

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

209

**CRM-M-34151-2022 (O&M)
Decided on : 11.10.2022**

Riaz Ahmed Khan

. . . Petitioner(s)

Versus

State of Punjab

. . . Respondent(s)

CORAM: HON'BLE MR. JUSTICE SANJAY VASHISTH

PRESENT: Mr. Prateek Pandit, Advocate
for the petitioner.

Mr. Anmol Singh Sandhu, AAG, Punjab.

SANJAY VASHISTH, J. (Oral)

CRM-36976-2022

Prayer in the application is for placing on record consent memo as Annexure P-3 and further for exemption from filing the certified copy of the same.

Notice in the application.

On asking of the Court, Mr. Anmol Singh Sandhu, AAG, Punjab, accepts notice on behalf of respondent-State and submits that he has no objection if the present application is allowed.

In view of the averments mentioned in the application, same is allowed and consent memo as Annexure P-3 is taken on record.

Registry is directed to tag the same at appropriate place with proper page marking.

CRM-M-34151-2022

The instant petition has been filed under Section 439 of the Code

of Criminal Procedure, 1973, for grant of regular bail to the petitioner –Riaz Ahmed Khan, who has been booked for having committed the offence punishable under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short ‘the Act’), in FIR No. 257 dated 17.12.2021, registered at Police Station Division No. 8, District Jalandhar.

Learned counsel for the petitioner submits that as per allegations, on the basis of secret information regarding having possession of the narcotic substance by the petitioner and other co-accused Zohar Ahmed Khan, and after informing the same to Sh. Nirmal Singh, ACP(D), Jalandhar on his mobile phone No. 99154-00515, the police party proceeded for effecting the search on the spot, as disclosed by the informant. On reaching the spot, petitioner-Riaz Ahmad Khan and co-accused Zohar Ahmed were found present there.

Learned counsel submits that as per the contents of the FIR, notice under Section 50 of the Act was served upon the accused and, thereafter, 250 grams of heroin was recovered from the pocket of co-accused Zohar Ahmed Malik and 750 grams of heroin was recovered from the jacket worn by Riaz Ahmad Khan (petitioner). While praying for regular bail, learned counsel for the petitioner submits that notice under Section 50 of the Act is defective as the same is incomplete being partial.

Section 50 of The Narcotic Drugs and Psychotropic Substances Act, 1985 says 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.

(4) No female shall be searched by anyone excepting a female. 1[(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.] ”

Learned counsel for the petitioner also placed on record a translated copy of the notice dated 17.12.2021 issued under Section 50 of the Act, which says as under:

I, Nirmal Singh PPS, ACP Detective, Commissionerate Jalandhar reached at the spot and apprised Riaz Ahmed Khan son of Noordeen Khan Resident of Hamatpura, Tehsil and District Kupuwara, Jammu & Kashmir who had been apprehended by the police party that I am Gazetted officer of the Punjab police. I am posted as ACP Detective, Commissionerate Jalandhar. I am in my uniform and my nameplate is affixed. There is suspicion that you have some intoxicant substance and your search is to be conducted but you have legal right to get your search conducted from some Magistrate. For the same Magistrate can be called at the spot or you can be taken to the Magistrate.

He further contends that a bare reading of the aforesaid notice, would show that on expressing the suspicion of possessing of some intoxicant substance, the offer was given only with the choice of Magistrate. Learned counsel while arguing that such offer is incomplete and does not stand correct as per Section 50 of the Act, according to the interpretation made by the Hon'ble Apex Court, relies upon para 22 of the judgment passed by Hon'ble Apex Court in **Criminal Appeal No. 1101 of 2004**, titled as **State of Delhi v. Ram Avtar**, decided on 07.07.2011, 2011(4) R.C.R. (Criminal) 191.

The relevant para No. 22 of the said judgment says as under:

“22. It is a settled canon of criminal jurisprudence

that when a safeguard or a right is provided, favouring the accused, compliance thereto should be strictly construed. As already held by the Constitution Bench in the case of Vijaysinh Chandubha Jadeja (supra), the theory of 'substantial compliance' would not be applicable to such situations, particularly where the punishment provided is very harsh and is likely to cause serious prejudices against the suspect. The safeguard cannot be treated as a formality, but it must be construed in its proper perspective, compliance thereof must be ensured. The law has provided a right to the accused, and makes it obligatory upon the officer concerned to make the suspect aware of such right. The officer had prior information of the raid; thus, he was expected to be prepared for carrying out his duties of investigation in accordance with the provisions of Section 50 of the Act. While discharging the onus of Section 50 of the Act, the prosecution has to establish that information regarding the existence of such a right had been given to the suspect. If such information is incomplete and ambiguous, then it cannot be construed to satisfy the requirements of Section 50 of the Act. Non-compliance of the provisions of Section 50 of the Act would cause prejudice to the accused, and, therefore, amount to the denial of a fair trial. To secure a conviction under Section 21 of the Act, the possession of the illicit article is a sine qua non. Such contraband article should be recovered in accordance

with the provisions of Section 50 of the Act, otherwise, the recovery itself shall stand vitiated in law. Whether the provisions of Section 50 of the Act were complied with or not, would normally be a matter to be determined on the basis of the evidence produced by the prosecution. An illegal search cannot entitle the prosecution to raise a presumption of validity of evidence under Section 50 of the Act. As is obvious from the bare language of Ex.PW-6/A, the accused was not made aware of his right, that he could be searched in the presence of Gazetted Officer or a Magistrate, and that he could exercise such choice. The writing does not reflect this most essential requirement of Section 50 of the Act. Thus, we have no hesitation in holding that the judgment of the High Court does not suffer from any infirmity.

