

CRA-S-798-SB-2016

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

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Date of Decision: 17.03.2018

Mohd. Arshad and another

.....Appellants

Vs.

State of Punjab

.....Respondent

CORAM: HON'BLE MR. JUSTICE ARVIND SINGH SANGWAN

Present: Ms. Nupur Chaudhary, Advocate,
as amicus curiae
for the appellants.

Mr. K.S. Sidhu, D.A.G., Punjab.

ARVIND SINGH SANGWAN, J.

Prayer in this appeal is for setting aside the judgment of conviction dated 30.11.2015, vide which, appellants Mohd. Arshad and his wife Masrat @ Gudia were convicted under Section 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'the Act') as well as the order of sentence dated 30.11.2015, vide which both the appellants were sentenced to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs. 1 lac each and in default of payment of fine, to further undergo rigorous imprisonment for a period of one year.

This appeal is being prosecuted by Amicus Curiae counsel appointed by the High Court.

As per the custody certificate, appellant no. 1 has undergone 3 years and 7 months of actual sentence as on 27.03.2017 whereas appellant no. 2 has undergone 3 years, 4 months and 6 days of actual sentence as on 12.01.2017, when their sentence was suspended by this Court.

Brief facts of the case are that on 22.07.2013, ASI Lal Chand alongwith other police officials was present in the area of Bridge Pulli Galwatti, on

Nabha Malerkota Road and they laid a Barricade for checking illegal activities and at about 3:30 A.M., one motorcycle bearing registration No. PB-13AE-1756, was seen coming from the side of Nabha and on seeing the police party, the driver of the motorcycle became perplexed and tried to turn back. On apprehension, he was stopped and ASI-Lal Chand, after disclosing his identity, enquired about their names and conveyed that he was suspicious that they were carrying some narcotic contraband and he wanted to search the accused persons. A notice under Section 50 of the Act was served upon them giving them an option whether they want to be searched by a Gazetted Officer or a Magistrate and both the accused persons gave their consent reposing faith on ASI-Lal Chand to conduct the search. After recording the memo of consent, the search was conducted and one plastic cane was recovered from the pillion rider and one bag of red colour was recovered from the lap of appellant-accused No. 1-Mohd. Arshad. Thereafter, on search of the bag, 2020 capsules of Parvospos were recovered, out of which 10-10 capsules were separated and the remaining contraband was found to be 2000 capsules which were sealed separately. Thereafter, on checking plastic cane in the hand of accused Masrat, intoxicant liquid was found and two samples of 180 ml. were separated and the remainder was measured with the help of a bottle which came out to be 9½ bottles. The I.O. also sealed the nips and the liquid was refilled in the said cane and sealed it separately and also affixed his seal on the sample parcel and handed over seal to independent witness Harjit Singh. Thereafter, on personal search of accused Mohd. Arshad, Registration Certificate of the motorcycle, Voter card, Rs. 700/- and a Driving Licencse were recovered and on personal search of accused Masrat, which was conducted by Lady Constable Amanpreet Kaur, nothing was recovered. Separate search memos were prepared. Thereafter, he sent the *ruqa* to the Police Station for registration of FIR, on the basis of which, formal FIR was

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recorded. After receiving the report from FSL, the challan was presented and the appellants were charge-sheeted under Section 22 of the Act.

The prosecution examined PW1-H.C.Surinder Dutt, who deposed on the line of Investigating Officer PW6-ASI Lal Chand and stated that the consent statement Ex.PA was recorded which was attested by him and independent witness, namely, Ranjit Singh. After the recovery was effected, the sample parcel as well as the remainder parcel were prepared and they were sealed with the seal of 'LC' and sample chit was also affixed with the seal of 'LC'. The sample chit was also proved as Ex.P1. This witness further stated that the seal was handed over to independent witness Harjit Singh. The accused persons were arrested vide memo Ex.PC. The personal search of Mohd. Arshad was conducted vide memo Ex.PD and personal search of Masrat was conducted by Lady Constable Amanpreet Kaur vide personal search memo Ex.PE.

