

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

CRA-S-2584-SB-2006 (O&M)

Reserved on:08.12.2022

Date of Decision: 09.12.2022

Gopal	Versus	...Appellant
State of Haryana		... Respondent

CORAM : HON'BLE MR. JUSTICE N.S.SHEKHAWAT

Present : Mr. Vibhor Bansal, Advocate as Amicus Curiae
for the appellant.

Mr. Rajinder Kumar, DAG, Haryana.

N.S.SHEKHAWAT, J.

Challenging the correctness and legality of the impugned judgement dated 08.12.2006 and order of sentence dated 13.12.2006, passed by the Judge, Special Court, Panipat, whereby, the appellant had been convicted under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter to be referred as '**the NDPS Act**') and sentenced to undergo rigorous imprisonment for four years and to pay a fine of Rs. 50,000/- alongwith default stipulation, the appellant has preferred the instant appeal before this Court.

The FIR in the instant case was got registered on 11.10.2005 by the complainant, namely, ASI Vijay Singh, who was present with other police officials for patrolling and crime prevention near the outer gate of Bus Stand Panipat and in the mean time, one person, who was carrying a plastic bag in his right hand came from the bus stand side and on seeing the police party, he turned back and

started walking. ASI Vijay Singh with the help of other police officials apprehended him and on inquiry he told his name to be Gopal son of Badri Lal resident of village Karawan, Police Station Pagaria, District Jhalawad (Rajasthan). The complainant expressed the suspicion that he was carrying some narcotic substance and issued him a notice under Section 50 of the NDPS Act. The complainant apprised him of his right to get his search conducted in the presence of either a Magistrate or a Gazetted Officer and he had legal right to do so. Gopal and the witnesses appended their signatures on the said notice and he replied in writing that he want to get his search conducted in the presence of the Gazetted Officer. On this Virender Kumar Vij, the Deputy Superintendent of Police, City Panipat, was telephonically informed and on getting the information, the Deputy Superintendent of Police, City Panipat, came at the spot alongwith personal staff on the government vehicle and Gopal son of Badri Nath was presented before him. In the meantime, the public witnesses were also requested to join the investigation, but all of them expressed their helplessness and went away. The Deputy Superintendent of Police asked Gopal regarding his search and he had given his consent to be searched by him.

The Deputy Superintendent of Police asked the complainant to search the plastic bag, which was being carried by Gopal in his right hand and on this the plastic bag was searched and

one shawl containing opium wrapped in the polythene was recovered from the plastic bag kept by the accused in his possession. Two samples weighing 20 grams each of the opium were taken out and the remaining quantity was weighed with the pen type weighing machine and it weighed 910 grams. Both the samples were kept in the plastic boxes and remaining recovered opium was also kept in a container of one kilogram and three separate parcels were prepared and were sealed with the seal of 'BS' and the Deputy Superintendent of Police also affixed his stamp 'VK' on all the parcels and after affixing the seal, the seal was handed over to HC Sewa Ram and the Deputy Superintendent of Police retained his seal with himself. The aforesaid two parcels of the opium, alongwith the plastic container of opium, which were duly sealed, the plastic bag and shawl were taken into possession by the police as evidence and the memos were prepared in this regard and the witnesses had appended their signatures in this regard. By keeping 950 gram of opium in his possession, Gopal son of Badri Lal had committed the offence under Section 18 of the NDPS Act and consequently *ruka* was sent to the police station for registration of the FIR and the senior officers were also informed. On the statement made by ASI Vijay Singh, the present case was got registered under Section 18 of the NDPS Act against Gopal Singh of Badri Lal.

During the course of investigation, the Station House Officer, Police Station City Panipat also verified the facts before him. The case and samples were produced and he sealed the sample and remainder with his seal 'LS' and retained his seal with himself.

The information under Section 57 of the NDPS Act was also sent to the senior police officers who ordered the case property to be deposited with the MHC and the accused was sent to lockup. On the next date, i.e. 12.10.2005, the complainant produced accused Gopal alongwith the case property, sample parcels, sample seal and photographs before the Illaqua Magistrate, Panipat, who issued the requisite certificate and passed the order for disposal of the case property. The samples were sent to FSL, Madhuban.

On completion of the investigation, the challan under Section 18 of the NDPS Act was presented against the accused/appellant. Even, the accused/appellant was charge sheeted under Section 18 of the NDPS Act, to which, the appellant pleaded not guilty and claimed trial.

