

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

1. **CRA-S No.2249-SB of 2008 (O&M)**
Date of Decision: 01.09.2018

Jaspal Singh	Appellant
Vs	
State of Punjab	Respondent

2. **CRA-S No.133-SB of 2010 (O&M)**

Sukhwinder Singh @ Ghuk	Appellant
Vs	
State of Punjab	Respondent

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present:Mr. Munish Raj Chaudhary, Legal Aid Counsel
for the appellant(s).

Mr. Surinder Pal Singh Tinna, Addl. A.G., Punjab.

RAJ MOHAN SINGH, J.

[1]. Vide this common order, CRA-S No.2249-SB of 2008 (O&M) and CRA-S No.133-SB of 2010 (O&M) are being disposed of.

[2]. Both the appeals have been arisen from the same judgment of conviction dated 03.10.2008 and order of sentence dated 04.10.2008 passed by the Special Judge, Ferozepur convicting and sentencing the appellant(s) under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985

(hereinafter to be referred to as 'the NDPS Act'). Accused have been sentenced to undergo rigorous imprisonment for a period of 10 years each and to pay fine of Rs.1 lakh each along with the default mechanism. Since both the appeals involve similar controversy, therefore, for brevity facts are being culled out from CRA-S No.2249-SB of 2008.

[3]. The prosecution story started with the allegations that on 06.09.2002, the police party headed by ASI Ranjit Singh was present on the low lying area towards eastern side of *kacha* path towards village Bhagu i.e. *kacha* path leading from Bhagu to village Kular near the bridge of the canal. The police party was present in connection with special *naka*. At about 3.00 p.m., a white colour car make Maruti bearing registration No.PB-26-0966 came from the side of village Kular. On being signalled by ASI Ranjit Singh, the car was stopped. The accused persons came out from the car and tried to ran away. Accused Jaspal Singh (driver of the car) was apprehended, whereas second accused succeeded in fleeing from the spot. His name came to be known subsequently as Sukhwinder Singh @ Ghuk son of Virsa Singh. ASI Ranjit Singh told accused Jaspal Singh about his suspicion of having some contraband present in the car. He wanted to conduct search of the accused as well as the car for which accused was apprised of his right to

be searched before the Gazetted Officer or Magistrate. Consent memo Ex.P-1 was prepared. The accused opted for his search in the presence of Gazetted Officer. Sh. Rakesh Aggarwal, ASP was informed, who reached at the spot in his official gypsy and introduced himself to the accused as Gazetted Officer of the Police. He gave him the offer whether the accused wanted to be searched by him or before some other Gazetted Officer or the Magistrate. The accused reposed faith in him. Consent memo Ex.P-2 was prepared. Thereafter, as per directions of the ASP, search of the car was conducted by ASI Ranjit Singh, which led to the recovery of three bags containing poppy husk. 250 grams of poppy husk was separated from each bag and remaining poppy husk in each bag on being weighed was found to be 39.750 kgs. All the three bags and samples containing poppy husk were separately packed, sealed and were taken in police possession. Seals were affixed by ASI Ranjit Singh and the Gazetted Officer ASP Rakesh Aggarwal. A *ruqa* was sent to the police station and thereafter formal FIR Ex.P-9 was registered against the accused.

[4]. After necessary proceedings, the police party returned to the police station along with the accused and contraband. The case property and the accused were produced before the SHO Kuldip Singh, who after verification, took the case property

in his possession after affixing his seal vide Ex.P-11. On the next day, the case property as well as the accused were produced before the *Illaq*a Magistrate and application Ex.P-13 was moved before the *Illaq*a Magistrate on which order Ex.P-14 was passed. The case property was sent to the office of Chemical Examiner for analysis on 18.09.2002. The accused Sukhwinder Singh @ Ghuk was arrested in the case on 14.10.2002.

[5]. Challan was presented on receipt of report of Chemical Examiner. The accused were chargesheeted for the offence under Section 15 of the NDPS Act, to which they did not plead guilty and claimed trial.

[6]. The prosecution in its evidence, examined HC Puran Chand as PW-1, who was member of the police party present at the *Naka* on 06.09.2002. He supported the prosecution case on material particulars. In his deposition, the factum of personal search of the accused came to be noticed wherein currency notes of Rs.50/- were recovered from the accused Jaspal Singh vide recovery memo Ex.P-5. The witness identified the signatures of Investigating Officer ASI Ranjit Singh, who had expired subsequently.

