

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-A-395-2020 (O&M)
DECIDED ON: 29th APRIL, 2022

STATE OF PUNJAB

.....APPELLANT

VERSUS

JATINDER KUMAR

.....RESPONDENT

CORAM: HON'BLE MR. JUSTICE AUGUSTINE GEORGE MASIH
HON'BLE MR. JUSTICE SANDEEP MOUDGIL

Present: Ms. Monika Jalota, DAG, Punjab
for the applicant.

SANDEEP MOUDGIL, J

CRM-8177-2020

Prayer in this application is for condonation of delay of 10 days
in filing the present appeal.

In view of averments made in this application as duly supported
by an affidavit, the delay of 10 days in filing the present appeal is condoned.

Accordingly the application is allowed.

CRM-A-395-2020

The instant application seeking leave to appeal has been
preferred by the State of Punjab against the judgment of acquittal dated
05.09.2019 passed by learned Judge (Special Court), Shaheed Bhagat Singh
Nagar arising out of an FIR No. 84, dated 07.07.2018 under Sections 21, 22
of Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'Act
1985') registered at Police Station Rahon, District SBS Nagar.

To consider the instant application for grant of leave to appeal,

it would be appetite to test the foremost question before this Court i.e.whether Section 50 of the Act, 1985 is applicable only in case of personal search of the accused, if acting on the prior information by the Investigating Officer and secondly, would it be fatal to the prosecution case if no independent witness is joined and examined?

The case set up by the prosecution is that on 07.07.2018 ASI Surinder Singh along-with other police officials while on patrolling duty between Rahon to Dilawarpur, at around 4.30 AM spotted a motorcycle driven by a person near Gas Agency, Village Dilawarpur. A polythene bag was tied with the handle of motorcycle and the rider got panicked on seeing the police party who made an attempt to retreat. The police party succeeded in apprehending the accused who disclosed his name as Jatinder Kumar as well as his address. The investigating officer disclosed his identity and told the accused that he want to conduct his search and search of polythene bag having suspicion of it containing incriminating material. The specific offer was made to the accused to get himself searched in the presence of Gazetted Officer or a Magistrate, however, the accused Jatinder Kumar reposed confidence in the Investigating Officer. Before conducting the search the Investigating Officer made an effort for joining independent witness from the public but no one agreed. Thereafter the search was conducted and from the polythene bag which was tied on the handle of the motorcycle, 10 injections of Buprenorphine, 02 ml each were recovered and parcel was prepared and was sealed with seal bearing impression 'SS'. The parcel was taken into possession with specimen seal impression and ruqa was prepared, on the basis of which FIR was registered. In pursuance thereof, the accused was arrested and personal search was conducted. After inspecting the spot

of recovery a rough site plan was prepared and investigation in this case was pressed into motion by recording the statements of witnesses and on completion of investigation the challan against the accused was prepared and submitted to the Court.

The trial Court served the charge sheet upon the accused having found *prima-facie* commissioning of offence under Section 22 of the Act, 1985. The prosecution made valiant attempt to bring the accused to book by leading evidence in the form of ASI-Gurbax Singh as PW-1, ASI Surinder Singh as PW-2, HC-Surinder Kumar as PW-3, Rajan Bhatia, Clerk as PW-4, Palwinder Singh as PW-5, DSP Rupinderjit Singh as PW-6 and HC-Balvir Singh as PW-7 while closing the evidence.

All the incriminating material revealed from the afore-said prosecution evidence was put to accused while recording his statement under Section 313 Cr.P.C. to which the accused did not plead guilty and rather alleged false implication and innocence. Though no evidence was led on behalf of the accused and it was closed by an order.

On the basis of pleadings and submissions made by the respective parties following questions were framed for determination:-

- (i) *Whether non-joining of independent witness is fatal to the prosecution case?*
- (ii) *Whether provisions of Section 50 NDPS Act were required to be complied with, if so, its effect?*
- (iii) *Whether prosecution has been able to prove on record charge against the accused beyond shadow of reasonable doubt?*

The trial Court on examination of evidence holding the story of the prosecution to be doubtful adjudicated all the above three questions against the prosecution and acquitted the accused of the charges framed

against him.

The said judgment of acquittal has been assailed before this Court by way of an application under Section 378(3) Cr.P.C. seeking leave to appeal contending that it is a case of recovery of heavy commercial quantity with the further averment that Section 50 of Act, 1985 would not apply in case of recovery from any bag or envelope in the hands of accused or from the vehicle or from the premises in the possession of the accused. Learned State counsel also argues that sufficient compliance of Section 50 of the Act 1985 was made, as the accused was apprised of his legal rights, if he so, opts to be searched by a Gazetted Officer or Magistrate, however, the accused reposed faith in the Investigating Officer and therefore, despite the afore-said offer, the trial Court gravely erred in law to pass judgment of acquittal on the ground of non-compliance of Section 50 of the Act, 1985 inasmuch as it is applicable only in the case of personal search of the accused acting on the prior information by the Investigating Officer.