During the course of trial, the prosecution examined PW1 Virender Kumar Vij, the Deputy Superintendent of Police, who reached at the spot on getting telephonic information. The recovery was effected in his presence and he supported the case of the prosecution completely. The prosecution further examined PW2 Constable Devinder Singh, who had carried the special report of the

case and delivered the same to the Illaqua Magistrate and higher police officers. ASI Jai Narayan was examined as PW3, whose evidence was formal in nature. HC Dharampal was examined as PW4, who was posted as MHC in Police Station City Panipat on 11.10.2005 and the complainant deposited the case property with him. On 12.10.2005, again, the complainant took parcels alongwith impressions of seals in order to comply with Section 52 of the NDPS Act for depositing the same before the Illaqua Magistrate. Again, after production of the case property before the Illaqua Magistrate, the same was deposited with him alongwith the seal impressions. On 25.10.2005, he sent the sample parcel to the FSL Madhuban for analysis. During that period, he did not tamper with the evidence nor allowed any one to tamper with that. Still further, the prosecution examined PW5 ASI Mahabir Singh, who recorded the formal FIR Ex.PB/1, on receipt of ruka Ex.PB. ASI Vijay Singh, the complainant was examined as PW6, who alongwith other police officials had apprehended the accused at the spot with the opium and had supported the case of the prosecution as narrated in the FIR. Still further, ASI Sewa Ram was examined PW7, who was part of the raiding team, which had apprehended the accused at the spot and was also signatory to certain memos, which were prepared at the spot and was part of the initial investigation. The prosecution examined PW8 Constable Bijender Singh who delivered the special report to the

Superintendent of Police, the Deputy Superintendent of Police and the Area Magistrate without any delay. He took the sample on 25.10.2005 to the FSL, after collecting the same from MHC of the Police Station. Rajinder Kumar, Civil Ahalmad, in the Court of learned Civil Judge, Civil Judge, Panipat was examined as PW9, who proved on record the application Ex.PJ and the order dated 12.10.2005 Ex.PJ/1 passed by the Court of learned JMIC Panipat regarding distruction of the case property. Lastly, the prosecution examined PW10 Laxman Singh retired Inspector, who was posted as Inspector/the Station House Officer in Police Station City Panipat on 11.10.2005. The complainant alongwith police party had apprehended the accused at the spot and produced him before Laxman Singh, SHO and he directed the Investigating Officer to deposit the case property with the MHC and the accused was ordered to be kept in the police lock-up. He sent a report under Section 57 of the NDPS Act to the higher officers and proved the ruka in this case.

After examining ten witnesses, the prosecution closed its evidence and statement of the accused under Section 313 Cr.P.C., was recorded. The accused pleaded false implication and stated that he was apprehended by the police on 10.10.2005 in the night and was kept in the Police Station as he was not carrying his identity card at that time. He was working as a labourer in a factory at that time and

the police told him that he would be left after making necessary inquiry but the police later falsely implicated him in the case.

The learned counsel for the defence examined DW1 Constable Gulzar, who brought the summoned register No. 19 and 21. Further DW2 HC Naresh Kumar also produced certain official record from the police station, i.e. Rapat Rojnamcha dated 11.10.2005 and, thereafter, the evidence was ordered to be closed.

Learned counsel vehemently contended that there was material discrepancies in the statements of various witnesses produced by the prosecution. It was submitted that notice given by the police was defective as the appellant was never apprised of his right to get his search conducted in the presence of a Gazetted Officer or a Magistrate. Consequently, the notice under Section 50 of the NDPS Act was a defective one and the appellant was not informed of his right to be searched as per law and the appellant was liable to be acquitted. Further, no public witness was joined by the police as it was a chance recovery and the recovery was allegedly made at the bus stand, so number of witnesses were present there from the general public and despite availability, they were not joined by the prosecution. It was further submitted that only the official witnesses had supported the case of the prosecution. Still further, PW7 ASI Sewa Ram admitted that the seal of LS and VK were not visible on the sample parcels and the said admission proves that there was

tampering with the sample parcels and the appellant was liable to be acquitted by the Court. Still further, there was non-compliance of Section 57 of the NDPS Act and the case is based on the testimonies of the official witnesses and since the mandatory provisions of the Act have not been complied with, the appellant was liable to be acquitted by this Court.

Refuting the contentions raised by the learned counsel for the appellant, the learned State counsel submitted that from the perusal of the record, it is apparent that police had complied with all mandatory provisions of the NDPS Act and the impugned judgment is liable to be upheld. Learned State counsel further submitted that evidence of the prosecution witnesses could not be disbelieved only on the ground that they were the official witnesses and they had no enmity or any other reason to falsely involve the present appellant. Thus, it was prayed that impugned judgment may be ordered to be upheld.

