

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

CRM-A-375-2022

Date of decision: 29.07.2022

State of Punjab

....Appellant(s)

Versus

Lakhvir Singh

...Respondent(s)

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

Present: Ms. Monika Jalota, DAG, Punjab.

G.S.SANDHAWALIA, J. (Oral)

The present application has been filed under Section 378(3) Cr.P.C. for permission to file an appeal on account of the fact that the judgment of acquittal of the respondent-accused recorded by the Special Court, Fatehgarh Sahib on 28.02.2020 is not sustainable.

We have perused the paper book, which goes on to show that the proceedings were initiated in FIR No. 13 dated 28.01.2018 under Sections 22, 61 and 85 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short 'the Act'), P.S. Khamanon which was lodged at about 11.05 a.m. in the area of village Kotla. The recovery of contraband is of 4900 tablets of Lomotil.

As per the case of the prosecution, the police party while on patrol of the area of the said village, had noticed a young boy in the field of sugarcane crop, whose motor cycle was standing nearby. He had been apprehended by the police party and disclosed his identity and resultantly, on suspicion, he had been apprised of his right that his search could be

conducted by the Gazetted Officer or a Magistrate. He reportedly gave his

consent and reposed confidence in the police party, on which the search on his person was conducted. Resultantly, 5 polythene bags from the piece of cloth (parna) tied around his waist were recovered and one empty strip of Lomotil tablets was recovered from the left pocket of the trouser of the accused. The bags, on opening, were found to be containing loose intoxicant tablets numbering 4900. In such circumstances, charge under Section 22 of the Act was framed for having psychotropic substance in his possession. The Trial Court has noticed that there is violation of Section 50 of the Act in the absence of any Gazetted Officer/Magistrate having been associated in the search and the fact that there is no independent witness and neither the Sarpanch had been called. Thus, it came to the conclusion that the recovery is vitiated and had not taken place in the mode and manner alleged and did not inspire any confidence in the mind of the court.

Counsel for the State has argued that there is substantial compliance as the accused was given an option as such and, therefore, the judgment is not sustainable and requires reconsideration.

We have heard counsel for the State and are of the considered opinion that the law has been crystalized by the Constitution Benches of the Apex Court on this aspect regarding the recovery and the legality of the search which would stand vitiated in the absence of the mandatory safeguards having been violated by the Investigating Officer. It is in such circumstances, the Constitution Bench of the Apex Court in ***State of Punjab vs. Baldev Singh, (1999) 6 SCC 172*** and ***Vijaysinh Chandubha Jadeja vs. State of Gujarat, 2010 (4) RCR (Crl.) 911*** has held that the conviction would be vitiated if it is only recorded on the basis of the recovery of the illicit article from the person of the accused and if mandatory

compliance is not there. 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 factum of no other independent witness being associated at the time of his search and the arrest of the respondent-accused and only on the statement of the official witnesses the prosecution wishes to prove its case. This is another aspect which would not convince us to interfere in the order of conviction since the judgment as such does not seem to be suffering from any vice of perversity which would give any reason to reopen the double presumption of innocence which has now come in favour of the respondent, as per the settled principle of law.

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

29.07.2022
shivani

(VIKAS SURI)
JUDGE

Whether reasoned/speaking
Whether reportable

Yes/No
Yes/No