

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRA-S-1759-SB-2005(O&M)

Date of decision: 28.10.2017

Smt. Manorama Devi

...Appellant

Versus

State of Haryana

...Respondent

CORAM: HON'BLE MR. JUSTICE ARVIND SINGH SANGWAN

Present: Ms. Gagan Mohini, Legal Aid counsel
for the appellant.

Mr. Naveen Sheoran, DAG, Haryana.

ARVIND SINGH SANGWAN, J. (ORAL)

1. Challenge in this appeal is to the judgment of conviction dated 30.07.2005, vide which, the trial Court has convicted the appellant for the offence punishable under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (for short 'the Act') and the order of sentence of the even date, vide which, the appellant was ordered to undergo rigorous imprisonment for a period of 10 years and to pay a fine of ₹1 lac for committing an offence punishable under Section 20 of the Act. In default of payment of fine, she was further ordered to undergo rigorous imprisonment for a period of 2 ½ years more.

2. The brief facts of the case are that on 17.02.2004, a police party headed by PW-2 Sultan Singh, ASI was present at Jatal Road Bridge, Panipat and the appellant was seen coming from the side of City Panipat carrying a bag in her right hand. On seeing the police party, she felt perplexed and tried to take u-turn and she was apprehended. Since she was suspected as to carry some contraband in her bag, a notice under Section 50 of the Act was served upon her to which she opted to be searched in the

presence of a Gazetted Officer. O.P.Narwal, DSP was called at the spot and on his written direction, the bag of the appellant was searched and the same was found containing 1.5 kg of *charas*. Thereafter, samples of 20 gms. was taken and sealed and the residue was also sealed vide recovery memo. Thereafter, a ruqa was sent to the police station and on the basis of same a formal FIR, Ex.PG/1, was recorded against the appellant. After completing the investigation at the spot, the case property along with the accused was produced before Satbir Singh, Inspector-SHO, Police Station City, Panipat and he verified the investigation and put his seal on the case property. The sample was sent to FSL and after receiving the report, challan was presented before the trial Court.

3. The trial Court, framed charges against the appellant under Section 20 of the Act, vide order dated 11.03.2004.

4. The prosecution in its evidence produced Constable Udai Singh, who appeared as PW-1, stated that he tender his affidavit Ex.PA on record regarding submitting the sealed sample with the FSL. PW-2, ASI Sultan Singh, the Investigating Officer stated on the line of the version given in the FIR. This witness stated that when the appellant-accused was apprehended, she was given a notice under Section 50 of the NDPS Act Ex.PB to the effect that she has a right to be searched either before a Gazetted Officer or a Magistrate. This notice was signed by ASI Jai Narain and a lady Constable Santosh Kumari. The accused put her thumb impression on the same and in reply Ex.PB/1, she opted to be searched before a Gazetted Officer. The same was also signed by the witnesses. Thereafter, DSP, O.P.Narwal was summoned at the spot and the accused was produced before him. The DSP gave a direction vide Ex.P-C to him to

conduct the search of the bag of the accused and the contraband was recovered. This witness further proved that after the recovery was effected, the sample was separated and sealed with seal SS and the residue was also sealed with the seal. Thereafter, a ruqa Ex.PG was sent to police station on the basis of which formal FIR Ex.PG/1 was recorded against the accused.

5. In cross-examination, this witness has stated that the accused-appellant was an illiterate lady and despite his effort, no person from the public was ready to join the investigation. PW-3 ASI Jai Narain also has deposited on the same line of PW-2.

6. The public prosecutor, made a statement on 30.09.2004 that he gave up PW-2 Santosh Kumari as unnecessary. PW-4 HC Surinder Singh stated that on 20.02.2004, he handed over the sample parcel to Constable Udai Singh for depositing the same with FSL Madhuban and after depositing the same, Constable Udai Singh handed over a receipt to him. PW-5 DSP O.P. Narwal stated that on receiving message, he reached at the spot and enquired from the accused to disclose her name and she disclosed herself to be Manorama Devi, resident of Betiya. ASI Sultan Singh produced the accused before him and she was having a bag in her right hand. Thereafter, he instructed ASI Sultan Singh to conduct the search of the bag, vide memo Ex.P-C. ASI Sultan Singh conducted the search of the bag of the accused and the charas was recovered from the bag. This witness further deposited about the remaining procedure carried out about separating the sample, sealing of the same and sealing of the residue and handing over the seal to the witnesses. PW-6 Inspector Satbir Singh SHO stated that the accused and the recovered case property were produced before him and he verified the same and affixed his seal and on completion of the

investigation, report under Section 173 Cr.P.C. was submitted before the trial Court.

