

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

CRM-M-46826-2022

Date of decision : 15.12.2022

Gurwinder Singh alias Jangira

....Petitioner

Versus

State of Punjab

...Respondent

CORAM: HON'BLE MR. JUSTICE PANKAJ JAIN

Present : Ms. Suman Kumari, Advocate
for the petitioner.

Mr. Sarabjit Singh Cheema, Dy. Advocate General, Punjab.

PANKAJ JAIN, J. (ORAL)

This is a petition filed under Section 439 for grant of regular bail to the petitioner in case FIR No.172 dated 16th of July, 2022 registered for the offence punishable under Section 22 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (for short, 'the Act'), at Police Station Lambi, District Sri Muktsar Sahib.

2. As per the allegations levelled in the FIR, it has been stated as under :-

“Today I SI was present in the police station and a written information was received by ASI Balraj Singh 323/SMS police Station Lambi through PHG Kulwinder Singh 23802 in the police station That he alongwith PHG Jagsir Singh No.23725 in official vehicle Scorpio being driven by HC Lakhwinder Singh 775 were going from Police Station to Village Khiowali via Village Lambi, Khiowali, Mehna etc. for patrolling and checking

of suspects. When police part reached near Sappa Wala Dera on miner bridge then two boys were found sitting on right side of bridge. One boy was having strip of tablets in his hand. Both of boys perplexed on seeing the police party and tried to conceal the strip of tablets in his pocket of pants. Then I ASI on the basis of suspicion nabbed both the boys and asked their whereabouts turn by turn. First boy having strip of tablets in his hand disclosed his name as Surinder Singh @ Kala s/o Pritam Singh, resident of Mehna and another boy disclosed his name as Gurwinder Singh @ Jangira s/o Gyan Singh, resident of Badal. I am having suspicion that both the boys are having intoxicant tablets in their possession but I cannot conduct their search due to local rank and requested to send Regular NGO on the spot for initiating proceedings. These two boys are stopped on the spot. Written information is being sent through PHG Kulwinder Singh 23802 to police station. On receiving information in the police station, I SI vide entering rapat No.25 dated 16.07.2022 in the daily register and after taking original information, I alongwith PHG Baljinder Singh 12060 reached on the spot I private vehicle for taking action where ASI Balraj Singh No.323/SMS alongwith official companions and nabbed two boys met. ASI Balraj Singh No.323/SMS informed about the situations to me SI. On that I SI introduced myself to both the boys that I am SI Iqbal Singh No.549/SMS and posted at Police Station Lambi. My name plate is affixed on right pocket of my uniform. Then I SI asked whereabouts of both the boys turn by turn. First boy disclose his name as Surinder Singh @ Kala s/o Pritam Singh, resident of Mehna and another disclosed his name as Gurwinder Singh @ Jangira s/o Gyan Singh, resident of Badal. I am having suspicion that you have some intoxicant tablets and I want to conduct you search but you have legal right that you can get your search before any Magistrate or Gazetted Officer, who can be called on the spot or you can be produced before him. They said in one voice to I ASI that they did not want their search before any Magistrate of Gazetted Officer. They reposed faith