PW2-Kuldeep Singh, Steno, Office of DTO, Sangrur, proved the R.C. of the motorcycle bearing No. PB-13-AE-1756 as Ex.P2 and copy of electronic record as Ex.P3.

PW3-ASI Gurdarshan Singh, who was officiating as SHO of Police Station Sadar, Nabha, deposed that on 22.07.2013, ASI Lal Chand, Investigating Officer of the case, had produced before him the case property i.e. two sealed sample parcels each containing 10 narcotic capsules of Parvonspas. The complete examination-in-chief is reproduced as below:-

“On 22.7.2013 I was posted as ASI at PS Sadar Nabha and on that day I was officiating as SHO of the said PS as the regular SHO was not available and on the same day I was present in the said PS where ASI Lal Chand (IO of this case) had produced before me the case property of the present case i.e. two sealed sample parcels each parcel containing therein 10 narcotic capsules of PARVONSPAS and one sealed bulk

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parcel containing therein 2000 narcotic capsules of PARVONSPAS and two sealed sample nips each sample nip containing therein 180 ml of narcotic/intoxicating liquid and one sealed cane plastic containing therein 9½ bottles of narcotic/intoxicating liquid along with sample seals along with motorcycle bearing number PB13 AE 1756 along with RC of the said motorcycle along with voter Card of accused Mohd. Arshad along with Jamatalshi of accused of Mohd. Arshad i.e a sum of Rs.700/- and DL of this accused along with witnesses including private witness Harjit Singh along with both the accused of this case namely Mohd. Arshad and Masarat @ Guddia and at that time all the said sealed parcels were duly sealed with seal bearing impression LC. I had verified the factum of recovery from the witnesses and both the accused and the same were found to be correct where upon I had affixed my own seal bearing impression GS on all the said sealed parcels and on sample seals and I had also attested sample seal out of which sample seal is Ex.P1. Thereupon I had deposited the aforesaid case property and Jamatalshi with MHC Chamkaur Singh of the said PS with seals intact.

On the same day I had prepared remand request of accused PW3/A and handed over the same to said IO and directed him to obtain the case property of the present case from the MHC of the said PS and prepared inventory of the same and to produce it along with said documents accused before the Judicial court at Nabha and on the same day the IO had complied with my said direction.

So long as the case property remained in my custody neither I tempered the same nor I have allowed anyone to temper the same. Both the said accused are present in the court and I identify them”

PW4-Constable Paramjit Singh, tendered his affidavit Ex.PW4/A and stated that he has taken the case property from Judicial Malkhana to FSL, Mohali and deposited the same.

PW5- HC Raja Singh stated that on 24.07.2013, he has taken the case property from MHC Chamkaur Singh i.e one sealed sample parcel containing 10 capsules of Parvonspas and one sealed sample parcel containing therein one nip containing 180 ml. of intoxicating liquid medicine and one sealed bulk parcel containing one bag with 2000 capsules of Parvonspas and one sealed cane of plastic containing 9½ bottles of intoxicating liquid and deposited the same in Judicial Malkhana. The sealed parcels were bearing impression “LC and GS”.

PW6-ASI Lal Chand, the Investigating Officer of the case, also deposed on the line of version given in the FIR. This witness further stated that after the accused were apprehended, he disclosed his identity and gave them an offer that they can be searched by a Magistrate or some Gazetted Officer who can be called at the spot but both the accused persons reposed faith on him (ASI) and asked him to conduct the search and accordingly, he prepared the joint consent memo of both the accused as Ex.PA which was attested by HC Surinder Dutt and PW Harjit Singh and both the accused persons marked their thumb impression on the same. This witness further stated that on conducting the search of the bag, capsules of Parvonspas wrapped in polythene envelope, were recovered, out of which, he took out 10-10 capsules each as sample and prepared two sample parcels of the same and the remaining capsules i.e. 2000 intoxicant were kept in a separate parcel. With regard to the recovery effected from the cane, this witness further deposed as under:-

