

IN THE HIGH COURT FOR THE STATES OF PUNJAB AND
HARYANA AT CHANDIGARH

1) Date of Decision: 02.05.2018
CRM-M-6713-2018 (O&M)

Sukhvir Singh

...Petitioner

Versus

State of Punjab

...Respondent

2) CRM-7013 of 2018 in
CRA-S-1500-SB-2017 (O&M)

Kamaldeep Singh @ Babbu

...Applicant-appellant

Versus

State of Punjab

...Respondent

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present:- Mr. Anterpreet Singh, Advocate, for the petitioner.
Mr. G.S. Madaan, Advocate, for the applicant-appellant.
Ms. Monika Jalota, DAG, Punjab.
...

AMOL RATTAN SINGH, J. (Oral)

By these two cases (CRM-M-6713-2018 and CRM-7013-2018 in CRA-S-1500-SB-2017), have been clubbed together for hearing, in view of the fact that common arguments have been raised, in similar circumstances, as to whether Section 50 of the NDPS Act, 1985, was duly complied with by the arresting officer in each case, or not.

2. CRM-M-6713-2018 is a petition filed under Section 439 Cr.P.C., seeking the concession of bail to the petitioner, who is facing trial for the alleged commission of offences punishable under Section 22 of

the NDPS Act, 1985, whereas the applicant-appellant in CRM-7013 of 2018 in CRA-S-1500-SB-2017 is seeking suspension of his sentence of imprisonment after he has been convicted for the commission of an offence punishable under Section 21 of the said Act and having been sentenced to undergo rigorous imprisonment for 10 years, with a fine of Rs. 1,00,000/- also imposed upon him, in default of payment of which he is to undergo rigorous imprisonment for a further period of 06 months.

The said appeal was admitted to regular hearing by this Court vide an order dated 20.04.2017. Thereafter, the application seeking suspension of sentence (CRM-7013-2018) has been filed.

3. The common argument made by Mr. Anterpreet Singh, learned counsel appearing for the petitioner in CRM-M-6713-2018 and Mr. G.S. Madaan, learned counsel appearing for the applicant-appellant in the criminal appeal, is that though consent memos are shown to have been signed by both the accused at the time of their arrest (in wholly unrelated cases, as CRM-M-6713-2018 arises out of FIR No. 64 dated 18.03.2017, registered at Police Station Samrala, District Khanna, whereas CRA-S-1500-SB-2017 has arisen out of the case originating from FIR No. 119 dated 12.07.2015, registered at Police Station City, Nawanshahr, SBS Nagar), after they are stated to have reposed faith in the officers arresting them, after an offer had been made to them that they had a right to be searched in the presence of a Gazetted Officer/Magistrate, however, even that is not sufficient compliance of Section 50 of the NDPS Act, as per the ratio of the judgment of a Constitution Bench of the Supreme Court, in **Vijaysinh Chandubha Jadeja vs. State of Gujarat** (2011) 1 SCC 609.

4. Both learned counsel specifically point to the following

paragraphs from the said judgment:-

“28. We shall now deal with the two decisions, referred to in the referral order, wherein "substantial compliance" with the requirement embodied in Section 50 of the NDPS Act has been held to be sufficient. In Prabha Shankar Dubey (supra), a two Judge bench of this Court culled out the ratio of Baldev Singh's case (supra), on the issue before us, as follows :

"11....What the officer concerned is required to do is to convey about the choice the accused has. The accused (suspect) has to be told in a way that he becomes aware that the choice is his and not of the officer concerned, even though there is no specific form. The use of the word "right" at relevant places in the decision of Baldev Singh case seems to be to lay effective emphasis that it is not by the grace of the officer the choice has to be given but more by way of a right in the "suspect" at that stage to be given such a choice and the inevitable consequences that have to follow by transgressing it."

However, while gauging whether or not the stated requirements of Section 50 had been met on facts of that case, finding similarity in the nature of evidence on this aspect between the case at hand and Joseph Fernandez (supra), the Court chose to follow the views echoed in the latter case, wherein it was held that searching officer's information to the suspect to the effect that "if you wish you may be searched in the presence of a gazetted officer or a Magistrate" was in substantial compliance with the requirement of Section 50 of the NDPS Act. Nevertheless, the Court indicated the reason for use of expression "substantial compliance" in the following words :

"12. The use of the expression "substantial compliance" was made in the background that the searching officer had Section 50 in mind and it was unaided by the interpretation placed on it by the Constitution Bench in Baldev Singh case. A line or a word in a judgment cannot be read in isolation or as if interpreting a statutory provision, to impute a different meaning to the observations."

