

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

CRA-S-4481-SB-2016

Date of Decision: 01.08.2017

Amarjit Singh

...Appellant

Vs.

State of Punjab

... Respondent

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present:- Mr. Kanwar Pahul Singh, Advocate,
for the appellant.

Mr. Vaibhav Sharma, D.A.G, Punjab.

Amol Rattan Singh, J.

The appellant herein having been convicted by the learned Judge, Special Court, Amritsar, for having committed an offence punishable under Section 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter to be referred to as the Act), and having been sentenced to rigorous imprisonment for a period of one year and further to pay a fine of Rs.10,000/-, has preferred this appeal against the said judgment dated 11.08.2016.

2. The case of the prosecution was that on 07.01.2014, ASI Rajinderpal, accompanied by Head Constables Baljinder Singh, Lakhwant Singh and Bhupinder Kumar, were patrolling in a private car going to different villages including Udho Nangal, Nath Di Khui, Jalal, Usma Mehsampur. When they reached a bridge on the drain at village Mehsampur at about 6:40 p.m., a young clean shaven person was seen coming on foot from village Jalal, alongside the drain, who was signaled by ASI Rajinderpal, with the light of his

torch, to stop. However, on seeing the police party he is alleged to have immediately turned back with an intention to escape and took out a polythene 'envelope' from the right pocket of his trouser, and threw it on the ground.

He was stated to have been apprehended by the police party and on being questioned, he gave his name as Amarjit Singh son of Charan Singh, caste Jat, resident of Wadala Kalan, falling within the jurisdiction of Police Station Khilchian.

3. As per the prosecution version, before conducting his personal search, independent witnesses were attempted to be joined but allegedly with none ready to join, the appellant was asked why he had thrown the polythene 'envelope' on the ground, after which he (the appellant-accused), lifted the polythene envelope and produced it before ASI Rajinderpal.

It was further the case of the prosecution that three packets of intoxicant tablets, 'Losmostils', were found in the polythene 'envelope' and upon opening them, 10 tablets were taken as a sample, which were put in a small plastic container which was thereafter kept as a sample parcel and sealed with the impression 'RS'.

The remaining tablets, upon counting the same, were found to be 290 tablets, thus with each packet containing 100 tablets of 'Losmostils'.

4. ASI Rajinderpal was stated to have put the 290 tablets alongwith the empty packets in a plastic container, making a bulk parcel out of it, which was also sealed with the seal impression 'RP' (as stated in the judgment).

A separate sample was also prepared, Form M29 was filled in, after which the seal was handed over to HC Baljinder Singh and thereafter a personal search of the appellant-accused Amarjit Singh was conducted, by which one currency note each of denominations of Rs.100/- and Rs.10/- were

recovered, taken into possession by the police party vide a separate recovery memo.

5. As the accused could not produce any prescription slip of a doctor or any licence for keeping such tablets in his possession, a written message (*ruqa*) was sent through HC Bhupinder Singh to the Police Station, for the registration of an offence punishable under Sections 21 and 22 of the Act, also seeking to invoke the provisions of Section 61 thereof.

The appellant was also arrested and thereafter produced before the Court alongwith the contraband stated to have been recovered from him.

6. The sample parcel having been sent to the office of the Chemical Examiner through HC Ranjit Singh, vide road receipt no.914/21 dated 10.01.2014, the report of the Chemical Examiner was subsequently received and thereafter, a report under Section 173 Cr. P.C. presented to the competent Court by the investigating agency, indicting the appellant, as regards the commission of the aforesaid offences.

7. The learned trial Court, after appraising the evidence in the form of the testimonies of HC Baljinder Singh, retired Inspector Darbara Singh (SHO of the Police Station at the relevant time), the apprehending officer-cum-Investigating Officer, ASI Rajinderpal and HC Ranjit Singh (the person who took the samples to the Laboratory), found the appellant to be guilty.

8. As per the trial Court, due procedure had been followed by the police officials in apprehending the appellant, arresting him, drawing samples, further with the seals on the packets containing the contraband, found to be intact, at all stages.

9. Thus, after discussing essentially the case of the prosecution in the same sequence as has been noticed herein earlier and essentially holding

that due procedure had been followed, the appellant was held guilty of having kept in his possession 300 tablets of 'Losmostil', with the weight of each tablet being 2.38 mg. Thus, 24 grams of “prohibited material” under the Act, i.e. Diphenoxylate hydrochloride, was held to have been possessed by him. (The quantity of the said salt shown to be “.080” in the judgment).

10. Consequently, convicting him for having committed an offence punishable under Section 22 of the Act, the appellant was sentenced to imprisonment and imposed a fine as already given in the initial part of this judgment.

11. In this appeal, counsel for the appellant essentially made a single argument, to the effect that the appellant having been subjected to a personal search, without him having been even given the option of production before a Gazetted Officer or a Magistrate, and in any case, he not having been so produced, the entire case of the prosecution stood vitiated in terms of the ratio of the judgment of the Supreme Court in **State of Rajasthan v. Parmanand and another** 2014 (2) RCR (Criminal) 40.