“On checking the said recovered cane plastic intoxicating liquid was recovered from the same, from which I took out two samples of 180 ml-180ml each and I had prepared two separate sample parcels of the same and the remaining intoxicating liquid came out to be 9½ bottles of intoxicating liquid which was put by me in the same cane plastic and I had prepared separate bulk parcel of the same. I had sealed all the

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said parcels with my seal bearing impression LC. I had prepared sample seals including sample seal Ex.P1 and I had handed over my seal after its use to PW Harjeet Singh. I took into police custody aforesaid case property and said motorcycle along with its RC and one Voter card of accused Mohd. Arashad issued by Election Commission of India vide memo Ex.PB attested by HC Surinder Dutt and PW Harjit Singh and LC Amanpreet Kaur. Said RC is Ex.P2 and said Voter Card is Ex.P3.”

Thereafter, he prepared *ruqa* Ex.PW6/A and sent the same to the police station for registration of the FIR through PHG Kashmir Singh, on the basis of which formal FIR Ex.PW6/B was registered by ASI Jaspal Singh, who had also made an endorsement on the *ruqa* as Ex.PW6/B1 and he identified the signatures of ASI Jaspal Singh. The rough site plan was prepared at the spot as Ex.PW6/C and, thereafter, vide arrest memo Ex.PC, which was thumb marked by both the accused and attested by PW Harjit Singh, HC Surinder Dutt and LC Amanpreet Kaur, the accused were arrested. This witness further stated that the personal search of accused Mohd. Arashad was also conducted by him and vide recovery memo Ex.PD, Rs.700 and one driving license were taken into police custody and the same were attested by witnesses and on the personal search of accused Masrat, conducted by L.C. Amanpreet Kaur, nothing was recovered and in this regard personal search memo Ex.PE was prepared which was thumb marked by accused and attested by PW Harjit Singh and L.C. Amanpreet Kaur. This witness further stated that on 22.07.2013, after returning to the Police Station, he produced the case property, accused persons and witnesses before ASI Gurdarshan Singh, officiating SHO and he inquired the factum of recovery and affixed his own seal bearing impression 'GS' on all the sealed parcels including the sample seal chit Ex.P1 and directed to deposit the case property with MHC Chamkaur Singh in the

Police Station. This witness further deposed that he sent special report (Ex.PW6/D) to the higher police officials. On the same day, officiating SHO gave him a remand request of accused (Ex.PW3/A) and he obtained the case property from MHC Chamkaur Singh and prepared inventory of the same as Ex.PW6/E and produced it alongwith documents and accused persons before Judicial Magistrate 1st Class, Nabha alongwith another application Ex.PW6/F. The Magistrate inspected the case property and documents and returned the same to ASI Lal Chand and passed orders Ex.PW6/G and Ex.PW6/G1 and, thereafter, ASI Lal Chand returned to Police Station and re-deposited the case property with the MHC. During investigation, he moved an application Ex.PW6/H to DTO, Sangrur, for verification of ownership of the motorcycle and vide endorsement Ex.PW6/H1, Mohd. Arashad was found to be the owner of the motorcycle. After receiving reply from FSL (Ex.PW6/1) and on completion of investigation, he submitted the challan against the accused persons through Inspector SHO Jaswant Singh.

This witness also proved on record sample parcel containing 10 capsules of Parvonspas as Ex.MO1 and sample parcel containing 1 nip containing 180 ml. of intoxicating liquid medicine as Ex.MO2 and one sealed bulk parcel containing therein one bag containing 2000 capsules of Parvonspas as Ex.MO3 and one sealed plastic cane containing 9½ bottles of intoxicating liquid medicine as Ex.MO4.

