

803-2 cases

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

**Date of decision: May 24, 2018
CRA-S-24-SB of 2016 (O&M)**

Suraj Bhan

.....Appellant

Versus

State of Haryana

....Respondent

CRA-S-745-SB of 2016 (O&M)

Janak Prasad and another

.....Appellants

Versus

State of Haryana

....Respondent

**CORAM: HON'BLE MR. JUSTICE A.B. CHAUDHARI
HON'BLE MR. JUSTICE B.S. WALIA**

Present: Mr. Pawan Kumar Hooda, Advocate
for the appellant (in CRA-S-24-SB of 2016).

Mr. P.S. Ahluwalia, Amicus Curiae
for appellants (in CRA-S-745-SB of 2016).

Mr. Vivek Saini, DAG Haryana.

A.B. CHAUDHARI, J

By this common order, above said both the appeals are being
disposed of.

Being aggrieved by the judgment/order dated
19.11.2015/20.11.2015 passed by the learned Additional Sessions Judge
(Exclusive Court), Jhajjar, in Case No.34 (RBT) of 2011/2015, by which
the appellants, namely Janak Prasad, Shesh Nath and Suraj Bhan, were

convicted for commission of offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'NDPS Act') and Section 420 of Indian Penal Code, 1860 (for short 'IPC') and were sentenced to undergo Rigorous Imprisonment for 10 years and to pay fine in the sum of ₹1,00,000/- each; in default of payment of fine, to further undergo Simple Imprisonment for one year each, the present appeals have been filed by the appellants in this Court.

FACTS

Briefly stated, the prosecution case is that on 26.12.2010, Inspector/SHO Pradeep Kumar received secret information that the present appellants were dealing in *Charas* at large scale by bringing the same from Nepal and Bihar. The information was that a Tata Sumo white colour car driven by Shesh Nath, with registration No.HR-16C-0212 for which fake number plate bearing registration No.HR-55C-6986 was affixed and in which the said contraband was being brought would come from Delhi. The information was that they used to bring *Charas* in village Bambla of Suraj Bhan and then Suraj Bhan used to sell the same. Accordingly, after recording Rapat No.21 dated 26.12.2010 (Exhibit PA) with a copy to DSP, Bahadurgarh, team of officers laid a barricade at National Highway-10, Tikri Border, Bahadurgarh opposite Maruti showroom. A Tata Sumo bearing registration No.HR-55C-6986 came from the side of Delhi towards Tikri Border. On signal, it was stopped. One person was sitting besides driver and one person was sitting in the middle seat of the vehicle. There was a gunny bag under the feet of the

driver, whereas, the other two persons were holding one-each gunny bag in their hands. As soon as, the vehicle stopped, all the three persons tried to run away along with gunny bags. However, they were apprehended. On enquiry, driver disclosed his name as Shesh Nath. The person sitting besides driver seat disclosed his name as Janak Prasad and the person in the middle seat disclosed his name as Suraj Bhan. Accordingly, notices under Section 50 of the NDPS Act (Exhibit PE, Exhibit PF and Exhibit PG) were served on them. They were apprised of their right to be searched before a Magistrate or a Gazetted Officer. They exercised the option to be searched by a Gazetted Officer and accordingly, wireless message was flashed to Mahabir Singh, DSP, Bahadurgarh, who verified all the facts from the three persons and personal search was also undertaken of Inspector Pradeep Kumar so also the search of gunny bags in the custody of all the accused persons. The gunny bag of Janak Prasad was searched which contained *Charas*, in Laddu and Pindi Shape, wrapped in a white coloured polythene and weighed 20 Kg. The whole quantity of the contraband was seized from all of them. The investigation was completed and thereafter, the challan was filed in the trial Court. Before the trial Court, prosecution examined official witnesses numbering 13. The statement under Section 313 of Code of Criminal Procedure, 1973 of the accused persons was recorded. The trial Court thus, thereafter, convicted them as stated above. Hence, these appeals.

ARGUMENTS

In support of the appeals, Mr. Ahluwalia, amicus curiae,

learned counsel for appellants (in CRA-S-745-SB of 2016), vehemently argued that there was violation of Section 50 of the NDPS Act as the personal search of the appellants was also undertaken after serving on them the concerned memos Exhibit PE, Exhibit PF and Exhibit PG. According to him, the reading of these documents do not anywhere show that the accused persons were told about their right, but were merely given an option and therefore, there was violation of Section 50 of the NDPS Act. He then, submitted that the report under Section 42 of the NDPS Act was false and fabricated for which there was sufficient material to indicate so on the record. He further contended that there was non-compliance of Section 52-A of the NDPS Act also inasmuch as no sampling was done before the Magistrate. Mr. Ahluwalia relied on the following decisions:-

“Dilip versus State of M.P., 2007 (1) RCR (Criminal) 586, Union of India versus Shah Alam and another, 2009 (3) RCR (Criminal) 158, State of Rajasthan versus Parmanand, 2014 (2) RCR (Criminal) 40, Vijaysinh Chandubha Jadeja versus State of Gujarat, 2010 (4) RCR (Criminal) 911 and Nirmal Singh Pehlwan @ Nimma versus Inspector, Customs, Customs House, Punjab, 2011 (3) RCR (Criminal) 831”.

