

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

CRA-D No. 319-DB of 2017 (O&M)

Reserved on : 22.2.2019

Date of decision : 27.2.2019

Gagandeep Singh @ Bau

.... Appellant

versus

State of Punjab

... Respondent

**Coram: Hon'ble Mr. Justice Rajiv Sharma
Hon'ble Mr. Justice Kuldip Singh**

Present Mr. Vipul Jindal and Mr. Ranbir Singh, Advocates,
for the appellants.
Mr. S. P. S. Tinna, Additional Advocate General, Punjab.

Rajiv Sharma, J.

1. This appeal is instituted against the judgment and order dated 29.11.2016, rendered by learned Judge, Special Court, Amritsar, in NDPS Case No. 318 of 2016 dated 29.3.2016, by appellant Gagandeep Singh alias Bau. He was charged with and tried for the offence punishable under Sections 21 and 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, 'the Act'). He was convicted and sentenced to undergo rigorous imprisonment for 12 years and to pay a fine of ₹ 1,50,000/- and in default of payment of fine, to undergo further rigorous imprisonment for a period of six months.

2. The case of the prosecution in a nutshell is that on 25.10.2014, ASI Mukhtiar Singh of Police Station, Sultanwind, Amritsar, along with HC

Tajinder Singh, Constable Jagdev Singh and other police officials, was going from Chatiwind Chowk towards Kot Mit Singh, in connection with patrolling and search of bad elements. When they reached in front of Namdhari Kanda, one person came out of the street towards Tarn Taran Road. On seeing the police party, he became perplexed and turned back and tried to flee. ASI Mukhtiar Singh asked the person to stop, however, he started running. ASI Mukhtiar Singh apprehended him with the help of police officials. He disclosed his name as Gagandeep Singh alias Bau. ASI Mukhtiar Singh tried to join independent witnesses in the investigation. The polythene envelope carried by the accused was found to be containing intoxicant powder. Out of the recovered intoxicant powder, 10 grams was separated as sample and converted into parcel. The remaining intoxicant on weighment came out to be 290 grams. The same was also converted into separate parcel. Both the parcels were sealed by ASI Mukhtiar Singh with his seal impression 'MS'. Sample seal was prepared separately and one specimen seal was affixed on Form M29. Seal after use was handed over to HC Tajinder Singh. Form M29 was prepared at the spot. Ruqa was sent to the police station. FIR was registered by Sub-Inspector Prabhjot Singh. ASI Mukhtiar Singh, Investigating Officer prepared rough site plan of the place of recovery. Accused was arrested. He was taken to police station. The Investigating Officer handed over both the parcels, Form M29 and sample seal to SHO Arun Sharma, who after verifying the intactness of the seals on the parcels, affixed his seal 'AS' on both the parcels and completed the remaining codal formalities of Form M29. The case property was deposited in the double lock. On the next day i.e. 26.10.2014, SHO Arun Sharma

handed over to ASI Mukhtiar Singh, the sample parcel, bulk parcel, Form M29 and specimen seal after taking out of the double lock of Malkhana for verification of the sample from the Ilaqa Magistrate. The Investigating Officer produced the case property and accused before the Ilaqa Magistrate. The Court inspected the case property and drawn 10 grams intoxicant powder from the bulk parcel after breaking its seals and prepared representative parcel. It was sealed by the Presiding Officer with his seal 'SPS' and ASI Mukhtiar Singh also affixed his seal 'MS'. Similarly the bulk parcel of 280 grams intoxicant powder was resealed by the Court with seal 'SPS' and ASI Mukhtiar Singh also affixed his seal 'MS' on the bulk parcel. The case property thereafter was kept in double lock of Malkhana. On 31.10.2014, SHO Arun Sharma operated the double lock and handed over to ASI Mukhtiar Singh one bulk parcel of 280 grams intoxicant powder and one representative parcel of 10 grams intoxicant power duly sealed with seals 'SPS' and 'MS' for depositing the same in the Judicial Malkhana, Amritsar. ASI Mukhtiar Singh deposited the case property on the same day and the receipt thereof was handed over to the SHO. Samples were sent to the Chemical Examiner through HC Gurinder Singh. The investigation was completed and challan was put up against the accused after completion of all the codal formalities.