Learned counsel for the appellant submitted that in the instant case, the mandatory provisions of Section 50 of the NDPS Act have not been complied with by the prosecution and the appellant was liable to be acquitted only on this ground. While referring to notice Ex.PC, learned counsel submitted that the police was under a legal

obligation to inform the accused of his right to be searched in the presence of a Gazetted Officer or the Magistrate.

Learned counsel appearing for the State has opposed the said submission and submitted that the provisions of Section 50 of the NDPS Act would not be applicable to the facts of the instant case.

I have heard submissions made by the learned counsel for the parties.

From a perusal of the testimonies of PW6 ASI Vijay Singh and PW7 ASI Sewa Ram, it is apparent that recovery of the opium had taken place from a plastic bag, which was held by the accused in his right hand. Even, no recovery was effected from the personal search of the accused and in case the recovery is made from the plastic bag, held by the accused, the provisions of Section 50 of the NDPS Act are not attracted.

It has been held by the Hon'ble Supreme Court in the matter of State of Punjab VS. Baljinder Singh and another 2020(1) R.C.R. (Criminal) 58 as follows:-

15. At this stage we may also consider following observations from the decision of this Court in Ajmer Singh v. State of Haryana [2010(2) RCR (Criminal) 132 : (2010) 3 SCC 746]-

"15. The learned counsel for the appellant contended that the provision of Section 50 of the Act would also apply,

*while searching the bag, briefcase, etc. carried by the person and its non-compliance would be fatal to the proceedings initiated under the Act. We find no merit in the contention of the learned counsel. It requires to be noticed that the question of compliance or non-compliance with Section 50 of the NDPS Act is relevant only where search of a person is involved and the said section is not applicable nor attracted where no search of a person is involved. Search and recovery from a bag, briefcase, container, etc. does not come within the ambit of Section 50 of the NDPS Act, because firstly, Section 50 expressly speaks of search of person only. Secondly, the section speaks of taking of the person to be searched by the gazetted officer or a Magistrate for the purpose of search. Thirdly, this issue in our considered opinion is no more res integra in view of the observations made by this Court in **Madan Lal v. State of H.P. [2003(4) RCR (Criminal) 100 : (2003) 7 SCC 465]**. The Court has observed: (SCC p. 471, para 16)*

"16. A bare reading of Section 50 shows that it only applies in case of personal search of a person. It does not extend to search of a vehicle or a container or a bag or premises (see Kalema Tumba v. State of Maharashtra

[1999(4) RCR 575 : (1999) 8 SCC 257], State of Punjab v. Baldev Singh [(1999) 6 SCC 172] and Gurbax Singh v. State of Haryana [2001(1) RCR (Criminal) 702 : (2001) 3 SCC 28] . The language of Section 50 is implicitly clear that the search has to be in relation to a person as contrasted to search of premises, vehicles or articles. This position was settled beyond doubt by the Constitution Bench in Baldev Singh case. Above being the position, the contention regarding non-compliance with Section 50 of the Act is also without any substance.

" 16. As regards applicability of the requirements under Section 50 of the Act are concerned, it is well settled that the mandate of Section 50 of the Act is confined to "personal search" and not to search of a vehicle or a container or premises.

17. The conclusion (3) as recorded by the Constitution Bench in Para 57 of its judgment in Baldev Singh clearly states that the conviction may not be based "only" on the basis of possession of an illicit article recovered from personal search in violation of the requirements under Section 50 of the Act but if there be other evidence on record, such material can certainly be looked into.

In the instant case, the personal search of the accused did not result in recovery of any contraband. Even if there was any such recovery, the same could not be relied upon for want of compliance of the requirements of Section 50 of the Act. But the search of the vehicle and recovery of contraband pursuant thereto having stood proved, merely because there was non-compliance of Section 50 of the Act as far as "personal search" was concerned, no benefit can be extended so as to invalidate the effect of recovery from the search of the vehicle. Any such idea would be directly in the teeth of conclusion (3) as aforesaid.

Consequently, when the recovery of the opium has taken place from the plastic bag held by the accused in his right hand, the provisions of Section 50 of the NDPS Act would not be applicable and the said argument is liable to be rejected.