[7]. Sh. Rakesh Aggarwal, IPS was examined as PW-2, who stated on broad features of the prosecution case. As per

his testimony, the accused Jaspal Singh was apprised of his legal right about his search to be conducted in his presence or in the presence of some other Gazetted Officer or Magistrate. The accused reposed faith in him and tendered no objection if the search was to be conducted in his presence. The Gazetted Officer signed all the three samples parcels and residual parcels and affixed his seal. In the cross-examination the witness admitted that he received the information on wireless in the office at about 3.15 p.m. Place of recovery was situated at a distance of 35 kms. from his office. The witness reached at the spot at about 4.00 p.m. The witness did not find any private driver or owner of the car at the spot, which was used by the police party. No writing work was shown to the witness by the Investigating Officer on his arrival at the spot, but the Investigating Officer orally told the witness that offer was given to the accused. Witness did not ask the Investigating Officer as to the nature of the offer given to the accused by him. The witness did not interrogate the accused regarding ownership of the car used in the offence. No document of the car in respect of its ownership was collected by the Police, but it was told by the Investigating Officer that the accused had purchased this car for a consideration of Rs.73,000/-.

[8]. Constable Parmatma Singh was examined as PW-3.

He was the official, who took the sample parcels to the office of Chemical Examiner. He was entrusted with the sample parcels on 18.09.2002 at about 09/10 a.m. As per his testimony, he reached the office of SSP at 12.00 Noon on the same day. He went to the office of Chemical Examiner on 20.09.2002. On 18.09.2002 and 19.09.2002, he stayed in the police line at night, but did not enter his presence in the *roznamcha* of police line. His presence was not marked in the police station on 19.09.2002. After submitting the sample parcels in the office of Chemical Examiner on 20.09.2002, he returned to the police station on 21.09.2002.

[9]. SHO/SI Kuldip Singh was examined as PW-4. In his deposition he stated that the case property was sealed by him when the same was produced before him in the office on 06.09.2002. He took possession of whole of the case property which was attested by ASI Ranjit Singh. The witness kept the case property in his custody. On 07.09.2002, he produced the case property along with accused Jaspal Singh before the Judicial Magistrate by moving application Ex.P13 on which the Magistrate passed the order Ex.P-14 and thereafter he brought back the case property to the police station and kept the same in his custody. On 18.09.2002, the witness handed over the sample parcels to Constable Parmatma Singh for depositing the

same in the office of Chemical Examiner. Constable Parmatma Singh deposited the same in the said office on 20.09.2002 and handed over the receipt after his return from the office. On the receipt of report of Chemical Examiner Ex.P-16 and after investigation of the case, the challan was presented. ASI Ranjit Singh has already died. The witness identified signatures of ASI Ranjit Singh on documents. In his cross-examination, reference to Register No.19 was made, but according to his testimony, Register No.19 was not seen by him in the Court. The witness did not contact the owner of the car, nor verified how the car went to the accused person. The owner of the car was not interrogated, nor his complicity in the context of offence was verified. ASI Ranjit Singh was directed to verify the complicity of owner of the car, but he did not report back. The owner of the car could have been prosecuted under Section 25 of the NDPS Act on finding contraband in the car, but such a course was not adopted as Ranjit Singh did not report back, even he was asked to verify the involvement of owner, if any of the car. FSL Form Ex.P-15 was filled on 18.09.2002. The witness made the entry in Register No.19 regarding taking out of sample parcels. Signatures of Constable Parmatma Singh were not taken in Register No.19. The witness specifically stated that the case property was never deposited with the MHC. He did not make

any statement to the Investigating Officer that he deposited the case property with MHC Balwinder Singh. The witness was confronted with portions A to A1 of the statement Ex.D-1 wherein it was recorded that he deposited three parcels of bulk contents with the MHC Balwinder Singh after producing same before the *Ilalaqa* Magistrate.

[10]. PW-5 Avtar Singh was a formal witness. HC Darshan Singh was examined as PW-6, who was the member of police party present at the spot. After endorsing the prosecution story in his examination-in-chief, PW6 in his cross-examination admitted that samples were drawn in the *potlis* and not in the sewed bags. The offer was given to the accused in respect of his search by the Magistrate or DSP, but the search was conducted in the presence of ASP. The writing work was done before arrival of the ASP and the same was shown to the ASP on his arrival. After going through the writing which was shown to him by ASI Ranjit Singh, he directed ASI Ranjit Singh to carry out search of the person of the accused. The Gazetted Officer remained present throughout upto 7.30 p.m. In the concluding part of his cross-examination, the witness admitted that Balwinder Singh was MHC of Police Station Sadar Abohar with whom the case property and samples were deposited by the SHO on return to the police station.

