

In the High Court of Punjab and Haryana at Chandigarh

Crl. Appeal No. S-2556-SB of 2014
Date of Decision: 26.03.2019

Paramjit Kaur @ Pammi

.....Appellant

Versus

State of Punjab

.....Respondent

CORAM: HON'BLE MR. JUSTICE HARNARESH SINGH GILL

Present: Mr. Aman Dhir, Advocate
Legal Aid Counsel for the appellant.

Mr. Sandeep Kumar, DAG, Punjab.

HARNARESH SINGH GILL, J.

The present appeal arises from the judgment and order dated 17.2.2014 passed by Additional Sessions Judge (Adhoc), Fast Tract Court, Amritsar vide which appellant Paramjit Kaur alias Pammi had been convicted under Section 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('1985 Act' for short) and was sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of ₹ 1,00,000/- and in default of payment of fine, to further undergo rigorous imprisonment for a period of six months.

The brief facts of the case are that on 11.3.2010, the police party was going to Anngarh in connection with patrolling duty and checking of anti social elements. They saw one lady carrying a polythene carry bag in her hand and on seeing the police party, she tried to run away towards her house. The appellant-accused was apprehended by the police officials

including lady Constable-Satwinder Kaur and she had disclosed her name as

Paramjit Kaur. The polythene envelope was checked and it was found to contain 15 injections of Amin 10 ML and 15 injections of Bonorwin 2 ML. These injections were put in a plastic container and made into two parcels. The parcels were sealed with seal bearing impression 'AS'. Seal after use was handed over to HC Wilson Masih. Accused was arrested. Ruqa was sent to the police station on the basis of which, formal FIR was registered. The parcels and sample seal impressions were sent to the Forensic Science Laboratory and report of the Forensic Science Laboratory was received that sample contained Pheniramine Maleate average 22.50 ml. and Buprenorphine hydrochloride average of 0.28 ml.

After completion of investigation and necessary formalities, challan was submitted against the the appellant.

Charge under Sections 22 of the 1985 Act was framed against the appellant.

To prove its case, prosecution examined four witnesses.

After closure of the prosecution evidence, the appellant was examined under Section 313 of the Code of Criminal Procedure ('Cr.P.C.' for short) wherein she denied correctness of incriminating evidence appearing against her and pleaded false implication.

The appellant, however, did not examine any witness in her defence.

After taking into consideration the evidence on record, the trial Court vide judgment/order dated 17.2.2014, has concluded that the contraband which was recovered from the appellant, was of commercial quantity and, thus, as noticed above, she was convicted under Section 22 of the 1985 Act and sentenced accordingly.

I have heard the learned counsel for the appellant and the learned State counsel and with their able assistance, I have gone through the record of the Court below.

Learned legal aid counsel appearing on behalf of the appellant has submitted that in the present case, provisions of Section 50 of the 1985 Act have not been complied with. It has been further argued that SI Amrik Singh had appeared as PW-2 and stated that one lady was seen coming in the Street No. 3, Anngarh and on seeing the police party, she had turned back. She was carrying a polythene carry bag in her right hand. She was apprehended by him (Amrik Singh) with the help of lady Constable Satwinder Kaur. On enquiry, she disclosed her name as Paramjit Kaur alias Pammi wife of Chand Singh. Lady Constable Satwinder Kaur took the polythene carry bag from her hand and handed over the same to him (PW-2). On checking, the polythene carry bag, held by the appellant in her right hand, it was found containing 15 injections of Amin 10 ML and 15 injections of Bonorwin 2 ML each. Thereafter, these injections were put into a plastic container and made into two different parcels and the parcels were sealed by him (PW-2). Thereafter personal search was also conducted by the police party. Learned counsel has also pointed out that Ex.P-3 is the search memo which clearly indicates that the appellant was not searched personally.

