

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

CRM-A-2165-2019 (O & M)
Date of decision: 01.08.2022

State of Punjab

....Appellant(s)

Versus

Sukhwinder Singh @ Sonu

...Respondent(s)

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

Present: Mr. Ajay Pal Singh Gill, DAG, Punjab.

G.S.SANDHAWALIA, J. (Oral)

CRM-29522-2019

Application has been filed for condonation of delay of 122 days in filing the application for grant of leave to appeal.

Keeping in view the averments made in the application duly supported by affidavit of the official, application is allowed. Delay of 122 days in filing the application for grant of leave to appeal is condoned.

CRM stands disposed of.

CRM-A-2165-2019

The present application has been filed under Section 378(4) Cr.P.C. for grant of leave to appeal against the judgment passed by the Special Court, Tarn Taran dated 30.11.2018 whereby acquittal has been recorded of the respondent in FIR No. 214 dated 17.07.2015 under Sections 22, 61 and 85 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short 'the Act'), P.S. Patti.

The recovery in the present case is stated to be 275 grams of

intoxicant powder containing Diacetylmorphine. The Trial Court found that

there is a violation as such of Section 50 of the Act since the search of the person was also conducted and, therefore, in the absence of the Gazetted Officer or the Magistrate, the proceedings stood vitiated and conviction could not be recorded on the basis of such trial. In this regard, the trial Court relied upon the judgment of the Apex Court in ***State of Rajasthan vs. Parmanand and others, 2014 (2) RCR (Crl.) 40*** apart from placing reliance upon judgment in ***Vijaysinh Chandubha Jadeja vs. State of Gujarat, 2010 (4) RCR (Crl.) 911***. 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."*

It has been noticed that the PW-4 Inspector Rajwinder Kaur

had stated that the sample was sent on 17.12.2015 whereas PW-1 HC Palwinder Singh had stated that the sample had been handed over to him on 29.07.2015 for depositing the same in the office of the Chemical Examiner, Kharar, which had been deposited on the same date. It was noticed that the FSL report shows that the same had been received on 29.07.2015 (Ex.P-14), though the date of reference is 21.07.2015 from SSP, Tarn Taran. A perusal of the said report would also go on to show that the parcel which was received contained seals of 'HS' and 'RK' which apparently are of PW-2 ASI Harsa Singh and PW-4 Inspector Rajwinder Kaur. Thus, there is a delay of 12 days in sending the samples to the laboratory and the aspect of being tampered with arises.

It is not disputed that the sampling was also conducted in front of the Magistrate on 17.07.2015 (Ex.P-12) namely Sh. Kamaldeep Singh Dhaliwal, SDJM, Patti and he had put his seal 'KS' alongwith the official seal 'HS'. It is, thus, apparent that the sample which had reached the forensic laboratory is not the sample which was taken in the presence of the Magistrate. The trial Court has also noticed that there were cutting in the statement made under Section 161 Cr.PC. and the date had been changed apart from the fact that in the recovery memo, the FIR number has been mentioned to record a finding that the entire writing work had been done while sitting in the police station. The statements of PW-2 ASI Harsa Singh would also go on to show that on seeing the police party, the respondent had thrown the polybag on the ground after taking it out from the left pocket of his wearing lower and when he was accosted, he stated that the bag contained intoxicant powder which had then been picked up. It is not disputed that personal search was also conducted of the respondent-accused

but no option was given to him under Section 50 of the Act. It has come out in the cross examination of the said witness that at one point of time, the recovery has been effected from the right hand side of the accused, which is in contradiction that the packet was thrown after taking it out from the left pocket, which has also been stated by PW-3 H.C. Balwant Singh wherein, he had stated that Investigating Officer had picked up the poly bag. He had also deposed in affirmative that in personal search, Rs.600 had been recovered and thus it is apparent that the findings which had been recorded by the Trial Court to the extent that the search of the person was also conducted without complying with Section 50 of the Act.

The judgment of the Apex Court would thus come into play for correct appreciation of the facts and the benefit of acquittal has rightly been granted in the present facts and circumstances. As noticed, there is serious doubt on the material which was apparently sent for sampling on the basis of which the respondent was charged of the offence under Sections 22, 61 and 85 of the Act and, therefore, the trial itself stands vitiated as the manner in which the investigation has been completed suffers from various infirmities and the benefit of doubt has flown to the appellant.

Accordingly, in the absence of any perversity in the judgment under appeal, we are of the considered opinion that no case is made out to grant leave to appeal in the present facts and circumstances. The present application stands dismissed.

(G.S. SANDHAWALIA)
JUDGE

01.08.2022

shivani

Whether reasoned/speaking

Whether reportable

(VIKAS SURI)
JUDGE

Yes/No

Yes/No