He, therefore, prayed for acquittal of the appellants.

Per contra, learned State counsel submitted that the contraband was never found on the person of the appellants, but was stored in the bags, which they were carrying with them and therefore, Section 50 of the NDPS Act is not attracted. Regarding the alleged

violation of Sections 42 and 52-A of the NDPS Act, he submitted that these provisions have no application in the present case and these provisions are directory in nature. He, therefore, prayed for dismissal of the appeals.

CONSIDERATION

We have heard learned counsel for the rival parties. It would be appropriate for us to extract the relevant part of the evidence before proceeding further. PW12, Inspector Pardeep Kumar, SHO, PS Bhondsi, on the aspect of service of notice under Section 50 of the NDPS Act on all the three accused persons, stated thus, in his examination-in-chief:-

“.....I served upon each accused persons separately a notice under Section 50 NDPS Act giving them the option to get there selves searched by either Magistrate or Gazetted Officer. The notice given to Janak Parshad was Exh.PE, to accused Shesh Nath Exh.PF & to Suraj Bhan Exh.PG. In reply to the notices under Section 50 NDPS Act, the accused persons agreed to get themselves searched by Gazetted Officer and Janak Parshad & Suraj Bhan had signed upon their replies and Shesh Nath accused affixed his left thumb impression on the reply. The reply of Janak Parshad is Exh.PH of accused Shesh Nath Exh.PJ & of accused Suraj Bhan Exh.PI respectively which were attested by SI Jai Kishan & SI Randhir Singh.....”

He further stated as under:-

“.....Personal search of accused persons were conducted.....”

The consent memos Exhibit PE, Exhibit PF and Exhibit PG, in

relation to all the accused persons also show that the appellants were merely informed of their option and not the right, in the notices. It is in the above background, we find that on facts these appeals filed by the convicts are covered by the Supreme Court's decision in the case of **State of Rajasthan versus Parmanand**, 2014 (2) RCR (Criminal) 40 and we quote the following relevant paragraphs from the said judgment, as under:-

“2.....On seeing the raiding party, they tried to run away but they were stopped. Enquiry was made with both the respondents in the presence of the independent witnesses by SI Qureshi. The respondents gave their names. Respondent No.1 Parmanand had one white colour gunny bag of manure in his left hand. SI Qureshi told the respondents that he had to take their search. They were told about the provisions of section 50 of the NDPS Act. They were told that under section 50(1) of the NDPS Act, they had a right to get themselves searched in the presence of any nearest Magistrate or any gazetted officer or in the presence of Superintendent J.S. Negi of the raiding party. One written notice to that effect was given to them. On this notice, appellant Surajmal gave consent in writing in Hindi for himself and for appellant Parmanand and stated that they are ready to get themselves searched by SI Qureshi in the presence of Superintendent J.S. Negi. He also put his thumb impression. Thereafter, bag of respondent No.1 Parmanand was searched by SI Qureshi. Inside the bag in a polythene bag some black material was found. The respondents told him that it was opium and they had brought it from the village. The weight of the opium was 9 Kg. 600 gms.....

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5. Mr. Imtiaz Ahmed, learned counsel for the State of Rajasthan submitted that the High Court was wrong in coming to the conclusion that there was no compliance with section 50 of the NDPS Act. Counsel submitted that PW-10 SI Qureshi has clearly stated that the respondents were communicated their right under section 50(1) of the NDPS Act. A written notice was also given to them and only after they consented to be searched by PW-10 SI Qureshi in the presence of PW-5 J.S. Negi, the Superintendent, that the search of their person and search of bag of respondent No.1 Parmanand was conducted. Counsel submitted that the High Court was also wrong in disbelieving independent pancha witnesses. Counsel urged that the impugned order is perverse and deserves to be set aside.

