

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

CRA-S-1896-SB of 2013

Date of Decision: August 20, 2019

Kulwinder Singh @ Kala

.....Appellant

Vs.

State of Punjab

.....Respondent

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

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Present:- Mr. H.S. Jagat, Advocate for the appellant.
Mr. V.G. Jauhar, Sr. DAG, Punjab.

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MAHABIR SINGH SINDHU, J.

Present appeal has been filed against the impugned judgment and order dated 19.02.2013 passed by learned Additional Sessions Judge-cum-Judge Special Court, Rupnagar, for short 'Special Court', whereby the appellant was convicted and sentenced under Section 22 (c) of the Narcotic Drugs and Psychotropic Substances Act, 1985, for short 'the Act', to undergo rigorous imprisonment for a period of 10 years and to pay fine of Rs.1,00,000/- with a default clause to further undergo imprisonment for 2 years.

2. In brief, the prosecution case is that on 11.10.2010, SI Nirmal Singh (PW4), CIA Staff, Ropar, along with other police officials were going from Bela Chowk to Khairabad in connection with checking of suspected persons. At about 5.00 p.m., when they reached near T-point of Village Shampura, a motorcycle, on which three persons were riding, was seen coming from opposite direction. Upon noticing the police officials, they tried to turn back, but on suspicion, all three were apprehended and on enquiry, they disclosed their names as Balwinder Singh, Kulwinder Singh

and Ranjit Singh. PW4 introduced himself and told that there is a suspicion of some contraband in their possession, therefore, they are to be searched. He offered them “whether they want to be searched by him or in the presence of some Gazetted Officer or any Magistrate, and they have a legal right.” Appellant along with other co-accused reposed confidence with PW4 and stated that he can conduct the search. Upon which separate consent memos were prepared, which were duly signed by all three accused as well as attesting witnesses. From personal search of appellant, 20 packets of Phenotil tablets containing 100 tablets in each packet (total 2000 tablets), were recovered from his right pocket of the trouser; whereas a recovery of 140 loose capsules of Parvonspas was effected from co-convict Ranjit Singh from his right pocket of the trouser. Nothing was recovered from accused Balwinder Singh. Two samples from each of the contraband recovered at the instance of present appellant as well as co-convict Ranjit Singh were taken separately and put into separate parcels. All the parcels along with the contraband were sealed with the impression ‘NS’ and were taken into possession vide recovery Memo. Ex.PW4/A. Seal after use was handed over to HC Shingara Singh, No. 102, CIA Staff Ropar(PW-3). Thereafter, Ruqa Ex.PW4/B was sent to the police station, on the basis of which formal FIR, Ex.PW4/C was registered by ASI Shingara Singh, PS City Rupnagar under Section 22 of the Act and Section 27 of the Drugs and Cosmetics Act, 1940, for short ‘Act of 1940’. A rough site plan Ex.PW4/E of the place of recovery was prepared. The motorcycle was taken into police possession vide recovery memo Ex.PW4/F. After conducting physical search (Jamatalashi) of all the

accused, they were arrested and intimation to that effect was sent to their relatives. Statements of witnesses were recorded under Section 161 Cr.P.C., and all accused along with case property were produced before Inspector-Digvijay Kapil, SHO PS City, Ropar, (PW7) who after verifying the facts affixed his seal bearing impression 'DK' on the case property and the same was deposited with the MHC.

3. On the next day, i.e. 12.10.2010, all the accused along with case property including four samples were produced before the Chief Judicial Magistrate, Ropar. After opening the seal of the case property, representative sample of 100 tablets of Phenotil and 10 capsules of Parvonspas were separately drawn to be kept as proof thereof and remaining case property was repacked and sealed with seal of the Court reflecting letters 'CJM/R'. Case property alongwith sample drawn by the Court as well as one sample taken at the time of recovery, was ordered to be deposited in the Judicial Malkhana. Remaining one sample already drawn at the time of recovery by the police was handed over to SI Nirmal Singh on his request. Photographs of the contraband were also taken in the Court and case property was ordered to be disposed off by the Committee as per Rules and a certificate to that effect was issued. All the accused were sent to Judicial custody. After receipt of result from the Forensic Science Laboratory (for short 'FSL') of both the samples, report under Section 173 Code of Criminal Procedure, for short 'Cr.P.C.' was submitted before the competent Court and copies of the same were supplied to the accused as per provisions of Section 207 Cr.P.C. Finding a prima facie case under Section 22 of the Act, all three accused were

charge-sheeted by the learned Special Court vide order dated 04.07.2011, to which they pleaded not guilty and claimed trial.

