

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

CRM-M-11389-2021 (O&M)

Date of Decision:- 30.9.2021

Manjit Kaur @ Akki

...Petitioner

Versus

State of Punjab

...Respondent

CORAM: HON'BLE MR. JUSTICE GURVINDER SINGH GILL

Present: Mr. Ruhani Chadha, Advocate for the petitioner.

Mr. Ajay Pal Singh Gill, DAG, Punjab
assisted by ASI Varinder Kumar.

(proceedings conducted through video conferencing)

GURVINDER SINGH GILL, J.

1. The petitioner seeks grant of regular bail in a case registered vide FIR No.119 dated 15.6.2020 under Sections 21/29 of the NDPS Act at Police Station Dharamkot, District Moga.
2. As per the case of prosecution, on 15.6.2020 when a police party headed by ASI Charanjit Singh was present in the area of Dharamkot in connection with patrolling, then a secret information was received to the effect that Manjit Kaur @ Akki brings 'heroin' from outside the district and supplies the same in the area of District Moga and that even on the given day, she was bringing 'heroin' from Fatehgarh Panjtoor and was heading towards Dharamkot.
3. Pursuant to receipt of aforesaid information, the same was conveyed to the police station and FIR was lodged. Thereafter, another police party headed

by ASI Varinder Kumar proceeded towards canal bridge situated in the area of village Kannia Khas. Shortly thereafter, a lady was seen coming on foot while carrying a black coloured polythene bag. The said lady was apprehended by lady constable Gurwinder Kaur with the help of other police officials. Upon inquiry, she disclosed her name as Manjit Kaur @ Akki. An offer in terms of Section 50 of the NDPS Act (in short hereinafter referred to as 'the Act') was extended to her and she opted to be searched in presence of a gazetted officer. Consequently, DSP Shubeg Singh was called at the spot who after introducing himself again extended an offer in terms of Section 50 of the Act, but the aforesaid Manjit Kaur reposed confidence in him. The search of the polythene bag held by the petitioner in her hand was conducted which led to recovery of 1 kg and 200 grams of '*heroin*'.

4. The learned counsel for the petitioner while pressing upon his case for grant of bail has made the following submissions :-

(i) that there is violation of provisions of Section 50(4) of the Act which mandates that no female shall be searched by anyone except a female whereas in the instant case, the search has been conducted by ASI Varinder Kumar.

(ii) that the consent memo and recovery memo (Annexure P-5 and Annexure P-6) do not bear the signatures of the DSP which rather creates a doubt as to whether the search was conducted in the presence of the DSP or not.

5. Opposing the petition, the learned State counsel has submitted that the instant case is a case of search of a bag which cannot be said to be personal search so as to necessitate compliance of Section 50 of the Act. The learned

counsel has submitted that when the personal search of the petitioner was conducted, the same was conducted by a lady constable who was present at the spot, as would be evident from the search memo annexed with the affidavit dated 10.2.2021 (Annexure P-7) of DSP Shubeg Singh filed in the earlier bail application i.e. CRM-M-319 of 2021 wherein it is specifically recorded that the search was got conducted through a lady constable Gurwinder Kaur.

6. The learned State counsel while replying to submission No. 4(i) has submitted that the presence of the DSP at the spot cannot be doubted in any manner as he has specifically deposed so in his affidavit dated 10.2.2021 filed in the earlier bail application and that his signatures are also there underneath the personal search memo, which is annexed with Annexure P-7 in the instant case. It has further been submitted that even if the signatures of the DSP are missing on any memo, the effect of such omission is a matter to be considered at the time of trial alongwith other evidence which may be brought on record and that since the instant case is a case of recovery of 'commercial quantity', no case for grant of bail is made out.
7. I have considered rival submissions addressed before this Court.
8. As far as submission (i) is concerned, a perusal of personal search memo under Section 51 Cr.P.C., annexed with the affidavit dated 10.2.2021 (Annexure P-7) of DSP Shubeg Singh as Annexure P-7, would show that the ASI has got the personal search of accused conducted through lady constable Gurwinder Kaur who was a member of the police party. The said personal search memo duly bears the signatures of lady constable Gurwinder Kaur.

9. Apart from the personal search, it is the search of the polythene bag carried by the petitioner which was conducted. However, the search of bag was not required to be conducted by a lady constable as the same cannot be said to be personal search. Hon'ble the Supreme Court, while discussing the scope of application of Section 50 of the Act, in State of Himachal Pradesh vs. Pawan Kumar 2005(4) SCC 350, held as follows:

“11. A bag, briefcase or any such article or container, etc. can, under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body of a human being. Depending upon the physical capacity of a person, he may carry any number of items like a bag, a briefcase, a suitcase, a tin box, a thaila, a jhola, a gathri, a hold all, a carton, etc. of varying size, dimension or weight. However, while carrying or moving along with them, some extra effort or energy would be required. They would have to be carried either by the hand or hung on the shoulder or back or placed on the head. 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.

