

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

CRM-A-62-2021

Date of decision: 09.08.2022

State of Punjab

....Appellant(s)

Versus

Amarjit Kaur and another

....Respondent(s)

**CORAM: HON'BLE MR. JUSTICE G.S.SANDHAWALIA
HON'BLE MR. JUSTICE VIKAS SURI**

Present: Mr. Ajay Pal Singh Gill, DAG, Punjab.

G.S.SANDHAWALIA, J. (Oral)

The present application has been filed under Section 378(3) Cr.P.C. for grant of leave to appeal against the judgment passed by the Judge (Special Court), Shaheed Bhagat Singh Nagar dated 03.02.2020 whereby, acquittal has been recorded of the respondents in FIR No. 126 dated 11.07.2018 under Sections 22, 31, 61 and 85 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short 'the Act'), P.S. City Nawanshahr.

Prosecution case was set in motion by lodging the abovesaid FIR wherein, the allegations were that the police party at 7.00 p.m. had spotted the respondents standing on the bridge and on seeing the police party, they both panicked and tried to retreat. On apprehending them, they disclosed their names and addresses and thus were apprised of their legal right for search to be conducted in the presence of Gazetted Officer/Magistrate and consent memos were prepared. The recovery is stated to be 13 and 8 injections of Buprenorphine Omgesic, each measuring

02 ml, which was done from the *chunni* (veil) of both respective accused. The trial Court came to the conclusion that the offer as such was a joint offer though on record, Ex.PW4/A PW4/B had come. Resultantly, keeping in view the provisions of Section 50 of the Act and while placing reliance upon the judgment of ***Arif Khan @ Agha Khan vs. State of Uttarakhand, (2018) 18 SCC 380***, the benefit has been granted on account of the non-compliance of the mandatory procedure. PW-5 Gurmail Singh was the Investigating Officer and prepared the personal search memo of both the respondents. The samples also were sent and received by the laboratory after a period of 3 days on 16.07.2018, though they had been produced in Court on 13.07.2018. The lack of independent witnesses as such is another reason which would weigh with us not to interfere in the order of acquittal keeping in view the settled principles of law laid down by the Constitutional Bench in ***Vijaysinh Chandubha Jadeja vs. State of Gujarat, (2011) 1 SCC 609*** which reiterated the view of the earlier constitutional Bench in ***State of Punjab vs. Baldev Singh, (1999) 6 SCC 172***. The trial Court has also relied upon the judgment in ***State of Himachal Pradesh vs. Pawan Kumar, 2005 (2) RCR (CrI) 622***.

Relevant portion of *Vijaysinh Chandubha Jadeja's case (supra)* reads thus:-

“22. 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. As observed in **Re Presidential Poll, (1974) 2 SCC 33**, it is the duty of the courts to get at the real intention of the Legislature by carefully attending to the whole scope of the provision to be construed. "The key to the opening of every law is the reason and spirit of the law, it is the animus imponentis, the intention of the law maker expressed in the law itself, taken as a whole." 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)*. 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. 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 (1974) 2 SCC 33 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.”

In ***State of Rajasthan vs. Parmanand and others, 2014 (2) RCR (Crl.) 40***, the issue of joint consent was also discussed and it was held that it was a common notice given, which would vitiate the recovery as such. The relevant portion of the judgment reads thus:-

“14. 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 a nearest gazetted officer or before a nearest Magistrate. Similar view taken by the Punjab & Haryana High Court in Paramjit Singh and the Bombay High Court in Dharamveer Lekhram Sharma meets with our approval. It bears repetition to state that on the written communication of the right available under section 50(1) of the NDPS Act, respondent No. 2 Surajmal has signed for himself and for respondent No. 1 Parmanand. Respondent No. 1 Parmanand has not signed on it at all. He did not give his independent consent. It is only to be presumed that he had authorised respondent No. 2 Surajmal to sign on his behalf and convey his consent. Therefore, in our opinion, the right has not been properly communicated to the respondents. The search of the bag of respondent No.1 Parmanand and search of person of the respondents is, therefore, vitiated and resultantly their conviction is also vitiated.”

It is also to be noticed that the respondents are ladies and Section 50(4) of the Act further provides that no female shall be searched by anyone except a female.

In such circumstances, the contention of the State as such that the acquittal should be reversed and conviction should be recorded solely on the basis of the statements of official witnesses is not justified keeping in view the fact that there is a double presumption of innocence on account of which the acquittal has been recorded by the Special Court.

Even otherwise, we are of the considered view that the trial Court as such has committed no perversity which would warrant interference, as apparently it had examined all the evidence in detail and the statements of the official witnesses and come to a logical conclusion. The

would warrant us to take a different view.

Accordingly, keeping in view the above, we are of the considered opinion that no case is made out for grant of leave to appeal in the present facts and circumstances and the present application stands dismissed.

(G.S. SANDHAWALIA)
JUDGE

09.08.2022
shivani

(VIKAS SURI)
JUDGE

Whether reasoned/speaking
Whether reportable

Yes/No
Yes/No