This witness, in the cross-examination, deposed as under:-

“ The word R.T.I and L.T.I are not mentioned on the documents attached on the file. First of all consent statement memo was prepared thereafter recovery memo was prepared and thereafter ruka was prepared On the last the zimmni was completed. Till the conclusion of the ruka at the spot I had not informed any police officials from the spot. The bottle vide which I had measure the intoxicating liquid was not taken into

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police custody however the same was in my investigating kit and I had not mentioned that I was having bottle with me in any document volunteered I had mentioned the same in the zimmni. I had only one bottle vide which the measurement was done volunteered one bucket was arranged at the spot and this fact is not mentioned in any document. I have not mentioned in any document that the said bucket was brought by HC Surinder Dutt. It is wrong to suggest that I have improved my version.”

PW7-MHC Chamkaur Singh tendered his affidavit as Ex.PW7/A and in cross-examination, he has stated that no CFSL form was deposited with him.

Thereafter, statements of accused under Section 313 Cr.P.C. were recorded and they denied all the incriminating evidence put to them which the prosecution has collected during investigation and stated that appellant No.2-Masrat is under treatment from one Dr. Parmod Mittal, Model Town, Patiala and she is suffering from liver disease and after medical examination, she alongwith her husband i.e. appellant No.1-Mohd. Arshad, were going back to home and they were apprehended by the police at about 8:00 P.M. on 21.07.2013. Similar statement was made by appellant No.1-Mohd. Arshad.

In defence, the appellants produced HC Badal Singh, P.S.Sadar Nabha, as DW1, who proved on record the entries pertaining to FIR No. 80 dated 22.07.2013 and certain DDRs, from 21.07.2013 to 11.08.2013, as Ex. D2 to Ex.D7 and closed their evidence.

Thereafter the appellants, vide impugned judgment of conviction and order of sentence, were convicted and sentenced to undergo 10 years rigorous imprisonment and to pay a fine of Rs.1 lac each.

Counsel for the appellants has argued that notice given to the appellants under Section 50 of the Act was by way of a joint notice and even their consent was taken jointly.

Counsel for the appellants has relied upon document i.e. Ex.PA, vide which the joint offer was given to the appellants to be searched either before a Magistrate or before a Gazetted Officer and it bears thumb impression of both the appellants, though RTI/LTI is not mentioned.

Counsel for the appellants has relied upon **2014 (2) RCR (Criminal) 40 State of Rajasthan vs. Parmanand and another**, wherein the Hon'ble Supreme Court has held that while conducting search in a case in 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:-

“14. In our opinion, a joint communication of the right available under Section 50(1) of the NDPS Act to the accused would frustrate the very purport of Section 50. Communication of the said right to the person who is about to be searched is not an empty formality. It has a purpose. Most of the offences under the NDPS Act carry stringent punishment and, therefore, the prescribed procedure has to be meticulously followed. These are minimum safeguards available to an accused against the possibility of false involvement. The communication of this right has to be clear, unambiguous and individual. The accused must be made aware of the existence of such a right. This right would be of little significance if the beneficiary thereof is not able to exercise it for want of knowledge about its existence. A joint communication of the right may not be clear or unequivocal. It may create confusion. It may result in diluting the right. We are, therefore, of the view that the accused must be individually informed that under Section 50(1) of the NDPS Act, he has a right to be searched before a nearest gazetted officer or before a nearest Magistrate. Similar view taken by the Punjab & Haryana High Court in Paramjit Singh and the Bombay High Court in Dharamveer Lekhram Sharma meets with our approval. It bears repetition to state that on the written communication of the right available under Section

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50(1) of the NDPS Act, respondent No.2 Surajmal has signed for himself and for respondent No.1 Parmanand. Respondent No.1 Parmanand has not signed on it at all. He did not give his independent consent. It is only to be presumed that he had authorized respondent No.2 Surajmal to sign on his behalf and convey his consent. Therefore, in our opinion, the right has not been properly communicated to the respondents. The search of the bag of respondent No.1 Parmanand and search of person of the respondents is, therefore, vitiated and resultantly their conviction is also vitiated.”

