

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

Sr.No.217

Criminal Appeal No.2317-SB of 2007
Date of Decision:18.08.2018

Kashmir Singh and anotherappellants

Versus

State of Haryanarespondent

Criminal Appeal No.2380-SB of 2007

Bittu Masih @ Ladiappellant

Versus

State of Haryanarespondent

CORAM: HON'BLE MR.JUSTICE ARVIND SINGH SANGWAN

Present: Mr.P.S.Hundal, Senior Advocate with
Mr.Jashandeep Singh, Advocate;
Mr.D.N.Ganeriwala, Advocate and
Mr.Sukhveer Singh Killianwali, Advocate
for the appellants in CRA-S-2317-SB of 2007

Mr.Rahul Vats, Advocate
for the appellant in CRA-S-2380-SB of 2007

Mr.Himmat Singh, DAG Haryana

ARVIND SINGH SANGWAN, J. :

Challenge in these two appeals i.e.CRA-S-2317-SB of 2007
and CRA-S-2380-SB of 2007 is to the judgment of conviction dated 24th
September, 2007, passed by Judge Special Court, Kaithal, vide which the
appellants were held guilty of offence punishable under Section 15 of the
Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, 'NDPS

Act'), as well as the order of sentence of even date, vide which the appellants were sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of ₹1,00,000- each, with a rider that in default of payment of fine, they will further undergo rigorous imprisonment for a period of three years in FIR No.188 dated 19.11.2003 registered at Police Station Guhla.

It may be noticed that these appeals pertains to the year 2007 and the sentence of the appellant Bittu Masih @ Ladi in CRA-S-2380-2007 was suspended on 11.11.2008, as he had undergone 03 years, 03 three months and 10 days of sentence. Sentence of Kashmir Singh-appellant No.1 in CRA-S-2317-SB of 2007 was suspended on 15.01.2009 as he had undergone 04 years of substantive sentence. Similarly, the sentence of Palvinder Singh-appellant No.2 in CRA-S-2317-SB of 2007 was suspended on 18.01.2018 as he had undergone 04 years, 05 months and 25 days of the actual sentence in present FIR No.188 dated 19.11.2003 and in another FIR No.112 dated 23.09.2002, he had undergone the complete sentence of 10 years.

Brief facts of the case are that on 19.11.2003 SI Jaimal Singh, along with ASI Jagdish Lal, HC Balbir Singh, HC Gurbaj Singh and other police officials were going towards the dera of one Amrik Singh, situated on an unmettled road leading from village Shiv Majra to Daban Kheri. The police party saw three persons sitting on the bags near the aforesaid dera. On apprehension, they tried to nab the accused persons, out of which two persons namely Palvinder Singh @ Polla and Laddi @ Bittu ran away and accused Kashmir Singh was apprehended at the spot. The other two accused persons were known to SI Jaimal Singh and ASI Jagdish

Lal and they had identified them. On suspicion of some narcotic substance in the bags, a notice under Section 50 of the NDPS Act was served upon Kashmir Singh, informing him about his right to be searched either before the Investigating Officer i.e. SI Jaimal Singh or before a Gazetted Officer or before a Magistrate, vide notice Ex.PA. Accused Kashmir Singh opted to be searched in presence of a Gazetted Officer, vide his consent memo Ex.PB and both the memos were attested by ASI Jagdish Lal and Head Constable Balbir Singh. Thereafter, the Investigating Officer sent a message to Dharam Pal, DSP, through VT message and after some time he reached at the spot along with his staff. Accused Kashmir Singh was produced before DSP Dharam Pal Dalal and he verified the facts from the accused and witnesses and on his direction the Investigating Officer opened the bags and found poppy husk in all the ten bags. Thereafter, two samples of 100 gms.of poppy husk were drawn from each bag and were sealed separately as sample parcels. The residue on weighment was found to be 19 kgs. 800 gms.in each bag. All the 20 sample parcels and the 10 bags were converted into separate parcels and were sealed with the seal of the investigating officer 'JS' and the seal of DSP as 'DP'. Thereafter, the specimen seal impressions were prepared. The investigating officer handed over his seal 'JS' to ASI Jagdish Lal and the DSP retained his seal with him. The sample parcels, the residue bags and specimen seal impressions were taken in police possession vide recovery memo Ex.PC, which was signed by ASI Jagdish Lal and Head Constable Balbir Singh and was attested by Dharam Pal, DSP. Thereafter, the investigating officer sent a ruqa Ex.PD to the police station through Constable Nathu Ram, on the basis of which, formal FIR Ex.PD/1 was recorded by MHC Rishi Parkash and he made his endorsement on the

