

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

CRA-S-1458-SB-2012

Date of decision: 17th October, 2018

Suresh Raut

.....Appellant

Versus

State of Punjab

.....Respondent

CORAM:HON'BLE MS. JUSTICE RITU BAHRI

Present: Mr. Jaspal Singh Pann, Advocate/Legal Aid Counsel,
for the appellant.

Ms. Monika Jalota, DAG, Punjab

Ritu Bahri, J.

This appeal has been filed against the judgment dated 14.07.2011 passed by the Special Judge, Sangrur, whereby accused-appellant (Suresh Raut) has been convicted and sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.1,00,000/- for committing an offence punishable under Section 20 of Narcotics Drugs and Psychotropic Substance Act (for short 'the Act').

Brief facts of the case are that on 25.01.2011, ASI Sukhdev Singh along with other police officials was going on patrolling duty from Chhajli to village Nangla. At about 5.00 P.M., when they reached at the bridge of drain in the revenue limits of village Nangla, accused (appellant) was seen coming from the opposite side on foot and was having a plastic bag in his right hand. On seeing the police party, he turned back, but was apprehended on the basis of suspicion. On enquiry, he disclosed his name as Suresh Raut son of Chhote Lal, resident of Shikarpur, District Bidhia, West

Chhapparan (Bihar). After disclosing his identity, ASI Sukhdev Singh

asked him as to whether he wanted to get himself searched before a Gazetted Officer or a Magistrate. However, he (accused) reposed his faith in ASI Sukhdev Singh. In this regard, his consent statement was recorded. On conducting search of the bag of accused, it was found containing charas/sulfa, out of which, two samples of 10 grams each were separated. On weighing the remaining charas/sulfa, it came to be 980 grams. ASI Sukhdev Singh prepared the parcels of samples and bulk, which were sealed with the seal bearing impression 'SS'. Sample seal impression was prepared and seal after use, was handed over to HC Gurtej Singh. Two sample parcels and bulk parcel were taken into possession vide recovery memo, which was attested by the witnesses. Ruqa was sent to the police station, on the basis of which, formal FIR was registered. Rough site plan of the place of recovery was prepared. Statements of the witnesses were recorded. On completion of investigation, challan was prepared and presented in Court. Copies of challan and other documents were supplied to the accused-appellant free of costs, as envisaged under Section 207 Cr.P.C.

Thereafter, finding a prima facie case, charge under Sections 20 of the Act was framed against the accused-appellant, to which, he pleaded not guilty and claimed trial.

In order to prove its case, the prosecution examined ASI Sukhdev Singh (PW-1), HC Gurtej Singh (PW-2), SI/SHO Gurcharan Singh (PW-3), HC Harinder Singh (PW-4) and HC Kamaljit Singh (PW-5). On conclusion of the prosecution evidence, statement of the accused-appellant under Section 313 Cr. P.C. was recorded, wherein entire incriminating evidence was put to him. However, he denied the same and pleaded false implication.

He further stated that he had come to Punjab in search of livelihood and

during this period on 23.01.2011, he was picked up by the CIA Staff. They confined him in illegal custody and later on, a false case had been foisted on him. No evidence was led in defence.

Trial Court, after going through the evidence led by the prosecution, convicted and sentenced accused-appellant in the aforesaid terms.

While convicting accused-appellant, trial Court observed that the evidence led by prosecution i.e. testimony of ASI Sukhdev Singh (PW-1), HC Gurtej Singh (PW-2), SI/SHO Gurcharan Singh (PW-3), HC Harinder Singh (PW-4) and HC Kamaljit Singh (PW-5) and other documents Ex.PA to Ex.PX were sufficient to prove that on 25.01.2011, 1 Kg. sulfa/charas was recovered from the possession of the accused. As such, the plea of learned defence counsel about innocence of accused was held to be devoid of any merit. The plea raised by the defence that no independent witness was examined, was also discarded by the trial Court by relying upon the judgment passed by this Court in **Shish Ram vs. State of Haryana**, 2000 (1) RCR (Criminal) 823. In that case, 30 Kgs. of opium had been recovered and no independent witness had been produced. It was held that the police officials had no grievance against the accused and conviction was upheld by the High Court. With these observations, accused was held guilty and convicted.

Learned counsel for the appellant has argued that at the time of taking consent of accused-appellant, his personal search was conducted. ASI Sukhdev Singh (PW-1), in his cross-examination, stated that not even a single penny was recovered from the personal search of the accused and recovery in question was made from the plastic bag held in his right hand,

which was found containing charas/sulfa. HC Gurtej Singh (PW-2) also stated, during his cross-examination, that not even a single penny was recovered from personal search of the accused. Both the witnesses of prosecution had conducted personal search of the accused and search of the plastic bag. Hence, in the present case, even if no recovery was effected from the personal search of accused-appellant, as per judgment passed in **Vijaysinh Chandubha Jadeja vs. State of Gujrat**, 2010 (4) RCR (Criminal) 911, a proper notice was required to be given to him. However, in the present case, thumb impressions of the accused (appellant) have been taken on his consent statement Ex.PA, which was written in Punjabi. It has been admitted by PW-1 and PW-2, in their cross-examination that accused did not know, how to read or write Gurmukhi language (Punjabi). It was further stated that accused might be able to understand Punjabi language.

Hon'ble the Supreme Court in **Suresh and others vs. State of Madhya Pradesh**, 2013 (1) RCR (Crl.) 229, has followed the judgment given in **Vijaysinh Chandubha Jadeja's** case (supra). In that case personal search was made and recovery had been effected from the car. It was held that even if, Section 10 of the Act is not mandatory to be complied for conducting search of the car, the personal search made without non compliance of Section 50 (1) of the Act would vitiate the prosecution case/investigation and the accused was acquitted.

Hon'ble the Supreme Court in **State of Rajasthan vs. Parmanand and another**, 2014 (2) RCR (Crl.) 40, has again reiterated that each accused must be individually informed that he has a right to be searched before a nearest Gazetted Officer or before a nearest Magistrate. If the provisions of Section 50 (1) are not complied with, it will frustrate the very purpose of

Section 50. In para no.15 of the judgment, it was observed 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.”

Hon'ble the Supreme Court in **Arif Khan @ Agha Khan vs. State of Uttarakhand**, 2018 (2) RCR (Criminal) 931, while examining Section 50 of the NDPS Act with respect to the personal search of accused, held that it was mandatory on the part of authorised officer to make suspect aware of existence of his right to be searched before Gazetted Officer or Magistrate and this requires strict compliance. If the evidence adduced by the prosecution neither suggested nor proved that search and recovery was made in presence of Magistrate or Gazetted Officer, the accused is entitled

to the benefit of doubt. It was further observed as under:-

“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.”

However, in the present case, thumb impression of accused-appellant were taken on the consent statement Ex.PA, which was written in Punjabi and as per admission made by ASI Sukhdev Singh (PW-1) and HC Gurtej Singh (PW-2) in their cross-examination, accused-appellant did not know how to read or write Gurmukhi language (Punjabi). It was further stated that he was only able to understand Punjabi language. Hence, the benefit of doubt has to be extended to accused-appellant as his personal search was made without complying the provisions of Section 50 (1) of the NDPS Act.

In view of the above discussion, the present appeal is allowed, impugned judgment Dt.14.07.2011 is set aside and accused-appellant is acquitted of the charge framed against him. His bail bonds and surety bonds stand discharged.

(RITU BAHRI)
JUDGE

17.10.2018
ajp

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No