

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRA-S No.3100-SB of 2009
Date of Decision-19.05.2018

Harinder Singh @ Bhura ... Appellant
Versus
State of Haryana ... Respondent

CORAM:-HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. K.S. Dhaliwal, Advocate and
Mr. S.S. Gill, Legal Aid Counsel
for the appellant.
Mr. M.D. Sharma, AAG, Haryana.

RAJ MOHAN SINGH, J.

[1]. Appellant has preferred this appeal against the judgment of conviction dated 09.11.2009 and order of sentence dated 11.11.2009 passed by Judge Special Court, Karnal, whereby he was convicted for the offence under Section 15 (b) of the NDPS Act for keeping 25 kgs of poppy husk in his conscious possession and was sentenced to undergo rigorous imprisonment for a period of 3 years and to pay fine of Rs.3000/-. In the event of default of payment of fine, he was to further undergo rigorous imprisonment for a period of 2 months.

[2]. Prosecution story started with the allegations that on 03.06.2007, ASI Mukesh Kumar (PW 4) along with his companions was on patrolling and checking duty. When the police party reached at the bridge in the area of village Gobind Gamri, a young person was seen coming from the side of village Shakenpur with a bori tat on his head. On seeing the police party,

he retraced his steps and started walking briskly. On suspicion, he was apprehended. On being asked, he disclosed his name as Harinder Singh son of Ram Singh, resident of Gobind Garh. Notice under Section 50 of the Act (Ex.P2) was issued to him to the effect that whether he wanted to get himself searched before any Magistrate or Gazetted Officer of Excise Department or Gazetted Officer of Revenue Department or Gazetted Officer of Police Department. Vide Ex.P3, consent of the appellant was recorded to the effect that he wanted to get himself searched by Investigating Officer by reposing faith in him. He refused to get himself searched before Magistrate or Gazetted Officer. Thereafter, search was effected and 25 kgs of poppy husk was recovered from the accused/appellant. Two samples of 100 grams each were separated and remainder was found to be 24 kg 800 grams of poppy husk. Samples and remainder were sealed in separate parcels with the seal of MK. Two sample seals were prepared. Thereafter, samples and residual were taken in police possession vide recovery memo Ex.P4. Seal after use was handed over to ASI Gurmail Singh. FIR was registered. The case property was produced before the Magistrate.

[3]. After proceedings, the accused along with case property was produced before the SHO, who had affixed his seal as RK on each parcel. An application was moved before the Magistrate under Section 52-A of the Act on 04.06.2007 and the

following endorsement was made by Judicial Magistrate First Class, Karnal:-

“Present: ASI Mukesh Kumar with case property.

The case property produced before me. It consists of two samples. Each sample parcel bears five seals of mark MK and one seal of mark RK. Two separate samples each bearing one sample of seal MK and one sample impression of seal RK, have also been produced. All have been endorsed as seen by the undersigned and have been returned to the I.O. ASI Mukesh Kumar for deposit in accordance with the rules.

*JMIC, Karnal
04.06.2007”*

Magistrate also passed the order on even date i.e. 04.06.2007, certifying the aforesaid inventory report vide Ex.P11.

[4]. Challan was presented. Accused was chargesheeted and thereafter, prosecution led evidence of PW 1 Constable Ved Pal, who had delivered special report of the case to the Illaqa Magistrate and senior police officers. PW 2 HC Sher Singh tendered his affidavit Ex.P1 in the context of link evidence. ASI Gurmil Singh appeared as PW 3, who was recovery witness and seal after use was handed over to him. ASI Mukesh (PW 4) Investigating Officer of the case was examined in the context of proving prosecution story. Inspector/SHO Ram Kumar was examined as PW 5 in the context of producing the accused along with case property before him and who after due verification,

affixed his seal RK on each parcel. Thereafter, the case property was deposited with the MHC. Report under Section 57 of the Act was prepared.

[5]. After completion of prosecution evidence, statement of the accused was recorded under Section 313 Cr.P.C. He denied the incriminating allegations against him and pleaded false implication. However, no evidence was led by the accused in his defence.

[6]. Trial Court proceeded to convict the accused/appellant for the offence under Section 15(b) of the NDPS Act and sentenced him accordingly in the manner as stated above.

[7]. I have heard learned counsel for the parties.

[8]. Learned counsel for the appellant vehemently submitted that there was total non-compliance of Section 50 of the NDPS Act inasmuch as that instead of offering in respect of Magistrate or Gazetted Officer, the Investigating Officer made the accused totally confused by giving numerous offers as of Gazetted Officer of Excise Department, Gazetted Officer of Revenue Department, besides Magistrate and Gazetted Officer of Police Department.

[9]. Learned counsel contended that there was no offer given to the petitioner in respect of his search before the Magistrate. He relied upon ***Gurjant Singh @ Janta vs. State of***

Punjab, 2013(4) R.C.R. (Criminal) 874 and submitted that the Hon'ble Supreme Court after considering the ratio of ***State of Punjab vs. Balbir Singh, 1994(1) R.C.R. (Criminal) 736; State of Punjab vs. Baldev Singh, 1993(3) R.C.R. (Criminal) 533*** and ***State of H.P. vs. Pawan Kumar, 2005(2) R.C.R. (Criminal) 622*** has held that when the Investigating Officer on noticing contraband felt the need of invoking Section 50 of the Act and gave offer to the accused, then Principle No.1 as held in para no.25 of ***Balbir Singh's*** case (supra) would not apply.

[10]. Learned counsel further contended that once notice under Section 50 of the Act was given to the accused, then it was imperative requirement on the part of the officer intending search to comply with requirement of Section 50 of the Act mandatorily.