ruqa as Ex.PD/2. Thereafter, the investigating officer prepared the rough site plan Ex.PE and recorded the statement of witnesses under Section 161 Cr.P.C. The investigating officer arrested the accused Kashmir Singh and on return to the police station, the investigating officer deposited the case property, sample parcels and specimen seal impressions with MHC, in intact position and lodged Kashmir Singh accused in the police lock up. Thereafter, next day, he sent a report under Section 57 of the NDPS Act to the higher polices officials. The accused Laddi @ Bittu was arrested on 29.05.2005 and Palvinder Singh @ Polla was arrested on 15.04.2005. Thereafter, separate reports under Section 173 Cr.P.C. were prepared and presented in the Court. The accused Kashmir Singh was charged under Section 15 of the NDPS Act, vide order dated 08.03.2004, for having possession of 200 kgs.of poppy husk. Whereas accused Bittu Masih @ Ladi and Palvinder Singh @ Polla were charged under Section 15 of the NDPS Act, for having possession of 60 kgs. of poppy husk, without any permit or licence. All the accused persons denied the charge and pleaded not guilty and claimed trial.

The prosecution in its evidence, examined SI Jaimal Singh, the investigating officer as PW1, who reiterated the version given in the FIR and proved the notice under Section 50 of the NDPS Act, as Ex.PA, consent memo Ex.PB, vide which accused Kashmir Singh, opted to be searched before a Gazetted Officer. This witness stated that these memos were attested by ASI Jagdish Lal and Head Constable Balbir Singh. Thereafter, Dharam Pal Singh, DSP was called at the spot and on his direction he searched the bags, in which poppy husk was found. From the bags he had taken two samples of 100 gms. each of poppy husk and sealed all the 20

sample parcels and the residues of each bag with his seal 'JS' and the DSP affixed his seal as 'DP'. This witness further stated that the sample parcels, bags and specimen impressions were taken in possession by the police vide recovery memo Ex.'PC', which was signed by ASI Jagdish Lal, HC Balbir Singh and attested by Dharam Pal, DSP. This witness further stated that thereafter he had sent ruqa Ex.PD to the police station through Constable Nathu Ram, on which the formal FIR Ex.PD/1 was recorded by Rishi Parkash, MHC, who made an endorsement as Ex.PD/2. Thereafter, this witness prepared the rough site plan Ex.PE and recorded the statement of witnesses under Section 161 Cr.P.C, and arrested the accused Kashmir Singh. On return, he deposited the case property along with sample parcels and specimen seal impressions with MHC and put accused Kashmir Singh in police lock up. This witness further stated that he prepared a report under Section 57 of the NDPS Act and the same was sent to the higher police officials. This witness also stated about the arrest of other two accused and submitting the report under Section 173 Cr.P.C., against all the accused persons. In cross examination, this witness stated that the police party reached the place of recovery at 04:50 PM and the place of recovery was near the residential dera of Amrik Singh. This witness further stated that the police party remained at the spot for about 4 hours and in the ruqa Ex.PD, he had not mentioned about informing the facts of the case to DSP and also about verification done by the DSP, in this regard. This witness also admitted that he did not mention in the ruqa about the number of the bags. In further cross-examination this witness deposed "I do not know whether any other criminal case is registered or pending against the accused Palvinder Singh @ Pali and accused Laadi @ Bittu. Neither I have

conducted any investigation nor I depose as witness in any other criminal case against the accused Palvinder and Laddi except the present."

