

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

CRA-S-2805-SB-2015

Date of decision: 02.07.2018

Kulwinder Kumar @ Bona

... Appellant

vs.

State of Punjab

... Respondent

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH.

Present: Mr. A.K. Bakshi, Advocate, for the appellant.

Mr. V.G. Jauhar, Sr. DAG, Punjab

...

AMOL RATTAN SINGH, J.

The appellant challenges the judgment of the learned Judge, Special Court, Hoshiarpur, dated June 04, 2015, by which he has been convicted for the commission of an offence punishable under Section 22 of the Narcotic Drugs and Psychotropic Substances Act, 1885 (in short “the Act”) and thereafter sentenced to undergo 10 years rigorous imprisonment, along with a fine of Rs.1 lac to be paid by him, in default of which he has to further undergo rigorous imprisonment for 2 years.

2. The facts leading up to the conviction of the accused are that, as per the prosecution, on 03.05.2013, ASI Kulwinder Singh and Head Constable Gurdeep Singh, along with other police officials, are stated to have been patrolling near the Bus-Stand of village Badala Mahi, when, from the side of village Kathar, one clean shaven person is stated to have been seen coming, who on seeing the police party is stated to have turned away. On suspecting him (of the commission of an offence), the ASI apprehended

him with the help of the remaining police party and on asking for his name, was told that he was Kulwinder Kumar, resident of Ward no.1 Sham Chorasi. ASI Kulwinder Singh is stated to have disclosed his identity to the appellant, giving therein his name and rank and also informing him that it was suspected that he was carrying some narcotic material with him, for which his search was to be conducted, and that he could get his search conducted either in the presence of a Magistrate or a gazetted officer, who could be called to spot. However, the appellant is stated to have 'reposed faith' in the ASI and is stated to have signed a statement, consenting that his search be conducted by the ASI.

3. Further as per the case of the prosecution, the Assistant Sub-Inspector tried to join witnesses from the public, with none ready to participate in the process, after which he is stated to have conducted the search of the appellant. From the right pocket of his pants, a plastic envelope was said to have been recovered, containing white powder. The appellant is stated to have told the police party that it was intoxicant powder, upon which two samples of 5 grams each are stated to have been drawn and weighed on an electronic scale, with the remaining powder found to be 160 grams.

Thus, a total of 170 grams of intoxicant powder is stated to have been recovered from the appellant.

4. Parcels of the samples as also of the 'bulk powder' were prepared by the ASI and sealed with his seal, bearing the impression 'KS'. A recovery memo, as also Form 29, are stated to have been filled up, with the specimen of the seal prepared separately. The seal was then handed

over to HC Gurdeep Singh, with information (*ruqa*) sent to the police station, on the basis of which FIR no.63 was registered on the same date, i.e. 03.05.2013, at Police Station Bullowal (District Hoshiarpur).

The accused not having been able to produce any permit or license, he was arrested and a rough site plan prepared of the place of recovery.

5. Upon receipt of the report from the Forensic Science Laboratory, the salt shown to be recovered from the appellant was stated to be 'Diphenoxylate', though in the FIR it was stated to be 'Amphetamine'.

The report under Section 173 having been submitted to the trial Court, the appellant was charged with the commission of an offence punishable under Section 21 of the Act.

The following witnesses were examined by the prosecution:-

“PW-1, HC Gurdeep Singh;

PW-2 PRHC Karnail Singh;

PW-3 MHC Rajwinder Singh;

PW-4 ASI Kulwinder Singh, Investigating Officer and

PW-5, Inspector Harneel Singh.”

The following documents were also exhibited :-

1. Consent memo, Ex.PA
2. CFSL Form Ex.PB;
3. Recovery memo Ex.PC;
4. Ruqa Ex.PD;
5. Site Plan Ex.PE
6. Arrest cum intimation memo Ex.PF;

7. Personal search memo Ex.PG
8. Entrustment memo Ex.PH;
9. Affidavit Ex.PJ;
10. Affidavit Ex.PK;
11. FIR Ex.P2;
12. Endorsement on Ruqa Ex.P3;
13. Application moved to the Duty Magistrate Ex.P4
14. Order passed by the Court Ex.P5
15. Report of the FSL Ex.P6
16. Bulk case property parcel Ex.P7
17. Second sample as Ex.P8.