[11]. In ***Vijaysinh Chandubha Jadeja Vs. State of Gujarat 2010(4) RCR (Criminal) 911***, the Constitutional Bench of the Hon'ble Supreme Court after considering ratio of ***State of Punjab Vs. Balbir Singh, 1994(1) RCR (Criminal) 736, State of Punjab Vs. Baldev Singh, 1993(3) RCR (Criminal) 533, Karnail Singh Vs. State of Haryana, 2009(5) RCR (Criminal) 515, Parbha Shankar Dubey Vs. State of MP, 2004(1) RCR (Criminal) 104*** and ***Joseph Fernandez Vs. State of Goa, (2000) 1 SCC 707*** held in para No.22 of the judgment in the following manner:-

“22. In view of the foregoing discussion, we are of the firm opinion that the object with which right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect, viz. to check the misuse of power, to avoid harm to

*innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that in so far as the obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires a strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision. As observed in **Re Presidential Poll, (1974) 2 SCC 33**, it is the duty of the courts to get at the real intention of the Legislature by carefully attending to the whole scope of the provision to be construed. "The key to the opening of every law is the reason and spirit of the law, it is the animus imponentis, the intention of the law maker expressed in the law itself, taken as a whole." We are of the opinion that the concept of "substantial compliance" with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said Section in Joseph Fernandez (supra) and Prabha Shankar Dubey (supra) is neither borne out from the language of sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in Baldev Singh's case (supra). Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf. We also feel that though Section 50 gives an option to the empowered officer to take such person (suspect) either before the nearest gazetted officer or the Magistrate but in order to impart authenticity, transparency and creditworthiness to the entire proceedings, in the first instance, an endeavour should be*

to produce the suspect before the nearest Magistrate, who enjoys more confidence of (1974) 2 SCC 33 the common man compared to any other officer. It would not only add legitimacy to the search proceedings, it may verily strengthen the prosecution as well.”

[12]. The view expressed in **Vijaysinh Chandubha Jadeja’s case (supra)** was followed in **Narcotics Central Bureau Vs. Sukh Dev Raj Sodhi, 2011(3) RCR (Criminal) 370**, wherein it was held that the requirement of Section 50 of the NDPS is not a mere formality. The requirement of Section 50 of the NDPS Act is not 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.

[13]. Learned counsel by relying upon **Gannu and another Vs. State of Punjab, 2017(3) RCR (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) RCR (Criminal) 237** and **Ajay Singh and another Vs. State of Chhatisgarh and another, 2017(1) RCR (Criminal) 559** submitted that Investigating Officer 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. This 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 trial is depending upon fair investigation which should have been conducted by any person, other than the one who arrested and effected seizure of the contraband.

[14]. The next plinth of arguments of learned counsel rested upon the fact that contraband after seizure and deposit in the *Malkhana* was subjected to FSL after a delay of 2 days. By referring to instructions/notification No.1/88 issued by Narcotics Control Bureau and view expressed in **Union of India Vs. Bal Mukund and others, 2009(2) RCR (Criminal) 574** and **CRA-S No.1449-SB of 2008** titled **Satpal Vs. State of Haryana** decided on 06.08.2012, learned counsel contended that samples were required to be sent to the FSL within 72 hours. Delay in sending the samples to the FSL would make the prosecution story doubtful. This Court does not take cognizance of aforesaid fact as the expiry of 72 hours would be on questionable note from the date and time of preparing samples.

[15]. On the other hand, learned State counsel opposed the arguments of learned counsel for the appellant on the ground that the case property remained intact after its seizure from the spot. Sample seals appearing on the parcels were found intact. Investigating Officer and S.H.O have given statements in respect of actual details appearing on record. No link evidence was missing in the present case. Learned State counsel further highlighted that the appellant was having antecedent behavior of his criminal activities as he was involved in number of cases. Learned State counsel also submitted that on the strength of the then precedents on the point, further investigation conducted by the Investigating Officer was proper.

[16]. Having considered the controversy with reference to material on record, I find that the accused was entitled to be informed about his legal right to be searched before the Magistrate or Gazetted Officer before issuing any notice under Section 50 of the NDPS Act. Investigating Officer has straight away issued notice under Section 50 of the NDPS Act without informing the accused/appellant in respect of existence of his legal right to be searched before the Magistrate or Gazetted Officer. Even the offer given to the appellant was not confined to Magistrate or Gazetted Police Officer, rather it contained offer in respect of Gazetted Officer of Excise Department, Gazetted Officer of Revenue Department in addition to Magistrate and Gazetted Officer of Police Department. The accused allegedly

reposed faith in the Investigating Officer. In my considered opinion, the aforesaid act of the police was in utter disregard to the ratio laid down in **Vijaysinh Chandubha Jadeja's case (supra)** and **Narcotics Central Bureau's case (supra)**. The competence of the Investigating Officer being Judge of his own cause has been explained by the Courts in **Gannu and another's case (supra)**, **Laltu Prasad's case (supra)** and **Ajay Singh and another's case (supra)**. In the light of mandate arising out of **Gurjant Singh's case (supra)**, Section 50 of the NDPS Act was required to be mandatorily complied with.

[17]. Keeping in view the totality of facts and circumstances of the case, I am of the view that prosecution has not been able to prove guilt of the accused/appellant to the hilt.

[18]. For the reasons recorded hereinabove, the present appeal is accepted. Judgment of conviction dated 09.11.2009 and order of sentence dated 11.11.2009 passed by Special Court, Karnal are hereby set aside. Normal consequences to follow in accordance with law.

(RAJ MOHAN SINGH)
JUDGE

19.05.2018

Prince

Whether Reasoned/Speaking

Yes/No

Whether Reportable

Yes/No