[11]. Jasbir Singh was examined as PW-7, who was owner of Maruti car. As per his testimony he never sold the car to Jaspal Singh.

[12]. After leading prosecution evidence and giving up PW Jasbir Singh, Constable Wazir Chand, MHC Balwinder Singh, Independent witness Surjit Singh and closing of prosecution evidence, the statements of the accused were recorded under Section 313 Cr.P.C. in which the entire incriminating material was put to them, to which they pleaded themselves to be innocent and stated that they have been falsely implicated.

[13]. The trial Court recorded the conviction under Section 15 of the NDPS Act and sentenced the accused for a period of 10 years of rigorous imprisonment along with fine of Rs.1 lakh each along with default mechanism of undergoing rigorous imprisonment for one year each in case of non-payment of fine.

[14]. I have considered the submissions made by learned counsel for the parties.

[15]. Perusal of record would show that it was a case of recovery from the car and personal search of accused Jaspal Singh was also conducted leading to recovery of currency notes of Rs.50/- Ex.P-5. In **State of Rajasthan vs. Parmanand and another, (2014) 2 R.C.R. (Criminal) 40**, the Hon'ble Apex Court

has held that in case of personal search of the accused Section 50 of the NDPS Act will have application. Joint communication of right available to the accused under Section 50(1) of the said Act would frustrate very purport of Section 50 of the Act. The communication of said right to the accused, who is about to be searched is not an empty formality. Since there are minimum safeguards available to accused against possibility of false implication, therefore, communication of this right has to be clear, unambiguous and individual. The accused must be made aware of existence of such right even if, it would be of little significance if the accused is not able to exercise the same for want of knowledge about its existence. A joint communication of right may not be clear or unequivocal and the same may create confusion in the mind of the accused. As per the aforesaid judgment, the communication with regard to the existence of legal right in favour of the accused has to be specifically given for incrimination of the accused on account of personal search. Evidently, in the case set up by the prosecution in terms of communication, the consent memo is only dependent upon one offer given to the accused viz-a-viz. his option to be searched before the Gazetted Officer or the Magistrate.

[16]. In **Vijaysinh Chandubha Jadeja vs. State of Gujarat, 2010(4) R.C.R. (Criminal) 911**, the Larger Bench of the Hon'ble

Apex Court held that though Section 50 of the NDPS Act gives an option to the empowered police officer to take the accused either before the Gazetted Officer or Magistrate, but in order to impart, authenticity, transparency and creditworthiness to the prosecution story, an endeavour should be made to produce the suspect before the nearest Magistrate at the first instance as the Magistrate enjoys more confidence of the common man as compared to any other officer. It was also held that Section 50 of the NDPS Act provides for search of the suspect, who is suspected to be in possession of the contraband. The Section casts upon a duty on empowered officer to inform the suspect of his right to be searched in the presence of a Gazetted Officer or Magistrate. A mere enquiry by the said officer as to whether suspect would like to be searched in the presence of Magistrate or a Gazetted Officer will not be a compliance with the mandate of Section 50 of the NDPS Act. It would be imperative on the part of the empowered police officer to apprise the suspect intended to be searched of his right to be searched before the Gazetted Officer or the Magistrate. Such communication is not an empty formality and the failure to comply with the said provision would render the recovery of the contraband illegal and would vitiate the conviction.

[17]. In a subsequent judgment of the Hon'ble Apex Court in

in **Narcotics Central Bureau Vs. Sukh Dev Raj Sodhi, 2011**

(3) RCR (Criminal) 370, the view expressed in **Vijaysinh Chandubha Jadeja's** case (supra) was followed, and it was held that the requirement of Section 50 of the NDPS Act is not a mere formality. The requirement of Section 50 of the NDPS Act would not be complied with by merely informing the accused of his option to be searched before the Gazetted Officer or Magistrate. The requirement continues even after that and it is clear that the accused is actually brought before the Gazetted Officer or Magistrate in order to impart authenticity, transparency and creditworthiness to the entire prosecution case. An endeavour should be made by the prosecuting agency to produce the suspect before the nearest Magistrate. In other words, it can be seen that even the consent is given by the accused by reposing faith in the Investigating Officer or the Gazetted Officer, the police is required to produce the suspect before the nearest Magistrate in order to impart authenticity, transparency and creditworthiness to the prosecution story.