On this, learned counsel has developed the argument that the bag was taken from the appellant-accused by the lady Constable and was handed over to PW-2 and thereafter, the personal search was conducted without calling the nearest Gazetted Officer on the spot. Even the appellant-accused was not informed of her right regarding the personal search. Thus,

Section 50 of the 1985 Act, has not been complied with in the present case.

Learned counsel has relied upon the judgments of the Apex Court in *State of Rajasthan versus Parmanand and another 2014(2) R.C.R. (Criminal) 40*, *Arif Khan @ Agha Khan versus State of Uttarakhand 2018(2) R.C.R. (Criminal) 931* and *Sk Raju @ Abdul Haque @ Jagga versus State of West Bengal 2018 AIR (SC) 4255*.

The other argument raised by learned counsel for the appellant is that the occurrence in question took place on 11.3.2010 at 3.30 P.M., that too, in the busy residential area. No independent witness was joined by the prosecution agency. It has also been argued that there is delay of seven days in sending the parcel to the Chemical Examiner, which is also fatal to the present case. It has further been argued that PW-4 Deputy Superintendent of Police Nirlep Singh, who was posted as SHO 'C' Division, Amritsar on the day of occurrence, stated in his cross-examination that he had not produced the case property in the Court but Ex. P9, which bears his signatures, indicates production of the case property in the Court. This factor also indicates that the case property was not produced in the Court by the prosecution agency.

Lastly, learned counsel for the appellant has argued that the lady Constable was not present at the spot when the said occurrence had been shown to have taken place. The signatures of lady Constable on Ex. P1 to Ex. P3 are in different hand.

Per contra, learned State counsel has argued that in the present case, the recovery is of the commercial quantity and even if there is delay of 07 days in sending the contraband to Chemical Examiner i.e. on 18.3.2010, then also there is no evidence on record that the samples were ever

tampered with. Rather, the samples were sent to the laboratory in an intact condition. On non-joining of independent witness, learned State counsel has pointed out that this cannot be fatal to the prosecution case because generally people from general public avoid to be a prosecution witness on the pretext of harassment. Learned State counsel has further argued that the prosecution had examined PW-2 SI Amrik Singh and PW-1 Head Contable Wilson Masih. Both were the recovery witnesses, who had duly proved the recovery from appellant-accused Paramjit Kaur and the said witnesses were not cross-examined for the reasons best known to the appellant-accused. It has been further argued that it is a case of chance recovery and Section 50 of the 1985 Act, will not come into force. So far as personal search is concerned, the same had been done as per statutory requirements. It has been further argued that the appellant-accused was rightly convicted and sentenced and the judgment passed by the trial Court deserves to be upheld. Learned State counsel has relied upon the judgment of the Apex Court in ***Union of India and another versus Sanjeev V. Deshpande 2014(4) R.C.R. (Criminal) 75, Paramjit Singh @ Pamma and another versus State of Punjab 2015(4) R.C.R. (Criminal) 102 and Bashir Ahmed versus State of Punjab, CRA-S-612-SB of 2004, decided on 25.3.2015.***

For proper adjudication of the matter, provisions of Sections Section 50 of the 1985 Act need to be taken into consideration which read as under:-

50. Conditions under which search of persons shall be conducted. □

(1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest

Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

[(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.]

After taking into consideration the documents on record and the arguments advanced by the learned counsel for both the sides, this Court is of the view that it is clear that the carry bag was taken from the appellant-accused by the patrolling police party and thereafter, her personal search was also conducted. The personal search memo is on record which is Ex. P3. Admittedly, one lady Constable Satwinder Kaur was also present with the police party and no direction was given to her to conduct the search of

the appellant-accused. Moreover, the said lady constable, namely, Satwinder Kaur had not been examined by the prosecution and, thus, the search carried out by the investigating agency, cannot be said to be a proper search. Therefore, to the mind of this Court, Section 50 of the 1985 Act, has not been complied with in the present case.