4. Prosecution, in order to prove its case, examined following seven witnesses:--

PW1 HC Navin Kumar, No.254/R (deposited sample with the Director, FSL, Punjab at Chandigarh on 27.10.2010 and tendered his affidavit (Ex.PW1/A);

PW2 ASI Rajinder Singh No.372 (partly investigated the case and recovered the documents relating to ownership of Motorcycle bearing registration No.PB-71-1366);

PW3 HC Shingara Singh, No.102, CIA Staff, Rupnagar, (witness to the recovery);

PW4 SI Nirmal Singh, (Seizing Officer/ Investigating Officer);

PW5 Gurinder Singh, (Clerk, Office of SDM, Chamkaur Sahib, who produced the record pertaining to the ownership of motorcycle No.PB-71-1366);

PW6 HC Kulwinder Singh, No.337; Produced Register No.19 regarding DDR No.68 dated 11.10.2010 & DDR No.35 dated 27.10.2010 and tendered his affidavit Ex.PW6/A.

PW7 DSP Digvijay Kapil, the then SHO, PS City Ropar.”

Following documentary evidence was also produced by the prosecution, in support of the case:-

Ex.PW2/A Application and report of Registering Authority
and
Ex.PW2/B re: Motorcycle No.PB-71-1366

Ex.PW3/A Consent Memo- Ranjit Singh

Ex.PW3/B Consent Memo- Kulwinder Singh

Ex.PW3/C Consent Memo- Balwinder Singh

Ex.PW4/A Joint Recovery Memo
Ex.PW4/B Ruqa
Ex.PW4/C FIR
Ex.PW4/D Endorcement on ruqa
Ex.PW4/E Site plan
Ex.PW4/F Recovery of Motor Cycle No.PB-71-1366
Ex.PW4/G Physical search (Jamatalashi)- Ranjit Singh
Ex.PW4/H Physical search (Jamatalashi)-Balwinder Singh
Ex.PW4/J Physical search (Jamatalashi)-Kulwinder Singh
Ex.PW4/K Intimation to Relatives- Ranjit Singh
Ex.PW4/L Intimation to Relatives- Kulwinder Singh
Ex.PW4/L Intimation to Relatives- Balwinder Singh
Ex.PW4/M Sample Seal, impression NS/DK
Ex.DA Form M-29
Ex.PW4/N FSL Report
Ex.PW4/P Order of CJM Ropar, dated 12.10.2010.
Ex.PW5/A Registration Certificate of Motorcycle
Mark A Report of Drug Inspector, Ropar

5. The entire incriminating material was put to the accused under Section 313 Cr.P.C. but they claimed innocence and raised the plea of false implication due to enmity with HC Shingara Singh, who had purchased construction material from the shop of accused Ranjit Singh, but on demanding the money for the same, he felt aggrieved and falsely implicated the accused.

In defence accused examined three witnesses, namely, Nirmal Singh, Gurbax Singh, Gurcharan Singh, as DW1, DW2 and DW3, respectively.

6. After taking into consideration the material available on record and hearing both sides, learned Special Court, found the appellant as well as Ranjit Singh guilty. Appellant was sentenced under Section 22 (c) of the Act to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs.1,00,000/- with default clause to further undergo imprisonment for 2 years; whereas Ranjit Singh was sentenced under Section 22 (b) of the Act to undergo rigorous imprisonment for 2 years along with Rs.10000/- fine with default clause to further undergo imprisonment of 2 months; however, third accused Balwinder Singh was acquitted by giving him benefit of doubt. Hence, the present appeal.

7. It is necessary to mention here that co-convict Ranjit Singh, filed separate appeal bearing CRA-S-1857-SB of 2013, but during pendency of the same, he died on 16.06.2018 and the appeal was ordered to be abated by this Court, on 02.07.2019.

8. It is contended on behalf of the appellant that as per allegations of the prosecution itself, the recovery of contraband was effected from the right pocket of the appellant after his personal search, but the mandatory provisions of Section 50 of the Act have not been complied with, therefore, the impugned judgment and order of conviction are not legally sustainable. Further argued that there is no evidence on record that any inventory of the contraband or Form No.29 for sending the test sample was prepared by the Seizing Officer/ Investigating Officer at the relevant time. Also contended that there is an unexplained delay of 15 days while sending the sample to the FSL; thus, the recovery of alleged contraband has become doubtful.

