

IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH

1. CRA-D-820-DB-2018

Hardeep Singh @ Deepa

... Appellant

Versus

State of Haryana

... Respondent

2. CRA-S-6521-SB-2018(O&M)

Amit Kumar

... Appellant

Versus

State of Haryana

... Respondent

Reserved on : 01.03.2019
Date of decision : 07.03.2019

CORAM: *HON'BLE MR. JUSTICE RAJIV SHARMA*
HON'BLE MR.JUSTICE KULDIP SINGH

Present: Mr.Sandeep Kotla, Advocate
for the appellant in CRA-D-820-DB-2018.

Mr.Anil Kumar Malik, Advocate
for the appellant in CRA-S-6521-SB-2018.

Mr. Vishal Garg, Addl.A.G. Haryana.

RAJIV SHARMA, J.

Since common questions of law and facts are involved in both these appeals, therefore these are taken up together and disposed of by a common judgment.

2. These appeals arise out of the judgment and order dated

21.08.2018 and 24.08.2018 rendered by the learned Special Judge, Panipat, in NDPS Case No.10 of 2017 whereby appellant Amit Kumar was charged with and tried for offence punishable under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as “NDPS Act”) and appellant Hardeep Singh @ Deepa along with co-accused Harvel Singh, Gurmeet Singh @ Ladi and Ranjit Singh @ Sethi were charged with and tried for offence punishable under Section 21 read with Section 29 of the NDPS Act.

3. Appellant Amit Kumar was convicted and sentenced to undergo rigorous imprisonment for a period of one year and to pay fine of Rs.10,000/- and in default of payment of fine to further undergo simple imprisonment for a period of two months for the offence punishable under Section 21(b) of the NDPS Act. Appellant Hardeep Singh @ Deepa was convicted and sentenced to undergo rigorous imprisonment for a period of 15 years and to pay fine of Rs.1,50,000/- and in default of payment of fine to further undergo simple imprisonment for a period of two years for the offence punishable under Section 21(c) of the NDPS Act. Co-accused Gurmeet Singh @ Ladi and Ranjit Singh @ Sethi were acquitted whereas co-accused Harvel Singh had died during the course of trial.

4. The case of the prosecution in a nutshell is that on 26.01.2015 at about 06.00 P.M., Sub Inspector / SHO Lalit Kumar along with police officials was present at platform No.1 near over bridge, Railway Station, Panipat. In the meantime, one person was seen coming towards over bridge from main gate side and on seeing police party, he turned back and tried to escape. He was apprehended. He disclosed his identity to be Amit Kumar.

He was served notice under Section 50 of the NDPS Act. Accused opted to

be searched in the presence of a gazetted officer. Tirath Ram, Deputy Superintendent of Police, Railways, was incidentally present in Panipat in connection with checking on the occasion of Republic Day. He was informed vide notice under Section 42 of the NDPS Act. Sub Inspector / SHO Lalit Kumar conducted search of accused Amit Kumar. Amit Kumar was carrying smack wrapped in a polythene, which was recovered from the back pocket of his pant. On weighing, smack was found to be 8 grams. Two samples of 2 grams each were separated, kept in two separate plastic containers and were converted into parcels. Remaining smack weighing 4 grams along with polythene was kept in a separate container and was converted into a parcel. One seal each of 'AK' was affixed on the aforesaid parcels. The seal after use was handed over to ASI Raj Kumar No.552. DSP Tirath Ram also affixed one seal of 'RK' on the said parcels. These three parcels were taken in possession. The FIR was registered. However during course of investigation, accused Amit Kumar made disclosure statement that he had purchased said smack from one Hardeep Singh @ Deepa at Shahadra, Delhi. Amit Kumar was produced before Court along with samples of smack and compliance of Section 52-A of the NDPS Act was made. On 29.01.2015, investigating team had reached at the house of Hardeep Singh @ Deepa situated in Shashtri Colony, Panipat and found four persons sitting in a vacant plot in front of his house. On seeing police party, Harvel Singh son of Bahadur Singh resident of Shashtri Colony, Panipat gave a briefcase of black colour inscribed with "Donex" to Hardeep Singh @ Deepa. Hardeep Singh @ Deepa tried to run away towards railway line. They were apprehended. Other two boys were also apprehended. They disclosed their names as Gurmeet Singh @ Ladi and Ranjit Singh @ Sethi.