7. The statement of the accused was recorded under Section 313 Cr.P.C. and she denied all the incriminating evidence against her and pleaded innocence.

8. Thereafter, the learned trial Court, after hearing learned counsel for the parties and on appreciating the evidence and record of the case passed the impugned judgment of conviction and order of sentence dated 30.07.2005 and convicted the appellant and sentenced her to undergo 10 years rigorous imprisonment with fine of ₹.1 lac.

9. The appellant was released on bail vide order dated 02.02.2006. It may be noticed here during the pendency of the trial, the accused made a statement on 30.09.2004 that she is a poor lady and has no money to engage a counsel and prayed before the trial court to appoint a legal Aid counsel. The present appeal is also filed by a legal aid counsel.

10. It is submitted on behalf of the appellant that the appellant is a lady and the search was not conducted in accordance with the provisions of Section 50(4) of the NDPS Act. A perusal of the consent memo as well as non-consent memo, Ex.PB and Ex.PB/1 which is prepared on a single paper, it is apparent that while giving any option to be searched before a gazetted Officer or a Magistrate, there is no endorsement that the same was read over to her as she is illiterate and has put her right thumb impression. Both these documents are witnessed by Lady Constable Santosh Kumari, who admittedly was given up by the prosecution and was never examined. A perusal of the order Ex. PC issued by PW5 O.P. Narwal, DSP, read as under:-

“I, Om parkash Narwal, Deputy Superintendent of Police, Headquarter, Panipat order Sultan Singh, ASI that he should conduct a search of the bag of which Manorama Devi wife of Amar Yadav accsued, resident of Betiya, Police Station Mawanpur, District Pashchim Champaran (Bihar) in accordance with law.

17.02.2004. S/d– DSP
Head quarter, Panipat”

11. It is thus submitted that despite availability of a lady constable, the DSP ordered ASI Sultan Singh, a male police officer to conduct the search in violation of provisions of Section 50(4) of the Act. It is next submitted on behalf of the appellant that a perusal of the recovery memo of the contraband Ex.PE also depicts that the recovery was effected by ASI Sultan Singh from the bag which the appellant was carrying. Though the same was witnessed by lady constable Santosh Kumari but it is nowhere mentioned that the search was conducted by her. The counsel for the appellant, in support thereof, has relied upon the judgment of **2014(5) R.C.R. (Criminal) 162 Darshna @ Moli Vs. State of Punjab**, wherein this Court in similar circumstances has held as under:-

“7. Counsel for the appellant has submitted that the appellant deserves to be granted the benefit of doubt as the prosecution has failed to prove charge of recovery of poppy husk from the appellant beyond shadow of doubt. He has pointed out mandatory provisions of law having been violated and that the procedure under the Narcotic Drugs and Psychotropic Substances Act, 1985 for recovery and sampling has not been proved beyond shadow of doubt.

8. I have considered the contentions of the learned Counsel for the appellant and I am of the opinion that the appellant deserves to be acquitted granting her benefit of doubt for the

following reasons:-

(1) Section 50 (4) the Narcotic Drugs and Psychotropic Substances Act, 1985 requires that in case the accused is a lady she cannot be searched by anyone except a female. No doubt a police official had been sent to bring a lady constable from Police Station but neither recovery was effected in her presence nor she has been examined to prove that the search was conducted by a female. The provisions of Sections 50 (4) the Narcotic Drugs and Psychotropic Substances Act, 1985 are mandatory. Non production of said lady constable and no document having been signed by the lady police official clearly indicates that provisions of Section 50 (4) the Narcotic Drugs and Psychotropic Substances Act, 1985 have been violated;

*(2) The seal after use was retained by the DSP Balbir Singh as deposed by him while appearing as a witness as PW.6. As the seal of the DSP had been retained by him a serious doubt is created regarding the recovery having been effected from the spot as alleged by the prosecution. Besides this another circumstance that sample taken on 24.6.2001 had been sent for analyses on 4.7.2001 is indicative of the fact that the prosecution has not proved that the sample was not tampered with or the documents recovered were not prepared in the Police Station. Delay of 40 days in sending sample is suggestive of recovery having not been effected and the sample having been tampered with. In this context, a reference can be made to judgment in case **Gian Singh Vs. State of Punjab, 2006 (3) Criminal Court Cases, 480 (P&H), State of Rajasthan Vs. Gurmail Singh, 2005 (1)***

Apex Court Judgments, 468 (SC) and Ramji Singh Vs.State of Haryana, 2007 (3) Criminal Court Cases 955 (P&H). In case Gian Singh (supra) there was a delay of 10 days in sending sample to the office of chemical examiner. In case Gurmail Singh (supra) the contraband remained in Malkhana for 15 days. In case Ram Singh (supra) the sample was sent to the office of chemical examiner after 72 hours and the seal remained with police officials. In all the cases, the delay in sending the sample to chemical examiner at a belated stage was held to vitiate the case of prosecution. Following the ratio of above said judgments, the petitioner deserves to be granted benefit of doubt.