6. The statement of the appellant having been recorded under Section 313 Cr.P.C., he denied the allegations leveled against him, stating that he was innocent, with a false case planted by the police. He, however, did not lead any evidence in defence.

7. Upon appraising the evidence, the learned trial court came to the conclusion that as per the testimony of PW-4, ASI Kulwinder Singh, he deposed in terms of what was got recorded by him in the FIR. The search and arrest memos and the rough site plan were also referred to by him, he further stating that he had produced the accused before the SHO, Police Station Bullowal, Inspector Harneel Singh (PW-5), who also verified the facts from the appellant-accused and found them to be correct, with the seals on the case property as also the samples, found to be intact, the Inspector also having affixed his seal thereto, bearing the impression 'HS'. Other proceedings with regard to deposit of the case property with the MHC

and production of the sample parcels before the learned Area Magistrate, were also followed, as per the testimony of PW-4.

8. Similarly, PW-1 HC Gurdeep Singh also essentially corroborated the aforesaid testimony, with the other witnesses being formal witnesses with regard to the case property being handed over and deposited with the MHC and the deposit of the samples with the Forensic Science Laboratory by PW-2 PRHC Karnail Singh.

PW-5, i.e. SHO, Harneel Singh, was also found by the trial court to have testified in terms of his role as was testified to by PW-4.

9. Essentially on the basis of the aforesaid evidence, the learned trial Court held the petitioner guilty, not of the commission of an offence punishable under Section 21, but under Section 22 of the Act.

Rejecting an argument that the mandatory provisions contained in Section 50 of the Act had not been complied with, the trial court held that both, ASI Kulwinder Singh and HC Gurdeep Singh, had categorically stated that the accused was apprised of his legal right to get a search conducted in the presence of a Magistrate or a gazetted officer, with the memo (Ex.PA) having been signed by him, to the effect that he did not wish to be produced before a Magistrate or gazetted officer, for his personal search to be conducted.

10. Before this Court, Mr. Bakshi, learned counsel for the appellant, submitted that the FIR is wholly falsely registered against the appellant, with him never actually having been apprehended carrying any contraband, as can also be seen from the fact that in the FIR (Ex. P-2), it is shown that the recovery is of Amphetamine powder, weighing 170 grams, whereas as per the FSL report Ex. P-6, the powder allegedly recovered from

the appellant is shown to be Diphenoxylate.

He next submitted that the patrolling party was stated to be in a private vehicle, with no copy of the DDR also produced before the trial Court to show that any such vehicle was used by the said party.

To further substantiate the argument that the appellant was not apprehended in the manner shown in the FIR, Mr. Bakshi submitted that there was no independent witness joined in the search, though he is stated to have been apprehended in the day time between 01 p.m. to 02 p.m., as per the FIR, near the bus stand of village Badala Mahi.

11. Learned counsel next pointed to the testimony of PW-1 HC Gurdeep Singh, i.e. one of the persons in the patrolling party, to submit that whereas this witness testified that before sending the "*Ruqa*" to the police station, Form No. 29 was filled in by the IO, with only one form prepared by him (and no other form prepared), ASI Kulwinder Singh (PW-4) stated in his cross-examination that he filled up two copies of the CFSL from.

He further submitted that the said witness also admitted that there was no document/memo to show that the alleged recovery was actually effected from the accused, though he referred to the consent memo (with regard to there being no need to produce the accused before a Gazetted Officer or a Magistrate).

The witness also admitted that the seals affixed on the form were not attested and that he had also not obtained the signatures of the accused on the case property, or on the sample.

He next pointed to the contradiction in the testimony of PWs-4 and 5 (with PW-5 being the SHO, Inspector Harneel Singh), wherein it is testified that he had also not joined any independent witness at the time of

preparing the entrustment memo, nor had he obtained the signatures of the accused, nor had he checked the contraband by breaking open the seals.

Thus, learned counsel for the appellant submitted that all facts seen together, would show that the story of the prosecution was wholly concocted and the appellant was actually not apprehended in the manner described in the FIR, with any contraband.