It is further submitted that the Hon'ble Supreme Court in this judgment, has held that a joint communication under Section 50 of the Act may not be clear or unequivocal exercise of right and it may create confusion and, therefore, the accused must be given individual information under Section 50 (1) of the NDPS Act. Similar view has been taken by this Court in case **Paramjit Singh and another vs. State of Punjab, 1996 (3) AICL, 729.**

Counsel for the appellants has further submitted that even the consent given by the appellants that they have faith on ASI and they can be searched by him, is also defective as also it is mandatory under Section 50 of the Act that the search is to be carried out either in the presence of a Magistrate or a Gazetted Officer.

Counsel for the appellants has relied upon **Parmanand's case** (supra), wherein it was held that the offer should not be a mere formality as certain safeguards have been provided to accused persons and the procedure prescribed under Section 50 of the Act should be meticulously followed by the Investigating Officer. Counsel for the appellants has further submitted that since apart from searching the bag and the cane, the personal search of both the appellants were also carried out, therefore, the search conducted by the Investigating Officer i.e. PW6-ASI Lal Chand is in violation of Section 50 of the Act.

Counsel for the appellants has further submitted that while conducting the personal search of appellant No.2-Masrat, it is stated by the Investigating Officer that it was conducted by Lady Constable Amanpreet Kaur, however, she was never examined as a witness and was given up without any reason by stating that it is unnecessary to examine her vide statement made by the Public Prosecutor on 21.05.2014.

Counsel for the appellants has relied upon **2016 (2) RCR (Criminal) 241, Shinderpal Kaur vs. State of Punjab**, wherein this Court has held that in case where a search is conducted by a Lady Constable of a lady accused and the Lady Constable is not examined by the prosecution as a witness, the accused is held entitled to be given benefit of doubt. The relevant part of the judgment is reproduced below:-

“19. Lady constable Mandeep Kaur was the star witness of the prosecution. The accused-appellant is a female and as per the consistent testimonies of the prosecution witnesses namely PW-2 ASI Sukhchain Singh, PW-3 ASI Malkit Singh and PW-5 DSP Ajmer Singh. The search of accused-appellant was got conducted through lady constable Mandeep Kaur. So, it was lady constable Mandeep Kaur, who carried out search of the accused-appellant and recovered the contraband. But, she has not been examined by the prosecution and was given up being unnecessary by the learned Public Prosecutor vide his statement dated 17.04.2014. It is very surprising that how such a material witness can be given up being unnecessary. The giving up of lady constable Mandeep Kaur in this manner rather makes even her presence at the spot doubtful. Thus, the most material witness of the prosecution has been withheld by the prosecution without assigning any reason and stating her to be an unnecessary witness. In fact, she was the most material witness, which raises the adverse inference against the prosecution.”

Counsel for the appellants has further submitted that the prosecution has failed to prove as to how the recovery and measurement of the intoxicant liquid were done by the Investigating Officer. Counsel for the appellants has referred to the statement of the Investigating Officer who has stated in his examination-in-chief that from the recovered cane of plastic carrying the intoxicant liquid, he has taken two samples of 180 ml-180 ml. each and prepared two separate sample parcels of the same and the remaining intoxicating liquid came up to be 9 ½ bottles which was put by him in the same plastic cane. In cross-examination, this witness has stated that he had only one bottle vide which measurement was done and volunteered one bucket was arranged at the spot and admitted that this fact is not mentioned in any document that the bucket was brought by HC Surinder Dutt. This witness has further stated that he was carrying the bottle vide which the measurement of intoxicating liquid was done in his investigation kit but he has not mentioned in the document that he was having a bottle with him.

Counsel for the appellants has thus submitted that in the absence of any measurement instrument, the measurement done by the Investigating Officer with the help of a bottle which was neither taken into custody alongwith the case property nor sent with the sealed property to the FSL for giving the correct weighment of the contraband recovered, it cannot be said that the recovery was of 9½ bottles and even the sample parcel which is stated to be 100 ml. of intoxicating liquid on the basis of the measurement made by bottle which is not a standard equipment and specially in the absence of any such evidence that what was the capacity of that bottle, the recovery from the appellants is doubtful specially the weight/mass of the liquid recovered is not proved.