*(3) Another important fact in the present case is that the case was registered on the basis of secret information but the said information having been recorded or sent to higher authorities has not been established. None of the witnesses has stated that the information was recorded. There is clear violation of Section 42(2) the **Narcotic Drugs and Psychotropic Substances** Act, 1985, as the provision require to take down said information in writing and record ground for his plea as per Section 41 (1) and (2) of the **Narcotic Drugs and Psychotropic Substances** Act, 1985 and to send within 72 hours copy thereof to his immediate official superior. In **P. Kumar Vs. Namaju Baddi 2010 (4) RCR (Crl.) 367**, Hon'ble the Apex Court had held that compliance of Section 42 (2) the **Narcotic Drugs and Psychotropic Substances** Act, 1985, is mandatory. In above said case, it was held that when information in writing is not conveyed to the immediate senior police official,*

the accused was entitled to acquittal.

In view of above, order of conviction qua the appellant is hereby set aside by giving her benefit of doubt. Conviction is set aside. Sentence of imprisonment and fine is also set aside.”

12. Similar view has been taken by this Court in **2016(2) R.C.R. (Criminal) 241, Shinderpal Kaur Vs. State of Punjab** that where a search was conducted by a lady Constable of a lady accused and the lady constable was not examined by the prosecution as a witness, the accused was held to be entitled to be given benefit of doubt. The relevant para is read as under:-

“19. Lady constable Mandeep Kaur was the star witness of the prosecution. The accused-appellant is a female and as per the consistent testimonies of the prosecution witnesses namely PW-2 ASI Sukhchain Singh, PW-3 ASI Malkit Singh and PW-5 DSP Ajmer Singh. The search of accused-appellant was got conducted through lady constable Mandeep Kaur. So, it was lady constable Mandeep Kaur, who carried out search of the accused-appellant and recovered the contraband. But, she has not been examined by the prosecution and was given up being unnecessary by the learned Public Prosecutor vide his statement dated 17.04.2014. It is very surprising that how such a material witness can be given up being unnecessary. The giving up of lady constable Mandeep Kaur in this manner rather makes even her presence at the spot doubtful. Thus, the most material witness of the prosecution has been withheld by the prosecution without assigning any reason and stating her to be an unnecessary witness. In fact, she was the most material witness, which raises the adverse inference against the prosecution.”

13. It is next argued on behalf of the appellant that it is the case of the prosecution, as per statement of PW-2-ASI Sultan Singh, the Investigating Officer and PW-3 ASI Jai Narain, a witness that after the

appellant was apprehended on suspicion; notice for being searched either before a Gazetted Officer or a Magistrate under Section 50 of the NDPS Act was served upon the accused; her reply was obtained; DSP O.P.Narwal was summoned at the spot; the search of the accused was conducted and the recovery of contraband was effected vide recovery memo was Ex. PE; and only thereafter a ruqa / information Ex.PG was sent by PW-2 ASI Sultan Singh to police Station for registration of an FIR.

14. Learned counsel for the appellant has relied upon the documents Ex.PB the notice, Ex. PB/1 reply, Ex. PC the order of DSP and the recovery of charas Ex.PE to submit that in the first three documents, FIR number is not mentioned, whereas, in the recovery memo, a complete detail of FIR No. 42 dated 17.02.2004, found mention, though, it is the case of the prosecution that after effecting the recovery from the appellant, an information was sent to the police station and only thereafter the FIR was registered and therefore, it is submitted that it raises a doubt on the prosecution version that how the FIR number has been incorporated in the recovery memo which was prepared prior to registration of the FIR. The counsel for the appellant, in support thereof has relied upon **Didar Singh @ Dara Vs. The State of Punjab 2010(3) R.C.R.(Criminal) 37**, wherein it is 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 ruqqa 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."*

15. It is thus submitted that the recovery of contraband from the appellant is highly doubtful. It is next submitted that since the notice issued under section 50 of the NDPS Act nowhere reveals that it has been read over to the appellant and the contents of the same has been informed to her and after sending the same, she had put her thumb impression as admittedly it has come in the statement of PW-2, ASI Sultan Singh, the Investigating Officer that the appellant is an illiterate lady and was alone at the time of recovery, the proper procedure under Section 50 of the NDPS Act has not been followed. Learned counsel for the appellant has relied upon **2014 (2) R.C.R.(Criminal) 40 State of Rajasthan Vs. Parmanand and another**, wherein the Hon'ble Supreme Court has held as under:-

“11. In Union of India v. Shah Alam[9], heroin was first recovered from the bags carried by the respondents therein. Thereafter, their personal search was taken but nothing was recovered from their person. It was urged that since personal search did not lead to any recovery, there was no need to comply with the provisions of Section 50 of the NDPS Act. Following Dilip, it was held that since the provisions of Section 50 of the NDPS Act were not complied with, the High Court was right in acquitting the respondents on that ground.