The bag was searched. It contained smack wrapped in two polythenes of black colour. On weighing, it was found to be 500 grams. Two samples of 5 grams each were separated, kept in two separate plastic containers and were converted into parcels. Remaining smack weighing 490 grams along with polythene was kept in a separate container and was converted into a parcel. One seal each of 'AK' was affixed on the aforesaid parcels. The seal after use was handed over to ASI Dalbir Singh. A sum of Rs.1,42,000/- was also recovered from the said briefcase. Section 52-A of the NDPS Act was complied with. The investigation was completed and challan was put up after completing all the codal formalities.

5. Prosecution examined a number of witnesses. The statements of appellants along with co-accused were also recorded under Section 313 Cr.P.C. They denied the case of the prosecution. The accused examined three witnesses in their defence. The appellants were convicted and sentenced as noticed hereinabove. Hence these appeals.

6. Learned counsel appearing for the appellants have vehemently argued that the prosecution has failed to prove the case against the appellants.

7. Learned counsel appearing on behalf of the State has supported the judgment and order dated 21.08.2018 and 24.08.2018.

8. We have heard learned counsel for the parties and have gone through the judgment and record very carefully.

9. PW-2 Tirath Ram testified that he was posted as DSP, Headquarter GRP, Ambala, on 26.01.2015. He was present in Panipat. He received telephonic information that a boy was apprehended. He was suspected to have narcotic substance. He was searched by I.O. Lalit Kumar

in the presence of ASI Raj Kumar and Tara Chand. Smack wrapped in the polythene was recovered from the pocket of the pant. It was 8 grams. Two samples of 2 grams each were separated and put in separate polythene and converted into sealed parcel in separate plastic containers. Remaining smack was put in the same polythene and converted into sealed parcel in separate plastic container. He affixed his seal 'RK'. In his cross-examination, he deposed that he remained present on the spot for one hour. Writing work was carried out at the spot while sitting on the bench. He did not know to whom 'RK' seal belonged. He obtained the seal 'RK' on the same day from some other I.O. It could be of ASI Raj Kumar. He was member of raiding party. He kept the seal after use with him for 5-7 days. He did not remember whether he returned the seal to ASI Raj Kumar. He did not remember whether he used this seal in some other case or not. He affixed three seals of 'RK' on the parcels and one on the sample seal. The smack was weighed with the help of electronic machine. It was with the I.O. He did not affix his signatures on the parcels.

10. PW-4 Raj Kumar deposed that he was posted as ASI in P.S. GRP Panipat on 26.01.2015. He along with SI Lalit Kumar and SI Tara Chand was present at the platform near over bridge. A young boy was coming towards the over bridge from main gate. On seeing the police party, he turned back. He was apprehended. Notice under Section 50 of the NDPS Act was served by the SHO. Accused Amit Kumar replied that he wanted to be searched before a gazetted officer. DSP Tirath Ram was present in Panipat. On the direction of DSP, accused was searched by I.O. Lalit Kumar. Contraband wrapped in polythene was recovered from the pocket of pant. It