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9. In this case, the conviction is solely based on recovery of opium from the bag of respondent No.1-Parmanand. No opium was found on his person. In **Kalema Tumba v. State of Maharashtra, 1999 (4) R.C.R. (Criminal) 575 : (1999) 8 SCC 257**, this Court held that if a person is carrying a bag or some other article with him and narcotic drug is recovered from it, it cannot be said that it was found from his person and, therefore, it is not necessary to make an offer for search in the presence of a gazetted officer or a Magistrate in compliance of section 50 of the NDPS Act. In **State of Himachal Pradesh v. Pawan Kumar, 2005 (2) R.C.R. (Criminal) 622 : (2005) 4 SCC 350**, three-Judge Bench of this Court held that a person would mean a human being with appropriate coverings and clothing and also footwear. A bag, briefcase or any such article or container etc. can under no

circumstances be treated as a body of a human being. Therefore, it is not possible to include these articles within the ambit of the word “person” occurring in section 50 of the NDPS Act. The question is, therefore, whether Section 50 would be applicable to this case because opium was recovered only from the bag carried by respondent No.1-Parmanand.

*10. In **Dilip & Anr. v. State of Madhya Pradesh, 2007 (1) R.C.R. (Criminal) 586 : 2007 (1) Recent Apex Judgments (R.A.J.) 235 : (2007) 1 SCC 450**, on the basis of information, search of the person of the accused was conducted. Nothing was found on their person. But on search of the scooter they were riding, opium contained in plastic bag was recovered. This Court held that provisions of Section 50 might not have been required to be complied with so far as the search of the scooter is concerned, but keeping in view the fact that the person of the accused was also searched, it was obligatory on the part of the officers to comply with the said provisions, which was not done. This Court confirmed the acquittal of the accused.*

*11. In **Union of India v. Shah Alam, 2009 (3) R.C.R. (Criminal) 158 : 2009 (3) Recent Apex Judgments (R.A.J.) 695 : (2009) 16 SCC 644**, heroin was first recovered from the bags carried by the respondents therein. Thereafter, their personal search was taken but nothing was recovered from their person. It was urged that since personal search did not lead to any recovery, there was no need to comply with the provisions of section 50 of the NDPS Act. Following Dilip, it was held that since the provisions of section 50 of the NDPS Act were not complied with, the High Court was right in acquitting the respondents on that ground.*

12. 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.”

It is then pertinent to note the ratio of the decision of the Constitution Bench of the Supreme Court in the case of **Vijaysinh Chandubha Jadeja versus State of Gujarat**, 2010 (4) RCR (Criminal) 911, we quote the following paragraphs from the said judgment:-

“22. In view of the foregoing discussion, we are of the firm opinion that the object with which the right under Section 50 (1) of the Narcotic Drugs and Psychotropic Substance 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 insofar as the obligation of the authorised officer under sub-section (1) of Section 50 of the Narcotic Drugs and Psychotropic Substance Act is concerned, it is mandatory and requires 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.....”

The said decision of the Constitution Bench was thus, followed by the Apex Court in the case of **Nirmal Singh Pehlwan @ Nimma versus Inspector, Customs, Customs House, Punjab**, 2011 (3) RCR (Criminal) 831, in which, it is stated thus:-

“8. It is therefore apparent that the precise question that was before the Constitution Bench was as to whether a consent memo could be said to be information conveyed to an accused as to his right under Section 50 of the Act. The Constitution Bench clearly stated that a consent memo could not be said to be such information as the provisions of Section 50 of the Act were mandatory and strict compliance was called for and any deviation therefrom would vitiate the prosecution. It was further held that it was not necessary that this information should be in a written form but the information had to be conveyed in some form or manner which would depend on the facts of the case. We have accordingly gone through the evidence of PW 4 Prem Singh. He did not utter a single word as to whether he had informed the appellant of his right and he merely took his option as to whether he would like to be searched before a Gazetted Officer or a Magistrate as noted in Ex. PA. In the light of the judgment in Vijaisingh's case (supra) we find that there has been complete non-compliance with the provisions of Section 50 of the Act.”

We find from the above evidence in the present case on facts,

that the present case is covered by the aforesaid decision with reference to the Paragraphs from the judgments, we quoted above.

Since we have found that the present case is covered by the decisions cited supra qua non-compliance of Section 50 of the NDPS Act, the appellants would be entitled to acquittal, we do not think it is necessary to dwell on the other submissions made by Mr. Ahluwalia. In the result, we make the following order:-

ORDER

- (i) **CRA-S-24-SB of 2016 and CRA-S-745-SB of 2016** filed by the appellants are allowed;
- (ii) The impugned judgment/order dated 19.11.2015/20.11.2015 passed by the learned Additional Sessions Judge (Exclusive Court), Jhajjar, in Case No.34 (RBT) of 2011/2015, is set aside;
- (iii) They are acquitted of the charge framed against them;
- (iv) Fine, if paid, be refunded to them.

(A.B. CHAUDHARI)
JUDGE

(B.S. WALIA)
JUDGE

May 24, 2018

mahavir

Whether speaking/ reasoned: Yes/No

Whether Reportable: Yes/No