12. 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.

13. 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.

14. In our opinion, a joint communication of the right available under Section 50(1) of the NDPS Act to the accused would frustrate the very purport of Section 50. Communication of the said right to the person who is about to be searched is not an empty formality. It has a purpose. Most of the offences under the NDPS Act carry stringent punishment and, therefore, the prescribed procedure has to be meticulously followed. These are minimum safeguards available to an accused against the possibility of false involvement. The communication of this right has to be clear, unambiguous and individual. The accused must be made aware of the existence of such a right. This right would be of little significance if the beneficiary thereof is not able to exercise it for want of knowledge about its existence. A joint communication of the right may not be clear or unequivocal. It may create confusion. It may result in diluting the right. We are, therefore, of the view that the accused must be individually informed that under Section 50(1) of the NDPS Act, he has a right to be searched before a nearest gazetted officer or before a nearest Magistrate. Similar view taken by the Punjab & Haryana High Court in Paramjit Singh and the Bombay High Court in Dharamveer Lekhram Sharma meets

with our approval. It bears repetition to state that on the written communication of the right available under Section 50(1) of the NDPS Act, respondent No.2 Surajmal has signed for himself and for respondent No.1 Parmanand. Respondent No.1 Parmanand has not signed on it at all. He did not give his independent consent. It is only to be presumed that he had authorized respondent No.2 Surajmal to sign on his behalf and convey his consent. Therefore, in our opinion, the right has not been properly communicated to the respondents. The search of the bag of respondent No.1 Parmanand and search of person of the respondents is, therefore, vitiated and resultantly their conviction is also vitiated.”

16. It is thus submitted that the provisions of Section 50 of the NDPS have not been complied with.

17. After hearing learned counsel for the appellant, I find merit in the present appeal. Admittedly, the appellant is a lady and while conducting the search, the provision of Section 50(4) of the NDPS Act have not been complied with. It has come in the statement of PW-5 O.P.Narwal, DSP that he has directed to PW-2 ASI Sultan Singh to conduct her search whereas a lady constable Sontosh Kumari was also present and no such direction was given to her to conduct the search. Moreso, the prosecution has given up lady Constable Santosh Kumari and has never recorded her statement which raises a doubt about her physical presence at spot. Therefore, in view of Darshna @ Moli and Shinderpal Kaur's cases (supra), the important right of the appellant has been vitiated as the said lady constable was never examined as prosecution witness. It is apparent on record that after effecting the recovery, as per the statement of PW-2, ASI Sultan Singh as well as PW-5 DSP, O.P.Narwal, the information was sent by way of a written communication as Ex. PG for registration of the FIR. Thus, prior to

sending this information, Ex. PG for registration of the case, the recovery memo Ex.PE was also prepared at the spot. However, the FIR No. 42 with complete details find mention in this recovery memo, which makes it highly doubtful to have been prepared at the spot. In view of the judgment relied upon by the learned counsel for the appellant **Didar Singh @ Dara and Ajay Malik (Supra)**, wherein, it has been held by this Court that if in the recovery memo, the FIR number is mentioned which was admittedly registered subsequent to effecting the recovery, the prosecution case becomes highly doubtful. It has also come in the evidence that the appellant, is an illiterate lady and was alone at the time when she was arrested. A perusal of the notice under Section 50 of the NDPS (Ex.PB) and the consent memo Ex. PB/1 reflect that it bears right thumb impression of appellant accused Manorama Devi and it is nowhere mentioned that the contents of the notice or reply were read over to the accused and after admitting the contents and understanding the same, she has put her right thumb impression.

18. In view of the judgment of Hon'ble the Supreme Court in **State of Rajasthan Vs. Parmanand and another**, it is held that the procedure adopted by the prosecution in this regard is also defective.

19. In view the above, the present appeal is allowed. The judgment of conviction and order of sentence dated 30.07.2005 is set aside. The appellant is acquitted of the charge under Section 20 of the NDPS Act.

(ARVIND SINGH SANGWAN)
JUDGE

28.10.2017

Hemlata

Whether speaking/reasoned
Whether reportable

Yes
Yes