

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

**CRA-S No.4040-SB of 2016
Date of Decision: 21.04.2018**

Sukhjinder SinghPetitioner
Vs
State of PunjabRespondent

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. Sumer Singh Brar, Advocate
for the appellant.

Ms. Jaspreet Kaur, A.A.G., Punjab.

RAJ MOHAN SINGH, J.

[1]. Appellant has preferred this appeal against the judgment of conviction and order of sentence dated 02.02.2016 passed by the Judge, Special Court, Gurdaspur whereby appellant was convicted for the offence under Section 22 of Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter to be referred as 'the NDPS Act') and was sentenced to undergo rigorous imprisonment for a period of four years and to pay fine of Rs.40,000/- along with default clause.

[2]. Prosecution story started with the allegations that on 21.01.2012, the police party headed by ASI Baldev Raj was on patrolling duty in order to search for miscreants. When the police party was present at bridge Awankha, then a clean shaven person was seen coming. On seeing the police party, he

turned back and threw envelope by taking out the same from his pocket. He was apprehended on the basis of suspicion by ASI Baldev Raj with the help of his companions. On being asked the said person disclosed his name as Sukhjinder Singh son of Mukhtiar Singh.

[3]. Concededly, before checking of the envelope thrown by the appellant, no independent witness was joined. According to prosecution nobody joined the investigation showing their own compulsions. The envelope was opened and checked by ASI Baldev Raj in the presence of his companions and intoxicant powder was found present in the said envelope. Two samples of 10 grams each were drawn and were taken into separate boxes. Remaining intoxicant powder was found to be 230 grams. The parcels of the sample and remaining bulk were prepared separately. ASI Baldev Raj put his seal impression as 'BR'. Parcels were taken into police possession. Seal after use was handed over to HC Jagdish Singh. On the basis of information given by ASI Baldev Raj, FIR in question was registered. The case property was handed over to SHO, who also affixed his seal impression as 'HS' on the three parcels and kept the same in double lock. On the next day, accused and the case property were produced before the Magistrate. The case property was seen and was ordered to be deposited in official *malkhana*.

Accused was remanded to judicial custody. Sample parcel was sent to office of Chemical Examiner. On analysis, the same was found to be containing Dextropropoxyphene with percentage of 24.44%. After completion of investigation challan was presented.

[4]. After necessary proceedings, accused was charge-sheeted for the offence under Section 22 of the NDPS Act to which he pleaded not guilty and claimed trial.

[5]. Prosecution examined HC Daljit Singh as PW-1, PHC Tarlok Singh as PW-2, HC Jagdish Singh PW-3, Inspector Baldev Raj as PW-4, Inspector Hardip Singh as PW-5 and Anshul Saini as PW-6. Thereafter prosecution evidence was closed.

[6]. Statement of the accused was recorded under Section 313 Cr.P.C. Accused/appellant denied the allegations. He pleaded his ignorance and false implication. However, no defence evidence was led by him.

[7]. The trial Court after appraisal of evidence, convicted and sentenced the accused as narrated above. That is how the present appeal came to be filed in the High Court.

[8]. Learned counsel for the appellant vehemently submitted that there was no compliance of Section 50 of the NDPS Act. The accused/appellant was neither brought before

the Gazetted Officer nor before Magistrate. Personal search of the accused/appellant was also conducted. On personal search of the accused/appellant currency notes to the tune of Rs.200/- were recovered.

[9]. By referring to the ratio of **State of Rajasthan vs. Parmanand and another, (2014) 2 R.C.R. (Criminal) 40,** learned counsel further submitted that if personal search of the accused/appellant was also done besides carrying out search of the bag, then Section 50 of the NDPS Act will have full application. From the polythene an envelope containing narcotic substance and from personal search of the accused, currency notes worth Rs.200/- were recovered. The entire exercise was done in an spontaneous manner, therefore, ratio of judgment of **State of Rajasthan vs. Parmanand and another's** case (supra) is fully applicable.

[10]. Learned counsel further submitted that in the instant case, the accused/appellant was never told about his legal right to be searched before the Gazetted Officer or Magistrate. The communication of said right to the accused was not a mere formality, but would have provided minimum safeguard against false implication. The communication of such legal right has to be clear, unambiguous and individual. The accused must be made aware of existence of such right. Section 50 of the NDPS

Act makes it imperative for the empowered officer to inform the suspect about the existence of his right that if, he so requires, he shall be searched before the Gazetted Officer or Magistrate. Failure to inform the suspect about existence of such right would cause material prejudice to the suspect. Failure to conduct search of the accused before the Gazetted Officer or Magistrate may not vitiate the trial, but would render the recovery of the illicit article suspected and vitiate the conviction and sentence of the accused.

