

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRA-S-2028-SB-2016 (O&M)
Date of decision: 24.02.2018

Jagtar Singh @ Lucky

... Petitioner

Vs.

State of Punjab

... Respondent

CORAM: HON'BLE MR. JUSTICE ARVIND SINGH SANGWAN

Present: Mr. Nandan Jindal, Advocate
for the appellant.

Mr. D.S. Sukarchakia, DAG, Punjab.

ARVIND SINGH SANGWAN, J. (ORAL)

Challenge in this appeal is to the judgment of conviction dated 06.10.2015, vide which appellant-accused was held guilty of offence punishable under Section 22 of The Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'NDPS Act') and order of sentence dated 15.10.2015, vide which the appellant was sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.1.00 lac and in default of payment of fine, to further undergo simple imprisonment for one year.

This appeal is filed through legal aid counsel appointed by the High Court Legal Services Authority and was admitted on 25.05.2016. The appellant is in custody and as per custody certificate dated 03.02.2018, he has undergone about 02 years and 06 months of actual sentence.

Brief facts of the case are that on 22.09.2012, SI Barma Singh along with his co-officials HC Mohan Singh, HC Swaran Singh etc. were

present near Amar Hospital, Sector-70, Mohali, where they had laid a barrier for the purpose of checking of suspected persons and vehicles. One Indigo car bearing registration No.CH03-3P-2577 of blue colour was seen coming from the side of Sector-69, Mohali. A signal was given to stop it and checked the same. The driver of the car told his name as Jagtar Singh @ Lucky i.e. accused-appellant. On making the search of the car, underneath the driver seat, a small bag was found and on opening the same, 11 vials of Rexcof Syrup and 40 strips of Spasmocip Plus capsules were recovered. From the recovered contraband, he had taken out two vials each of Rexcof syrup and 5 strips each as sample. The samples were put into parcels and sealed with seal BS and remaining 7 vials of Rexcof Syrup and 30 strips of Spasmocip Plus capsules were also sealed in bulk parcels with his seal BS. Form No.29 was prepared and the seal BS was also affixed on the same. Thereafter, the sample parcels and bulk parcels along with Form No.29 were taken into possession and the same were attested by HC Mohan Singh and sample seal was handed over to him. The car of the accused was also taken into possession by preparing a separate memo and it was attested by HC Mohan Singh. Thereafter, he sent ruqa/written information to the police station through Constable Kamaldeep Singh for registration of a case and a formal FIR was registered by ASI Sartaj Singh. He arrested the appellant vide arrest memo signed by him and attested by HC Mohan Singh and then he conducted the personal search of the accused vide personal search memo, in which Rs.500/- and a watch was recovered and the same was also attested by HC Mohan Singh. Thereafter, he prepared rough site plan and recorded the statements of the witnesses. He along with car of the accused and the case property returned back to the police station and produced them before the SHO/Inspector Dharam Pal, who verified the facts and affixed his seal DP over

the parcels of case property of the sample parcels and bulk parcels and also affixed seal impression DP on Form No.29 and directed that the case property be deposited with MHC Sudarshan Kumar in his presence with seals intact on the same.

On the next date i.e. 23.09.2012, he had taken the entire case property from MHC Sudarshan Kumar and produced the same along with accused before the Chief Judicial Magistrate, Mohali and gave an application, on which the Chief Judicial Magistrate passed an order that the case property be deposited in the judicial malkhana. However, he deposited the case property with MHC Sudarshan Kumar. Thereafter, the sample parcels were sent to CFSL and on receiving the report of Analyst/Chemical Examiner, the challan under Section 173 Cr.P.C. was submitted before the trial Court.

The trial Court charge-sheeted the accused under Section 22 of NDPS Act vide order dated 12.12.2012, to which the accused did not plead guilty and claimed trial.

The prosecution, in its evidence, examined PW1 ASI Mohan Singh (who was HC at the time of recovery) and he deposed about the investigation conducted by SI Barma Singh as well as the various documents prepared at the spot and recording of statements of the witnesses and recovery effected from the accused-appellant. The detail of the investigation was given in the statement of PW4 SI Barma Singh.