[18]. A similar view has been taken by the Hon'ble Apex Court in **Arif Khan @ Agha Khan vs. State of Uttarakhand, 2018(2) R.C.R. (Criminal) 931**. For the sake of clarity, paras No.23 and 25 are reproduced hereinbelow:-

“23. *Their Lordships have held in Vijaysinh Chandubha*

*Jadeja (supra) that the requirements of Section 50 of the NDPS Act are mandatory and, therefore, the provisions of Section 50 must be strictly complied with. It is held that it is imperative on the part of the Police Officer to apprise the person intended to be searched of his right under Section 50 to be searched only before a Gazetted officer or a Magistrate. It is held that it is equally mandatory on the part of the authorized officer to make the suspect aware of the existence of his right to be searched before a Gazetted Officer or a Magistrate, if so required by him and this requires a strict compliance. It is ruled that the suspect person may or may not choose to exercise the right provided to him under Section 50 of the NDPS Act but so far as the officer is concerned, an obligation is cast upon him under Section 50 of the NDPS Act to apprise the suspect of his right to be searched before a Gazetted Officer or a Magistrate. (See also **Ashok Kumar Sharma vs. State of Rajasthan, 2013 (2) SCC 67** and **Narcotics Control Bureau vs. Sukh Dev Raj Sodhi, 2011 (6) SCC 392**)*

25. *In our considered view, the evidence adduced by the prosecution neither suggested and nor proved that the search and the recovery was made from the appellant in the presence of either a Magistrate or a Gazetted Officer.*

[19]. It is also a fact established on record that the sample parcels were not drawn in the presence of the Magistrate. The view expressed by the Hon'ble Apex Court in **Union of India vs. Mohan Lal & Anr., 2016(1) RCR (Criminal) 858** has its application to the facts of the present case. As per statement of PW-2 Rakesh Aggarwal (Gazetted Officer) no writing work was

shown to him by the Investigating Officer on his arrival at the spot. The Investigating Officer told the witness orally that an offer was given to the accused. The Gazetted Officer did not ask the Investigating Officer as to the nature of offer given to the accused/suspect. The aforesaid statement of Gazetted Officer is in contrast to the statement made by PW-6 Darshan Singh, who stated that all the writing work done before arrival of the Gazetted Officer was shown to him and after going through the said writing work in the presence of Investigating Officer i.e. ASI Ranjit Singh, Form No.29 was prepared at the spot and seals were affixed. Concededly the owner of the car was not associated in the investigation. As per testimony of original owner of the car i.e. Jasbir Singh PW-7, who sold the car to Balwant Singh son of Atma Singh, was never interrogated or associated in the investigation of the case.

[20]. PW-2 in his cross-examination admitted the fact that no document was collected by the police in respect of ownership of the car. It was the Investigating Officer, who told the witness that the accused had purchased car for a consideration of Rs.73,000/-. In the testimony of SI/SHO Kuldip Singh, it has come on record that he directed the ASI Ranjit Singh Investigating Officer to verify the complicity of the owner of the car, but he did not report back. Investigating Officer ASI Ranjit

Singh died during pendency of the case and he could not be cross examined. According to SI/SHO Kuldip Singh PW-4, Register No.19 was filled, but the same was not seen by him in the Court. Register was not exhibited on record. The case property has to be recorded in Register No.19 maintained in the police station. The case property was kept by the SHO in his custody. According to his statement, the same was never deposited with the MHC Malkhana Balwinder Singh. The SHO was confronted with his statement that the case property was not deposited with the MHC Balwinder Singh. He was confronted with portion A to A1 of the statement Ex.D-1 recorded by ASI Ranjit Singh wherein it was recorded that the case property was deposited with the MHC Balwinder Singh, who has not been examined, rather was given up while closing of evidence of the prosecution. Deposit of the case property with MHC Balwinder Singh was also endorsed by the SHO Kuldip Singh. The same has also been admitted by PW-6 Darshan Singh in his cross-examination when he stated that Balwinder Singh, MHC was entrusted with the property after return to the police station. The recording of statement of SHO as Ex.D-1 with reference to the admission of PW-6 Darshan Singh viz-a-viz. the deposit of the case property with MHC could have been explained only by deceased ASI Ranjit Singh, who had recorded

the statement of SHO. Since the SHO kept the case property with him from 06.09.2002 to 18.09.2002 without establishing the fact whether the same was recorded in Register No.19 maintained in the police station. The same would be on highly questionable note as to its preservation and tampering.