The Apex Court in ***State of Rajasthan versus Parmanand and another 2014(2) R.C.R. (Criminal) 40***, has held as under:-

“7. The question is whether [Section 50](#) of the NDPS Act was complied with or not. Before we go to the legalities, it is necessary to see what exactly the important police witnesses have stated about compliance of [Section 50](#) of the NDPS Act. The gist of the evidence of the police witnesses PW-5 J.S. Negi, the Superintendent, PW-9 SI Meena and PW-10 SI Qureshi is that the respondents were informed that they have a right to be searched in the presence of a gazetted officer or a nearest Magistrate or before J.S. Negi, the Superintendent, who was present there. They were given a written notice. On that notice, respondent No.2 gave his consent in Hindi in his handwriting that he and respondent No.1 Parmanand are agreeable to be searched by PW-10 SI Qureshi in the presence of PW-5 J.S. Negi, the Superintendent. He signed on the notice in Hindi and put his thumb impression. Respondent No.1 Parmanand did not sign. There is nothing to show that respondent No.1 Parmanand had given independent consent. Search was conducted. PW-10 SI Qureshi did not find anything on the person of the respondents. Later on, he searched the bag which was in the left hand of respondent No.1 - Parmanand. In the bag, he found black colour material which was tested by chemical kit. It was found to be opium.

X X X X X

12. 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.

In the case of ***Arif Khan @ Agha Khan versus Stae of Uttarakhand 2018(2) R.C.R. (Criminal) 931***, it was held by the Apex Court 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. In other words, the question that arises for consideration in this appeal is whether the prosecution was able to prove that the procedure prescribed under Section 50 of the NDPS Act was followed by the Police Officials in letter and spirit while making the search and recovery of the contraband “Charas” from the appellant (accused).

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).

In *Sk Raju @ Abdul Haque @ Jagga versus State of West Bengal 2018 AIR (SC) 4255*, it was held by the Apex Court as under-

“According to Section 50(1), an empowered officer should necessarily inform the suspect about his legal right, if he so requires, to be searched in the presence of a gazetted officer or a magistrate. In Vijaysinh Chandubha Jadeja v State of Gujarat (“Vijaysinh”),¹⁰ a Constitution Bench of this Court interpreted Section 50 thus:

“The mandate of Section 50 is precise and clear, viz. if the person intended to be searched expresses to the authorised officer his desire to be taken to the nearest gazetted officer or the Magistrate, he cannot be searched till the gazetted officer or the Magistrate, as the case may be, directs the authorised officer to do so ... 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 in so far 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 ... 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 (supra) and Prabha Shankar Dubey (supra) 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's case (supra).”

The principle which emerges from Vijaysinh is that the concept of “substantial compliance” with the requirement of Section 50 is neither in accordance with the law laid down in Baldev Singh, nor can it be construed from its language. [Reference may also be made to the decision of a two judge Bench of this Court in Venkateswarlu]. Therefore, strict compliance with Section 50(1) by the empowered officer is mandatory. Section 50, however, applies only in the case of a search of a person. In Baldev Singh, the Court held “on its plain reading, Section 50 would come into play only in the case of a search of a person as distinguished from search of any premises, etc.” In State of Himachal Pradesh v Pawan Kumar (“Pawan Kumar”), 2005(2) R.C.R. (Criminal) 621 : (2005) 4 SCC 350 a three judge Bench of this Court held that the search of an article which was being carried by a person in his hand, or on his shoulder or head, etc., would not attract Section 50. It was held thus:

“In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore, it is not possible to include these articles within the ambit of the word “person” occurring in Section 50 of the Act ...After the decision in Baldev Singh, this Court has consistently held that Section 50 would only apply to search of a person and not to any bag, article or container,

etc. being carried by him.”