PW2 Dharam Pal Singh, DSP, also stated on the line of deposition made by PW1 and stated that he reached at the spot. SI Jaimal Singh told him that accused Laddi and Palvinder Singh ran away from the spot and they had apprehended accused Kashmir Singh and accused Kashmir Singh had opted to be searched before a Gazetted Officer. When he reached at the spot along with staff on his official vehicle, SI Jaimal Singh produced Kashmir Singh, the witnesses and ten bags before him. He verified the facts and thereafter directed SI Jaimal Singh to check the bags. This witness also stated that investigating officer took two samples of 100 gms. each poppy husk from each bag and on weighment, the residue came to be 19 kgs.and 800 gms. in each bag. The sample parcels and residues were converted into separate parcels and were sealed with the seal 'JS' of SI Jaimal Singh and he affixed his seal 'DP' on each parcel. The specimen seal impressions were also prepared with both the seals. This witness further stated that he had attested the recovery memo Ex.PC, signed by ASI Jagdish Lal and HC Balbir Singh. This witness further stated that on the next day, he received the report under Section 57 of the NDPS Act, which is Ex.PF and it bears his signatures and he forwarded the same to Superintendent of Police, Kaithal. This witness further proved the case property as Ex.P1 to Ex.P10, sample parcels as Ex.P11 to Ex.P22 and the remaining sample parcels as Ex.P21 to Ex.P30. In cross examination, this witness stated that his statement under Section 161 Cr.P.C.was recorded and he has stated that accused opted to be searched before a Gazetted Officer. This witness was confronted with 'Ex.DA', where it is not so recorded and it is stated that the

accused opted to be searched before him. This witness stated that he had reached the spot at about 5.30 PM and did not join any independent witness on the way or at the spot. This witness further stated that constable, who took the ruqa left the spot at 06.00 PM. This witness denied the suggestion that his signatures were obtained afterwards on the memo Ex.PC and statement Ex.PF.

PW3 HC Rishi Parkash stated that on receiving the ruqa Ex.PD in the police station, he recorded formal FIR Ex.PD/1. In cross examination, this witness stated that he recorded entry in register No.19 at 10.30 PM for deposit of the case property vide Ex.PW3/A. PW4 SI Ram Phal Goyat, stated that he had prepared the supplementary report under Section 173 Cr.P.C. against accused Palvinder Singh @ Polla. PW5 SI Ashok Kumar, stated about preparation of another report under Section 173 Cr.P.C. PW6 EHC Satpal Singh had tendered his evidence as Ex.PH, regarding deposit of the sample parcels in the office of Director FSL, Madhuban. PW7 Ram Pal Ex Constable tendered his evidence as Ex.PJ regarding handing over the special report to the Illaqa Magistrate. PW8 Sahi Ram SI/SHO, stated about the preparation of the report under Section 173 Cr.P.C. Thereafter, ASI Raghbir Singh was given up.

PW9 ASI Raghbir Singh stated that he had moved an application before the SDJM, Guhla, for issuance of production warrant of accused Palvinder Singh, and on the basis of the same, he produced the accused in the Court and thereafter, the challan was presented against him by SI/SHO Ram Phal. PW10 Jagdish Lal, retired SI, stated on the line of the version given in the FIR. This witness further stated that “two other persons ran away from the spot and Kashmir Singh told their names as

Palvinder Singh @ Pilla and Laddi @ Bittu.” In cross examination, this witness has stated, “I never remained Investigating Officer or cited as witness in any case against Palvinder Singh or accused Laddi @ Bittu. I never meet Harbans Singh, who is father of the accused, prior to the present case. I never visited the house of the accused. So I cannot tell how much family members accused persons are having.”

Thereafter, the trial Court recorded the statements of the accused persons under Section 313 Cr.P.C. and had put all the incriminating evidence, which has come on record. A perusal of the statement recorded under Section 313 Cr.P.C. shows that no specific question was put to any of the accused that they were found in conscious possession of the contraband recovered at the spot. The accused person stated that they have been falsely implicated in the case and want to lead defence evidence. Thereafter, statement of DW1 Darshan Singh was recorded, who stated that he along with family members of Kashmir Singh and villagers had met the S.P.Kaithal, regarding the false implication in the case.

Thereafter, the trial Court vide impugned judgment of conviction and order of sentence dated 24th September, 2007, held the appellants guilty of offence punishable under Section 15 of the NDPS Act and sentenced them to undergo rigorous imprisonment for a period of ten years and to pay a fine of ₹ 1,00,000/- and in default of payment of fine to further undergo rigorous imprisonment for a period of three years.