PW2 SHO/Inspector Dharam Pal deposed that on 22.09.2012, he was posted as SHO and SI Barma Singh produced before him 04 sample parcels and two bulk parcels of Rexcof syrup and Spasmocip plus capsules with seal BS and Form No.29. SI Barma Singh also produced a Indigo car bearing registration No.CH03-P-2577 along with accused Jagtar Singh, who was

present in the Court. He put his seal impression DP on four sample parcels and two bulk parcels. This witness also initialled the Form No.29 and put up his seal impression DP on the same. He deposited the case property along with sample parcels with MHC Sudarshan Kumar with seals intact and his statement was recorded. The examination-in-chief of PW2 Inspector Dharam Pal is reproduced as under: -

“PW-2 on S.A. Inspector Dharam Pal, No.24/JR, SHO of PS: Singh Bhagwantpur, Distt. Ropar.

On 22.9.2012 I was posted as SHO in Police Station Mataur. On that day ASI Barma Singh produced before me the case property i.e. 4 sample parcels and two bulk parcels of strips of Spasmocip plus capsules and bottles of Rexcof and two bulk parcels of these drugs, duly sealed with seal BS along with sample seals and form No.29. ASI Barma Singh also produced before me Indigo car bearing No.CH03-P-2577. The accused Jagtar Singh who is present in the Court and I identify him, was also produced before me. I verified the facts of the case and interrogated the accused. I resealed the above said four sample parcels and two bulk parcels with my seal bearing impression DP. I also initialled the form No.29 and put my seal DP on the same. Then I deposited the case property along with the sample parcels with MHC Sudarshan Kumar, with seals intact. My statement was recorded.”

PW3 ASI Sartaj Singh stated that on receiving a ruqa/written information Ex.PW3/A from SI Barma Singh through Constable Kamaldeep Singh, he registered formal FIR, which bears his signatures on the FIR Ex.PW3/B. He further stated that on 15.09.2013, he recorded the statement of

MHC Sudarshan Kumar and Constable Angrej Singh under Section 161 Cr.P.C. and on 11.11.2013, he recorded the statement of Manoj Kumar, Dealing Clerk of the office of Registering Authority, Chandigarh under Section 161 Cr.P.C. In cross-examination, this witness stated that Constable Kamaldeep Singh reached in the police station along with ruqa Ex.PW3/A at about 7.40 pm and at about 8.40 pm, he was sent back from the police station along with copy of the FIR.

SI Barma Singh appeared as PW4 and proved the entire investigation. The examination-in-chief of this witness is reproduced as under: -

“PW4 on S.A. SI Barma Singh, No.1/SAS Nagar, PS:Zirakpur, Distt. Mohali.

On 22.9.2012 I was posted at PS: Mataur. On that day I along with HC Mohan Singh, HC Swaran Singh and other police officials were present near Amar Hospital, Sector 70, Mohali in connection with checking of suspected persons and we were holding a naka there and we were checking the vehicles. During Naka a Indigo car No.CH03-3P-2577 of blue colour came from the side of Sector 69, Mohali. I stopped it and checked. The driver of this car told his name as Jagtar Singh @ Lucky son of Sher Singh r/o H.No.147, Phase-9, Mohali. The accused Jagtar Singh is present in the Court and I identify him. On making search of the car and from underneath the driver seat of the car, a bag of small size was found, from which I recovered 11 vials of Rexcof syrup and 40 strips of Spasmocip Plus capsules. From the recovered vials of Rexcof syrup, two vials each were taken out as a sample and 5 strips each were also taken out as a sample and all the samples were prepared into parcel with my seal BS and the

