

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

CRM-24303-2019

in/and

CRM-A-2017 of 2019

Date of Decision:-05.12.2022

State of Punjab

....Appellant

Vs.

Nirmal Singh @ Nimma

....Respondent

CORAM: HON'BLE MR. JUSTICE KARAMJIT SINGH

Argued by:- Ms. Kanika Sachdeva, AAG, Punjab.

KARAMJIT SINGH, J.

CRM-24303 of 2019

This is an application under Section 5 of Limitation Act for condonation of delay of 36 days in filing the appeal.

The delay of 36 days in filing of appeal stands condoned in the light of reasons detailed in the application.

CRM-A-2017 of 2019

The appellant-State has filed the appeal against judgment dated 17.01.2019, whereby the Court of Judge Special Court, Shaheed Bhagat Singh Nagar (SBS Nagar) has acquitted respondent Nirmal Singh @ Nimma in a criminal case having FIR No.71 dated 20.09.2017 under Sections 21 and 22 of NDPS Act, Police Station,

Banga (District SBS Nagar). Along with the appeal, an application has been filed by the State under Section 378(3) CrPC for grant of leave to file an appeal against the aforesaid judgment.

The brief facts of the present case are that on 20.09.2017, the police party headed by PW2 ASI Satnam Singh was presented in the area of bus stop, Dhahan Kaleran and in the meantime, respondent-accused alighted from the bus which came from Jalandhar and he started walking quickly towards the road leading to village Kaleran and was apprehended on the basis of suspicion by the members of the aforesaid police party. PW2 ASI Satnam Singh told the respondent-accused that some contraband was suspected to be in his possession and the respondent-accused was also apprised of his legal right of personal search before a Magistrate or a Gazetted Officer, however, the respondent-accused reposed confidence in the said police official and gave his consent to PW2 ASI Satnam Singh to conduct his personal search and consent memo is Ex.P1 which was signed by the respondent-accused in presence of PW1 HC Jagjit Singh and HC Jaskaran Singh in presence of the Investigating Officer. On search of the respondent-accused, 5 grams of heroine wrapped in polythene envelope was recovered from the right pocket and 35 grams of intoxicating substance wrapped in the polythene envelop was recovered from the left pocket of the lower/pajama worn by the respondent-accused. Parcels of the recovered contraband were prepared which were sealed by PW2 ASI Satnam

Singh with his seal bearing impression 'SS'. Specimen seal impressions were prepared in triplicate and the seal after use was handed over to PW1 HC Jagjit Singh. The entire case property was taken into police possession vide memo Ex.P3 which was attested by PW1 HC Jagjit Singh and HC Jaskaran Singh at the spot. Ruqa was prepared and sent to the police station through HC Vijay Pal for registration of the FIR. Thereafter, FIR was registered and investigation was initiated. The accused was arrested. After completion of the investigation on the spot, ASI Satnam Singh produced the accused and the case property before PW5 SI/SHO Rajiv Kumar, who verified the facts of the case and sealed the case property with his seal bearing impression 'RK'. Thereafter, the entire case property was deposited with PW3 HC Raj Kumar (MHC) and the accused was kept in police lock up. On 21.09.2017, the entire case property along with accused was produced before Yukti Goyal, Ld. Chief Judicial Magistrate, SBS Nagar, who checked the sealed parcels (the case property) and out of the sealed parcel having 35 grams of intoxicating substance, two samples of 05 grams each of intoxicating substance were separated from the bulk and converted into two sample parcels weighing 5.82 grams and 5.71 grams and they were sealed by the Chief Judicial Magistrate with his seal bearing impression YG and the remaining intoxicating substance was repoured in the same plastic pouch and converted into separate parcel which was also sealed by the Chief Judicial Magistrate with his

aforesaid seal. Another parcel having 5 grams of heroin was also checked after breaking open its seal and then converted into separate parcel which was also sealed by the Chief Judicial Magistrate with his aforesaid seal and separate sample seal impression of the seal used by the Chief Judicial Magistrate was also prepared. Thereafter, the entire case property was deposited with the MHC. The MHC sent the sealed parcel of heroin and sealed sample parcel of intoxicating substance along with sample seal impressions and form No.M29 to the office of Chemical Examiner, Ludhiana through PW4 HC Varinder Kumar on 22.09.2017. On receipt of the report of Chemical Examiner Ex.P19 and after completion of all other formalities of investigation, the challan against the accused was presented in the Court.

The Trial Court framed charges under Sections 21 and 22 of NDPS Act to which the respondent-accused pleaded not guilty and claimed trial.

