

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

**CRA-S-2332-SB of 2004**

**Date of decision: August 30, 2019**

Balwant Singh

.....Appellant

Versus

State of Haryana

.....Respondent

**CORAM: HON'BLE MR. JUSTICE MAHABIR SINGH SINDHU**

**Present:** Mr. J.S. Virk, Advocate for the petitioner.  
Mr. Saurabh Mago, AAG, Haryana.

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**MAHABIR SINGH SINDHU, J**

Present appeal has been filed against the impugned judgment and order dated 15.10.2004 passed by learned Special Court, Kurukshetra, (for short 'Special Court') vide which the appellant was convicted and sentenced under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'The Act') to undergo rigorous imprisonment for a period of four years alongwith fine of Rs. 6000/- with a default clause to further undergo rigorous imprisonment for two months.

Brief facts of the case are that on 20.09.2001 at about 2:40 p.m. ASI Mahavir Singh (PW-8) alongwith other police officials were present at Bus Stand, Village Surja. Then in the meantime, appellant, who was carrying a plastic bag in his right hand came from Village Isherheri side. On seeing the police party, he turned back and started walking briskly, but on suspicion was apprehended by the police party. On search of plastic bag carried by appellant, poppy husk (Choorā post) was recovered and out of which two samples of

200 gms each were drawn and the residue on weighment found to be 1 kg 100 grams. On asking, the suspect disclosed his name as Balwant Singh son of Jit Singh, resident of Babain. The samples and residue were converted into sealed parcels and sealed with seal bearing impression 'MS' and were taken into possession vide memo (Ex. PD) duly attested by the witnesses. Seal after use was handed over to PW7-HC Rohtash Kumar, No. 849. Thereafter, ruqa (Ex.PF) was sent to Police Station, Babain through Constable Jaswant Singh, upon which FIR No.82 (Ex.PF/1) was registered under Section 15 of the Act on 20.09.2001 at Police Station Babain, District Kurukshetra. After completion of the usual investigation, report under Section 173 Cr.P.C. was submitted. The case was committed to the Court of Special Judge and appellant was charge-sheeted for commission of offence under Section 15 of the Act, to which he pleaded not guilty and claimed trial.

In order to prove its case, prosecution examined eight witnesses, which are as under:-

|            |                            |
|------------|----------------------------|
| <i>PW1</i> | <i>ASI Baljit Singh</i>    |
| <i>PW2</i> | <i>HC Balbir Singh</i>     |
| <i>PW3</i> | <i>Constable Raj Karan</i> |
| <i>PW4</i> | <i>ASI Ashok Kumar,</i>    |
| <i>PW5</i> | <i>HC Jasmer Singh</i>     |
| <i>PW6</i> | <i>Constable Gurdeep</i>   |
| <i>PW7</i> | <i>HC Rohtas</i>           |
| <i>PW8</i> | <i>ASI Mahavir Singh</i>   |

Prosecution also produced the documentary evidence, which is as under:-

|                |                                          |
|----------------|------------------------------------------|
| <i>Ex.PA</i>   | <i>Carbon copy of Special Report</i>     |
| <i>Ex.PA/2</i> | <i>Special Report</i>                    |
| <i>Ex.PB</i>   | <i>Affidavit of MHC Balbir Singh</i>     |
| <i>Ex.PC</i>   | <i>Affidavit of C.Raj Karan</i>          |
| <i>Ex.PD</i>   | <i>Recovery Memo</i>                     |
| <i>Ex.PE</i>   | <i>Site Plan</i>                         |
| <i>Ex.PF</i>   | <i>Ruqa</i>                              |
| <i>Ex.PF/1</i> | <i>Copy of FIR</i>                       |
| <i>Ex.PF/2</i> | <i>Endorsement on Ruqa</i>               |
| <i>Ex.PG</i>   | <i>Notice under Section 50 NDPS Act.</i> |
| <i>Ex.PH</i>   | <i>Arrest memo.</i>                      |

The entire incriminating material was put to the appellant under Section 313 Cr.P.C., but claimed innocence and stated that he had been falsely implicated by the police.

In support of his defence, appellant produced Sarwan Kumar as DW1.

After hearing both sides and perusing the record, learned Special Court convicted and sentenced the appellant in the terms as mentioned in the opening para of this order. Hence the present appeal.

It is contended by learned counsel for the appellant that there is non-compliance of Section 50 of the Act, inasmuch as the offer for search of the appellant was given after making the alleged recovery and that too, only before a gazetted officer instead of Magistrate as well. Also contends that even the FIR number is already mentioned on the notice (Ex.PG), under Section 50 of the Act, thus, the entire police proceedings are prepared while sitting in the police station. Further contends that neither any independent

witness had been joined; nor any explanation coming forward for not joining the independent witness. Also argued that there was a delay of eight days in sending the sample to the FSL and even the specimen seal impression has not been proved on record by the prosecution. Further argued that there are material contradictions in the testimony of prosecution witnesses.