Counsel for the appellants has further submitted that it has not come in the statement of either PW3-ASI Gurdarshan Singh who was officiating SHO or

the Investigating Officer i.e. PW6-ASI Lal Chand that CFSL form No.29 was prepared at the spot or sent alongwith the sample sealed parcels to FSL. Counsel for the appellants has laid stress on the statement of PW3-ASI Gurdarshan Singh, who has only stated that he had attested the sample seal chit which is Ex.P1. A perusal of Ex.P1 shows that a sample seal chit was prepared with seal 'GS and LC' and it was also seen by JMIC, Nabha on 22.07.2013. However, none of these witnesses have stated that form No.29 was prepared at the spot. Even a perusal of the report of FSL dated 14.01.2014 shows that at serial No. 6, relating to the articles received by FSL, Punjab Mohali, it is stated that the seals on the parcels and bottles were found intact and tallied with the specimen seal impression without reference to form No. 29. A perusal of the Lower Court Record though shows that CFSL form No. 29 is available at page No. 81 of the trial Court Record, however, this form was not relied upon by PW3 and PW6 and was never sent to FSL and, therefore, this document was never exhibited by the Investigating Officer. This document, though not exhibited, further shows that it was prepared on 24.07.2013 whereas the recovery was effected on 22.07.2013 and perhaps for this reason, the prosecution has opted not to rely upon the same.

Counsel for the appellants further submitted that a perusal of orders Ex.PW6/G and Ex.PW6/G1 show that when the appellants alongwith the case property were produced before the Illaqa Magistrate on 22.07.2013, the learned Magistrate has seen all the parcels bearing seal impression 'LC and GS' and has marked his initials in the token of correctness of the seal and the same were returned to ASI Lal Chand to be deposited in judicial malkhana and one sample parcel was handed over to him for sending the same for chemical examination. A perusal of this order also shows that there is no mention that CFSL form No.29 has not been produced before the Magistrate. The other order Ex. PW6/G1 pertains to

remanding the accused to judicial custody till 05.08.2013 for further investigation.

It is, thus submitted on behalf of the appellants that the prosecution has failed to prove that CFSL form No.29 was prepared at the spot or sent to FSL alongwith the sealed sample parcels.

Counsel for the appellants further submitted that the entire investigation was undertaken by PW6-ASI Lal Chand himself and even the inventory Ex.PW6/E was prepared by him and, therefore, in the absence of any other officer conducting the investigation other than PW6-ASI, who has undertaken the entire investigation, the same is not in accordance with the procedure as laid down under the Act.

Counsel for the appellants further submitted that though the prosecution has initially associated independent witness PW Harjit Singh to whom after sealing the parcel seal was handed over, however, this witness was given up by stating that he has turned hostile and, thus, prosecution has failed to prove the fate of the original seal as to whether the same were taken back by the police and, therefore, even the handing over of seal to this witness is not proved.

Counsel for the appellants has further argued that in the statements under Section 313 Cr.P.C., both the appellants have specifically stated that they were apprehended by the police on 21.07.2013 while they were returning back from the doctor after taking medicine of appellant No.2 and in this regard, the statement of defence witness i.e. DW1, who proved the DDRs i.e. Ex.D1 to Ex.D8 have not been taken into consideration by the trial Court.

Counsel for the appellants has further submitted that PHG Kashmir Singh, who has taken *ruqa* Ex.PW6/A from ASI Lal Chand for recording the FIR, was also not examined as witness.