Learned senior counsel appearing for the appellant Kashmir Singh has submitted that there is a gross violation of Section 52-A of the NDPS Act as the prosecution has failed to prove that after the accused persons were arrested, the recovery was affected at the spot. They were

produced before the Illaqa Magistrate and in the absence of the same, the conviction of the appellant is liable to be set aside. Learned senior counsel has relied upon judgment of the Hon'ble Supreme Court in ***Union of India vs. Mohanlal and another 2016(1) RCR (Criminal) 858***, wherein the Hon'ble Supreme Court has held as under:

12. Section 52A as amended by Act 16 of 2014, deals with disposal of seized drugs and psychotropic substances. It reads:

“Section 52A : Disposal of seized narcotic drugs and psychotropic substances.

(1) The Central Government may, having regard to the hazardous nature of any narcotic drugs or psychotropic substances, their vulnerability to theft, substitution, constraints of proper storage space or any other relevant considerations, by notification published in the Official Gazette, specify such narcotic drugs or psychotropic substances or class of narcotic drugs or class of psychotropic substances which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may from time to time, determine after following the procedure hereinafter specified.

(2) Where any narcotic drug or psychotropic substance has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section

(1) may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings under this Act and make an application, to any Magistrate for the purpose of-

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such Magistrate, photographs of such drugs or substances and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

(3) When an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of [narcotic drugs, psychotropic substances, controlled substances or conveyances] and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence.] ”

13. It is manifest from Section 52A (2)(c) (supra) that upon seizure of the contraband the same has to be forwarded either to the officer in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory (b) certifying photographs of such drugs or substances taken before the Magistrate as true and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of

samples so drawn. Sub-section (3) of Section 52-A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer in charge of the Police Station or the officer empowered, the officer concerned is in law duty bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-section (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure. Be that as it may, a conflict between the statutory provision governing taking of samples and the standing order issued by the Central Government is evident when the two are placed in juxtaposition. There is no gainsaid that such a conflict shall have to be resolved in favour of the statute on first principles of interpretation but the continuance of the statutory notification in its present form is bound to create confusion in the minds of the authorities concerned instead of helping them in the discharge of their duties.

The Central Government would, therefore, do well, to re-examine the matter and take suitable steps in the above direction.

Learned counsel appearing for the accused Palvinder Singh @ Polla and Bittu Masih @ Ladi has argued that the notice issued to the accused Karnail Singh under Section 50 of the NDPS Act is defective as it is mentioned in the notice Ex.PA as under:

“You are informed by notice that there is a doubt that in the 10 plastic bags in your possession, you are carrying some intoxicant material therefore, you can get the search of these bags from me or from a Magistrate or from a Gazetted Officer. On the notice, the signatures of the accused and witnesses are obtained”.

Learned counsel further referred to the ruqa Ex.PD, wherein a similar fact has been mentioned that the notice was issued to the accused giving option to be searched either by the SI/SHO or a Magistrate or a Gazetted Officer. Counsel for the appellant has relied upon the judgment of Hon'ble Supreme Court in ***State of Rajasthan vs. Parmanand and another 2014(2) RCR (Criminal) 40***, wherein, the Hon'ble Supreme Court has held that where in the notice, the option is given to be searched before the officer who was member of the raiding party, such search is vitiated and it is a breach of Section 50(1) of the NDPS Act and the conviction was set aside. Para No.15 of the judgment reproduced as under:

15. We also notice that PW-10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate or before a nearest gazetted officer or before PW-5 J.S. Negi, the Superintendent, who was a

part of the raiding party. It is the prosecution case that the respondents informed the officers that they would like to be searched before PW-5 J.S. Negi by PW-10 SI Qureshi. This, in our opinion, is again a breach of Section 50(1) of the NDPS Act. The idea behind taking an accused to a nearest Magistrate or a nearest gazetted officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer. Therefore, it was improper for PW-10 SI Qureshi to tell the respondents that a third alternative was available and that they could be searched before PW-5 J.S. Negi, the Superintendent, who was part of the raiding party. PW-5 J.S. Negi cannot be called an independent officer. We are not expressing any opinion on the question whether if the respondents had voluntarily expressed that they wanted to be searched before PW-5 J.S. Negi, the search would have been vitiated or not. But PW-10 SI Qureshi could not have given a third option to the respondents when Section 50(1) of the NDPS Act does not provide for it and when such option would frustrate the provisions of Section 50(1) of the NDPS Act. On this ground also, in our opinion, the search conducted by PW-10 SI Qureshi is vitiated. We have, therefore, no hesitation in concluding that breach of Section 50(1) of the NDPS Act has vitiated the search. The conviction of the respondents was, therefore, illegal. The respondents have rightly been acquitted by the High Court. It is not possible to hold that the High Court's view is perverse. The appeal is, therefore, dismissed.