In order to bring home the guilt of the respondent-accused, the prosecution examined PW2 ASI Satnam Singh, Investigating Officer who narrated the entire prosecution story in his testimony. HC Jagjit Singh who was the member of police party headed by PW2, also corroborated the prosecution story while being examined as PW1. HC Raj Kumar who handled the case property being posted as MHC in Police Station Banga at the time of the recovery, was examined as PW3. HC Varinder Kumar who took the

sealed samples and deposited the same with the FSL appeared in the witness box as PW4, while SI Rajiv Kumar, who was SHO of Police Station Banga at the relevant time appeared in the witness box as PW5.

After recording of entire prosecution evidence, the respondent-accused was examined under Section 313 Cr.P.C. and the entire incriminating evidence and circumstances were put to him but he denied the same and further took plea of false implication. However, he did not lead any evidence in his defence.

After hearing the learned Additional Public Prosecutor for the State and defence counsel and appreciating the entire evidence the trial Court, acquitted the respondent-accused, while placing reliance upon the law laid down by the Hon'ble Apex Court in ***Mohan Lal Vs. State of Punjab 2018(2) RCR Criminal 931***, wherein it was held that if the complainant himself is the investigating officer, it violates the constitutional right of the accused to have fair trial and further relied on the ratio laid down in ***Arif Khan @ Agha Khan Vs. State of Uttrakhand (2018) 18 SCC 380***, wherein the accused was acquitted on the ground that search and recovery was not in conformity with the requirement of Section 50 of the NDPS Act.

I have heard the State counsel and gone through the record of the trial Court.

The State counsel while assailing the impugned judgment dated 17.01.2019, has contended that the law laid down in

Mohan Lal's case (supra) is no more a good law and in this context the State Counsel referred to ***Mukesh Singh Vs. State (Narcotic Branch of Delhi) SLP (Criminal No.39528/2018) decided on 31.08.2020.***

The State counsel has further contended that in the present case the respondent-accused was made aware of existence of his legal right to be searched before a Gazetted Officer or a Magistrate as per the mandate of Section 50 of the NDPS Act, however, the respondent-accused gave his consent in writing that he has a faith in the investigating officer and gave his consent to be searched by him, as is evident from Ex.P1, which bears the signatures of respondent-accused. The State counsel has further contended that there is nothing on record to prove that the aforesaid consent was given by the respondent-accused under coercion, duress or threat. The State counsel has further contended that thus there is no violation of the mandatory provisions of Section 50 NDPS Act in the present case.

The State counsel while referring to the evidence led by prosecution, further argued that from the perusal of testimony of PW1 and PW2 it stands proved that on 20.09.2017 the respondent-accused was apprehended by the police party headed by PW2 ASI Satnam Singh, while he alighted from a bus in the area of bus stop Dahan Kaleran on the basis of suspicion and then he was informed about his legal right of personal search before a Gazetted Officer or a

Magistrate, but the respondent-accused reposed confidence in the members of the police party and gave his consent vide Ex.P1 and only thereafter, the personal search of the respondent-accused was conducted by PW2 ASI Satnam Singh on which the contraband was recovered from both the pockets of the lower (pajama) worn by him. The counsel for the State has further contended that in this manner there is no breach of the mandatory provisions of Section 50 NDPS Act.

The State counsel has further contended that the recovered contraband was converted into two parcels which were sealed by PW2 ASI Satnam Singh with his seal bearing impression SS and seal after use was handed over to PW1 HC Jagjit Singh by the investigating officer and then the entire case property was taken into possession by the police vide memo. Ex.P3 along with sample seal impressions. The State counsel has further submitted that on return to the police station the respondent-accused along with the case property was produced before PW5 SI Rajiv Kumar who was incharge of the Police Station Banga at that time and the said police official checked the entire case property and verified the facts of the case and then appended his seal bearing impression RK on the entire case property and separate seal impression was also prepared and then the entire case property and sample seal impressions were deposited with the concerned MHC who while appearing in the witness box as PW3 proved the link evidence by way of his affidavit