3. The prosecution examined a number of witnesses in support of the case. The statement of the accused was also recorded under Section 313 Cr.P.C. According to him, he was falsely implicated in the case. He has also produced DW1 Ajit Singh in his defence. He was convicted and sentenced, as noticed above. Hence, the present appeal.

4. Learned counsel appearing on behalf of the appellant vehemently argued that the prosecution has failed to prove its case. Learned counsel appearing for the State vehemently argued that the prosecution has proved its case beyond reasonable doubt and supported the judgment and order of the learned Court below.

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

6. PW1 HC Tejinder Singh deposed that on 25.10.2014, he was posted as HC at Police Station, Sultanwind, Amritsar. He alongwith other police officials was present in the police party headed by ASI Mukhtiar Singh. When the police party reached near Namdhari Kanda, they saw one person coming from the street. On seeing the police party, he became perplexed and turned back. He was questioned by the Investigating officer. He disclosed his name as Gagandeep Singh @ Bau. On checking, the polythene held by the accused, intoxicant powder was recovered. Out of the recovered intoxicant powder, 10 grams was separated as sample and converted into parcel by putting the same into plastic container. The remaining, on weighment came to be 290 grams. The same was also converted into separate parcel after putting the same into plastic container. Both the parcels were sealed by the Investigating Officer with his seal impression 'MS'. Sample seal was prepared separately. One specimen seal was affixed on Form M29. The accused was arrested. The case property was handed over to SHO Arun Sharma. He affixed his seal 'AS'. The case property was deposited in the double lock Malkhana. In his cross-examination, he deposed that they left at about 4.00 P.M. for patrolling. The

place is thoroughfare and there is bazar on both the sides of the road. People were coming and going. Police party was in uniform. They reached at the spot at about 5.15 P.M. Accused was seen coming from a distance of 100 karams. Accused tried to slip away, however, he was apprehended. No intimation was given to Halqa officer/ GO from the spot by ASI Mukhtiar Singh regarding the arrest of the accused. No intimation was given to the Commissioner of Police from the spot by the ASI. The accused was not apprised of his legal right to be searched before a Gazetted Officer or the Executive Magistrate. Ruqa was sent from the spot at about 6.30 P.M.

7. PW2 ASI Mukhtiar Singh testified that on 25.10.2014 he was posted as ASI/IO at Police Station, Sultanwind, Amritsar. He along with other police officials was on patrol duty. They saw accused coming from the side of street near Namdhari Kanda. On seeing the police party, he tried to escape. He was nabbed. He was having something in a polythene in right pocket of his pant. He was questioned. He disclosed his name as Gagandeep Singh @ Bau. On checking the polythene, intoxicant powder was recovered. Out of recovered intoxicant powder, one sample of 10 grams was separated and converted into parcel. Remaining 290 grams intoxicant powder was also converted into parcel. He prepared Form M29 at the spot. He also prepared rough site plan, Ex.P7, of the place of recovery. He handed over the case property along with Form M29 to SHO Arun Sharma. The same was deposited in the Malkhana on the same day. On the next day i.e. 26.10.2014, SHO Arun Sharma handed over to him the sample parcel, bulk parcel, Form M29 and specimen seal after taking out from the double lock of Malkhana. He produced the case property and the accused before the Ilaqa Magistrate/

JMIC, Amritsar. The Court after inspecting the case property had drawn 10 grams intoxicant powder from the bulk parcel after breaking his seal and prepared representative parcel, which was sealed by the Court with its seal 'SPS' and his seal 'MS'. The bulk parcel of 280 grams intoxicant powder was resealed by the Court with his seal 'SPS'. He affixed his seal 'MS' on the bulk parcel and the Court passed order, Ex.P9. He handed over the sample parcel, Form M29 and specimen seals to SHO to be kept in Malkhana. On 31.10.2014, SHO Arun Sharma operated the double lock and handed over to him one bulk parcel of 280 grams intoxicant powder and one representative parcel of 10 grams intoxicant powder duly sealed with seals 'SPS' and 'MS' for depositing in the judicial malkhana, Amritsar. He deposited the same on the same day vide receipt, Ex.P12. The receipt was handed over to the SHO. In his cross-examination, he admitted that the place of occurrence was thoroughfare and people were coming and going. He had purchased the weighing machine himself. He did not give information to his superior officer for having weighing machine and weight in his possession. There is bazar on the way. There are shops on both sides of the road from the police station to the place of occurrence. None of the shopkeeper was asked to join the police party. He did not give intimation to the Commissioner of Police, Amritsar. No intimation was given to the Halqa Officer about the arrest of the accused. Police party remained at the spot for about four hours. He did not give any option to the accused about his legal right to be searched before a Gazetted Officer or the Executive Magistrate. The writing work was completed while sitting on the road side near Namdhari Kanda.