Learned counsel for the appellant has further argued that in the statement under Section 313 Cr.P.C., it is not put to any of the accused persons that they were found in conscious possession of the contraband which was recovered in the open area, as it is alleged in the FIR

that they were sitting on the bags and on seeing the police party two of them ran away, whereas one person was apprehended at the spot. Counsel for the appellant has relied upon judgment of Hon'ble Supreme Court in ***Avtar Singh vs. State of Punjab 2002(4) RCR (Criminal) 180***, wherein it has been held that if a specific question regarding conscious possession is not put to accused person in his statement under Section 313 Cr.P.C., it amounts that the accused person is not afforded an opportunity to rebut the same.

Counsel for the appellant has further argued that as per the statement of PW1 Jaimal Singh, after the appellant Kashmir Singh was nabbed, he was given a notice under Section 50 of the NDPS Act (Ex.PA), his consent memo was prepared as Ex.PB and thereafter, PW2 Dharam Pal, DSP was called at the spot and the recovery memo Ex.PC was prepared. Thereafter, the ruqa Ex.PD was sent to the police station for registration of the FIR. Learned counsel further argued that this witness has stated that the accused Kashmir Singh was apprehended at 04:50 PM and the DSP arrived at 05:30 PM and only thereafter the ruqa was sent. A perusal of this document Ex.PD shows that an endorsement was made in the police station about its receiving at 06:30 PM vide Mark A and Rishi Parkash, MHC, made another endorsement Ex.PD/2 that FIR No.188 was recorded at 06:30 PM. Learned counsel has argued that the prosecution has failed to explain in what manner, the FIR number finds mention in the aforesaid document, which were prepared much before the registration of the FIR, as a bare perusal of the document shows that FIR No.188 finds mention in Ex.PA, Ex.PB and Ex.PC and thus the prosecution case is highly doubtful. Counsel for the appellant has relied upon judgment of the Hon'ble Supreme Court in ***State of Orissa vs. Sitansu Sekhar Kanungo, JT 2002(8)SC 292***, wherein

the Hon'ble Supreme Court has held that when the seizure list is prepared before the lodging of the FIR, in such situation, the mentioning of FIR number in the seizure list will not arise.

Learned counsel has further relied upon a Division Bench judgment of this Court in ***Didar Singh @ Dara vs. The State of Punjab, 2010(3) RCR (Criminal) 337***, wherein it is held that at the time of recovery some documents were prepared and FIR number was mentioned on those documents, whereas, in fact the FIR was not registered when the documents were prepared and the prosecution having failed to explain how the FIR came to be recorded on the said document, the accused persons be acquitted, as it seriously reflect upon the integrity of the prosecution version.

Counsel for the appellant has further argued that the presence of the DSP at the spot is highly doubtful as no separate recovery memo have been prepared and a perusal of the recovery memo Ex.PC, which is not the complete copy on lower court record, show that DSP had signed at the end of this document. It is also argued that in the last line of this document, it is mentioned that this document is attested by DSP Guhla, which mean that DSP has only attested it and it is not proved that it was prepared as per his directions at the spot. Counsel for the appellant has further argued that the recovery from the appellant is 200 kgs.of poppy husk which is contained in 10 bags and the accused persons belong to different places and the police has made no investigation as to how the contraband contained in 10 bags was transported to the place of occurrence and no evidence has been adduced to prove the source of bringing such contraband, therefore, the prosecution has failed to give any satisfactory explanation.

Counsel for the appellant has relied upon ***State of Punjab vs. Balkar Singh***

2004(3)SCC 582, wherein Hon'ble Supreme Court has held that in such circumstances, where the prosecution has not adduced any evidence to show the ownership of the poppy husk and failure to give any satisfactory explanation by the accused for being present at the place, itself, does not prove that they were in possession of the articles.