Ex.PW3/A. The State counsel has further argued that on the next day the respondent-accused along with the entire case property was produced before the Court of Ld. Chief Judicial Magistrate along with applications Ex.P13 and Ex.P14 and samples were drawn out of the aforesaid case property and the samples and remaining bulk were sealed by the Chief Judicial Magistrate with his seal YG and separate sample seal impression of the seal used was prepared and form No.29 Ex.P17 was also filled and inventory was separately prepared as per the provisions of Section 52(A) of NDPS Act. The State counsel has further argued that both the samples along with sample seal impressions were sent to office of forensic science laboratory, Punjab, Ludhiana on 22.09.2017 through PW4 HC Varinder Kumar who also tendered his affidavit Ex.PW4/A to prove the link evidence. The State counsel has further contended that after analyzing the contents of sample parcels, the aforesaid laboratory gave its report Ex.P19, as per which diacetylmorphine (heroin) was found present in the content of parcel No.1, while alprazolam was found present in the content of parcel No.2. The State counsel further contended that the ratio laid down in Arif Khan @ Agha Khan was wrongly applied by the learned Trial Court while acquitting the respondent-accused. The State counsel while concluding her arguments made prayer that the leave to appeal be granted to the State.

I have considered the submissions made by the State counsel and gone through the record of the trial Court.

Definitely the respondent-accused cannot take benefit of the decision of the Hon'ble Supreme Court in ***Mohan Lal's case (supra)*** as the Hon'ble Supreme Court in its subsequent judgment in ***Mukesh Singh's case (supra)*** held that the law down in ***Mohan Lal's case (supra)*** is not a good law and the accused is not entitled to acquittal merely because the informant is the investigator, as by that itself cannot be said that the investigation would suffer the vice of unfairness or bias.

As per the prosecution version the alleged contraband was recovered from both the pockets of the lower/pajama worn by accused-respondent. So in the present case the alleged recovery was effected during the personal search of the respondent-accused and thus, the mandatory provisions of Section 50 of NDPS Act are applicable in the instant case, as per the law laid down by the Hon'ble Supreme Court in ***Vijaysinh Chandubha Jadeja Vs. State of Gujarat 2011(1) SCC 609*** wherein it was held that the provisions of Section 50 of NDPS Act must be strictly complied with.

The plea of the State is that the respondent-accused was informed about his legal right of personal search before a Gazetted Officer/Magistrate as per requirements of Section 50 of NDPS Act, but the respondent-accused reposed faith in the investigating officer and to this effect he gave his consent and only thereafter the personal search of the respondent-accused was conducted by the investigating officer (PW2 ASI Satnam Singh). It is evident that the respondent-

appellant was not produced before any Magistrate or Gazetted Officer for the purpose of effecting his personal search. Further, it also emerges that due to aforementioned reason, the search and recovery of the contraband was not made from the respondent-appellant in presence of any Magistrate or Gazetted Officer. Furthermore, it is also admitted fact that no gazetted officer was the member of the police party headed by PW2 ASI Satnam Singh, who conducted the personal search of the respondent-accused which resulted in recovery of alleged contraband.

This Court is of the view that the consent given by the respondent-accused vide Ex.P1 is not suffice to establish the compliance of mandatory provisions of Section 50 NDPS Act. In this regard I am supported by the judgment of Hon'ble Supreme Court in Arif Khan @ Agha Khan (supra) which has been relied upon by the trial Court also. In the Arif Khan @ Agha Khan (supra) the accused was informed about his legal right to be searched in presence of Gazetted officer or magistrate by the police officials and the raiding police party conducted the personal search of accused-respondent after obtaining his consent in writing to be searched by the raiding police party and the personal search resulted in recovery of contraband (charas). Admittedly, in the said case the accused was not produced before any magistrate or gazetted officer and the aforesaid personal search was not effected in presence of any magistrate or gazetted officer and after completion of trial the accused was

convicted by the Court of Additional Sessions Judge, Fast Track Court for possessing the said contraband and his appeal was dismissed by the High Court of Uttranchal at Nanital, against which the accused filed an appeal in the Hon'ble Apex Court and the same was allowed on the ground that a search and recovery made from the accused of the alleged contraband (charas) does not satisfy the mandatory requirements of Section 50 as held by the said Court in case of ***Vijaysinh Chandubha Jadeja's case (supra)*** and the Hon'ble Apex Court held that it was mandatory for the prosecution to prove that the search and recovery were made from the accused in presence of a magistrate or a gazetted officer.

In the light of the above I have no hesitation in concluding that breach of mandatory provisions of Section 50 of the NDPS Act has vitiated the entire personal search and recovery. Thus, there is no illegality in the judgment of acquittal passed by the learned Trial Court.

Accordingly, the application moved by the State under Section 378(3) Cr.P.C. for grant to leave to appeal is hereby declined and consequently, the appeal filed by the State also stands dismissed.

(KARAMJIT SINGH)
JUDGE

05.12.2022

P. Chawla

Whether reasoned / speaking? Yes / No

Whether reportable? Yes / No