remaining 7 vials of Rexcof syrup and 30 strips of Spasmocip Plus capsules were also sealed into parcel with my seal BS. Specimen of seal and Form No.29 was prepared. Specimen seal is Ex.P1 and form No.29 is Ex.P2. All the above said parcels and the form No.29 were taken into possession vide memo Ex.PW1/A, which was attested by HC Mohan Singh. The seal was handed over to HC Mohan Singh after its use. The above said car of accused was also taken into possession vide memo Ex.PW1/B, which was also attested by HC Mohan Singh. I sent ruqa Ex.PW3/A to the Police Station through C-Kamaldeep Singh for registration of the case, on the basis of which formal FIR Ex.PW3/B was registered by ASI Sartaj Singh. I arrested accused Jagtar Singh vide memo Ex.PW1/C which was signed by him and attested by HC Mohan Singh. I conducted the personal search of the accused vide memo Ex.PW1/D, which was also signed by the accused and attested by HC Mohan Singh. I prepared rough site plan Ex.PW4/A, which bears my signatures. I recorded the statements of the witnesses. On return to the police station, I produced the accused and the entire case property before Inspector SHO Dharam Pal, who verified the facts of the case and he resealed the parcel of case property and parcel of samples with his own seal DP and he also affixed the seal bearing impression DP on form No.29 and he deposited the case property with MHC Sudarshan Kumar in my presence with seal intact. I have seen the case property today in the Court. The bag is Ex.MO1, the bulk parcel of 7 vials of Rexcof is Ex.MO2. The bulk parcel of 30 strips of capsules is Ex.MO3.

Sample parcels of two vials of Rexcof Syrup is Ex.MO4 and sample parcel of 5 strips of Spasmocip Plus capsules is Ex.MO5.

On the next day i.e. 23.9.2012 I had taken the entire case property from MHC Sudarshan Kumar and I produced the same before ld. CJM, Mohali with seals intact. In this regard the application is Ex.PW4/B and the order passed by the learned CJM, Mohali is Ex.PW4/C. The ld. CJM seen the case property and handed over again to me and I again deposited the same with MHC Sudarshan Kumar with seals intact. During investigation, this fact has come on the record that the car in question stands in the name of Geeta d/o Inderjit Singh, r/o H.No.1052-A, Sector 20-B, Chandigarh.”

PW5 HC Sudarshan Kumar, a formal witness tendered his affidavit Ex.PW5/A regarding deposit of the case property by SI Barma Singh with him on 22.09.2012 and thereafter, it was taken by him prior to production before the Chief Judicial Magistrate on 23.09.2012 and it was re-deposited with him on the same day. This witness has stated in his affidavit Ex.PW5/A that on 05.10.2012, the case property was sent from police malkhana to judicial malkhana, however, it was returned back with the objection that same has to be sent to FSL and thereafter, sample sealed parcels were sent to FSL on 11.10.2012 from the police malkhana. In cross-examination, this witness admitted that on 23.09.2012, the case property was taken from him by SI Barma Singh and again deposited on the same day with him.

PW6 Manoj Kumar, Data Entry Operator, Registering and Licencing Authority, Chandigarh proved that the registered owner of the car No.CH03-P-2577 is Geeta daughter of Inderjit resident of House No.1052-A,

Sector-20B, Chandigarh.

PW7 Constable Angrej Singh tendered his affidavit Ex.PW7/A regarding taking of the sample sealed parcels from PW5 and depositing the same with CFSL.

Thereafter, the prosecution evidence was closed. In the statement recorded under Section 313 Cr.P.C., the appellant denied all the incriminating evidence put to him and pleaded that he has been falsely implicated in the case, however, no defence evidence was led and the trial Court vide judgment of conviction dated 06.10.2015 and order of sentence dated 15.10.2015 convicted the appellant and sentenced him to undergo 10 years R.I. and to pay a fine of Rs.1.00 lac.

Counsel for the appellant has argued that there is a violation of Section 50 of the NDPS Act as it is clear from the statement of PW4 SI Barma Singh that apart from searching the car, he has conducted the personal search of the appellant and it is a case of giving no offer at any stage. Counsel for the appellant has further argued that neither any written offer, to be searched before a Gazetted Officer or a Magistrate nor such right, was informed to the appellant orally. Counsel for the appellant in support of his arguments referred to the judgment in **State of Rajasthan Vs. Parmanand and another, 2014 (2) RCR (Cr1.) 40**, wherein the Hon'ble Supreme Court has held that while conducting search in a case under the NDPS Act, if the personal search of the accused is also conducted, Section 50 of the NDPS Act will have an application. The operative part of this judgment is reproduced as under: -

“Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched

and his person is also searched, Section 50 of the NDPS Act will have application. In this case, respondent No.1 Parmanand's bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of respondent No.2 Surajmal was also conducted. Therefore, in light of judgments of this Court mentioned in the preceding paragraphs, Section 50 of the NDPS Act will have application."