Lastly, it has been argued by learned State counsel that the findings returned by the trial Court is erroneous while holding the prosecution story to be doubtful on account of not associating and examining any independent witness to corroborate its case against the accused.

Having heard the learned counsel for the State, it is deemed in the fittest of facts that a critical glance to the provisions of Section 50 of the Act, 1985, which reads as under:

“Section 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.

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.”

A bare reading crystalizes the mandate of Section 50 of the Act, 1985 precisely as if the person intended to be searched expresses his desire to be taken to the nearest Gazetted Officer or the Magistrate, he can not be searched till the Gazetted Officer or the Magistrate, as the case may be, direct the officer to do so.

The real scope and object of Section 50 of the Act, 1985 as to what are the duties, obligations and the powers conferred on the authorities under the said statutory provision and as to whether the compliance of requirements of Section 50 are mandatory or directory, remains no more *res-integra* and now stands settled by a Constitution Bench of the Apex Court in “***State of Punjab vs. Baldev Singh; (1999) 6 SCC 172***”

In the present case in addition to search of polythene bag tied on the handle of motorcycle personal search of the accused was also made by the Investigating Officer, which ought to have been in conformity with ingredients of Section 50 of the Act, 1985, therefore, it was abundant duty of the prosecution to prove that the search and recovery was made from the accused in the presence of a Magistrate or Gazetted Officer and non-compliance thereof to the mandatory provisions as envisaged under Section 50 of the Act, 1985, derails the prosecution case.

On the other question of having not joining independent witness by the prosecution, the deposition of PW-1 ASI Gurbax Singh and PW-2 ASI Surinder Singh, Investigating Officer does not inspire confidence who in cross-examination admitted the fact that no Lambardar, Panch or Sarpanch was called at the time of offer, search, recovery despite availability and also admitted further that no independence witness was called at the time of offer.

PW-1 ASI Gurbax Singh is the witness to the alleged recovery from the accused, who deposed that the recovery memo was prepared prior to the consent memo which clearly demonstrate that the alleged recovery had been effected from the accused before giving him so called offer, if any to that of the personal and that of the polythene bag carried by him on his

motorcycle. ASI Gurbax Singh has been categoric in stating that at the time of alleged recovery from the accused, the Investigating Officer did not call any independent witness at the time of offer, search and alleged recovery.

Consent memo Ex.PW-1/A, recovery memo Ex-PW-1/C and ruqa Ex.PW-1/D though reveal that offer was given to conduct the personal search of the accused as well as polythene bag but examination of these documents also makes it abundantly clear that the personal search of the accused was conducted by the Investigating Officer alone as has been admitted by him while deposing as PW-2 ASI Surinder Singh.

It indicates that no efforts whatsoever was made by the police/Investigating Officer to join the independent witness at the time of apprehension of accused and alleged recovery. In the case in hand, the factual aspect of not associating any independent witness becomes fatal for the reason that the prosecution has failed *in toto* to demonstrate that any attempt or sincere effort to associate an independent witness either at the time of search and recovery or thereafter during the course of trial, was made.

It is the settled proposition in law that where a statute confers such drastic powers and seeks to deprive the citizen of his liberty for not less than 10 years besides stringent provision for grant of bail, scrupulous compliance of the same must be insisted upon. Some positive evidence ought to have been brought on record on the basis of which, testimony of the Investigating Officer deposing at the trial to the effect that he was unable to secure the presence of independent witnesses, however there is nothing in evidence lead by the prosecution to corroborate their stand on this question as well. Mere bald assertion of the Investigating Officer is not sufficient

and in fact lacks confidence for this Court to held against the accused.

Above all as per the alleged recovery memo the contraband consisted of injections of Buprenorphine whereas the FSL report Ex.PW-2/L has falsified this stand of the prosecution as well which on analysis labelled the contraband as “OMGESIC”. Under these circumstances either the alleged recovery is to be disbelieved or an inference is drawn that the case property was not intact after the place of alleged recovery till it reach the FSL making the whole story of the prosecution highly improbable and doubtful.

We, in the light of discussions made hereinabove and after perusal of the record including the evidence, are of the considered view that the prosecution has miserably failed to bring the guilt home against the accused which has failed to prove its case beyond reasonable doubt and therefore, do not find any reason to interfere with the judgment of acquittal dated 05.09.2019 passed by the trial Court.

Hence, the appeal stands dismissed in the above terms.

(SANDEEP MOUDGIL)
JUDGE

(AUGUSTINE GEORGE MASIH)
JUDGE

29th APRIL, 2022
sham

Whether speaking/reasoned *Yes/No*

Whether reportable *Yes/No*