12. Per contra, Mr. Jauhar, learned counsel for the State, reiterates the case of the prosecution, to the effect that it was a chance recovery, with the appellant having duly consented to a search by the apprehending party instead of before a Gazetted Officer or a Magistrate, and therefore there was, firstly, due compliance of Section 50, and further, non-production of an independent witness would not be fatal to the case of the prosecution, especially as the arresting officer stated to the effect that though he tried to join independent witnesses, nobody was ready to witness the arrest.

He further submitted that nothing having been pointed out that the seals on the sample received by the Forensic Science Laboratory were broken, it would make no difference that in the FIR a specific powder had been mentioned, but on analysis it was found to be a different powder by the laboratory.

13. Learned counsel also referred to paragraphs no. 23 and 24 of the judgment of the Supreme Court in Vijaysinh Chandubha Jadeja vs. State of Gujarat (2011) 1 SCC 609, to submit that a distinction has been drawn between a written consent and an oral consent, as regards compliance of the provisions of Section 50 of the Act.

14. Having considered the judgment of the learned trial Court as also the arguments addressed on both sides before this Court, and the record

of the evidence presented before the trial Court, it is first to be noticed that one of the contentions before this Court is that ASI Kulwinder Singh (PW4), in cross-examination deposed that the name of the powder given in the FIR is Amphetamine, whereas actually in the Chemical Examiners' report (Ex.P6), it is shown to be Diphenoxylate. A perusal of the FIR from the record (Ex.P2), shows that the name of the powder has not been given in the main body of the FIR (which is in *Gurmukhi*); however, it is shown to be Amphetamine powder at serial no.9 of the first page of the FIR (in English).

Thus, as to how the name of the powder was given without any basic testing shown to have been done by the police officers who are shown to have recovered it from the petitioner, by usage of any testing kit given to him (before it was sealed), is not understood, though that fact by itself may not have been fatal to the case of the prosecution.

15. However, it is further seen that when the contraband shown to be recovered was produced before the learned Magistrate as part of the procedure prescribed in Section 52-A of the Act, no sample is seen to have been drawn by the Magistrate, whose order dated 04.05.2013 is on record as Ex.P5, which reads as follows:-

“Accused Kulwinder Kumar @ Bona produced before me by SI Yogesh Kumar of P.S. Bullowal alongwith the case property parcel allegedly containing white powder as well as two samples allegedly containing white powder drawn at the time of alleged recovery bearing seal impression 'KS' and 'HS'. SI Yogesh Kumar also presented inventory of the case property allegedly recovered from the possession of the accused. The case property is as per the inventory and the inventory is certified to be correct. The seals of the case property as well as of samples are intact. The case property alongwith samples

returned back for its disposal as per provisions of law to the Investigating Officer SI Yogesh Kumar and till then the same be deposited in the Malkhana for safe custody.”

16. Thus, very obviously the seals were not opened by the Magistrate, who simply recorded that they were found to be intact, with the case property returned to Sub-Inspector Yogesh Kumar (not a prosecution witness) who had produced them before the Magistrate.

In **Union of India v. Mohan Lal and another** (2016) 3 SCC

379, the Supreme Court has held as follows:-

“16. 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.”

Therefore, in the opinion of this Court, especially seen with the fact that the FIR shows a different powder to have been recovered, with the report of the Chemical Examiner (Ex.P6) eventually showing it to be Diphenoxylate, the samples not have been drawn by the Magistrate and the petitioner not having been produced at the time of the arrest before a Magistrate or a gazetted officer, all point towards the possible correctness of what has been contended before this Court, to the effect that the petitioner-

accused was not actually arrested in the manner that he is shown to be arrested in the FIR, thereby making the recovery of the contraband in question, doubtful.

[It needs also to be noticed here that even if the powder had not been shown to be different in the FIR, to what is actually found to be in the report of the Chemical Examiner, even so, in my opinion, in view of what has been held by the Supreme Court in *Mohan Lals'* case, a mandatory provision (Section 52-A) is not seen to be complied with, in a legislation which provides for stringent procedures to be followed, in view of the very stringent punishments provided for in the Act, the offences punishable thereunder obviously being very serious offences affecting the very fabric of society].