Counsel for the appellant has next argued that provisions of Section 52-A of the NDPS Act has been violated. It is submitted that neither PW4 SI Barma Singh nor PW2 SHO/Inspector Dharam Pal has stated that as per provisions of Section 52-A of NDPS Act, any inventory was prepared. Counsel for the appellant has submitted that as per Section 52-A (2) of the NDPS Act, as and when any narcotic drug or substance has been seized and forwarded to the officer-in-charge of the nearest police station, as per provision of sub-section 2, he shall prepare an inventory of such narcotic drug or substance containing such details relating to their description, quality, quantity, make of packing, mark, number or such other identifying particulars of such substance and make an application to the Magistrate for the purpose of certifying correctness of the inventory so prepared or taking photographs in presence of the Magistrate or allowing to draw a representative sample of such drug or substance in the presence of the Magistrate.

It is submitted on behalf of the appellant that both the witnesses i.e. PW2 and PW4 have nowhere stated that any such inventory was prepared. It is also submitted that even in Form No.29, no detail of batch number, manufacturing date or manufacturer's detail, as required under Section 52-A (2) of the NDPS Act for the purpose of identifying the particulars of the recovery,

is reflected. In support of his arguments, counsel for the appellant has relied upon a judgment in **Union of India Vs. Mohanlal and another, 2016 (2) RCR (Crl.) 858**, wherein the Hon'ble Supreme Court with reference to the procedure regarding seizure and sampling of a contraband under Section 52-A of the NDPS Act, has observed as under: -

“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.”

Counsel for the appellant has further submitted that though it has come in the statement of PW4 SI Barma Singh that on 23.09.2012, he had produced the accused along with case property before the Magistrate and the Chief Judicial Magistrate passed an order dated 23.09.2012 Ex.PW4/C issuing a direction that the sealed property be deposited in Judicial Malkhana, Ropar, but the same was never deposited with the judicial malkhana, as it is clear from the

statement of PW5, who has stated in his affidavit Ex.PW5/A that from 22.09.2012 till 11.10.2012, when the sample sealed parcels were sent to CFSL, the entire case property remained in his custody for a period of about 20 days. The order dated 23.09.2012 passed by the Chief Judicial Magistrate Ex.PW4/C is reproduced as under: -

*“Present: APP/ASI Barma Singh for State.
Accused in custody.*

ASI Barma Singh has produced two sealed sample parcels allegedly containing two bottles containing Rexcof cough syrup and two sealed parcels allegedly containing 5 medicine strips of capsule of Sposmocip bearing seals of letter “BS and DP” and one parcel allegedly containing 7 bottles of Rexcof cough syrup and one parcel allegedly containing 30 medicine strips of capsules of Spsmocip bearing seals of letters “BS and DP”. The said sealed parcels, sealed sample parcels and sample of seals are seen and signed and are returned to ASI Barma Singh for the purpose of depositing sealed parcels with Judicial Malkhana, Ropar and for sending sealed sample parcels to be concerned laboratory accordingly in view of ratio of law discussed in Crl. Mis. No.30579-M of 2003, Crl. Mis. N.44940m of 1997 and Crl. Appeal No.266-B of 1990 as per settled principal of law. The two copies of this order be given to ASI Barma Singh for the said purpose. The papers be sent to the ld. Special Judge (I), Mohali. The Ahlamad is directed to send the papers complete in all respect to the ld. Special Judge (I), Mohali well before the date fixed.

*Sd/-
Chief Judicial Magistrate,
Mohali/23.9.12
Duty”*

It is further submitted on behalf of the appellant that the Investigating Officer has clearly violated the directions given by the Chief Judicial Magistrate for depositing the case property in judicial malkhana and

since there is no identification mark given in the Form No.29 Ex.P2, it cannot be said that the articles recovered on 22.09.2012 were the same, which were sent to CFSL for chemical examination. In support of his arguments, counsel for the appellant has relied upon a judgment in **Harjinder Singh Vs. State of Punjab, 2016 (1) RCR (Criminal) 197**, wherein this Court has held as under: -