12. An incriminating article can be kept concealed in the body or clothings or coverings in different manner or in the footwear. While making a search of such type of articles, which have been kept so concealed, it will certainly come within the ambit of the word "search of person". One of the tests, which can be applied is, where in the process of search the human body comes into contact or shall have to be touched by the person carrying out the search, it will be search of a person. Some indication of this is provided by sub-section (4) of Section 50 of the Act, which provides that no female shall be searched by anyone excepting a female. The legislature has consciously made

this provision as while conducting search of a female, her body may come in contact or may need to be touched and, therefore, it should be done only by a female. In the case of a bag, briefcase or any such article or container, etc., they would not normally move along with the body of the human being unless some extra or special effort is made. Either they have to be carried in hand or hung on the shoulder or back or placed on the head. They can be easily and in no time placed away from the body of the carrier. In order to make a search of such type of objects, the body of the carrier will not come in contact of the person conducting the search. Such objects cannot be said to be inextricably connected with the person, namely, the body of the human being. Inextricable means incapable of being disentangled or untied or forming a maze or tangle from which it is impossible to get free.”

10. The judgment in *Pawan Kumar's case* (supra) has recently been followed by Hon'ble Supreme Court in 2020(10) RCR 740 Rajesh Dhiman vs. State of Himachal Pradesh. The relevant extract from *Rajesh Dhiman's case* reads as under:

“22. The appellants' claim that the High Court erred in not considering noncompliance with Section 50 of the NDPS Act at the stage of appeal, is also premised upon a mistaken understanding of the law. As held in *State of Himachal Pradesh v. Pawan Kumar (2005) 4 SCC 350.*, the safeguards for search of a person would not extend to his bag or other article being carried by them. Given how the narcotics have been discovered from a backpack, as per both the prosecution and defence versions, there arises no need to examine compliance with Section 50 of NDPS Act.”

11. In light of ratio of the judgments referred to above, the instant case where recovery has been effected from a bag and not from personal search of the accused, Section 50 of the Act would have no application. As regards the search of person of accused, the same was conducted by a lady constable as

discussed above. Submission (i) does not carry any weight and cannot be accepted.

12. As far as submission no. (ii) is concerned, the learned counsel for the petitioner has vehemently argued that although it is the case of prosecution that DSP Shubeg Singh was called at the spot in whose presence search was conducted and that DSP Shubeg Singh had also extended an offer after reaching at the spot in terms of Section 50 of the NDPS Act but the consent memo as well as the recovery memo (Annexure P-5 and Annexure P-6) do not bear the signatures of the DSP which clearly show that the petitioner has been falsely implicated and all these documents have been fabricated.
13. While a perusal of the affidavit of DSP Shubeg Singh (Annexure P-7) and the personal search memo annexed with the said affidavit do show that the DSP Shubeg Singh was very much present at the spot, but interestingly a perusal of the consent memo (Annexure P-5) as regards the offer extended by DSP himself and recovery memo (Annexure P-6) would show that his signatures are conspicuously missing. While this Court is of the opinion that the instant case where recovery had been effected from a bag would not attract Section 50 of the Act and the police officer was infact not even required to extend any such offer in case any bag carried by the accused was to be searched. Further, this Court would also hold a view that in a case where compliance of Section 50 of the Act is not required but yet an offer is extended and there is some defect in the same, the same would not immaterial. However, the absence of signatures on the consent memo and recovery memo cannot be said to be just a “defect” in procedure but is something which rather absolutely negates what the police claims to have

done at the spot. The omission of signatures on the said documents would tend to show that the DSP Shubeg Singh was not present at the spot. However, this is a matter to be decided by the trial Court in context of all such evidence that may be brought on record. At this stage, since some kind of doubt has been created, the petitioner may be extended the relief of grant of bail, particularly keeping in view that the petitioner has already been behind bars since the last about more than 1 year.

14. The petition, as such, is accepted and the petitioner is ordered to be released on regular bail on her furnishing bail bonds/surety bonds to the satisfaction of learned trial Court/Chief Judicial Magistrate/Duty Magistrate concerned.
15. It is, however, clarified that since it is only photocopies of the consent memo and recovery memo (Annexure P-5 and Annexure P-6) which have been placed on record, it shall be open to the prosecution to move for cancellation of bail in case the said photocopies are not found to be correct. It is further made clear that none of the observations made above shall be construed to be any kind of expression as regards the merits of the case and the trial Court shall not be influenced in any manner by the aforesaid observations while deciding the case as the above said observations have been made for the purpose of decision of this petition for grant of bail only.

30.9.2021

kamal

(Gurvinder Singh Gill)
Judge

Whether speaking /reasoned

Yes / No

Whether Reportable

Yes / No