weighed to be 8 grams. Two samples of 2 grams each were separated. These were put in separate polythene and converted into separate sealed parcels. Residue was put in the same polythene and converted into sealed parcel in separate plastic container. DSP affixed his seal of 'RK' besides the seal of I.O. All the parcels along with sample seal were taken into possession. Accused Amit Kumar suffered disclosure statement Ex.PH. On 28.01.2015 he again suffered disclosure statement Ex.PH/1. He along with ASI Tara Chand, Jiya Lal and SHO Lalit Kumar were associated in the investigation of this case. On the basis of disclosure statement made by Amit Kumar, accused Hardeep Singh @ Deepa along with accused Ranjit Singh @ Sethi, Gurmeet Singh @ Ladi and Harvel Singh were apprehended. Notice under Section 50 of the NDPS Act Ex.PI was served upon accused Hardeep Singh @ Deepa. He reposed faith in I.O. for search. Accused was carrying a briefcase in his hand. Smack was recovered from a black polythene. Two samples of 5 grams of each were separated in polythene. Residue was wrapped in the same polythene and put in a plastic container. The seal was affixed by the I.O. The seal after use was handed over to ASI Dalbir Singh of RPF. Accused Hardeep Singh @ Deepa made disclosure statement Ex.PL. Accused Ranjit Singh @ Sethi made disclosure statement Ex.PM. Accused Gurmeet Singh @ Ladi made disclosure statement Ex.PN. Accused Harvel Singh made disclosure statement Ex.PO. Accused Hardeep Singh @ Deepa also suffered disclosure statement Ex.PQ, accused Gurmeet Singh @ Ladi Ex.PR, accused Ranjit Singh @ Sethi Ex.PS, accused Hardeep Singh @ Deepa Ex.PT and accused Harvel Singh Ex.PU. In his cross-examination he admitted that tea stall was situated near the RMS office about 50 meters

back from the place of occurrence. There were so many hawkers present near the place of occurrence. Writing work was done at the spot while sitting on the bench. The whole proceedings consumed 3½ hours. He admitted that no date was mentioned on Ex.PF and Ex.PG. DSP Tirath Ram was summoned by SHO Lalit Kumar on telephone. Signatures of the DSP were not appended on the memo. I.O. affixed three seals on all the parcels. The seal of 'AK' was with the SHO but he did not know in whose name it was issued. The DSP affixed one seal of 'RK' on each parcels. The seal of 'RK' belonged to him. He handed over the seal 'RK' to the DSP Tirath Ram to use it. DSP Tirath Ram had not returned the seal of 'RK' to him. DSP had returned the seal of 'RK' to him after two months. He had not used this seal of 'RK' during those two months. He further deposed that accused were apprehended at about 09.30 A.M. on 29.01.2015. He admitted that public persons were present near the railway lines. I.O. tried to join public persons in the investigation but they showed their inability. Besides Hardeep Singh @ Deepa, notice under Section 50 of the NDPS Act was not served to anyone. It was written in the notice that whether you want to be searched before a gazetted officer or before I.O.

11. PW-5A Subhash Chander deposed that he was posted as EASI in GRP, P.S. Panipat. MHC Surender Kumar handed over to him two sealed parcels containing smack seal with the seal of 'AK' and 'RK' vide receipt No.575 for depositing the same to FSL, Madhuban. He deposited the same on the same day and on coming back to the police station, the receipt was handed over to MHC.

12. PW-5 ASI Dalbir Singh deposed that they apprehended accused

Hardeep Singh @ Deepa. He was carrying some narcotic substance. Notice was served upon him. Hardeep Singh @ Deepa reposed faith in SI Lalit Kumar. Thereafter search of briefcase was carried out. Smack was recovered from it. The samples were drawn. A sum of Rs.1,42,000/- was also recovered.

13. PW-6 Lalit Kumar was the I.O. He deposed that on 26.01.2015 he was present at the platform. Amit Kumar was apprehended. He was served with a notice under Section 50 of the NDPS Act. Accused Amit Kumar opted to be searched before gazetted officer. DSP Tirath Ram was informed. Accused Amit Kumar was searched. Contraband was recovered. Samples were drawn. FIR was registered. Amit Kumar was interrogated by him. Accused along with case property was produced before the Magistrate. On 27.01.2015 accused Amit Kumar was again interrogated. On 28.01.2015 he made disclosure statement Ex.PH/1. Thereafter he along with other police officials went to Shashtri Colony, Panipat, on 29.01.2015. Hardeep Singh @ Deepa, Ranjit Singh @ Sethi, Harvel Singh and Gurmeet Singh @ Ladi were apprehended. He served notice Ex.PI upon accused Hardeep Singh @ Deepa. Accused Hardeep Singh @ Deepa submitted his reply Ex.PG showing faith in him. Briefcase was searched. Smack was recovered. Samples were drawn. He also prepared site plan. In his cross-examination he admitted that no independent witness was joined in the investigation by him though efforts were made. No action was taken against the persons who refused to join investigation. He admitted that he had not mentioned the date and time on notice Ex.PF and reply Ex.PG. Electronic scale was arranged from the store of Mohan Lal contractor for weighment. He did not

remember who brought the same. Notice was served upon Hardeep Singh @ Deepa, Ranjit Singh @ Sethi, Harvel Singh and Gurmeet Singh @ Ladi.

