the appellant that while recording the DDR No. 63 dated 28.10.2015, vide which Assistant Sub Inspector- Naveen Kumar had reported his return in Police Station along with his co-official, the circumstances under which the aforesaid Skoda Car was recovered had not been explained in the present FIR.

It is also submitted on behalf of the appellant that in the statement recorded under Section 313 Cr.P.C., no suggestion was given to the appellant that he was found in possession of the alleged contraband and notice under Section 50 of the Act was given. In reply to a specific question,

the appellant had stated that he was smoking outside his house and the Police official came there and enquired about some persons and when they did not get any satisfactory answer, they falsely implicated the accused in the present case and the false recovery has been planted on him and false documents have been prepared by the Police.

Lastly the learned counsel for the appellant has argued that the appellant is a young man of 27 year of age and he is not a previous convict and the recovery is marginally higher than the small quantity and the appellant has already undergone incarceration of about four months out of total one year of sentence awarded and he has been falsely implicated as accused in the present case .

On the other hand, counsel for the respondent has submitted that since this was a case of chance recovery, mandatory provisions of Section 50 of the Act, are not applicable as the same apply to personal search of a person and not to bag, article container etc. being carried by a person. It is also submitted that the Skoda Car relates to some different case and was not involved in the present FIR.

Counsel for the respondent has also submitted that, in fact, in view of the judgment of the Hon'ble Supreme Court in **State of Punjab vs. Baldev Singh** 1993(3) Recent Criminal reports 533(SC) wherein Hon'ble Apex Court had given the elaborate meaning of 'personal search' and after the decision given by the Hon'ble Apex Court, it has been held that provision of Section 50 of NDPS Act apply only to search of a person and not to any bag article or container etc being carried by him. Hence, provision of Section 50 of NDPS Act is not applicable to the present case.

In reply, the learned counsel for the petitioner has submitted that the Hon'ble Supreme Court in **Myia Venkateswarlu vs. State of A.P.** 2012(3) RCR (Criminal)72 with reference to earlier judgement Baldev Singh (supra) 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. “

After hearing the learned counsel for the parties, I find merit in the present appeal. In view of the judgment of Didar Singh (supra), the prosecution has failed to explain as to how the FIR number was mentioned in the recovery memo which was the first document prepared by the prosecution at the spot and as such, it makes this document suspicious. As per the own versions of PW3, Palvinder Singh and the first Investigating Officer, PW5 Vidyanand, the recovery of contraband was from the hands of the appellant, but no notice was given or offer was made by the Investigating Officer to the appellant, in compliance of Section 50 of the Act.

In view of the Myia judgment (supra), since the recovery was made from the fist of the appellant and it has also come in the statement of PW5 that even further personal search was made and, therefore, the prosecution has admittedly failed to comply with the provisions of Section 50 of the Act which is mandatory.

The prosecution has further failed to explain the circumstances under which the Skoda Car No. PBT-32 ,which was deposited in the malkhana along with the case property, was recovered, while conducting the investigation of the present FIR No. 442. The trial Court, in fact, has not at all discussed this aspect of the case regarding the recovery of Car and there is no finding recorded in this regard. The only reply given by the learned counsel for the respondent is that it was recovered in other case is not sufficient as no FIR or DDR of other case was produced.

It has also come in the evidence of the prosecution witnesses that though the place of recovery/arrest was a public place i.e. the light point on the main road yet no effort was made by the prosecution to join any independent witness. Since the recovery memo, which is the first document prepared by the prosecution, itself found mention of FIR number, makes the recovery as highly suspicious this fact could only be proved by joining an independent witness. In DDR Exhibit DW1/1, there is a mention of recovery of Car which has not been explained, which, again by joining of an independent witness may have been explained. Both the witnesses i.e. PW3 Palvinder Singh and PW5 Assistant Sub Inspector Vidyanand have not even stated that they had tried to involve any person from the general public to be a witness. Rather their statements show that no such effort was made for joining any independent witness. It has also come in the statement of accused recorded under Section 313 Cr.P.C. that no such suggestion had been put to the appellant-accused that he was given an option to be searched as per Section 50 of the Act for effecting recovery the alleged contraband. Moreover, a perusal of the recovery memo further shows that it is mentioned that heroin was recovered from the appellant, whereas, the police party was not carrying any Narcotic Detection Kit at the spot to prove that the alleged recovery from the appellant was, in fact, heroin. It is admitted by PW3 and PW5 that the kit which they were carrying comprised only weighing scale and, thus, the recovery of contraband from appellant is highly doubtful for the reasons discussed above. Moreover, the manner in which the investigation of the case had been conducted, renders the prosecution case highly doubtful. Keeping in view the totality of the

circumstances, it would be just and expedient to order the acquittal of the appellant as the prosecution case is not free from doubt. It is a settled proposition of law that the benefit of the same has to be extended to the accused. Hence, the appellant is acquitted of the charges framed against him.

Accordingly, this appeal is allowed. The impugned judgment/order dated 5.6.2017/6.6.2017 are set aside. Appellant is acquitted of the charge framed against him.

(ARVIND SINGH SANGWAN)
JUDGE

September 12, 2017
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Whether speaking/reasoned: Yes
Whether Reportable: Yes