Counsel for the appellant has relied upon judgment of the Hon'ble Supreme Court in ***Mohan Lal vs. The State of Punjab, Criminal Appeal No.1880 of 2011, decided on 16.08.2018***, wherein the Hon'ble Supreme Court has held as under:

*15. The discussion in the present case may not be understood as confined to the requirements of a fair investigation under the NDPS Act only carrying a reverse burden of proof. **Baldev Singh** (supra) related to a prosecution under Section 165A of the IPC. Nonetheless, it observed that if the informant were to be made the investigating officer, it was bound to reflect on the credibility of the prosecution case. **Megha Singh** (supra) concerned a prosecution under the Terrorist and Disruptive Activities (Prevention) Act, 1985. It was held that the Head Constable being the complainant himself could not have proceeded with the investigation and it was a practice, to say the least, which should not be resorted to so that there may not be any occasion to suspect fair and impartial investigation. **Rajangam** (supra) was a prosecution under the NDPS Act, an objection was taken that PW6 who apprehended the accused could not have investigated the case. Upholding the objection, relying on **Megha Singh** (supra) the accused was acquitted. The view taken by the Madras High Court in **Balasundaran vs. State**, 1999 (113) ELT 785 (Mad.), was also noticed as follows :*

“16. Learned Counsel for the appellants also stated that P.W. 5 being the Inspector of Police who was present at the time of search and he was the investigating officer and as such it is fatal to the case of the prosecution. P.W. 5, according to the prosecution, was present with PWs 3 and 4 at the time of search. In fact, P.W. 5 alone took up investigation in the case and he had examined the witnesses. No doubt the successor to P.W. 5 alone had filed the charge sheet. But there is no material to show that he had examined any other witness. It therefore follows that P.W. 5 was the person who really investigated the case. P.W. 5 was the person who had searched the appellants in question and he being the investigation officer, certainly it is not proper and correct. The investigation ought to have been done by any other investigating agency. On this score also, the investigation is bound to suffer and as such the entire proceedings will be vitiated.”

*16. **Bhaskar Ramappa Madar** (supra) concerned a prosecution under Section 304B, I.P.C. which also carries a reverse burden of proof. The Trial Court held that the investigating officer who was also the complainant could not have investigated, and on that ground, held the prosecution to be tainted. The acquittal was reversed by the High Court. In appeal, this Court declined to interfere with the conviction. After referring to **Bhagwan Singh** (supra) and **Megha Singh** (supra), it was observed that the principles laid down therein had to be confined to the facts of the said cases and that the matter would have to be decided on the facts of each case without any universal generalisation.*

17. **Hardip Singh vs. State of Punjab**, 2008 (8) SCC 557 concerned a prosecution under the NDPS Act. The contention was that the Inspector, PW5 being the complainant himself would be an interested person and should not have been made the investigating officer. The argument was repelled relying on **State rep. by Inspector of Police, Vigilance and Anti Corruption, Tiruchirapalli, Tamil Nadu vs. V. Jayapaul**, 2004 (5) SCC 223 observing as follows:

“6.... We find no principle or binding authority to hold that the moment the competent police officer, on the basis of information received, makes out an FIR incorporating his name as the informant, he forfeits his right to investigate. If at all, such investigation could only be assailed on the ground of bias or real likelihood of bias on the part of the investigating officer. The question of bias would depend on the facts and circumstances of each case and it is not proper to lay down a broad and unqualified proposition, in the manner in which it has been done by the High Court, that whenever a police officer proceeds to investigate after registering the FIR on his own, the investigation would necessarily be unfair or biased.”

Significantly, **V. Jayapaul**, (supra) related to a prosecution under the Prevention of Corruption Act which sought to distinguish **Megha Singh**, (supra) on its facts.

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25. In view of the conflicting opinions expressed by different two Judge Benches of this Court, the

importance of a fair investigation from the point of view of an accused as a guaranteed constitutional right under Article 21 of the Constitution of India, it is considered necessary that the law in this regard be laid down with certainty. To leave the matter for being determined on the individual facts of a case, may not only lead to a possible abuse of powers, but more importantly will leave the police, the accused, the lawyer and the courts in a state of uncertainty and confusion which has to be avoided. It is therefore held that a fair investigation, which is but the very foundation of fair trial, necessarily postulates that the informant and the investigator must not be the same person. Justice must not only be done, but must appear to be done also. Any possibility of bias or a predetermined conclusion has to be excluded. This requirement is all the more imperative in laws carrying a reverse burden of proof.