Also argued that testimonies of defence witnesses have been wrongly discarded by learned Special Court.

On the other hand learned State counsel opposed the submissions of the appellant and contended that there is proper compliance of Section 50 of the Act and recovery of contraband in the present case is commercial in nature which is duly proved and as such, mere non-preparation of inventory or Form No.29 or even delay of 15 days in sending the samples are inconsequential. Further submitted that defence witnesses were merely procured just to create false plea and their testimonies have rightly been rejected by learned Special Court.

9. Heard both sides and perused the paper book.

10. PW4, Seizing Officer/ Investigating Officer reiterated the narration given in ruqa (Ex.PW4/B) and stated that after introducing himself to the appellant as well as to other co-accused, he informed them that there is suspicion of some contraband in their possession, therefore, they are to be searched. He further appraised that they have legal right to get their search conducted in his presence or in the presence of some Magistrate or Gazetted Officer. All the accused reposed confidence with him. Their consent memos to that effect were prepared separately which have been produced on record as Ex.PW3/A to PW3/C. It is necessary to mention here that the consent memo pertaining to appellant is Ex.PW3/B and unofficial translated version of the same, reads as under:-

“In presence of following witnesses, the person riding on Motor cycle, Hero Honda, bearing Registration No. PB-71-1366, was stopped on the basis of suspicion

and on enquiry he disclosed his name as Kulwinder Singh @ Kala son of Sadhu Singh, caste Ramdasia, resident of Village Jagatpura, Chamkaur Sahib. I, myself after giving introduction informed him that there is a suspicion of some contraband in his possession, hence, a search is to be conducted. Whether you want your search to be conducted by me or in the presence of any Gazetted Officer or Magistrate, you have a legal right; they can be called at the spot. He reposed faith in me and stated that you can conduct the search. Upon which the consent memo was written, which was signed by Kulwinder Singh and witnesses.”

He further deposed that case property was taken into possession by way of recovery memo Ex.PW4/A. As per the recovery memo, 20 packets of Phenotil tablets were recovered from right pocket of appellant's trouser, whereas recovery of 140 loose capsules of Parvon Spas was effected from right pocket of co-convict Ranjit Singh, wrapped in a polythene.

During cross-examination, this witness has categorically acknowledged that neither any inventory of contraband was prepared at the spot; nor any CFSL form was signed by him. Further stated that he did not open and check each of the packet of Phenotil tablets.

PW3, HC Shingara Singh, No. 102 while appearing in the Court on 27.09.2012, stated as under:-

“On effecting the search of their pockets, from the possession of Kulwinder Singh, 20 packets of Lomotil tablets were recovered each containing 100 tablets, from the possession of Balwinder Singh, 10 packets of Parvonspas were recovered each

containing 10 tablets and nothing was recovered from the possession of Ranjit Singh.”

After recording the above testimony, learned Special Court deferred the examination-in-chief of PW3 for another day and on 01.10.2012, this witness again on the point of recovery, deposed as under:-

“From the possession of Kulwinder Singh, 20 pouches of Lomotil tablets, from the possession of Ranjit Singh 140 capsules of Parvonspas and nothing was recovered from accused Balwinder Singh.”

During cross-examination by the present appellant, PW3 stated that *“all the accused were given a joint consent offer but the same was prepared separately.”* Further stated that *“he cannot tell that form No.M-29 was prepared at the spot.”*

PW1 HC Navin Kumar, No.254-R, while appearing in the Court stated that he deposited the sample with the FSL, Chandigarh on 27.10.2010, for chemical examination.

PW6 HC Kulwinder Singh, No.337, (MHC) Police Station City, Ropar, deposed that on 11.10.2010 total six parcels including two of Phenotil tablets, two parcels (each containing 10 capsules of Parvon Spas) as well as residue of 18 packets of tablets and 120 capsules sealed with the impression ‘NS/DK’, along with sample seal and Form No.29 were deposited with him in Malkhana by Inspector Digvijay Kapil (PW7). He further deposed that on 12.10.2010, all the above six parcels were handed over to SI Nirmal Singh (PW4), who produced the same before the learned CJM, and after drawing one sample each from the case property i.e.