*“The recovery was effected on 11.08.2002 and the sample parcel was sent to FSL Laboratory on 21.08.2002. Thus, there was a delay of 10 days in sending the sample. As observed by the Division Bench of this Court in **Parminder Singh vs. State of Haryana 2006 (4) Recent Criminal Reports (CrL), 495(DB)**, according to the Narcotic Control Bureau Instructions, the sample parcel should have been deposited within 72 hours with the Chemical Examiner. Herein, the prosecution has not given any explanation for withholding the sample for such a long time.”*

Counsel for the appellant has thus submitted that the delay of 20 days in sending the sample parcels to CFSL that too without depositing the same in the judicial malkhana, as directed by the Chief Judicial Magistrate vide order dated 23.09.2012 and keeping it in the police malkhana, raises a doubt about the investigation conducted by the police.

Counsel for the appellant has next submitted that the very fact that since 22.09.2012, when the appellant was apprehended, till completion of the investigation and submission of report under Section 173 Cr.P.C., the entire investigation was conducted by SI Barma Singh and the same is not the correct procedure adopted by the investigating agency. Counsel for the appellant has relied upon the judgment in **State by Inspector of Police, Narcotic Intelligency Bureau, Madurai, Tamil Nadu Vs. Rajangam, 2010 (15) SCC**

369, wherein the Hon'ble Supreme Court has held as under: -

*“The learned counsel appearing for the accused submitted that the controversy involved in this case is no longer res integra. In **Megna Singh v. State of Haryana (1996) 11 SCC 709**, this Court has taken a categorical view that the officer who arrested the accused should not have proceeded with the investigation of the case. The relevant paragraph reads as under:*

"4. We have also noted another disturbing feature in this case. P.W.3, Sri Chand, Head Constable arrested the accused and on search being conducted by him a pistol and the cartridges were recovered from the accused. It was on his complaint a formal first information report was lodged and the case was initiated. He being complainant should not have proceeded with the investigation of the case. But it appears to us that 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. Such practice, to say the least, should not be resorted to so that there may not be any occasion to suspect fair and impartial investigation."

*The ratio of Megna's case has been followed by other cases. In another case in **Balasundaran v. State 1999 (113) ELT 785 (Mad)**, in para 16, the Madras High Court took the same view. The relevant portion reads as under:*

"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.”

It is thus submitted that the police official, who arrested the accused, should not have proceeded with the investigation of the case specially in view of the fact that no offer was given under Section 50 of the NDPS Act, to be searched before a Magistrate or DSP.

Counsel for the appellant has further argued that even from the perusal of CFSL report Ex.PW4/D, at Sr. No.6 giving description of the article received by CFSL, it is nowhere mentioned that two parcels marked ‘1’ and ‘2’ in the laboratory were bearing the signatures of Chief Judicial Magistrate. The operative part of this report is reproduced as under: -

“Articles received: Two parcels marked 1 and 2 in the laboratory, each sealed with two seals one each of ‘BS’ and ‘DP’ alleged to contain intoxicating material. Seals on the parcels were

found intact and tallied with the specimen seal impression.”

It is thus submitted that despite the fact that PW4 SI Barma Singh has stated that when he produced the sample parcels before the Chief Judicial Magistrate, he had put his signatures on the same, but report of CFSL does not find mention that the signatures of Magistrate were there on the parcels received and it mention only the seal impression BS and DP affixed by the PW4 Barma Singh and PW2 SHO/Inspector Dharam Pal and thus, it is submitted that in view of the fact that the entire case property remained in possession of the police officials, it cannot be said that it was the same sample parcels, which were sent to the CFSL. Counsel for the appellant has also relied upon a judgment of this Court dated 28.01.2015 passed in CRA-S-1909-SB-2009 (Karam Singh @ Karma and another Vs. State of Punjab), wherein this Court has observed that the witness from CFSL has only mentioned that two seals were intact but did not say anything about the counter-signatures of the Magistrate thereupon and conviction of the accused person was set aside.

Lastly, it is argued that the recovery was effected from the appellant at a public place and it is also admitted by PW4 Barma Singh that recovery was made at a public place near a Marriage Palace, however, no independent witness was examined.

In reply, learned State counsel has argued that in case of recovery from a car, provisions of Section 50 of NDPS Act will not apply. It is further submitted that it is proved from the statement of ASI Mohan Singh that the appellant was apprehended by the police and recovery of contraband was made from his conscious possession. It is also submitted that sample parcels were sent to the Chemical Examiner with seals intact and therefore, prayed for dismissal of the present appeal.