8. PW3 Inspector Arun Sharma deposed that he was posted as SHO, Police Station, Sultanwind on 25.10.2014. ASI Mukhtiar Singh produced before him one sample parcel of 10 grams intoxicant powder and one bulk parcel containing 290 grams intoxicant powder duly sealed with seal impression 'MS' along with Form M29. He affixed his seal 'AS'. He kept both the parcels along with the sample seals and Form M29 in double lock of Malkhana. On the next day i.e. on 26.10.2014, he handed over both the parcels duly sealed with seal impression 'MS' and 'AS' along with the sample seals and Form M29 after taking the same out of the double lock of Malkhana to ASI Mukhtiar Singh to be produced before the Magistrate. The Court had drawn 10 grams intoxicant powder from the bulk parcel after breaking the seal and prepared representative parcel, which was sealed with seal 'SPS'. The same were ordered to be kept in Judicial Malkhana. The Investigating Officer handed over all the parcels along with Form M29 and sample seals to him to be deposited in double lock of Malkhana.

9. PW4 HC Gurinder Singh deposed that on 8.12.2014 he deposited sample parcel of 10 grams intoxicant powder in the office of Chemical Examiner, Kharar.

10. PW5 Inspector Parvesh Chopra deposed that on 8.12.2014, he was posted as SHO, Police Station, Sultanwind. The sample parcel with seals 'MS' and 'AS' along with sample seal and form M29 was lying in the double lock. He operated the double lock and handed over the sample parcel of 10 grams intoxicant powder to HC Gurinder Singh to be deposited in the office of Chemical Examiner, Kharar. In his cross-examination, he admitted that he sent the sample to the Chemical Examiner for the first time on

8.12.2014. He did not know whether the sample was already sent before 8.12.2014 to the office of Chemical Examiner by the SHO, who was posted prior to his posting.

11. What emerges from the statements recorded hereinabove is that the appellant was apprehended from a busy place known as Namdhari Kanda. According to PW1 HC Tejinder Singh, the appellant was carrying contraband in his pocket. Similarly PW2 ASI Mukhtiar Singh has also testified that the appellant was carrying something in a polythene in right pocket of his pant. The contraband was recovered from his person. PW1 HC Tejinder Singh categorically admitted in his statement that the accused was not apprised of his legal right to be searched before a Gazetted Officer or the Executive Magistrate. Similarly PW2 ASI Mukhtiar Singh has also admitted in his cross-examination that he gave no option to the accused about his legal right to be searched before a Gazetted Officer. Since the contraband has been recovered from the person of the appellant, he was to be apprised of his legal right to be searched in the presence of a Gazetted Officer or Executive Magistrate.

12. The prosecution has failed to ensure mandatory compliance of Section 50 of the Act, as the alleged recovery of the contraband was made by the police party from the person of the appellant.

13. Further the Judicial Magistrate had put his seal 'SPS' on the representative sample but the police did not send the same for chemical examination. No explanation has been given why the sample drawn by the Judicial Magistrate was not sent for chemical examination.

14. 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.

20. xx xx xx

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).

22. xx xx xx

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).

24. to 27. xx xx xx

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.

15. The prosecution has failed to prove the case against the appellant beyond reasonable doubt. Accordingly, the appeal is allowed. He is acquitted of the charges framed against him. He be released forthwith.

(Rajiv Sharma)
Judge

27.2.2019
vs

(Kuldip Singh)
Judge

Whether speaking/reasoned

Yes/No

Whether reportable

Yes/No