

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

CRA-D-993-DB of 2017 (O&M)

Reserved on : 21.05.2019

Date of decision : 23.05.2019

Gurpreet Singh alias Mani

.... Appellant

Versus

State of Punjab

..... Respondent

CORAM :- HON'BLE MR. JUSTICE RAJIV SHARMA

HON'BLE MR. JUSTICE HARINDER SINGH SIDHU

Present: Mr. Vipul Jindal, Advocate,
for the appellant.

Mr. S.P.S. Tinna, Addl. A.G., Punjab.

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RAJIV SHARMA, J.

1. This appeal is directed against judgment dated 22.08.2017 and order dated 23.08.2017, rendered by Judge, Special Court, Amritsar, in NDPS Case No. 745 of 2014. Appellant Gurpreet Singh alias Mani was charged with and tried for the offence punishable under Section 21 (c) of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as 'the NDPS Act' for brevity). He was convicted and sentenced to undergo rigorous imprisonment for 12 years and to pay a fine of ₹ 1,50,000/- under Section 21 of the NDPS Act. In default of payment of fine, he was ordered to further undergo simple imprisonment for six months.

2. The case of the prosecution, in a nutshell, is that on 05.09.2013, at about 9.30 AM, ASI Jaswant Singh, Incharge, Police Post Town Jandiala, along with HC Sarabjit Singh and other police officials was present at bridge over canal, village Dharar, on their private motor cycles, in connection with patrolling. A Hindu young man was seen coming on foot by the side of canal from village Gunnowal side. After seeing the police party, he immediately tried to turn back. He was apprehended. His antecedents were ascertained. ASI Jaswant Singh, while disclosing his identity to the accused, said that he had suspicion that he (accused) was possessing some narcotic substance. ASI Jaswant Singh further asked the accused whether he wanted to get his search conducted either from him or from some Gazetted Officer. The accused reposed faith in ASI Jaswant Singh and consented to be searched by him. ASI Jaswant Singh prepared consent memo. It was signed by the accused. ASI Jaswant Singh conducted search of the accused in accordance with rules. Intoxicant powder wrapped in a polythene envelope was recovered from the right pocket of Jeans worn by the accused. Out of the recovered intoxicant powder, two samples of 10 grams each were drawn and converted into two separate parcels after putting the same into two separate plastic containers. The remaining bulk quantity, i.e. 280 grams intoxicant powder, was also converted into separate bulk parcel. All the parcels were sealed by ASI Jaswant Singh with his seal impression 'JS'. Form M-29 was filled up on the spot. Recovery memos were prepared. FIR was registered. Site plan was prepared. The accused was arrested. On completion of investigation at the spot and on arrival at the Police Station, ASI Jaswant Singh produced all the parcels along with sample seal, Form

M-29 and accused before Inspector SHO Ravinder Singh. He verified the correctness of the seals affixed on the parcels and thereafter, put his seal 'RS' on the parcels and also on Form M-29. The SHO operated the double lock and kept the case property along with sample seal and Form M-29 in the double lock. On the next day, i.e. 06.09.2013, Inspector SHO Ravinder Singh operated the double lock. He handed over the parcels, sample seal and Form M-29 along with accused to ASI Jaswant Singh for producing in the court of Ilaqa Magistrate. ASI Jaswant Singh produced the case property in the court of Ilaqa Magistrate. The Ilaqa Magistrate broke the seals of bulk parcel. She took out 20 grams of intoxicant powder from it and prepared representative parcel, which was sealed by her with her seal 'PK'. ASI Jaswant Singh also put his seal 'JS' on the same. The remaining bulk parcel of 260 grams intoxicant powder was re-sealed by the Ilaqa Magistrate with her seal 'PK'. The same was handed over by ASI Jaswant Singh to SHO Ravinder Singh. On 30.09.2013, SHO Ravinder Singh handed over the sample parcel of 10 grams intoxicant powder sealed with the seals of 'JS' and 'RS', sample seal, Form M-29 along with docket to HC Raj Kumar vide road certificate No. 227/21. He deposited the same in the office of Chemical Examiner. The remaining bulk contraband was deposited in the Judicial Malkhana on 10.10.2013. The investigation was completed and after receipt of report of the Chemical Examiner, the challan was put up.

3. The prosecution examined a number of witnesses in support of its case. The accused was also examined under Section 313 Cr.P.C. He denied the case of the prosecution. According to him, he was falsely implicated. He was convicted and sentenced, as noticed here-in-above.

Hence, this appeal.