26.Resultantly, the appeal succeeds and is allowed. The prosecution is held to be vitiated because of the infraction of the constitutional guarantee of a fair investigation. The appellant is directed to be set at liberty forthwith unless wanted in any other case.

Learned counsel for the appellants have argued that in the present case, SI Jaimal Singh was the investigating officer, who had arrested the accused Kashmir Singh and later on conducted the investigation and sent the report under Section 57 of the NDPS Act to the same police official i.e. PW2 Dharam Pal, DSP, who was called at the spot. It is also submitted that in the absence of any of a second Investigating Officer, the status of PW2 is that of complainant and the accused have been denied the right of fair investigation.

It is lastly argued by learned counsel for the appellants that from the statement of PW2 and PW10, it is not proved that the appellant Palvinder Singh @ Polla and Bittu Masih @ Ladi were present at the spot. Both these witnesses, in their cross examination have admitted that previously they have not conducted any investigation against these two appellants and thus, they were not known to the two accused. Counsel for the appellants have further argued that even no disclosure statement of the accused Kashmir Singh was recorded that the appellant Bittu Masih @ Ladi and Palvinder Singh @ Polla, were present at the spot.

In reply, learned State counsel has placed on record the photocopy of the first two pages of the document Ex.PC i.e. the recovery memo, as it was not there on the lower court records (at page 87) and is pasted there. Though, this photocopy is not much legible but it can be read and its contents can be understood. Learned counsel for the State has further submitted that there is recovery of 200 kgs.of poppy husk and there can be no possibility of some false implication of the appellants. It is also argued that provision of Section 50 of the NDPS Act are duly complied with as a Gazetted Officer was called at the spot and trial court has rightly convicted the appellants.

After hearing learned counsel for the appellants, I find merit in the present appeals for the following reasons:

- (i) The presence of PW Dharam Pal, DSP, at the spot, is highly doubtful, as Firstly, this witness except for attesting the recovery memo Ex.PC, has not signed/attested any other document prepared at the spot. Secondly, this witness in his deposition has stated that

when he reached at the spot, he verified the fact and directed SI Jaimal Singh to check the bags. A perusal of the recovery memo Ex.PC, photocopy of which is taken on record from the Investigating Officer to complete this document, as the first two pages were missing in the lower court record (carbon copy is available on the second part of the record), would show that in the recovery memo, the complete description of the proceedings undertaken by PW1, SI Jaimal Singh, upto the stage of issuance of the notice under Section 50 of the NDPS Act to accused Kashmir Singh and calling this witness at the spot is given. Therefore, the attestation of this document by PW2 at the spot, at the end of this document would mean that he had verified even those facts, when he had not even reached at the spot and as such it is apparent that this recovery memo Ex.PC was prepared prior to his reaching at spot and only thereafter, PW2 had signed in the end, at page 3 of this document. Thirdly, after reaching at the spot, if this witness had verified the contents of notice under Section 50 of the NDPS Act, he would have given a second notice as the notice issued by PW1 was defective. This shows that this witness had never issued the notice under Section 50 of the NDPS Act (Ex.PA) giving option to Kashmir Singh. Fourthly, even a perusal of the report, prepared under Section 57 of the NDPS Act (Ex.PF), shows that it was prepared on the same day i.e. 19.11.2013 and was

also signed by PW2 on the same day, whereas in the statement of this witness he has stated that he received the report on the next day i.e. 20.11.2013 and therefore, this witness has deposed incorrect fact against the document Ex.PF, itself.

(ii) The notice issued by PW1 SI Jaimal Singh to accused Kashmir Singh (Ex.PA) reads as under:

“Notice under Section 50 of the NDPS Act You are informed by this notice that there is a doubt, you are carrying or intoxicant material in the ten plastic bags, in your possession. Whether you want to be searched by me or by a Magistrate or by some Gazetted Officer. On the notice, the signatures of the accused and witnesses were obtained.”