It is manifest from the afore-extracted paragraph that Joseph Fernandez does not notice the ratio of Baldev Singh and in Prabha Shankar Dubey , Joseph Fernandez is followed ignoring the dictum laid down in

Baldev Singh's case.

29. 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.

30.As observed in *Re Presidential Poll, In re: (SCC p.49, para13)*

“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's 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.

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.”

Thus, both learned counsel submit that the Constitution Bench having held that 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, thereby lending more legitimacy to the search proceedings; actually it was the duty of the police parties shown to be apprehending the suspects with the contraband (in each case), to have actually so produced them before the Magistrates, they already having been apprehended.

5. Mr. Madaan, learned counsel for the applicant-appellant in the appeal, has further relied upon another judgment of the Supreme Court in

Arif Khan @ Agha Khan v. State of Uttarakhand (Crl. Appeal No.273 of

2017, decided on April 27, 2018), in which their Lordships eventually held as follows:-

“26. It is the case of the prosecution and which found acceptance by the two Courts below that since the appellant (accused) was apprised of his right to be searched in the presence of either a Magistrate or a Gazetted Officer but despite telling him about his legal right available to him under Section 50 in relation to the search, the appellant (accused) gave his consent in writing to be searched by the police officials (raiding party), the two Courts below came to a conclusion that the requirements of Section 50 stood fully complied with and hence the appellant was liable to be convicted for the offence punishable under the NDPS Act.

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.

Therefore, he submits that the Supreme Court has held that the mandate of Section 50 is that an accused suspected of carrying contraband, even if he is apprehended by a patrolling party, should be produced before a Magistrate, or at least a Gazetted Officer.

6. Per contra, in reply to the aforesaid contention of both the learned counsel, Ms. Monika Jalota, learned DAG, Punjab, first submits that each case has to be taken in the context of its own circumstances, as also

held by the Supreme Court even in Jadejas' case, and therefore to generalize that every single suspect must be produced before a Magistrate or a Gazetted Officer, especially when an Executive Magistrate/Duty Magistrate is "often not available", would be granting undue benefit to the persons shown to be apprehended with contraband in their possession.

In support of her arguments, she also refers to Jadejas' case (supra), (specifically to paragraphs 19, 20, 29 to 32), to submit that it is only if the person to be searched so requires that he/she be produced before a Gazetted Officer or a Magistrate, that it is necessary for the arresting/detaining officer to do so; but not if the suspect consents to the detaining officer himself searching her/him.

She further submits that even the mandate of Section 50 actually requires only that an offer be made and the production of the suspect before the Gazetted Officer or a Magistrate would be only upon the suspect saying so.

7. Learned State counsel has also raised an argument that recovery of the illicit article would be suspect only if the conviction of the accused is eventually recorded only on the basis of recovery during the search, with no other corroborative evidence, whereas in the present case, at least in the appeal, the applicant-appellant already stands convicted, on various grounds given in the appeal; and as regards the petitioner who seeks bail during trial, the trial Court would duly appraise all evidence to acquit or convict him.

As regards the said petitioner, she submits there is also another FIR registered against him in the State of Haryana, again alleging therein the commission of an offence punishable under Section 21 of the Act.

Finally, she submits that the drug menace being rampant in the State of Punjab, this Court would desist from granting bail to the under trial and suspending the sentence of the applicant, who has been convicted.

8. Having considered the rival contentions, for the purpose of the bail application and the application seeking suspension of sentence, though learned State counsel may be correct in submitting that it is all evidence which is to be appraised before the final conviction of any person, however, what this Court at least for the purpose of bail/suspension of sentence, cannot ignore, is that though the NDPS Act undoubtedly is a statute very much needed to try and curb the menace of the use of intoxicant drugs from becoming rampant in society, possibly leading to other crimes also, and the punishments provided for in the Act, for various offences, are also very stringent, however, as has been observed by the Supreme Court in *Jadejas'* case (*supra*) (and from time to time), compliance of the mandatory provisions of such an Act, to ensure that it is not mis-used, is also absolutely essential on the part of the prosecuting agencies.

9. Again to repeat, undoubtedly, as per the FIRs registered in each of these two cases (wholly separately), the accused are shown to have signed consent memos to the effect that they do not wish to be produced before either a Magistrate or a Gazetted Officer and may be searched by the detaining officer himself. Yet, again undoubtedly, the single accused in each case had already been detained by the police parties concerned (in each case) and as such they would not appear to be any reason to apprehend that they would escape, in the presence of many police officials present, who contend to have detained them.

In this context, it would be necessary to refer to the facts of

each case separately even for the purpose of bail/suspension of sentence, a separate order having to be passed in each case.