In Parmanand, on a search of the person of the respondent, no substance was found. However, subsequently, opium was recovered from the bag of the respondent. A two judge Bench of this Court considered whether compliance with Section 50(1) was required. This Court held that the empowered officer was required to comply with the requirements of Section 50(1) as the person of the respondent was also searched. [Reference may also be made to the decision of a two judge Bench of this Court in Dilip v State of Madhya Pradesh], 2007(1) R.C.R. (Criminal) 586 : (2007) 1 SCC 450. It was held thus:

“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.”

Moreover, in the above case, the empowered officer at the time of conducting the search informed the respondent that he could be searched before the nearest Magistrate or before the nearest gazetted officer or before the Superintendent, who was also a part of the raiding party. The Court held that the search of the respondent was not in consonance with the requirements of Section 50(1) as the empowered officer erred in giving the respondent an option of being search before the Superintendent, who was not an independent officer. It was held thus:

“We also notice that PW 10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate or before the 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 the nearest Magistrate or the 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 12 (2007) 1 SCC 450. 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.”

The question which arises before us is whether Section 50(1) was required to be complied with when charas was recovered only from the bag of the appellant and no charas was found on his person. Further, if the first question is answered in the affirmative, whether the requirements of Section 50 were strictly complied with by PW-2 and PW-4.

Not only this the lady Constable, who conducted search was not examined by the prosecution as a witness in this case. Thus, not examining lady Constable to my mind, creates doubt regarding her presence on the spot. Hence, the appellant is entitled to be given benefit of doubt. On this point, I am fortified with the judgment passed by the Co-ordinate Bench in ***Shinderpal Kaur versus State of Punjab 2016(2) RCR (Criminal) 241.***

The relevant para of the said judgment reads as under:-

“19. Lady constable Mandeep Kaur was the star witness of the

prosecution. The accused-appellant is a female and as per the consistent testimonies of the prosecution witnesses namely PW-2 ASI Sukhchain Singh, PW-3 ASI Malkit Singh and PW-5 DSP Ajmer Singh. The search of accusedappellant was got conducted through lady constable Mandeep Kaur. So, it was lady constable Mandeep Kaur, who carried out search of the accused-appellant and recovered the contraband. But, she has not been examined by the prosecution and was given up being unnecessary by the learned Public Prosecutor vide his statement dated 17.04.2014. It is very surprising that how such a material witness can be given up being unnecessary. The giving up of lady constable Mandeep Kaur in this manner rather makes even her presence at the spot doubtful. Thus, the most material witness of the prosecution has been withheld by the prosecution without assigning any reason and stating her to be an unnecessary witness. In fact, she was the most material witness, which raises the adverse inference against the prosecution.”

So far as non-joining of independent witness is concerned, the same is not fatal to the present case because the general public generally avoids to be a witness of the prosecution.

So far as the the delay in sending the sample to the Chemical Examiner is concerned, the same is proved to be fatal to the prosecution case. In the present case, recovery of the contraband was effected on 11.3.2010 and the samples were sent for analysis on 18.3.2010, meaning thereby that there was delay of seven days in depositing the samples with the Chemical Examiner. As per the instructions of Narcotic Control Bureau, the sample should have been sent to the Forensic Science Laboratory for analysis within 72 hours of the recovery. There is no justification by the prosecution for the said delay.

do not weigh in the mind of this Court. Thus, it is clear that the mandatory provisions of Section 50 of the 1985 Act, have not been complied with. The appellant was not informed of her right that she can call the nearest Gazetted Officer, rather, there is justification on the record qua this.

Cumulative effect of above discrepancies renders the prosecution case doubtful. It is a settled proposition of law that whenever there is doubt in the prosecution case, benefit of the same has to be extended to the accused. Accordingly, in the present case, benefit of doubt deserves to be extended to the appellant.

Resultantly, the appeal is allowed. The impugned judgment/order dated 17.2.2014 of conviction and sentence of the appellant, are set aside. Consequently, the appellant is acquitted of the charges framed against her.

(HARNARESH SINGH GILL)
JUDGE

March 26, 2019

Gurpreet

Whether speaking/reasoned : Yes

Whether reportable : Yes