Therefore, contending that there was a violation of the mandatory provisions contained in Section 50 (5) of the Act, Mr. Pahul Singh submitted that the appellant has to be acquitted.

12. *Per contra*, Mr. Vaibhav Sharma, learned Deputy Advocate General, Punjab, relied upon a judgment of a Constitution Bench in **Vijaysinh Chandubha Jadeja v. State of Gujarat** AIR 2011 SC 77, to submit that whereas the endeavour of the apprehending police party should be to produce the accused before a Gazetted Officer or a Magistrate, if he is suspected of being in possession of contraband, however, such non-production (as per learned Deputy Advocate General) would vitiate his conviction by the trial

Court only if the recovery of the contraband is made from the person of the accused during the search.

Therefore, the contention of learned Deputy Advocate General is that in the present case, the recovery having been made from the polythene bag shown to have been thrown away by the appellant at the time of his apprehension and subsequent arrest, there was no recovery of contraband from his person, even though a personal search was shown to have been conducted; and consequently the ratio of the judgment in *Parmanands'* case would not apply to the present case.

13. Having considered the arguments of learned counsel for the parties, as also the judgment of the learned trial Court, first, Section 50 of the Act needs to be referred to and is reproduced as follows:-

“50. Conditions under which search of persons shall be conducted.

(1) When any officer duly authorised under Section 42 is about to search any person under the provisions of Section 42 or Section 43, he shall, if such person as requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate.

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

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

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

¹[(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be

searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974)

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

Thus, as per sub-section (1) of Section 50, once an accused states that he should be produced before a Gazetted Officer or a Magistrate, the person apprehending him is bound to do so, with the exception thereto being stipulated in sub-section (5), to the effect that if it is not possible to take the accused to nearest Gazetted Officer or Magistrate, due to the possibility of the person to be searched parting with possession of the contraband, the apprehending officer may proceed to search the person of the accused by following the procedure laid down in Section 100 of the Code of Criminal Procedure, 1973.

14. In the present case, it is not shown to be even the case of the prosecution that the appellant was even given a choice of being produced before a Magistrate or a Gazetted Officer and though what was searched first was the polythene bag stated to have been thrown by him on the ground, admittedly he was immediately thereafter subjected to a personal search also, at the spot itself.

15. In the aforesaid circumstances, the relevant part of the judgment in *Jadejas'* case (*supra*) needs to be referred to, which reads as follows:-

“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.”

(Emphasis applied by this Court).

16. In the present case, though the records of the learned trial Court have not been summoned by this Court, that has not been considered necessary in view of the fact that it is not denied even by the respondent-State that the appellant was not informed of his right to be produced before a Gazetted Officer or a Magistrate and that the arresting officer, ASI Rajinderpal, straightway, after having (as per the prosecution version), found the contraband in the polythene envelope/bag stated to have been thrown at the spot by the appellant, proceeded to conduct his personal search also, and recovered two currency notes from the pocket of his pants.

Hence, in the opinion of this Court, there is a complete violation of Section 50, in terms of the ratio of the judgment of the Constitution Bench

in *Jadejas'* case (supra), as also of the ratio of the judgment in *Parmanands'* case (supra), inasmuch as, though undoubtedly the contraband is stated to have been found from the polythene first carried and allegedly thrown on the ground by the appellant, his personal search was conducted at the spot itself.

Hence, the ratio of *Parmanands'* case being that it would not be necessary to produce an accused before a Gazetted Officer or a Magistrate if his personal search is not conducted, the contention of learned Deputy Advocate General has to be rejected, even though the contraband was recovered only from a bag carried by him.

17. This is especially to be seen with the fact, in the present case, that with admittedly there being four persons of the police party, in a vehicle, and the appellant stated to have been alone on foot, there was no reason not to produce him before a Magistrate, as the polythene bag that is stated to have been carried by him had already been picked up by the appellant himself and produced upon the directions of the police party at the spot itself. Hence, there was no chance of the appellant disposing of the contraband, for which reason the exception carved out in sub-section (5) of Section 50 could have been invoked by the police party.

18. Consequently, firstly for the reason that the appellant was not even informed of his right to produce him before a Gazetted Officer or a Magistrate, and secondly, his personal search having been conducted without him being so produced before such Gazetted Officer or Magistrate, in the opinion of this Court, this appeal deserves to be allowed.

Therefore, the appeal is allowed and the judgment of the learned trial Court dated 06.08.2016 and order of sentence passed by that Court on 11.08.2016 are set aside, and the appellant is acquitted of the charges framed

against him by that Court.

His sentence already having been suspended by this Court at the time when the judgment was reserved in this matter, his bail bonds shall be discharged, as per procedure.

August 01, 2017
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(AMOL RATTAN SINGH)
JUDGE

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| 1. Whether speaking/reasoned? | Yes |
| 2. Whether reportable? | Yes |