On the other hand, learned State counsel opposed the submissions made on behalf of the appellant and contended that since recovery was effected from the plastic bag carried by the appellant and not from his personal search; thus, provisions of Section 50 of the Act are not attracted. Further argued that there is no requirement for joining any independent witness in such like cases and sample sent to the laboratory was duly intact, thus, mere delay of eight days in sending the sample would not extend any benefit to the appellant.

Heard both sides and perused the paper-book.

PW8, Investigating Officer, while supporting the prosecution case deposed that on 20.09.2001, he along with other police officials were present at Bus Stand, Village Surja. Then in the meantime, appellant who carrying a plastic bag in his right hand came from Village Isherheri side, but on seeing the police party he turned back and started walking briskly, however, he was apprehended. Plastic bag carried by the appellant was searched and that led to the recovery of poppy husk wrapped in a polythene. Out of which two samples of 200 gms. each were separately drawn

and residue was found to be 1 kg 100 grams. Thereafter, both the samples and residue were converted into separate parcels and sealed with his seal bearing impression 'MS'. After preparing the specimen seal impression, all the sealed parcels as well as specimen seal impression were taken into police possession vide recovery memo (Ex.PD) and duly signed by PW 7 as well as Constable Umed Singh. Seal after use was handed over to PW7. He further stated that rough site plan (Ex.PE) with marginal notes was prepared. Ruqa (Ex.PF) was sent to police station through Constable Jaswant Singh, on the basis of which formal FIR (Ex.PF/1) was registered by ASI Sukhdev Singh. After recovery, notice (Ex.PG) was served upon the appellant and consequently, he was arrested vide memo (Ex.PH). He further stated that after completion of investigation, appellant along with the case property were produced before PW1, who after verifying the facts affixed his seal bearing impression 'BS' on the sealed parcels as well as on specimen seal impression. He also stated that report under Section 57 of the Act was submitted in the matter. Thereafter, case property was deposited with MHC Malkhana (PW2) and the accused was sent to custody. On 29.09.2001, he recorded the statement of PW2 and PW3. After completion of investigation and receipt of report from FSL (Ex.PJ), challan under Section 173 Cr.P.C. was prepared by PW1-Baljit Singh.

During cross-examination, this witness stated that they reached at Bus Stand, Surja about 1.30 PM. According to the testimony of this witness, there is a frequent traffic on Shahbad-

Ladwa road. He further stated that no independent person was joined in the investigation. He also stated that notice under Section 50 of the Act was served upon the appellant. He also acknowledged that factum of preparing the specimen seal impression was not mentioned in the police proceedings recorded by him.

PW1 has deposed that he was posted as ASI, Police Station, Babian on 20.09.2001. On that day, PW8 produced the appellant along with sealed parcels of poppy husk along with witnesses. After verifying the facts of the case, he affixed his seal bearing impression 'BS' on the sample as well as residue (Ex.P1) and thereafter the same were handed over to PW8 with a direction to deposit the same with MHC of the concerned police station.

During cross-examination, this witness deposed that appellant was produced before him at 5.55 PM, but he did not record the statements of any witness. He also admitted the fact that specimen impression of seal was not mentioned in the report under Section 173 Cr.P.C.

PW 2- HC Balbir Singh deposed by way of his affidavit that on 20.09.2001, PW8 handed over two sample parcels of poppy husk containing 200 grams each, specimen seals bearing impressions 'MS' and 'BS' along with the residue weighing 1.1 kg. Thereafter, on 28.09.2001, he withdrew one sample parcel of poppy husk weighing 200 grams sealed with impression 'MS/BS' vide RC No. 201 from Malkhana and handed over the same to C.Rajkaran, No.963, for depositing with FSL, Madhuban. This witness further

deposed that C. Rajkaran deposited the sample parcel with Chemical Examiner on the same day and handed over the receipt to him.

C.Rajkaran Singh while appearing as PW3 deposed by way of affidavit that on 28.09.2001, he had taken one sample parcel of poppy husk weighing 200 grams sealed with impression 'MS/BS' vide RC No. 201 from Malkhana and deposited the same with FSL, Madhuban. Thereafter, the receipt was handed over to PW2.

PW4 ASI Ashok Kumar deposed that he had partly investigated the present case and recorded the statement of PW6 on 22.11.2001.

PW5-HC Jasmer Singh deposed that on 21.09.2001 he was posted as Assistant Reader to DSP, HQ, Kurukshetra. He received the report (Ex.PA/2) from PW1 and the same was placed before DSP (HQ), who after perusing it, signed the same as Ex.PA/3.

During cross-examination, this witness stated that he could not recollect when his statement was recorded by PW8. He voluntarily stated that his statement was not in the police file.

PW6-Constable Gurdeep Singh deposed that on 20.09.2001, he was posted on general duty in Police Station, Babian and the special reports were delivered by him to DSP, S.P., Kurukshetra and Illaqa Magistrate.

During cross-examination, this witness stated that PW4 recorded his statement on 22.11.2001.