Counsel for the appellants has further submitted that as per the

statement of PW6, after the notice under Section 50 of the Act was served upon the appellants and their consent was obtained and after search/personal search was conducted and after effecting recovery, *ruqa* Ex.PW6/A was sent to the police station for registration of the FIR at 6:15 A.M., as per the time mentioned on Ex.PW6/A and the same was duly received vide endorsement Ex.PW6/B1 reporting that FIR No. 80 dated 20.07.2013 under Sections 22, 61, and 85 of the Act was registered at Police Station Sadar, Nabha. Thus the notice was prepared at the spot during investigation prior to sending of the *ruqa*. Counsel for the appellants has referred to the recoveries memo i.e. Ex. PB and Ex. PC as well as the memo of personal search i.e. Ex.PD and Ex. PE which were prepared much before sending the *ruqa* to the police station, which finds mention the FIR number of the case. Counsel for the appellants has further submitted that this makes the recovery highly doubtful as it is the case of PW1 and PW6 that after the appellants were apprehended at the spot, notice under Section 50 of the Act was served, the search was effected, the recovery of the contraband was made on the basis of their personal search and, thereafter, *ruqa* was sent at 6:15 A.M., whereas the appellants were apprehended as per the version given in the FIR at about 3:30 A.M and, therefore, before recording of the FIR, all these documents were prepared at the spot. However, FIR No.80 and its description is given in these documents which makes the prosecution case doubtful.

Counsel for the appellants has relied upon a judgment of this Court rendered in *Ajay Malik and others vs. State of U.T., Chandigarh, 2009 (3) RCR (Criminal) 649*, wherein it has been held by this Court that when the documents which are prepared at the spot like search memo, recovery memo and rough site plan and then information was sent to the Police Station for registration of the FIR, it is not possible that the documents prepared at the spot could bear a reference of

FIR number which came to be registered at a later stage. In the instant case also, as per FIR, the accused were apprehended at 3:30 A.M. and *ruqa* was sent to the police station on 6:15 A.M. after completing all the formalities and, thereafter, the FIR was registered mentioning the FIR number in the document, makes the prosecution case doubtful.

In reply, learned State counsel, has submitted that since it was a case of chance recovery, the strict provisions of Section 50 of the Act will not be applied and in pursuance to the notice issued under Section 50 of the Act, both the accused persons have reposed confidence in the Investigating Officer ASI Lal Chand, who, later on, conducted the search and recovered the contraband from the appellants.

Learned State counsel has further submitted that there is no enmity with the official witnesses to disbelieve their versions and the independent witness was given up as he was won over by the accused persons. It is thus submitted that the appeal be dismissed and the judgment of conviction and order of sentence, as awarded by the trial Court, be upheld.

After hearing counsel for the parties, I find merit in the present appeal and the same deserves to be allowed on the following grounds:-

(a) that admittedly, both the accused were given a joint notice under Section 50 of the Act and even their consent was taken jointly vide Ex.PA. A perusal of this document Ex.PA shows that the offer as well as the consent was made on a single document and, therefore, neither any notice under Section was served upon the appellants nor separate consent statement was recorded. Therefore, in view of the judgment of Hon'ble Supreme Court in **Parmanand'** **case** (Supra), there is clear violation of Section 50 (1) of the Act as it is held by Hon'ble Supreme Court that communication of right under Section 50 of the Act is

not mere a formality and is provided as a safeguard to the accused persons under the Act which carry stringent punishment and, therefore, the prescribed procedure has not been followed meticulously by the prosecution;

(b) Even the consent taken by PW3-ASI Gurdarshan that both the appellants have reposed faith on him to conduct the search is not the compliance of the mandatory provisions under Section 50 of the Act as it is the requirement that the search should be carried out either in the presence of a Magistrate or a Gazetted Officer;

(c) A perusal of statement of PW3 further shows that the search of appellant No.2-Masrat was conducted by a Lady Constable Amanpreet Kaur, however, she was given up by the prosecution and was never examined as a witness and, therefore, there is a clear violation of Section 50 (4) of the Act. It has been held by this Court in **Shinderpal Kaur's** case (Supra) that when a lady constable, who has effected the personal search of lady accused, is not examined as a prosecution witness, the accused be given benefit of doubt.