Therefore, in view of the judgment of the Hon'ble Supreme Court in ***Parmanand's case (supra)***, the search made by PW1 is vitiated as it is in violation of provisions of Section 50(1) of the NDPS Act. The prosecution has failed to prove that after the accused Kashmir Singh was arrested and the recovery was effected on the spot, he was ever produced before the Illaqa Magistrate, in compliance of Section 52A of the NDPS Act. A perusal of the statement of PW1, PW2 and PW10, clearly show that no such procedure was followed. Therefore, in view of the judgment of Hon'ble Supreme Court in ***Mohanlal's case (supra)***, the police has failed to comply with the provisions

of Section 52-A of the Act.

(d) The prosecution has failed to put a specific question to all the three accused persons in their statements under Section 313 Cr.P.C. that they were found in conscious possession of the contraband which was lying in an open area as per the version in the FIR and therefore, in view of the judgment of Hon'ble Supreme court in ***Avtar Singh's case (supra)***, the accused persons were denied the right to prove their innocence in this regard.

(e) The prosecution has failed to explain as to how the FIR number finds mention in the notice under Section 50 of the NDPS Act (Ex.PA), consent memo Ex.PB and the recovery memo Ex.PC, which was prepared in the presence of PW2. It is undisputed case of the prosecution that only thereafter the ruqa/written compliant (Ex.PD) was sent to the police station for registration of the FIR. The FIR Ex.PD/1 was registered thereafter. The prosecution witnesses have stated that the accused Kashmir Singh was apprehended at 04.50PM and the endorsements on the ruqa Ex.PD show that it was received in the police station on 06.30 PM and in the intervening period, DSP had arrived at the spot at 05.30PM. Thus, the FIR was registered much after preparation of these three documents and the prosecution has failed to explain, in what manner, the FIR number is mentioned. Therefore, in view of the judgment of the Hon'ble Supreme Court in

Sitansu Sekhar Kanungo's case (supra), and of this Court in *Didar Singh @ Dara's case (supra)*, the case of the prosecution is highly doubtful.

(f) Though, it has come in the statement of PW1 that sample seal chits were prepared at the spot regarding the seal impressions of PW1 Jaimal Singh as 'JS' and of the DSP as 'DS'. However, no such document was proved or exhibited before the trial Court. The prosecution has further failed to prove and place on record either the Form No.29 or the relevant entry in register No.19 in the police station showing the arrest of Kashmir Singh-appellant No.1 as well as deposit of the contraband in the malkhana. Therefore, the prosecution has failed to prove its case beyond doubt.

(g) Even otherwise, in view of the judgment of the Hon'ble Supreme Court in *Balkar Singh's case (supra)*, the prosecution has failed to lead any cogent evidence regarding the investigation to show the ownership of the poppy husk or to give a satisfactory explanation from the accused to prove the source of acquiring the contraband. Therefore, in view of the judgment of the Hon'ble Supreme Court in *Balkar Singh's case (supra)*, the police has not conducted a fair investigation.

(h) From the statement of PW1 SI Jaimal Singh, it is apparent that he himself was the investigating

officer, who arrested Kashmir Singh-appellant No.1, conducted search, sent ruqa to police station, prepared the inventory under Section 57 of the NDPS Act. Therefore, in view of the recent judgment of the Hon'ble Supreme Court in ***Mohan Lal's case (supra)***, PW1 SI Jaimal Singh being the complainant, could not be the investigating officer himself. It is not disputed that a second investigating officer was never deputed to conduct the investigation.

(i) From the statement of PW2 and PW10 the prosecution could not prove that appellant Palvinder Singh @ Polla and Bittu Masih @ Ladi, were present at the spot. As both these witnesses in the cross examination have clearly admitted that they have never conducted any investigation against both these accused on a prior occasion and they were not known to them. Therefore, the allegations in the FIR that these two accused persons were known to the prosecution witnesses, are not proved.

In view of the same, I find that the prosecution has failed to prove the charges against the appellants. Therefore, the present appeals are allowed. The judgement of conviction and order of sentence dated 24.09.2007, passed by the trial Court is set aside and the bail bonds of the appellants are discharged.

[Arvind Singh Sangwan]
Judge

18.08.2018

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Whether speaking/reasoned

Yes

Whether reportable-

Yes