14. The case of the prosecution precisely is that appellant Amit Kumar was arrested on 26.01.2015 from Railway Station of Panipat. Smack was recovered from his pant. It weighed 8 grams. Samples were drawn. Similarly accused Harvel Singh, Hardeep Singh @ Deepa, Gurmeet Singh @ Ladi and Ranjit Singh @ Sethi were arrested. Smack weighing 500 grams was recovered from the bag carried by Hardeep Singh @ Deepa. Accused Harvel Singh died during the pendency of trial.

15. According to the prosecution, appellant Amit Kumar was served with a notice under Section 50 of the NDPS Act vide Ex.PF. PW-6 Lalit Kumar I.O. has categorically admitted in his cross-examination that he had not mentioned the date and time on notice Ex.PF. We have gone through the contents of notice served upon appellant Amit Kumar vide Ex.PF. I.O. had not given the option to Amit Kumar to be searched before a gazetted officer or a Magistrate. He had given option to Amit Kumar to be searched by him in the presence of a gazetted officer or a Magistrate. Similar notice under Section 50 of the NDPS Act was served upon appellant Hardeep Singh @ Deepa vide Ex.PI. We have gone through the contents of notice Ex.PI. I.O. had not given him choice to be searched before a gazetted officer or a Magistrate. He has given option to Hardeep Singh @ Deepa to be searched by him in front of a gazetted officer or a Magistrate. There is violation of Section 50 of the NDPS Act. The provisions of Section 50 of the NDPS Act are mandatory. The accused was to be given only two choices, to be searched either before a gazetted officer or a Magistrate.

However, I.O. had given the third choice to the accused to be searched by him in the presence of gazetted officer or a Magistrate. The appellants have legal right to be informed that they have a right to be searched before a gazetted officer or a Magistrate. It is nowhere mentioned in Ex.PF and Ex.PI that the appellants had legal right to be searched before the gazetted officer or a Magistrate. There are only two options required to be given to the accused. There is no provision for third option.

16. Their Lordships of the Hon'ble Supreme Court in ***State of Rajasthan v. Parmanand, (2014) 5 SCC 345***, have held that there is a need for individual communication to each accused and individual consent by each accused under Section 50 of the Act. Their Lordships have also held that Section 50 does not provide for third option. Their Lordships have also held that if a bag carried by the accused is searched and his personal search is also started, Section 50 would be applicable. Their Lordships have held as under:

“15. Thus, if merely a 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 the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application. In this case, respondent No.1 Parmanand’s bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of respondent No.2 Surajmal was also conducted. Therefore, in light of judgments of this Court mentioned in the preceding paragraphs, Section 50 of the NDPS

Act will have application.

16. It is now necessary to examine whether in this case, Section 50 of the NDPS Act is breached or not. The police witnesses have stated that the respondents were informed that they have a right to be searched before a nearest gazetted officer or a nearest Magistrate or before PW-5 J.S. Negi, the Superintendent. They were given a written notice. As stated by the Constitution Bench in Baldev Singh, it is not necessary to inform the accused person, in writing, of his right under Section 50 (1) of the NDPS Act. His right can be orally communicated to him. But, in this case, there was no individual communication of right. A common notice was given on which only respondent No.2 – Surajmal is stated to have signed for himself and for respondent No.1 – Parmanand. Respondent No.1 Parmanand did not sign.

