

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRA-S-2057-SB-2003

Reserved on: 09.12.2022

Date of Pronouncement:14.12.2022

Satish Kumar

...Appellant

VS.

State of Haryana

...Respondent

Coram : Hon'ble Mr. Justice N.S.Shekhawat

Present : Dr. Puneet Kumar Sekhon, Advocate (Amicus Curiae)
for the appellant.

Mr. Rajinder Kumar, Deputy Advocate General, Haryana.

N.S.Shekhawat J.

The present appeal has been directed against the judgment of conviction dated 17.10.2003 and the order of sentence dated 21.10.2003, passed by the Court of Learned Special Judge, Sonapat, whereby, the appellant was convicted under Section 18 of the Narcotic Drugs and Psychotropic Substance Act, 1985 (for short 'the NDPS Act') and sentenced to undergo rigorous imprisonment for a period of four years and to pay a fine of Rs.10,000/-. In default of payment of fine, he would further undergo rigorous imprisonment for a period of six months with a default stipulation.

The facts, which are necessary for disposal of the instant appeal, are that on 30.05.2001, Sub-Inspector, Amar Dass of Police Station, Ganaur was present along with other police officials at Agwanpur turn. In the meanwhile, one person was seen coming on foot from the side of bus stand, Ganaur and on

seeing the police party, he suddenly turned back and tried to escape. On suspicion, SI Amar Dass apprehended him with the help of other police officials and made enquiry from him and he told his name and address to be Satish Kumar S/o Pale Ram, caste Bairaghi resident of village Agwanpur, Police Station, Ganaur. SI Amar Dass raised the suspicion that he was carrying some contraband and he was to be searched. He could get his search conducted in the presence of some Executive Magistrate or Gazetted Officer and a separate notice was issued under Section 50 of the NDPS Act to Satish Kumar in this regard and the aforesaid person agreed to get his search conducted in the presence of a Gazetted Officer. On this, Bijender Singh, DSP, Ganaur was informed telephonically and was called at the spot. After sometime, Bijender Singh, DSP, Ganaur along with his staff reached at the spot and he asked Satish Kumar aforesaid regarding his search, in writing and Satish Kumar replied that he wanted to get his search conducted in the presence of the DSP. On this, Amar Dass, SI conducted the search and at that time, one polythene packet was recovered from the right side pocket of the pant of Satish Kumar and on opening the packet, opium was found in the same. Thereafter, the opium was weighed and 20 grams opium was taken out as a sample separately and was kept in a small plastic box and the remaining quantity of opium was found to be 770 grams and the remainder was also kept in a separate parcel. The sample parcel as well as the remainder were sealed separately with the sample seal 'AD' and DSP had also affixed his seal on each of both the parcels with the sample seal of 'BS' and both the sealed parcels were handed over to ASI Dhanpat Rai and specimen impressions of both the seals were also obtained separately. Both the abovesaid parcels along with specimen sealed impressions were taken

into possession by the police vide a separate memo and the signatures of the witnesses were obtained on the memo. It was found that the accused Satish Kumar by keeping 770 grams of opium without any permit or licence, had committed an offence under Section 18 of the NDPS Act. On this, the ruqa was sent for registration of the case through Constable Krishan Kumar and the FIR in the instant case was registered by the local police.

After completion of the investigation, the challan was presented before the Competent Court and the accused was charged for the offence under Section 18 of the NDPS Act by the learned Special Judge, to which he pleaded not guilty and claimed trial.

In support of the charge, the prosecution examined six witnesses and thereafter, closed the evidence. The prosecution examined PW-1 Constable Maha Singh, who stated that on 08.06.2001 MHC Hari Chand handed over to him one sealed parcel along with sample seal paper to deposit the same in the office of Director, Forensic Science Laboratory (FSL), Madhuban. He deposited the same with the FSL Madhuban and till the time, the samples remained in his custody, no one had tampered with the same. The prosecution further examined Inspector Randhir Singh as PW-2, who was posted as SHO, Police Station Ganaur, on 30.05.2001. He supported the case of the prosecution. He had prepared and submitted a report under Section 173 Cr.P.C. as well. Still further, the prosecution examined ASI Dhanpat Rai as PW-3, who was present along with SI Amar Dass at the time of recovery of the contraband. He stated that the written notice Ex.PB was served upon the accused regarding the search and he opted to get his search conducted in the presence of a Gazetted Officer. The said witness admitted that a large number of persons