[11]. In **Vijaysinh Chandubha Jadeja vs. State of Gujarat, 2010(4) R.C.R. (Criminal) 911**, the Constitutional Bench of the Hon'ble Supreme Court after considering 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**; **Karnail Singh vs. State of Haryana, 2009(5) R.C.R. (Criminal) 515**; **Parbha Shankar Dubey vs. State of M.P., 2004(1) R.C.R. (Criminal) 104**; **Joseph Fernandez vs. State of Goa, (2000)1 SCC 707** and further precedents on the point held in para no.22 of its 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 aforesaid view as referred in **Vijaysinh Chandubha Jadeja's** case (supra) was followed in **Narcotics Central Bureau vs. Sukh Dev Raj Sodhi, 2011(3) R.C.R. (Criminal) 370**, wherein it was held that 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 further submitted that even if the entire prosecution is taken to be on its face value, the non-compliance of Sections 50, 52-A of the NDPS Act would render

the conviction to be bad in law. He further submitted that the representative samples were not drawn before the Magistrate, therefore, there was total non-compliance of Section 52-A of the NDPS Act. The police officer, who arrested the accused and effected recovery, subsequently proceeded to investigate the offence. The Investigating Officer was not competent to investigate the case at a subsequent stage being the complainant. Learned counsel sought to argue the case on legal parameters as laid down in **State of Rajasthan vs. Parmanand and another** and **Narcotic Central Bureau's** cases (supra).

[14]. In addition to the aforesaid legal position, learned counsel also by relying upon **Union of India vs. Mohanlal and another, 2016(1) R.C.R. (Criminal) 858** submitted that non-compliance of Section 52-A of NDPS Act would result in material prejudice to the accused/appellant and he is entitled to be acquitted. Learned counsel further submitted that ASI Baldev Raj PW-4 after arresting the accused and effecting recovery of contraband further proceeded to investigate the case which was not permissible under law. The person effecting search and seizure should not have proceeded to investigate the offence at a later stage being a complainant in that case. Learned counsel by relying upon **Gannu and another vs. State of Punjab, 2017(3) R.C.R. (Criminal) 566** and **State by Inspector of**

Police, Narcotics Intelligence Bureau, Madurai, Tamil Nadu

vs. Rajangam, (2010) 15 SCC 369 at last submitted that non-compliance of the stringent provisions under the NDPS Act has to be credited in favour of the accused by acquitting him.

[15]. On the other hand, learned State counsel did not dispute the factual position, but submitted that in case of chance recovery, Section 50 of the NDPS Act is not to be mandatorily complied with. Non-joining of independent witness does not vitiate the entire trial, if testimonies of official witnesses are trustworthy.

[16]. I have considered the submissions made by learned counsel for the parties.

[17]. Factual details are admitted between the parties. In the instant case, beside searching the envelope, personal search of the accused/appellant was also conducted. There was no communication to the accused in respect of existence of his legal right that he had a right to be searched before the Gazetted Officer or the Magistrate. Such communication should have been clear, unambiguous and individual. Even if the accused reposed faith in the police officer, who had arrested him, the police officer was required to bring him before the Gazetted Officer or Magistrate in order to impart authenticity,

transparency and credit worthiness to the entire prosecution case. The arresting officer, did not make an endeavour to produce the accused/appellant before the nearest Magistrate.

[18]. In the present case, there was no communication addressed to the appellant nor there was any offer given by the arresting officer in respect of choice of the accused/appellant to be presented before the Gazetted Officer or Magistrate for conduct of personal search of the accused/appellant which yielded in recovery of currency notes of Rs.200/-. The distinction made in **State of Rajasthan vs. Parmanand and another's** case (supra) is to the effect that if merely 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 personal search of the accused is also conducted, then compliance of Section 50 of the NDPS Act becomes mandatory. It was not mere formality, but should have been complied with by the prosecution in order to rule out any false implication.

[19]. After appreciating the admitted facts on record, I am of the view that in the instant case there was total non-compliance of Section 50 of the NDPS Act. Accused/appellant was never apprised of his right to be searched before the Gazetted Officer or Magistrate at any point of time, rather no communication was made to the accused/appellant in respect of existence of his

legal right that he should have been brought before the Gazetted Officer or Magistrate for search in question. On both counts, the prosecution story is found to be lacking. The person effecting search and arresting the accused, proceeded to investigate the offence. In the light of ratio laid down in **Gannu and another's** case (supra), the prosecution story is vitiated.

[20]. The representative samples were not drawn in the presence of the Magistrate. The case projected by the prosecution was that after effecting search, samples were drawn at the spot and the sample parcels and bulk parcels were deposited with the SHO. On the next day the samples were produced before the Magistrate. Evidently, the representative samples were not drawn before the Magistrate and ratio as laid down in **Union of India vs. Mohanlal and another's** case (supra) has its own say in such like situations.

[21]. In the light of aforesaid facts it is found that ASI Baldev Raj being complainant of the case was not entitled to investigate the case at a subsequent stage. 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 partial 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. Reference can be made to **Laltu Prasad vs. The State of West Bengal, 2017(2) R.C.R. (Criminal) 237** and **Ajay Singh and another vs. State of Chhatisgarh and another, 2017(1) R.C.R. (Criminal) 559.**

[22]. For the reasons recorded hereinabove, I find that the prosecution has not brought the guilt of the accused/appellant to the hilt on mandatory aspect of the NDPS Act. In the absence of non-compliance of mandatory provisions in terms of Section 50 of the NDPS Act, the accused/appellant is entitled to be acquitted.

[23]. In view of above, the present appeal is accepted. The judgment of conviction and order of sentence dated 02.02.2016 passed by the Judge, Special Court, Gurdaspur is hereby set aside and the accused-appellant stands acquitted of the charges levelled against him. Normal consequences to follow.

April 21, 2018

Atik

Whether speaking/reasoned

Whether reportable

(RAJ MOHAN SINGH)
JUDGE

Yes/No

Yes/No