Learned counsel for the petitioner also relies upon the judgments passed by co-ordinate Benches of this Court in **CRM-M-27855-2022** titled as **Sohan Chand Sharma v. State of Punjab**, decided on 05.09.2022, **CRM-M-7647-2020**, titled as **Sahildeep Singh @ Sabi @ Deep @ Shaeldeep Singh v. State of Punjab**, **CRM-M-17909-2021**, titled as **Vinay Sharma @ Sinu v. State of Haryana**, decided on 29.04.2022 and **CRM-M-29734-2022**, titled as **Rohit v. The State of Haryana**, decided on 19.07.2022.

Apart from this, learned counsel submits that after completion of investigation, challan has been presented and petitioner is about 41 years of age and inside jail since 25.12.2021. It is further submitted that no other case is pending or registered against him and trial would take sufficient time to

conclude. Thus, prays, regular bail for the petitioner.

Per contra, learned State counsel submitted custody certificate dated 10.10.2022 in the Court today and same is taken on record. As per said custody certificate, petitioner has already undergone custody for a period of 09 months 19 days. While opposing the prayer made by learned counsel for the petitioner, learned State counsel submits that petitioner is involved in serious offence and submits that such persons, who are possessed with the narcotic substances are a big danger to the society. Therefore, petitioner does not deserve the concession of regular bail. He further submits that once notice under Section 50 of the Act has been served upon the petitioner, may be with some minor discrepancy, no benefit would be extended to the petitioner, when the recovery of the alleged contraband is otherwise proved from the petitioner with the help of other evidence.

However, learned State counsel does not dispute the fact that after completion of investigation challan has been presented. He further submits that out of total 11 prosecution witnesses, none has been examined so far.

I have considered the submissions of both the sides, and perused the material available on record with their able assistance.

Be that as it may, without making any comment over the validity of the notice under Section 50 of the Act and response/consent thereupon by the accused, I am of the view that with the help of the judgments cited by learned counsel for the petitioner, there would be an arguable substance for him to address before the Court at the final stage of the trial and, thereafter, it would be a moot question to decide whether the mandatory provisions of law has been complied with or not by the Investigating Agency.

Furthermore, taking into consideration the age of the petitioner

and the period of actual custody already undergone by the petitioner, no purpose would be served by keeping the petitioner inside jail, especially, when trial is moving very slow, as out of 11 prosecution witnesses none has been examined so far. Therefore, I deem it appropriate to enlarge the concession of bail to the petitioner.

In view of the aforementioned facts and circumstances of the case and the submissions recorded hereabove, present petition is **allowed**. Petitioner is ordered to be released on bail in this case, subject to his furnishing bail/surety bonds to the satisfaction of the learned Trial Court/ Chief Judicial Magistrate/ Illaqa Magistrate/ Duty Magistrate concerned, if not required in any other case.

It is made clear that the petitioner shall not extend any threat and shall not influence any prosecution witnesses in any manner directly or indirectly.

The observation made here-in-above shall not be construed as an expression on the merits of the case and the Trial Court shall decide the case on the basis of evidence available on record.

However, it is made clear that in future if the petitioner is found involved in any other case of similar nature, respondent-State would be at liberty to take necessary steps for cancellation of bail granted to the petitioner in present case.

(SANJAY VASHISTH)
JUDGE

October 11, 2022
Riya

Whether speaking/reasoned: *Yes/No*
Whether Reportable: *Yes/No*

269 IOIN-CRM-M-34151-2022
IN CRM-M-34151-2022

RIAZ AHMED KHAN VERSUS STATE OF PUNJAB.

Present: Mr. Prateek Pandit, Advocate for the petitioner.

Mr. Anmol Singh Sandhu, AAG, Punjab.

Due to noticing of typographical mistake, the office has listed the matter today again before this Court for making required correction in the order dated 11.10.2022, by mentioning actual number of main petition, i.e. **CRM-M-34151-2022** instead of **CRM-M-36976-2022**.

CRM-36976-2022 and CRM-M-34151-2022 came up for hearing on 11.10.2022 and vide order of even date, the same were allowed. After signing of the order, it was also uploaded on the web-portal of this Court.

It has been brought to my notice that due to typographical mistake, case number of main petition has been mentioned as “**CRM-M-36976-2022 (O&M)**” instead of “**CRM-M-34151-2022 (O&M)**”, in the order dated 11.10.2022, which is required to be corrected.

Since the said error has occurred due to a typographical mistake, it is directed that necessary correction be carried out in the order dated 11.10.2022. Accordingly, “**CRM-M-36976-2022**”, appearing in the order dated 11.10.2022 be read as “**CRM-M-34151-2022**”.

After carrying out necessary correction, let order dated 11.10.2022, by mentioning the correct number of main petition, i.e. “**CRM-M-34151-2022**”, be uploaded on the web-portal of this Court and this order be also made part thereof.

(SANJAY VASHISTH)
JUDGE

October 14, 2022

Riya