were present near the place of recovery at that time and the Investigating Officer asked number of persons to join the investigation, but they did not join. He further admitted that the DSP did not ask the accused that he has right to be searched in the presence of the Magistrate. Still further, the prosecution examined PW-4, HC Hari Chand, who was posted as MHC in Police Station, Ganaur on the date of the recovery from the accused. On 30.05.2001, Amar Dass, SI deposted with him two sealed parcels and one sample seal paper of AD, BS and RS. On 08.06.2001, he sent the sealed samples to the Director, FSL, Madhuban, through Constable Maha Singh. Bijender Singh, DSP, was examined as PW-5, who stated that on receiving the information from SI Amar Dass, he reached the spot. He also supported the case of the prosecution. SI Amar Dass was examined as PW-6, who was the complainant in the instant case and was a witness to the recovery and subsequent investigations conducted at the spot at the time of recovery. He also admitted that the place of recovery was a busy place and several persons were coming and going there.

The entire evidence led by the prosecution was put to the accused in the shape of his statement under Section 313 Cr.P.C. and he pleaded his false implication. He stated that nothing was recovered from him and he was caught by the police from his house and has been falsely implicated in the instant case.

To rebut the case of the prosecution, the accused examined two defence witnesses. Ram Chander, Ex-Sarpanch of village Agwanpur was examined as DW-1. He stated that the accused present in the Court was a student of a school in Sonapat and was a wrestler. About 2 ¼ years back, the police came to the village and lifted the accused as there was a complaint against the brother of the accused. Still further, the accused examined DW-2

Ram Phal and produced his Sports Certificate Ex.D-1 and newspaper Ex.D-2, showing that he was a good wrestler and had been picked by the police from his village, when the police came to search his brother, who was facing prosecution in several other cases.

I have heard learned counsel for the parties at length and with their able assistance, I have gone through the trial Court record.

Learned counsel for the appellant vehemently argued that in the instant case, the mandatory provisions of Section 50 of the NDPS Act were not complied with and the appellant was liable to be acquitted only on this ground alone. After the appellant was apprehended, the notice Ex.PB was served upon the appellant, whereby Amar Dass, SI informed the appellant in writing that there was suspicion that the appellant was carrying some contraband. He further asked him as to whether he wanted to get his search conducted in the presence of some Executive Magistrate or Gazetted Officer. In reply to the said notice, the appellant stated that he wanted to get his search conducted in the presence of some Gazetted Officer. Learned counsel submitted that by mentioning the word 'Executive Magistrate' the Investigating officer had not strictly complied with the provisions of Section 50 of the Act. Still further, the learned trial Court wrongly observed that it was a case of chance recovery and the provisions of Section 50 would not be applicable to the facts of the instant case. The submission made by learned counsel for the appellant has been vehemently opposed by the learned State counsel, who submitted that it was a case of chance recovery and there was no need of complying with the provisions of Section 50 of the NDPS Act and the impugned judgment is liable to be upheld.

The main submission in the instant case is with regard to the strict compliance of the provisions of Section 50 of the NDPS Act and the relevant extract of the said provision reads as under:-

“50. Conditions under which search of persons shall be conducted.

(1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

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It has been held by the Hon’ble Supreme Court in the matter of

Myla Venkateswarlu vs. State of A.P., 2012 AIR (SC), 1619.