17. Next, as regards Section 50 of the Act of 1885, it has been held by the Constitution Bench in *Vijaysinh Chandubha Jadejas'* case, as follows:-

“29. 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 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 insofar 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 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.

30. As observed in *Presidential Poll, In (1974) 2 SCC 33 (SCC p.49, para 13)*

“13. ...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.'”

31. 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 and Prabha Shankar Dubey* 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* case. 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.”

Even having said that, their Lordships thereafter went on to observe as follows:-

“32. 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 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.

33. Accordingly, we answer the reference in the manner

aforesaid. The appeals shall, now, be placed before the appropriate Bench for disposal.”

(Emphasis applied by this Court only).

18. No doubt, as very rightly pointed out by Mr. Jauhar, learned Senior Deputy Advocate General, Punjab, in paragraphs 23 and 24 of the said judgment, it was observed by the Supreme Court as follows:-

“23. In the above background, we shall now advert to the controversy at hand. For this purpose, it would be necessary to recapitulate the conclusions, arrived at by the Constitution Bench in *Baldev Singh* case. We are concerned with the following conclusions:

“(1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the person concerned of his right under sub-section (1) of Section 50 of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.

(2) That failure to inform the person concerned about the existence of his right to be searched before a gazetted officer or a Magistrate would cause prejudice to an accused.

(3) That a search made by an empowered officer, on prior information, without informing the person of his right that if he so requires, he shall be taken before a gazetted officer or a Magistrate for search and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of

Section 50 of the Act.

* * *

(5) That whether or not the safeguards provided in Section 50 have been duly observed would have to be determined by the court on the basis of the evidence led at the trial. Finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of Section 50 and, particularly, the safeguards provided therein were duly complied with, it would not be permissible to cut short a criminal trial.

(6) That in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Section 50 are mandatory or directory, but hold that failure to inform the person concerned of his right as emanating from sub-section (1) of Section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law.

(7) That an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search.”

(emphasis in original)

24. Although the Constitution Bench in *Baldev Singh* case did not decide in absolute terms the question whether or not Section 50 of the NDPS Act was directory or mandatory yet it was held that provisions of sub-section (1) of Section 50 make

it imperative for the empowered officer to “inform” the person concerned (suspect) about the existence of his right that if he so requires, he shall be searched before a gazetted officer or a Magistrate; failure to “inform” the suspect about the existence of his said right would cause prejudice to him, and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from the person during a search conducted in violation of the provisions of Section 50 of the NDPS Act. The Court also noted that it was not necessary that the information required to be given under Section 50 should be in a prescribed form or in writing but it was mandatory that the suspect was made aware of the existence of his right to be searched before a gazetted officer or a Magistrate, if so required by him. We respectfully concur with these conclusions. Any other interpretation of the provision would make the valuable right conferred on the suspect illusory and a farce.”

19. However, despite what has been observed above by the Supreme Court, as pointed to by learned State counsel, what has to be also seen by this Court, is that the conclusion drawn by the Apex Court in paragraphs 32 and 33 of the said judgment (*Jadejas'* case, as has also been reproduced hereinafore), was that “in order to impart authenticity, transparency and creditworthiness to the entire proceedings, in the first instance, an endeavour should be made to produce the suspect before the nearest Magistrate, who enjoys more confidence of 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”.

Therefore, in my opinion, what has been argued by Mr. Bakshi, learned counsel for the petitioner, needs to be taken notice of very carefully, because very unfortunately, misuser of the provisions of the Act is not an uncommon phenomena, even though the misuser is very often used by the prosecuting/investigating agency to try and ensure that petty criminals are 'put out of circulation in society' for a longer period of time.

20. Even having said that, though of course, common hearsay would not be ground enough to convict an accused or set aside such conviction, yet, non-compliance of mandatory provisions, in the spirit that such mandate has been included in any legislation, definitely in the opinion of this Court, is a ground for grant of benefit at least to an accused, in the circumstances of each case.