Phenotil tablets and Parvon Spas Capsules, the residue was re-sealed with the impression 'CJM/R' and all the above six samples plus two representative samples drawn by the Court were returned to SI Nirmal Singh (PW4) who deposited the same with Malkhana. He further deposed that two parcels i.e. one containing Phenotil tablets and another 10 capsules of Parvon Spas with seal impression 'NS/DK' along with Form No.29 were handed over to HC Navin Kumar No.254/R, (PW1) for chemical examination with an instruction that same be deposited with the FSL, Chandigarh, after obtaining the docket from District Police Officer,(DPO) Rupnagar, and which were accordingly deposited by said Navin Kumar and acknowledgement to that effect was handed over to him. He further deposed that remaining six parcels were handed over to HC Sushil Kumar to deposit the same with the Judicial Malkhana and who after handing over these parcels to the concerned quarter, submitted a receipt to him.

During cross-examination, PW6 candidly stated that as per DDR No.68, dated 11.10.2010, made in Register No.19, it has not been recorded that Form No.29 was also deposited with him. Further acknowledged that as per DDR No.35 dated 27.10.2010, it is not recorded that sample seal and Form No.29 were also sent to the office of Chemical Examiner.

PW7 DSP Digvijay Kapil, stated that on 11.10.2010 he was posted as SHO, PS City, Ropar, and on that day, accused along with case property were produced before him. After verification of the case property, he affixed his seal bearing impression 'DK' and sample seal was separately

prepared. Further stated that case property was deposited with the MHC by him and the accused were sent to lock-up.

During cross-examination, PW7 admitted that on Form No.29 (Ex.DA) his signatures are not there at point Mark 'A'. Further stated that he did not open the parcels produced before him and just put his seal on the parcels. He also admitted that no entrustment memo or inventory was prepared by him. He even did not know whether any DDR was recorded regarding the production of case property before him. He did not remember whether his statement under Section 161 Cr.P.C. was recorded by the IO or that the tablets and capsules were lying in loose condition inside the packet?

11. As per the case of the prosecution itself, the recovery of the contraband was effected from the right pocket of the appellant's trouser after conducting his personal search, therefore, provisions of Section 50 of the Act are duly attracted. The law is well settled by Hon'ble Supreme Court in a Constitution Bench judgment reported as **Vijaysinh Chandubhai Jadeja Vs. State of Gujarat**, (2011) 1 SCC 609, that provisions of Section 50 of the Act are mandatory, require strict compliance and failure thereof would render the recovery of contraband suspect. Para Nos. 29, 31 and 32 of the above judgment being relevant, are extracted as under:-

“29. In view of the foregoing discussion, we are of the firm opinion that the object with which the 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 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. xxx xxx xxx
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 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.”

The extracted part of the judgment clearly reveals that obligation of the authorized officer under sub-section (1) of Section 50 of the Act is mandatory and requires strict compliance. The concept of “substantial compliance” has been held to be not in consonance with earlier Constitution Bench judgment of Hon’ble Supreme Court titled as **State of Punjab Vs. Baldev Singh**, (1999) 6 SCC 172. The Hon’ble Supreme Court has also observed that to impart authenticity and credibility to the entire proceedings conducted by empowered officer an endeavour should be made to produce the suspect before the nearest Magistrate at the first instance who enjoys more confidence of a common man as compared to any other officer.

As discussed above, the offer in terms of Section 50 of the Act should be clear and categorical; not ambiguous, but in the present case, PW4 has informed the appellant that whether you want your search to be conducted by him or in the presence of a Gazetted Officer or Magistrate? Thus, the offer given to the appellant is ambiguous and cannot be termed

as strict compliance of the safeguards provided under Section 50 of the Act and has caused a serious prejudice to the appellant.

12. Still further, it has come in the testimony of PW3, that although separate consent memos of the accused were prepared at the time of recovery, but they were given a joint offer by PW4. Therefore, again this is non-compliance of Section 50 of the Act and the joint offer to all three accused cannot be termed as scrupulous compliance of the mandatory provisions and thus, legitimate right available to the appellant has been violated. To strengthen the above conclusion, reference in this regard can be made to Para 17 of the judgment of Hon'ble Supreme Court in **State of Rajasthan Vs. Parmanand and another, (2014) 4 SCC 345**, which reads as under:-

“17. 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 the nearest gazetted officer or before the nearest Magistrate. Similar view taken by the Punjab and Haryana High Court in Paramjit Singh and the Bombay High Court in Dharamveer Lekhram Sharma meets with our approval.”

In view of **Parmanand’s case** (supra), joint offer is not legally permissible and as such the formality of mere preparing separate consent memos followed by a joint oral offer, would not absolve the Seizing Officer from giving the individual offer to each and every suspect. Thus, there is a negation of valuable right of the appellant while giving a joint offer to all the accused.