Learned counsel for the appellant further submitted that the mandatory provisions of Section 57 of the NDPS Act were not complied by the prosecution as PW10 Laxman Singh, Inspector/the Station House Officer had not stated as to how the report under Section 57 of the Act was sent to the higher police officers. However, a perusal of the statement of PW10 Laxman Singh, Inspector/Station House Officer, clearly shows that he had sent report under Section 57 of the NDPS Act to the higher authorities. Even PW1 Shri Virender

Kumar Vij, the Deputy Commissioner of Police, supported the said version and admitted the factum of receipt of report under Section 57 of the NDPS Act.

Still further, the provisions of Section 57 of the NDPS Act are directory in nature and not mandatory and any violation of these provisions even would not have vitiated the trial or conviction. However, it is reiterated that there was sufficient compliance of provisions of Section 57 of the NDPS Act, as is apparent from the testimonies of PW1, Shri Virender Kumar Vij, the Deputy Superintendent of Police and PW10 Laxman Singh Inspector/the Station House Officer (retired).

Learned counsel for the appellant further submitted that the witnesses of the prosecution had also admitted that the seal of 'LS' was not mentioned in the particulars mentioned on remainder parcel Ex.P1 and the accused was entitled to acquittal on this ground. The said submission has been opposed by the learned counsel appearing for the State. I have considered the submissions made by the learned counsel for the parties and find no force in the said submission. In the instant case, the certificate Ex.PJ/2 as well as photograph Ex.PG of the case property and the samples were admissible in the evidence as per Section 52 A of the NDPS Act. As per the certificate Ex.PJ/2 and the photograph Ex.PG of the case property, it has been proved that the sample parcels were duly sealed with the seals of 'VS', 'LS' and 'VK'

and the parcels were found to be intact. Even as per the FSL report Ex.PX, the sample parcels were found to be duly sealed and the defence has failed to show any prejudice, which was caused to them in this regard. Thus, the said submission is also liable to be rejected by this Court.

Still further, learned counsel for the appellant submitted that there was unexplained delay of 14 days in sending the sample to FSL, Madhuban. The recovery was allegedly made from the appellant on 11.10.2005 whereas the samples were dispatched to the FSL for analysis on 25.10.2005 and this delay is fatal for the case of the prosecution as chances of tampering could not be ruled out in the meantime. However, from a perusal of the record, it is evident that said statement does not hold any ground in view of the fact that the FSL report Ex.PX clearly shows that the seals on the sample parcels were intact and also tallied with the impression seals, which clearly ruled out the tampering with the samples. The defence has also led no evidence to the contrary and the said submission is liable to be rejected.

Apart from that, the learned counsel for the appellant has referred to minor inconsistencies appearing in the testimonies of various prosecution witnesses. However, it is a matter of common knowledge that such variations are bound to appear in the testimony of truthful witnesses, who got a chance to appear before the Court

after a gap of several months. The police has to conduct investigation in different cases and it is not possible for the official witnesses to make parrot like depositions before the Courts of law. Thus, such minor inconsistencies appearing in the testimonies of various official witnesses are liable to be rejected. The prosecution examined PW1, Virender Kumar Vij, the Deputy Superintendent of Police, PW6 ASI Vijay Singh and PW7 ASI Sewa Ram, who have supported each other on material particulars. This Court has also perused the other evidence and found that the evidence led by the prosecution inspires confidence and finding no substance in the arguments raised by the learned counsel for the appellant, the judgment of conviction is liable to be upheld by this Court.

However, from a perusal of order of sentence, it is apparent that the recovery of opium from the appellant was not a commercial quantity and he was sentenced to undergo rigorous imprisonment for a period of 04 years and to pay a fine of Rs. 50,000/- under Section 18 of the NDPS Act. In the instant case, the appellant/accused has undergone one year and three months of actual sentence. Even, as per the custody certificate, no other case was registered against the present appellant. Still further, the sentence imposed on the present appellant was suspended on 09.01.2007 and as per custody certificate, he has undergone an actual sentence of one year, three months and nine days and in the last about 15 years, he has

not misused the concession of bail. Still further, the appellant is also stated to be suffered from paralysis, consequently, ends of justice will be suitably met, if the sentence is reduced to the one already undergone by him.

Resultantly, the conviction of the appellant, as recorded by the learned trial Court is maintained. The order of sentence is modified to that extent only. Sentence of fine of Rs. 50,000/- is maintained. However, the substantive sentence is ordered to be reduced from four years to the period already undergone by him.

All pending applications, if any, are disposed of, accordingly.

The case property, if any, may be dealt with as per the rules after expiry of period of limitation for filing the appeal.

Records of the Court below be sent back.

09.12.2022
amit rana

(N.S.SHEKHAWAT)
JUDGE

Whether reasoned/speaking	:	Yes/No
Whether reportable	:	Yes/No