“7. On account of divergence of opinion between the two decisions of this court with regard to the dictum laid down by the Constitution Bench in Baldev Singh, another Constitution Bench in Vijaysingh Chandubha Jadeja v. State of Gujarat, 2010(4) RCR (Criminal) 911: 2010(6) R.A.J. 326: (2011)1 SCC 609, considered the question whether Section 50 of the Narcotic Drugs and Psychotropic Substances Act casts a duty on the empowered officer to inform the suspect of his right to be searched in the presence of a gazetted officer or a Magistrate, if he so desires or whether a

mere enquiry by the said officer as to whether the suspect would like to be searched in the presence of a Magistrate or a gazetted officer can be said to be due compliance with the mandate of the said section. The Constitution Bench held that although Baldev Singh did not decide in absolute terms the question whether or not Section 50 of the Narcotic Drugs and Psychotropic Substances Act was directory or mandatory yet it was held that provisions of sub-section (1) of Section 50 makes it imperative for the empowered officer to inform the person concerned about the existence of his right that if he so requires, he shall be searched before a gazetted officer or a Magistrate; failure to inform the suspect about the existence of his said right would cause prejudice to him, and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from the person during a search conducted in violation of the provisions of Section 50 of the Narcotic Drugs and Psychotropic Substances Act. The Constitution Bench noted that in Baldev Singh, it was clarified that it was not necessary that the information required to be given under Section 50 should be in a prescribed form or in writing but it was mandatory that the suspect was made aware of the existence of his right to be searched before a gazetted officer or a Magistrate, if so required by him. The Constitution Bench reiterated the principles laid down by this court in Baldev Singh and added that the concept of substantial compliance with the requirement of Section 50 of the Narcotic Drugs and Psychotropic Substances Act is neither borne out from the language of Section 50(1) nor it is in consonance with the dictum laid down in Baldev Singh. Thus, it is no longer in dispute that strict compliance with the provisions of Section 50(1) of the Narcotic Drugs and Psychotropic Substances Act is necessary. We need to see whether evidence adduced in this case establishes that

there was strict compliance of Section 50(1) of the Narcotic Drugs and Psychotropic Substances Act.

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10. *At the relevant time, PW-3 CI Koteswara Rao was working as Inspector of Police. It is this witness who had received information about the illegal sale of Ganja at Koneru Bazar. On receiving the information, he proceeded to Koneru Bazar along with PW-1, PW-2 and another police constable. He has corroborated PW-1 and PW-2 as regards the apprehension of the appellant, A1 and A2. He has stated that the appellant, A1 and A2 revealed their names and identity. According to him, A1 produced packets containing Ganja. Then he told him that if he wanted another gazetted officer, he will bring him. So far as A2 and the appellant are concerned, he has stated that they produced packets containing Ganja. Thereafter, he revealed to them that they have a right to have another gazetted officer in addition to him to which they replied that his presence was sufficient. PW- 3 has thus come out with a new story viz. the appellant, A1 and A2 took out the Ganja packets from their pockets and, thereafter, he told the appellant, A1 and A2 that they had a right to have another gazetted officer in addition to him. This story that the accused themselves took out the Ganja packets from their pockets runs contrary to the version of PW-1 and PW-2 and, therefore, it does not inspire confidence. If the accused voluntarily took out Ganja packets, there was no question of conducting search in the presence of a gazetted officer or a Magistrate. But, assuming that this right can be communicated to a suspect after the seizure and assuming the evidence of this witness to be true, it still does not indicate that the requirement of Section 50(1) of the Narcotic Drugs and Psychotropic Substances Act was fulfilled. There is no clear communication to the accused that they had a right to be*

searched in the presence of a gazetted officer or a Magistrate. As we have already noted, the concept of substantial compliance cannot be read into the provisions of Section 50(1) of the Narcotic Drugs and Psychotropic Substances Act. We, therefore, have no hesitation in concluding that in this case, there is a breach of Section 50(1) of the Narcotic Drugs and Psychotropic Substances Act. Since the conviction of the appellant is solely based on possession of Ganja recovered from him, it will have to be set aside.”