13. Upon scrutinizing the record of the case, this Court has come across that at the time of framing the charges against all three accused, learned Special Court also committed the similar illegality while framing a conjoint charge-sheet dated 04.07.2011 instead of charging them individually. Relevant part of the charge-sheet dated 04.07.2011 reads as under:-

1. *Kulwinder Singh @ Kala son of Sadhu Singh, aged 30 years, resident of Village Jagatpur, PS Chamkaur Sahib, Tehsil and District Ropar.*
2. *Balwinder Singh son of Surjit Singh aged 30 years, resident of Village Asarpur, PS Chamkaur Sahib.*
3. *Ranjit Singh son of Narinder Singh, aged 41 years, resident of Village Sun City, Ropar.*
.....Accused.

“CHARGE-SHEET

“That on 11.10.2010 at about 6.30 PM in the area of T-point Shampura, you aforesaid accused while travelling on motorcycle bearing No. PB71-1366, were found in conscious possession of 20

packets of Phenotil total tablets 2000 and 140 capsules of Parvonspas which is prohibited under the NDPS Act as per the schedule contained in the said Act and you thereby committed an offence punishable under Section 22 of the Narcotic Drugs and Psychotropic Substances Act, and within the cognizance of this Court.

And I hereby direct that you the above named accused be tried on the above charge by this Court.

Sd/-Judge, Spl. Court, 4.7.11”

Perusal of the above charge-sheet clearly reveals that vague charges were framed against all three accused by learned Special Court in a casual manner and they were put to trial under Section 22 of the Act, which contemplates three different situations for varied punishment under clauses (a), (b) and (c) thereof, entailing punishment of imprisonment from one year along with fine of Rs.10,000/- upto twenty years with a fine which may extend to Rs.2 lacs, in a given case.

Thus, a Presiding Officer while discharging his duties in such like case(s), is expected to be more careful and considerate while framing the charge(s) against the suspect facing prosecution being of grave consequences in view of the adverse legal presumption attached under the Act, instead of proceeding like a post-office.

14. Concededly, there is a delay of 15 days while sending the sample for chemical examination to FSL which is not at all explained by the prosecution. There is no evidence on record to prove that seal after use remained in the safe custody and as such coupled with the delay of 15 days in sending the sample, creates a doubtful situation. Although PW4

has stated that the seal after use was handed over to HC Shingara Singh, No.102 (PW3), but he (Singhara Singh) in his testimony before learned Special Court, has not uttered even a single word that seal after use was handed over to him. Even PW4 has acknowledged that he did not sign Form No.29 at the time of recovery or subsequent thereto. PW7 also candidly admitted that he did not sign Form No.29 dated 27.10.2010 (Ex.DA). Still further, MHC Kulwinder Singh (PW6) also stated that neither any inventory of contraband; nor Form No.29 was deposited with him on 11.10.2010. Thus, all three PWs i.e. PW3, PW4 and PW7, have duly acknowledged that no inventory of the contraband was prepared in this case which is very much necessary in view of provisions of sub-Section (2) of the Section 52 A of the Act. Section 52 A (2) of the Act, inter-alia, envisages that where any contraband has been seized or forwarded to officer incharge of a police station, he shall prepare an inventory of such contraband containing the details of their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars or the packing in which they are packed along with other particulars which the officer may consider relevant to the identity of the drugs or substance, but as discussed above, in the present case, Seizing Officer (PW4) as well as SHO of the police station (PW7) have given a complete go-by to these provisions and as such the recovery of the contraband becomes doubtful.

15. In view of the facts and circumstances discussed hereinabove, this Court is of the opinion that there is non-compliance of Section 50 as well as violation of Section 52 A of the Act and an unexplained delay of 15 days in sending the samples to FSL coupled with no proof of safe custody

of seal, has resulted into a case of doubtful recovery. As a result thereof, the impugned judgment of conviction and order of sentence dated 19.02.2013 passed by Special Court are not legally sustainable and the same are liable to be set aside.

16. Consequently, the appeal is allowed. Impugned judgment of conviction and order of sentence dated 19.02.2013 passed by Special Court are set aside. Appellant is acquitted of the charges.

17. Since the judgment of conviction and order of sentence dated 19.02.2013 passed by Learned Judge, Special Court, Rupnagar, have been set aside by this Court and appellant-Kulwinder Singh @ Kala is acquitted of the charges, therefore, he be released from the custody forthwith, if not required in any other criminal case.

August 20, 2019
sanjay

(MAHABIR SINGH SINDHU)
JUDGE

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