4. Learned counsel appearing on behalf of the appellant has vehemently argued that the prosecution has failed to prove its case against his client. Learned counsel appearing on behalf of the State has 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. PW.4 ASI Jaswant Singh Singh deposed that on 05.09.2013, he along with other police officials was present at canal bridge, Village Dharar, in connection with patrolling. One person was seen coming on foot from the side of village Gunnowal. On seeing the police party, he got perplexed. He tried to flee. He was apprehended. He was apprised of his legal right to be searched before him or any Gazetted Officer or Magistrate. The accused reposed faith in him. Search was carried out. From the person of the accused, contraband was recovered. Search and seizure proceedings were completed on the spot. He filled up Form M-29. He produced the accused along with the case property before SHO Ravinder Singh, who put the case property in double lock. The case property was produced before Ilaqa Magistrate, Amritsar. She prepared sample of 20 grams intoxicant powder after making it representative. It was sealed by her with her seal 'PK'. He also put his seal 'JS'. The bulk parcel of 260 grams intoxicant powder was re-sealed by the Ilaqa Magistrate with her seal 'PK'. The order passed by the court is Ex.PW.3/B. SHO Ravinder Singh again operated the double lock on 10.10.2003. The bulk parcel was deposited in the Judicial Malkhana. The consent memo is Ex.P1. PW.4 ASI Jaswant Singh admitted in his cross-

examination that Ex.P1 was the only option given to the accused to get himself searched before him or before the Gazetted Officer. He had not given any option to the accused to be searched before a Magistrate. He admitted that vide Ex.PW.3/B, the Area Magistrate had directed to deposit the case property including bulk and representative sample in the Judicial Malkhana on 06.09.2013. He did not deposit case property in the Judicial Malkhana. He had deposited the case property in the Judicial Malkhana on 10.10.2013. The Clerk of Judicial Malkhana had given a note at Mark A that there was crack on seal on the bulk parcel. He also admitted that Ex.MO1, Ex.MO2 and Ex.MO3, when produced in the court, did not have any serial number.

7. PW.2 Head Constable Sarabjit Singh deposed the manner in which the accused was apprehended. He also deposed that the Investigating Officer had given option to the accused to be searched either by him or before Gazetted Officer. The accused reposed faith in the Investigating Officer. In his cross-examination, he admitted that the word 'Magistrate' was not mentioned in consent memo, Ex.P1.

8. PW.3 Inspector Ravinder Singh deposed that the Investigating Officer had produced before him the case property on 05.09.2013. He checked the correctness of the seals. He sealed both the parcels with his seal impression 'RS'. He handed over all the parcels on 06.09.2013 to ASI Jaswant Singh. He produced the same before the court. The Judicial Magistrate had drawn 20 grams intoxicant powder from the bulk parcel after breaking seals. The court prepared representative parcel, which was sealed by the court with her seal 'PK'. The Investigating Officer handed over the

parcels to him. He again operated the double lock on 28.09.2013 to get the docket issued. On 30.09.2013, he handed over the sample parcel of 10 grams of intoxicant powder, sample seal and Form M-29 to HC Raj Kumar vide road certificate NO. 227/21. He took the same to the office of the Chemical Examiner. On 10.10.2013, he again operated the double lock. He handed over the bulk parcel of 260 grams of intoxicant powder, sample parcel of 10 grams intoxicant powder and representative parcel of 20 grams intoxicant powder to ASI Jaswant Singh, who deposited the same in the Judicial Malkhana. He had not tampered with the case property, till it was in his custody.

9. PW.1 Head Constable Raj Kumar testified that he deposited the sample parcel, sample seal and Form M-29 in the office of the Chemical Examiner.

10. The mandatory provisions of Section 50 of the NDPS Act were not complied with in this case. The Investigating Officer, namely PW.4 ASI Jaswant Singh, had apprised the appellant that he could give option to be searched by him or a Gazetted Officer. He had not even mentioned the word 'Magistrate' in the consent memo Ex.P1. The Investigating Officer was required to give only two options to the appellant whether he wanted to get his personal search conducted before a Magistrate or a Gazetted Officer. He could not have asked for third option to be searched by him. Section 50 of the NDPS Act is mandatory. Option under Section 50 of the NDPS Act should be restricted and confined to Gazetted Officer or Magistrate.

11. Their Lordships of the 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 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."

12. PW.4 ASI Jaswant Singh has also admitted that though the Ilaqa Magistrate had directed him to deposit the case property, including bulk and representative parcels, in the Judicial Malkhana on 06.09.2013, but he deposited the same in Judicial Malkhana on 10.10.2013.

13. Accordingly, the appeal is allowed. The impugned judgment dated 22.08.2017 and order dated 23.08.2017 are set aside. The appellant is acquitted of the charge framed against him. He is in custody. He shall be released forthwith, if not required in any other case.

14. Before parting with the judgment, we would like to point out that this Court has come across in many criminal cases, where religion of the accused has been mentioned. In the instant case, it is stated by the trial court in the second paragraph of the impugned judgment that "a Hindu young man was seen coming on foot by the side of canal". The mentioning of religion in the enquiry, investigation or trial is against the spirit of the Constitution of India. It may cause bias and prejudice during the course of enquiry, investigation and trial. India is a secular country. All persons are equally entitled to freedom of conscience and the right to freely profess,

practise and propagate religion. Accordingly, the Investigating Officers in the States of Punjab and Haryana, as well as in the Union Territory, Chandigarh, are directed not to mention the religion of accused or victim.

(**RAJIV SHARMA**)
JUDGE

May 23, 2019
ndj

(**HARINDER SINGH SIDHU**)
JUDGE

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