CRM-M-6713-2018

10. In this case, the petitioner is stated to have been coming on foot when he was seen by a police party consisting of one ASI and two Head Constables, who stopped him and enquired about his particulars, and thereafter informed him that the ASI wish to search him, but that he could also opt to get his search conducted in the presence of any Magistrate or Gazetted Officer. Thereafter, the petitioner having agreed to a search by the ASI, and a consent memo having been shown to have been signed and a search conducted, 125 grams of intoxicant power are stated to have been found in a polythene bag in the trouser pocket of the petitioner.

11. In the *prima facie* opinion of this Court, firstly, the petitioner already having been detained by three policemen, there would be no reason for him to be not produced before a Magistrate.

Secondly, whether the consent memo was signed under duress or actually voluntarily, would need to be seen by the trial Court, along with all other evidence; and therefore, keeping in view of the ratio of the judgment of the Constitution Bench in **Jadejas'** case (supra), to the effect that “*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*”, as also the mandate in **Arif Khan @ Agha Khans'**

case (supra), in which case also a consent memo was duly shown to have

been signed by the accused, but it was still held that the search and recovery by a police official, without production of the accused before a Magistrate, did not fulfill the requirement of Section 50 of the Act; in my opinion, the petitioner is entitled to the concession of bail, especially as he has already been in custody for the past more than 07 months, even as per the custody certificate already on record, with the trial still not near conclusion in the immediate future.

Consequently, the petitioner in CRM-M-6713-2018, i.e. Sukhvir Singh, shall be released on bail upon him furnishing adequate bail and surety bonds to the satisfaction of the learned trial Court.

CRM-7013-2018 in CRA-S-1500-SB-2017

12. In this case also, as per the case of the prosecution, when ASI Darbara Singh and other police officials were travelling in a private vehicle through village Kulam at about 03:30 p.m., on patrolling duty, the applicant-appellant is stated to have been seen coming on a motor-cycle from the other side, and on seeing the police party, he got perplexed and tried to turn his motor-cycle around; but in that process, the motor-cycle got switched off, with the police party thereafter having apprehended him. The ASI is stated to have disclosed his identity and told him that he suspected that he was carrying contraband and wished to search him, though he had a legal right to get the search conducted in the presence of a Gazetted Officer or a Magistrate. The applicant-appellant is stated to have, again in this case also, reposed confidence in the ASI, with a consent statement signed by him to that effect, after which he was searched, and “intoxicating material” weighing 250 grams is stated to have been recovered from the inner pocket

(Dabb), of his pants.

13. Again, with reference to what has been held in **Jadejas'** and **Arif Khan @ Agha Khans'** cases (supra), at least for the purpose of suspending the sentence of the applicant-appellant during the pendency of the appeal, which is not likely to come up for hearing in the near future, I think learned counsel has duly made out a case for such suspension, seen along with the fact that the applicant-appellant has undergone about 02 years of actual custody, if calculated from the custody certificate on record dated 14.03.2018, on which date he is shown to have undergone 01 year, 10 month and 03 days of actual custody.

However, whether, on the basis of the ratio of the aforesaid judgments, he is to be eventually acquitted, or his conviction is to be upheld, would be seen at the time of final hearing of the appeal.

14. Consequently, upon the applicant-appellant, Kamaldeep Singh @ Babbu, furnishing bail/surety bonds to the satisfaction of the Chief Judicial Magistrate/Duty Magistrate, Shaheed Bhagat Singh Nagar, he would be released on bail during the pendency of this appeal.

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15. Before parting with the order in these 2 cases, it is considered appropriate to observe that obviously this Court is fully alive to the fact that the drug menace in the State is to be curbed; but whether it is actually all those indulging in the sale of drugs who are being apprehended, or some are only petty thieves (and possibly others) who are being shown to be apprehended, naturally it needs to be seen carefully by all Courts, that the provisions of the Act, as further interpreted by the Supreme Court, are fully complied with, such provisions being very stringent; and therefore, simply

accepting the word of a police official to be the absolutely true version of any particular occurrence, without any corroboration, amounts to saying that all such police officials are 100 % trustworthy and can tell no lie, which unfortunately is not the case. This observation is made with due respect to such police officers and officials, at all levels, who do their duty perfectly honestly and diligently.

(Hence, the observations of their Lordships in *Jadejas'* case, that a suspect should be taken to a Magistrate, who enjoys more confidence in the eyes of a common man than any other person).

02.05.2018
vcgarg/nitin

(AMOL RATTAN SINGH)
JUDGE

Whether speaking/reasoned
Whether Reportable

Yes
Yes