Thus, in the present case, the powder having been shown to be different in the FIR when there was no basis to indicate the kind of intoxicant powder, it admittedly being loose powder with no branded marking on any container/packet that it was contained in, with the FSL report showing it was a wholly different powder; further, with said powder not having been shown to have been actually drawn by the Magistrate from the sealed sample put up to him, in terms of Section 52-A; and yet further, though a consent memo is shown to have been signed by the petitioner to the effect that he did not wish to be searched in front of a Magistrate or a gazetted officer, but it having been held in *Jadeja* that at least an attempt should be made to produce an accused before a Magistrate, the petitioner needs to be granted the benefit of doubt, especially as, with regard to signing of a consent memo, a person who has already been apprehended by

police officials, does not have much of a choice to actually refuse to sign such memo, if he is pressurised to do so.

In my opinion, attributing one hundred percent truthfulness to the statements made by police officials, though would be an ideal situation and actually should be so, practically it is not possible to attribute such complete honesty to them always, because like all human beings, not all police officials can be honestly accepted to be truthful all the time, even though the intention behind any particular arrest, may not be malafide, which of course at times could also be so.

Thus, mandatory provisions of the Act need to be followed, even as per the ratio of judgments of the Supreme Court referred to hereinafore, in the spirit of the enactment of the legislation.

21. In fact, to elaborate on the aforesaid observation (in the context of Section 50 of the Act), a more recent judgment of the Supreme Court, in **Arif Khan @ Agha Khan v. State of Uttarakhand** (Criminal Appeal No.273 of 2007, decided on April 27, 2018), also needs to be referred to, wherein also, even though a consent memo was shown to have been signed by the accused, their Lordships held as follows:-

“27. We do not agree to this finding of the two Courts below as, in our opinion, a search and recovery made from the appellant of the alleged contraband “Charas” does not satisfy the mandatory requirements of Section 50 as held by this Court in the case of *Vijaysinh Chandubha Jadeja* (supra). This we say for the following reasons.

28. First, it is an admitted fact emerging from the record of the case that the appellant was not produced before any Magistrate or Gazetted Officer; second, it is also an admitted fact that due to the aforementioned first reason, the search and recovery of the contraband “Charas” was not made from the

appellant in the presence of any Magistrate or Gazetted Officer; third, it is also an admitted fact that none of the police officials of the raiding party, who recovered the contraband “Charas” from him, was the Gazetted Officer and nor they could be and, therefore, they were not empowered to make search and recovery from the appellant of the contraband “Charas” as provided under Section 50 of the NDPS Act except in the presence of either a Magistrate or a Gazetted Officer; fourth, in order to make the search and recovery of the contraband articles from the body of the suspect, the search and recovery has to be in conformity with the requirements of Section 50 of the NDPS Act. It is, therefore, mandatory for the prosecution to prove that the search and recovery was made from the appellant in the presence of a Magistrate or a Gazetted Officer.

29. Though, the prosecution examined as many as five police officials (PW-1 to PW-5) of the raiding police party but none of them deposed that the search/recovery was made in presence of any Magistrate or a Gazetted Officer.

30. For the aforementioned reasons, we are of the considered opinion that the prosecution was not able to prove that the search and recovery of the contraband (Charas) made from the appellant was in accordance with the procedure prescribed under Section 50 of the NDPS Act. Since the non-compliance of the mandatory procedure prescribed under Section 50 of the NDPS Act is fatal to the prosecution case and, in this case, we have found that the prosecution has failed to prove the compliance as required in law, the appellant is entitled to claim its benefit to seek his acquittal.

31. In the light of the foregoing discussion, the appeal succeeds and is allowed. Impugned judgment is set aside. As a consequence thereof, the appellant's conviction is set aside and he is acquitted of the charges in question.”

22. Hence, in view of the above discussion, in my opinion the benefit of doubt needs to be given to the petitioner and is so given, with the

judgment of the trial Court set aside and the petitioner acquitted of the charge framed against him.

Consequently, he be released from custody forthwith.

The appeal is allowed.

July 02, 2018
vcgarg/nitin

(AMOL RATTAN SINGH)
JUDGE

Whether speaking/reasoned	Yes
Whether Reportable	Yes