

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

CRM-A-336-2020 (O & M)
Date of decision: 01.08.2022

State of Punjab

....Appellant(s)

Versus

Narinder Kumar @ Nikku

...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)

CRM-5490-2020

Application has been filed for condonation of delay of 277 days in filing the application for grant of leave to appeal.

Keeping in view the averments made in the application duly supported by affidavit of the official, application is allowed. Delay of 277 days in filing the application for grant of leave to appeal is condoned.

CRM stands disposed of.

CRM-A-336-2020

The present application has been filed under Section 378(4) Cr.P.C. for grant of leave to appeal against the judgment passed by the Additional Sessions Judge, Gurdaspur dated 04.02.2019 whereby, acquittal has been recorded of the respondent in FIR No. 117 dated 18.07.2014 under Sections 21, 22, 61 and 85 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short 'the Act'), P.S. City Batala.

The recovery from the plastic bag was 20 grams of heroin and

Morphine. On account of the non-joining of the independent persons at the time of search and the police party not even being in a position to name the person who had refused to join the investigation and keeping in view the stringent punishment provided under the Act, the benefit of doubt has been extended.

The Trial Court also noticed that there was a delay of 5 days in sending the sample to the office of Chemical Examiner, Kharar and the case property had been produced before the Magistrate on 19.07.2014 and that the directions (Ex.PW3/H) had been issued to deposit the same with the Judicial Malkhana but it was deposited with the Police Malkhana. Therefore, it was held that the possibility of tampering could not be ruled out during the period sample remained with the police. It was also noticed that no effort was made to find out where the contraband as such had been sourced from and, therefore, the investigation as such was a mere eye wash and the accused was given the benefit of doubt. It is also relevant to notice that though reliance was placed upon ***Mohan Lal vs. State of Punjab, AIR 2018 SC 3853*** that the complainant and the Investigating Officer must not be the same the same may not be valid any more in view of the judgment in ***Mukesh Singh vs. State (Narcotic Branch of Delhi), (2020) 10 SCC 120*** and ***Varinder Kumar vs. State of Himachal Pradesh, (2020) 3 SCC 321***.

We have perused the record as such and find that the trial Court was well justified in recording the acquittal on other grounds. Apparently on 19.07.2014 (Ex.PW-3/H), two samples were produced before the Magistrate bearing seals 'PS' and 'LS'. The same were broken and separate sampling was done of the intoxicant powder and the Heroin which had been allegedly recovered and it was sealed with the seal of JMIC, Batala namely

Balvinder Kaur Dhaliwal bearing officials 'BKD'. They were to be sent to the office of the Chemical Examiner, Kharar and remaining case property was to be deposited with judicial *malkhana*.

We have perused the report of the FSL (Ex.PW-3/J), which goes on to show that the samples were received only on 24.07.2014, five days later through PHC Paramjit Singh. The samples which were received contained the seal with initials 'PS' and 'LS' and there is no mention as such of the seals BKD of the Magistrate.

In such circumstances, we are of the considered opinion that the trial Court was well justified in recording acquittal as such as admittedly, the contraband was recovered from the polybag in the hand of the accused-respondent. Even as per the cross examination of H.C. Afrik Singh, the accused was not having any poppy husk or any particulars of poppy husk whereas, the FSL report as such showed that poppy husk has been found in the contents of Parcels 1 and 2 and Diacetylmorphine was not found. It has also come on record from the statement of PW-2 that personal search memo was also prepared and the accused had been apprised on the basis of suspicion that he could be searched before Gazetted Officer or Magistrate but there was a consent as such that he had reposed faith in the Investigating Officer. Apparently, the consent memo was thus prepared on account of the fact that the search had also been conducted of the person and the non-joining as such of the Gazetted Officer or the Magistrate would also be in violation of Section 50 as per the law laid down in ***State of Punjab vs. Baldev Singh, (1999) 6 SCC 172*** and ***Vijaysinh Chandubha Jadeja vs. State of Gujarat, 2010 (4) RCR (Crl.) 911***. 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.”

The lacuna regarding the manner in which the search was conducted and the contraband tested as such as per the report of the FSL with the recovery effected, thus are also contrary and in such circumstances, it is apparent that the trial Court has rightly recorded acquittal and the benefit of doubt has to flow to the accused. In the absence of any perversity in the same, we are of the considered opinion that no case is made out to grant leave to appeal in the present facts and circumstances and the present application stands dismissed.

(G.S. SANDHAWALIA)
JUDGE

01.08.2022
shivani

(VIKAS SURI)
JUDGE

Whether reasoned/speaking
Whether reportable

Yes/No
Yes/No