From a bare perusal of the above referred case law, it is evident that the right conferred by the statute under Section 50 of the Act is sacrosanct and has to be complied with strictly. Still further, from a bare perusal of the notice Ex.PB, which is a notice under Section 50 of the Act, nowhere it is gathered that it was informed to the accused that it was his right to get himself searched in person by a Gazetted Officer or by a Magistrate. The Hon’ble Supreme Court in the matter of ***K. Mohanan Vs. State of Kerela, 2000 SCC (criminal), 1228*** held as under:-

“If the accused, who was subjected to search was merely asked whether he required to be searched in the presence of a Gazetted Officer or a Magistrate. It cannot be treated as communicating to him that he had a right under law to be searched so. What PW1 has done in this case was to seek the opinion of the accused whether he wanted it or not. If he was told that he had a right under law to have it (sic himself) searched what would have been the answer given by the accused cannot be gauged by us at this distance of time. This is particularly so when the main defence adopted by the appellant at all stages was that section 50 of the Act was not complied with.”

Still further, the Hon'ble Supreme Court, while dealing with Section 50 has held in a catena of judgments that merely asking to the accused to be searched in the presence of the Gazetted Officer or a Magistrate would not suffice. Indeed, it should have been informed to the accused that it is his right under the law to be searched before the Magistrate or a Gazetted Officer. From a perusal of the notice Ex.PB in the instant case, it is evident that the essential and mandatory requirement of the law is totally lacking. Moreover, the Investigating Officer in the instant case stated that the accused could get his search conducted from an Executive Officer or a Gazetted Officer. In fact by using the word 'Executive Magistrate', the Investigating Officer has restricted the scope of Section 50 of the Act and thus, the offer is defective in the eyes of law. The learned trial Court completely over looked this aspect of the matter, while delivering the impugned verdict.

Apart from that, the learned trial Court wrongly held that it was a case of chance recovery and there was no need to comply with the provisions of Section 50 of the Act. In fact while observing so, the learned trial Court completely over looked the evidence led by the prosecution itself. Apart from that, the learned trial Court also overlooked the various pronouncements, which were referred during the course of arguments. The learned trial Court observed that the accused was a well educated person, whose recovery was effected in the presence of DSP, who also apprised him of his right by serving notice whether he was interested to get the search conducted in his presence. Again the said finding is wrong and unsustainable. In fact the Investigating officer as well as the DSP were under a legal obligation to inform the accused specifically with

regard to his statutory right under Section 50 of the Act and non-compliance of the same vitiates the recovery and the investigation in this regard.

Learned counsel for the appellant further submitted that the recovery was affected by SI Amar Dass, PW-6 and he was the first informant in the instant case. The entire investigation was conducted by him and the investigation was conducted in the most unfair and partisan manner. The submission made by learned counsel for the appellant has been opposed by the learned State counsel on the ground that the appellant had failed to point out any illegality in the process of investigation and the said submission is liable to be rejected.

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

Further, it is apparent that the Investigating Officer had violated the principles of fair and impartial investigation. Still further, in the instant case, SI Amar Dass PW-6 was the person, who conducted the search and became the first informant. However, later on, he himself conducted the investigation and the prosecution case is rendered doubtful.

Still further in the instant case, it is apparent that despite availability, no independent witness was joined by the Investigating Agency. Apart from that, there was a delay of 8 days in sending the sample to the FSL without any explanation.

Consequently, I am of the considered opinion that the prosecution was not able to prove that the search and recovery of the contraband made from the appellant was in accordance with the procedure prescribed under the statutory provisions of the NDPS Act. Even non-compliance of the mandatory

procedure prescribed under Section 50 of the Act itself is fatal to the prosecution case and in this case, I have found that the prosecution has failed to prove the strict compliance as required in law, the appellant is held entitled to claim its benefit to seek his acquittal.

In the light of the foregoing discussion, the appeal succeeds and is allowed. The impugned judgment of conviction dated 17.10.2003 and order of sentence dated 21.10.2003, passed by the Court of Learned Special Judge, Sonapat, are set aside and the appellant is acquitted of the charges.

Pending applications, if any, are also disposed off, accordingly.

Case property, if any, be dealt with, and destroyed after the expiry of period of limitation. The trial court record be sent back.

In the end, I record my appreciation for Dr. Puneet Kumar Sekhon, learned Amicus Curiae, for the able assistance rendered to this Court.

14.12.2022

hemlata

(N.S.SHEKHAWAT)
JUDGE

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