(d) There is no cogent evidence led by the prosecution regarding measurement of the intoxicating liquid recovered from the appellants. It has come in the statement of Investigating Officer that he has done the measurement with the help of the bottle by putting the same in the plastic cane. Nothing has come on record to show the capacity of a bottle which was used as a measurement by the Investigating Officer. It is also not proved by the Investigating Officer that two samples of 180 ml. each were separated by using any standard instrument of measurement.

(e) PW3-ASI Gurdarshan, who was officiating SHO, not stated that the CFSL Form No.29 was prepared at the spot or it was sent alongwith sample sealed parcels to FSL. Even the Investigating Officer i.e. PW6 ASI Lal

Chand has failed to depose that the form No.29 was sent alongwith the sample parcels to the FSL. Further, perusal of statement of PW3-ASI Gurdarshan shows that he had deposed about the attestation of the sample seal chit Ex.P1 and further perusal of Ex.P1 shows that it bears seal of "GS and LC". Even the Judicial Magistrate 1st Class, Nabha, on 22.07.2013 has only seen the sample seal chit and there is no mention about form No.29. A perusal of report of FSL dated 14.01.2014 also reveals that there is no reference to form No.29.

(f) A perusal of the trial Court record also shows that though CFSL form No.29 is available at Page 81 but this document was neither relied upon by PW3-ASI Gurdarshan or PW6 ASI Lal Chand nor was sent to FSL and thus this document was never exhibited on record. A perusal of this document shows that it bears date 24.07.2013 whereas the recovery was effected on 22.07.2013 and perhaps for this reason, the prosecution did not rely the same and the fact remains that this link evidence was never proved on record.

(g) A perusal of orders passed by Illaqa Magistrate Ex.PW6/G and Ex.PW6/G/1 also show that after the Magistrate had seen all the parcels bearing seal impression "LC and GS", the same were returned to PW6 ASI Lal Chand for depositing in the Judicial Malkhana and one sample parcel was given to him for depositing in FSL. Even in the order, there is no reference to CFSL form No.29 which was prepared later on, on 24.07.2013 to prove that it was not prepared at the spot and never sent to FSL.

(h) A perusal of statement of PW6 ASI Lal Chand shows that he was the Investigating Officer as well as he prepared the inventory Ex.PW6/E and, therefore, the prosecution has failed to prove the mandatory provisions of the Act.

(i) The prosecution has even failed to examine an independent witness i.e. Harjeet Singh, to whom, the seals were handed over by the

Investigating Officer. This witness was given up by stating that he has turned hostile. Though, non-examination of an independent witness may not be fatal to the prosecution version in a given case, however, in the instant case, once the Investigating Officer has stated that the original seals were handed over to this independent witness, therefore, his non-examination has failed to prove the fate of the original seals which were handed over to him as no subsequent evidence has come on record as to whether the same were taken back by the police and, therefore, an important link evidence is missing.

(j) The prosecution has failed to explain how the details of the FIR which was registered at 6:15 A.M., as per the time mentioned in the *ruqa* Ex.PW6/A, finds mentioned in the documents i.e. recoveries memo Ex. PB and Ex.PC and the personal search memo, which were prepared much before sending the information/*ruqa* to the Police Station. Both PW1 and PW6 have deposed that the information was sent to the Police Station after the appellants were apprehended at the spot; notice under Section 50 was served upon them; consent was taken; search was effected and, therefore, the recovery of alleged contraband was made in their personal search. Therefore, the mentioning of FIR Number on these documents, makes the prosecute case doubtful.

In view of the above, the present appeal is allowed. Judgment of conviction dated 30.11.2015 and order of sentence of even date are set aside and the appellants are acquitted of the charge under Section 22 of the NDPS Act.

March 17, 2018
smriti

(ARVIND SINGH SANGWAN)
JUDGE

Whether speaking/reasoned
Whether Reportable

Yes/No
Yes/No.