After hearing learned counsel for the parties, I find merit in the present appeal.

(a) Admittedly, from the statements of PW2 and PW4, it is not proved on record that any inventory was prepared after the recovery and arrest of the appellant when they were produced before the PW2 SHO/Inspector Dharam Pal. A perusal of statements of both the witnesses clearly shows that neither any inventory was prepared nor the same was produced before the Chief Judicial Magistrate, Mohali on the next date i.e. 23.09.2012. This fact is also clear from the order dated 23.09.2012 passed by the CJM, Mohali, where there is no mention of production of the inventory before him. Thus, there is a clear violation of Section 52-A of the NDPS Act. Therefore, in view of the judgment in **Mohanlal's** case (supra), the prosecution has failed to prove that it adhered to the provisions of Section 52-A of the NDPS Act and an important right of the appellant has been taken away by the police as no inventory is otherwise exhibited on record.

(b) A perusal of the statement of PW4 SI Barma Singh shows that apart from searching car, personal search of the appellant was also conducted at the same time and therefore, in view of the judgment of the Hon'ble Supreme Court in **Parmanand's** case (supra), wherein it has held that where a search is being carried out of a bag held by a person apart from his personal search, Section 50 of the NDPS Act will have an application. Since it is a case of no offer, either written or even oral to inform the accused his right of being searched before a Gazetted Officer or DSP, again legal right of the appellant is pre-judged.

(c) A perusal of Form No.29 Ex.P2 further shows that no description of the case property recovered/sealed is given and it is only mentioned that

Rexcof bottles and Spasmocip plus capsules were recovered and therefore, the details of the manufacturer, batch number, manufacturing date etc., which is the requirement of Section 52-A of the NDPS Act to identify the case property is not mentioned on Form No.29. In view of the judgment of this Court in **Harjinder Singh's** case (supra), there is a clear violation of Section 52-A of the NDPS Act, especially in view of the fact that no separate inventory was prepared or proved on record.

(d) Admittedly, SI Barma Singh has conducted the entire investigation from the time of recovery of the contraband from the appellant, his arrest, his production before the SHO/Inspector Dharam Pal, production before the Chief Judicial Magistrate and preparation of report under Section 173 Cr.P.C. submitted before the trial Court. Therefore, at no point of time, no other independent officer was assigned the duty to investigate or verify the same. Therefore, in view of the judgment of the Hon'ble Supreme Court in **Rajangam's** case (supra), the entire investigation conducted by SI Barma Singh is vitiated.

(e) Admittedly in gross violation of order of CJM Ex.PW4/C, the case property was never deposited in Judicial Malkhana and it remained in custody of police malkhana.

(f) There is an unexplained delay of 20 days in sending the sample parcels to CFSL. Firstly, despite the order of the Chief Judicial Magistrate dated 23.09.2012 to deposit the case property in judicial malkhana, the same was never deposited in the judicial malkhana, as it is clear from the statement of PW5 that it was deposited in the police malkhana and secondly, in view of the fact that it was taken out from the police malkhana on 05.10.2012 for sending to judicial malkhana through PW7 Angrej Singh, however, it was returned back

with the objection that the same is to be deposited with the CFSL and it was again brought back to the police malkhana and then sent to CFSL on 11.10.2012. Therefore, delay in sending the case property to CFSL for chemical examination and keeping the same in police malkhana, in violation of the order Ex.PW4/C passed by the Chief Judicial Magistrate, is fatal to the prosecution case.

(g) As per report of CFSL, there is no mention that the sample parcels bore signatures of CJM and therefore, identity/sealing of parcels is doubtful.

In view of the above, this appeal is allowed. Impugned judgment of conviction dated 06.10.2015 and order of sentence dated 15.10.2015 are set aside. The appellant-convict is acquitted of the charge under Section 22 of the NDPS Act and he shall be released forthwith from judicial custody, if he is not required in any other case.

[ARVIND SINGH SANGWAN]
JUDGE

24.02.2018
vishnu

Whether speaking/reasoned : Yes/No

Whether Reportable : Yes/No