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19. We also notice that PW-10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate or before a nearest gazetted officer or before PW-5 J.S. Negi, the Superintendent, who was a part of the raiding party. It is the prosecution case that the respondents informed the officers that they would like to be searched before PW-5 J.S. Negi by PW-10 SI Qureshi. This, in our opinion, is again a breach of

Section 50(1) of the NDPS Act. The idea behind taking an accused to a nearest Magistrate or a nearest gazetted officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer. Therefore, it was improper for PW-10 SI Qureshi to tell the respondents that a third alternative was available and that they could be searched before PW-5 J.S. Negi, the Superintendent, who was part of the raiding party. PW-5 J.S. Negi cannot be called an independent officer. We are not expressing any opinion on the question whether if the respondents had voluntarily expressed that they wanted to be searched before PW-5 J.S. Negi, the search would have been vitiated or not. But PW-10 SI Qureshi could not have given a third option to the respondents when Section 50(1) of the NDPS Act does not provide for it and when such option would frustrate the provisions of Section 50(1) of the NDPS Act. On this ground also, in our opinion, the search conducted by PW-10 SI Qureshi is vitiated.

20. We have, therefore, no hesitation in concluding that breach of Section 50(1) of the NDPS Act has vitiated the search. The conviction of the respondents was, therefore, illegal. The respondents have rightly been acquitted by the High Court. It is not possible to hold that the High Court's view is perverse. The appeal is, therefore, dismissed."

17. The FSL report is Ex.PX. Recovery has been effected from the person of Amit Kumar though recovery was effected from the briefcase carried by Hardeep Singh @ Deepa but his personal search was also carried out.

18. Their Lordships of Hon'ble the Supreme Court in ***Arif Khan @ Agha Khan vs State of Uttarakhand, 2018 (2) R.C.R. (Criminal) 931***, observed that search and recovery has to be made in conformity with the requirements of Section 50 of the Act. Their Lordships held as under:-

“19. The short question which arises for consideration in the appeal is whether the search/recovery made by the police officials from the appellant (accused) of the alleged contraband (charas) can be held to be in accordance with the procedure prescribed under Section 50 of the NDPS Act.

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21. What is the true scope and object of Section 50 of the NDPS Act, what are the duties, obligation and the powers conferred on the authorities under Section 50 and whether the compliance of requirements of Section 50 are mandatory or directory, remains no more res integra and are now settled by the two decisions of the Constitution Bench of this Court in State of Punjab vs. Baldev Singh (1999) 6 SCC 172 and Vijaysinh Chandubha Jadeja (supra).

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23. Their Lordships have held in Vijaysinh

Chandubha Jadeja (supra) that the requirements of Section 50 of the NDPS Act are mandatory and, therefore, the provisions of Section 50 must be strictly complied with. It is held that it is imperative on the part of the Police Officer to apprise the person intended to be searched of his right under Section 50 to be searched only before a Gazetted officer or a Magistrate. It is held that it is equally mandatory on the part of the authorized officer to make the suspect aware of the existence of his right to be searched before a Gazetted Officer or a Magistrate, if so required by him and this requires a strict compliance. It is ruled that the suspect person may or may not choose to exercise the right provided to him under Section 50 of the NDPS Act but so far as the officer is concerned, an obligation is cast upon him under Section 50 of the NDPS Act to apprise the suspect of his right to be searched before a Gazetted Officer or a Magistrate. (See also Ashok Kumar Sharma vs State of Rajasthan, 2013 (2) SCC 67 and Narcotics Control Bureau vs Sukh Dev Raj Sodhi, 2011 (6) SCC 392).

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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.

19. It has come in the statement of witnesses that appellant Amit Kumar was apprehended at the railway station where many people were present. However they were not associated during the arrest, search and seizure of the case property. Similarly when the police party went to Shashtri Colony, independent witnesses were available but they were not associated. It was imperative for the police official to associate independent witnesses since these were readily available. The place from where the appellants were apprehended was neither desolated nor isolated.

20. Accordingly the appeals are allowed and judgment and order

dated 21.08.2014 and 24.08.2018 are set aside. The appellants are acquitted.
The appellants are in custody. They be released forthwith.

(RAJIV SHARMA)
JUDGE

(KULDIP SINGH)
JUDGE

March 07, 2019.
Davinder Kumar

Whether speaking / reasoned	Yes/No
Whether reportable	Yes/No