[21]. Register No.19 was not produced on record. The factum of making entry in Register No.19 at the time of taking out the sample and handing over the same to Constable Parmatma Singh would have been verified only by production of said register. The testimony of Constable Parmatma Singh would show that the sample parcels remained with him for two days on 18th and 19th Sept. 2002 and he never deposited the same with the office of Chemical Examiner. The witness stayed in the police line for two nights without entering his presence in the register of police line, nor his presence was marked in the police station on 19.09.2002. The act on behalf of PW-3 Parmatma Singh and PW-4 SI Kuldip Singh by keeping the case property and sample parcels for so long would create dent in the prosecution case particularly when MHC Balwinder Singh has not been examined, rather given up by the public prosecutor at the time of closing of prosecution evidence. Even though a suggestion given to the witnesses did not yield any incriminating disclosure, but the prosecution was bound to prove the guilt of

the accused/appellants to the hilt i.e. beyond reasonable doubt.

[22]. The contraband after seizure and deposit in the Malkhana or with the SHO was to be sent to the FSL within 72 hours as per instructions vide Notification No.1/88 issued by the Narcotics Control Bureau. The view expressed in **Union of India vs. Bal Mukund and others, 2009(2) R.C.R. (Criminal) 574** and **CRA-S No.1449-SB of 2008** titled '**Satpal vs. State of Haryana**' decided on 06.08.2012 would show that the samples were required to be sent to the FSL within 72 hours. In the instant case, the samples were drawn on 06.09.2002 and the same were sent to the FSL only on 18.09.2002 after delay of 12 days. Constable Parmatma Singh after receiving the samples on 18.09.2002 kept the same for two days without recording his presence in the *roznamcha* and the police station. The retention of the samples by him remained conspicuous without any evidence of entering the same in Register No.19 and non-examination of MHC Balwinder Singh with whom the case property was allegedly deposited as per first version shown in statement recorded by deceased ASI Ranjit Singh as Ex.D-1 and consequently admission made by PW-6 Darshan Singh in his cross-examination. Link evidence is missing altogether.

[23]. In respect of occurrence dated 03.00 p.m., the FIR came to be registered only on 6.30 p.m. In addition to the

aforesaid discrepancies, the documents viz. *Jamatalashi* and recovery memo would cast suspicion with regard to genuineness of the police proceedings. The prosecution has not been able to establish as to the extent of investigation done by the deceased ASI Ranjit Singh.

[24]. In view of ratio laid down in ***Gunnu and another vs. State of Punjab, 2017(3) R.C.R. (Criminal) 566; State by Inspector of Police, Narcotics Intelligence Bureau, Madurai Tamil Nadu vs. Rajangam, (2010) 15 SCC 369; Laltu Prasad vs. The State of West Bengal, 2017(2) R.C.R. (Criminal) 237*** and ***Ajay Singh and another vs. State of Chhatisgarh and another, 2007(1) R.C.R. (Criminal) 559***, the Investigating Officer being the complainant should have refrained himself from further investigation of the case as he was not only the complainant in the case, but he carried on with the investigation and examined witnesses under Section 161 Cr.P.C. The perception of the Officer, who had seized the contraband and arrested the accused would negate the concept of fair and impartial investigation. The plinth of justice dispensation system is founded on the faith, trust and confidence of the people. A litigant reasonably expects adherence to the rules pertaining to fundamental adjective and seminal substantive law while delivering reasoned decision. The fair investigation is the

backbone of fair trial. Fair investigation could have been conducted only by a person, who has not effected the arrest, search and seizure at the initial stage otherwise, he would be interested person in order to see success of his own case.

[25]. Taking into consideration the total facts and circumstances of the case, I find that prosecution story is not free from doubt on many counts. By giving benefit of doubt to the accused/appellant(s) namely Jaspal Singh and Sukhwinder Singh @ Ghuk, I hereby acquit them from the charges levelled against them. Both the appeals are accepted and impugned judgment of conviction dated 03.10.2008 and order of sentence dated 04.10.2008 passed by the Special Judge, Ferozepur passed against the accused/appellants are set aside. Accused/appellants be released forthwith, if not required in any other case.

September 01, 2018

Atik

**(RAJ MOHAN SINGH)
JUDGE**

Whether speaking/reasoned

Yes/No

Whether reportable

Yes/No