PW7 HC Rohtash, No.849 reiterates the version as stated by PW8. During cross-examination, he stated that police party

started from the Police Station at 8.30 AM for patrolling and reached at Bus Stand, Surja, where they apprehended appellant at 1.30 PM. Bus Stand, Surja, is at a distance of 3 KM from Police Station, Babain. He also stated that 2/3 persons were present on duty at the Bus Stand. Also acknowledged that traffic was frequent on the Bus Stand on Ladwa-Shahbad road. He also stated that they did not try to stop the vehicles which were coming and going on the road near Bus Stand, Surja. According to this witness, the investigation was conducted under the shelter of Bus Stand, Surja. He further stated that notice under Section 50 of the Act was given to the appellant, but he acknowledged that factum of producing the appellant before Gazetted Officer or Magistrate was not recorded in his statement.

Although, PW7 and PW8 deposed that notice (Ex.PG) under Section 50 of the Act was issued to the appellant, but perusal of the same reveals that alleged recovery of 1.5 kg of poppy husk was effected from the appellant prior in time; whereas the notice under Section 50 of the Act was issued subsequent thereto. Even FIR number is duly reflected at the top of the notice (Ex.PG) and translated version of the same reads as under:-

*“PS Babain                      District Kurukshetra  
State through ASI Mahavir Singh, Police  
Station Babain.*

*FIR No. 82 dated 20.9.2001, u/s 15-61-85  
NDPS Act, PS Babain.*

*Vs.*

*Balwant Singh S/o Jit Singh, Caste Rai Sikh,  
R/o Babain.*

Notice under Section 50 of NDPS Act

*You, Balwant Singh son of Jit Singh, caste Rai Sikh, resident of Babain are informed in writing that today on 20.09.2001, after your apprehension from the spot, 1 kg 500 grams of poppy husk was recovered from you. Regarding this recovery of poppy husk, if you want to appear before any gazetted officer, then you could be produced. In response thereto, accused declined to be produced before any gazetted officer regarding the recovery of poppy husk. Copy of this notice was acknowledged by the accused and he put his thumb impression and the same was signed by the witnesses.*

*Balwant Singh, accused  
(LTI)*

*Witness:*

*Sd/HC Rohtash Kumar,  
849, PS Babain*

*Witness*

*Sd/-Cl. Umed Since, 430  
PS Babain.*

*Sd/-Mahavir Singh, ASI  
PS Babain,*

*Dated: 20.09.2001”*

A perusal of the notice (Ex.PG), reproduced hereinabove, also reveals that offer was given to the appellant to be produced only before the gazetted officer, instead before any Magistrate as well. Thus, the notice (Ex.PG) purported to have been issued under Section 50 of the Act, is not only defective, but grossly in breach of the mandatory provisions.

Law is well settled by Hon'ble Supreme Court in Constitution Bench judgment titled as **Vijay Sinh Chandubha Jadeja VS State of Gujarat**, (2011) 1 SCC 609, to the effect that provisions of Section 50 of the Act are mandatory in nature and it requires strict

compliance. Reference can be made to para 29 of the above judgment, which reads as under:-

*“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 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 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.”*

Still further, there is no evidence on record to substantiate that samples along with residue of the contraband were produced before the Illaqa Magistrate or that any representative sample in terms of Section 52A of the Act was drawn by the concerned Magistrate. There is no material on record to prove that sample seal which was handed over to PW7 after its use, remained in safe custody.

As per the prosecution case itself, the recovery of contraband was effected from the appellant at a busy place i.e. Bus Stand, Surja and admittedly there was frequent traffic, but despite that no effort was made to join any independent person by the seizing officer.

Taking into consideration the facts and circumstances discussed hereinabove, the irresistible conclusions are as under:-

- i) *“There is a gross violation of provisions of Section 50 of the Act;*
- ii) *Alleged recovery of 1.5 kg of poppy husk was effected from the appellant by investigating officer prior in time, but notice (Ex.PG) was issued subsequently;*
- iii) *the offer was made to the appellant only to be produced before the Gazetted Officer instead of Magistrate as well; and*
- iv) *FIR No.82 dated 20.09.2001 was already recorded at the top of the notice (Ex.PG), thus, the recovery seems to be planted.”*

In view of the above, this Court has no option except to allow the present appeal and set aside the conviction as well as sentence of the appellant.

Consequently, the appeal is allowed; impugned judgment of conviction along with order of sentence dated 15.10.2004 passed by learned Special Court, Kurukshetra is set aside. Resultantly, appellant is acquitted of the charge under Section 15 of the Act.

As the appellant is already on bail, thus, his bail bonds/ surety bonds stand discharged.

Since the appellant is facing the agony of criminal proceedings for the last more than 19 years and the recovery seems to be planted, therefore, this Court deems it appropriate to burden State of Haryana with costs of Rs.20000/- to be paid to the appellant within a period of three months from the receipt of certified copy of this order.

**August 30, 2019**  
**sanjay**

**(MAHABIR SINGH SINDHU)**  
**JUDGE**

Whether speaking/ reasoned: Yes/No  
Whether Reportable: Yes/No