upon me and I can search them. Regarding this, separate notice u/s 50 NDPS Act were prepared and accused Surinder Singh and Gurwinder Singh put their signature on the notice and witnesses put their signatures. Then I SI tried to join public witness in the policy party but nobody met. Then I SI conducted search of accused Surinder Singh @ Kala and from right pocket of his pant, 2 strips of intoxicant tablets mark ETIZOLAM TABLETS-0.5 having batch No. KEC21004 a MFG-12/2021 EXP. 11/2024 15 tablets in one strip and 14 tablets in another total 29 tablets were recovered. During search of Gurwinder Singh @ Jangira, from internal pocket of his pant, one strip of intoxicant tablets mark ETIZOLAM TABLETS- 0.5 having batch No. KEC21004 A MFG-12/2021 EXP. 11/2024, containing 15 tablets was recovered. One parcel of three strips of intoxicant tablets mark ETIZOLAM TABLETS-0.5 was prepared and I SI sealed the same with my seal impression IS. Sample seal was separately prepared. Form M-29 was completed, seal after use was hand over to ASI Balraj Singh 323/SMS. Parcel of recovered intoxicant tablets duly sealed and sample seal Form M-29 were taken into police custody vide memo. ASI Balraj Singh 323 and HC Lakhwinder Singh No.775/SMS put their signatures on the memo. During personal search of accused Surinder Singh @ Kala and Gurwinder Singh @ Jangira, nothing valuable article was recovered. Personal Search Memo was separately prepared and witnesses put their signature on the memo. Accused Surinder Singh @ Kala etc. could not produced any permit or license for A possessing intoxicant tablets in their possession.”

3. Ld. Counsel for the petitioner submits that it is a case wherein mandatory provisions contained in Section 50 of the NDPS Act have been violated which casts cloud on the alleged recovery made from the conscious possession of the petitioner. She, thus, submits that though the contraband

recovered from the petitioner is said to be of commercial quantity yet in view of violation of Section 50 the Court can record satisfaction w.r.t. the rigors of Section 37 while granting concession of bail to the petitioner. Reliance has been placed upon **S.K. Raju @ Abdul Haque @ Jagga vs. State of West Bengal (2018)9 SCC 708**, **Arif Khan @ Agha Khan vs. State of Uttarakhand, (2018)18 SCC 380**, **State of Punjab vs. Baldev Singh, (1999)6 SCC 172** and law laid down by the Constitutional Bench in **Vijaysinh Chadubha Jadeja vs. State of Gujarat, (2011)1 SCC 609** to submit that Section 50 is mandatory in its nature. The same has to be complied with in its letter and spirit. The empowered/Authorized Officer is under statutory obligation to apprise the accused of his right and such right cannot be defeated merely by saying that the accused opted not to exercise such right. She submits that it is a settled law that there can't be any acquiescence against the statute. It has also been contended by counsel for the petitioner that the quantity of the contraband recovered from the petitioner is stated to be 2.60 grams *vis-a-vis* commercial quantity of 2.50 grams and while dealing with the same human error/instrumental error upto $\pm 10\%$ can be well factored in.

4. Per contra, Mr. Cheema submits that bare perusal of the provision contained in Section 50 casts an obligation on the officer concerned to apprise the accused of his legal right to get search conducted in the presence of Gazetted Officer or Magistrate. However, after having been apprised such right has to be exercised by the accused. In case such

right is exercised only thereafter the search has to be conducted in the presence of Gazetted Officer or the Magistrate. However, in case the accused opts not to exercise such right and poses confidence in the concerned officer there is no duty casted upon the concerned officer to still call for the Gazetted Officer or Magistrate. He, thus, submits that in case Section 50 is read in a way counsel for the petitioner has submitted the expression, “*if such person so requires*” shall be rendered otiose. He further submits that even as per the Constitutional Bench in **Vijaysinh Chadubha Jadeja's** case (supra), the mandate is to apprise the accused of his legal right only.

5. I have heard counsel for the parties and have gone through the records of the case.

6. The question that arises for consideration in the present case is , “*as to what amounts to compliance of Section 50 of the NDPS Act*”. It will be apt to peruse Section 50 of the NDPS Act :

“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 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.]”

7. The Constitutional Bench in **Chadubha Jadeja's** case while dealing with Section 50 of the NDPS Act held that :-

“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 Narcotic Drugs and Psychotropic Substances 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 subsection (1) of Section 50 of the Narcotic Drugs and Psychotropic Substances 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 Narcotic Drugs and Psychotropic Substances 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 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."

8. The same has been further followed by Apex Court in the case of **Arif Khan @ Agha Khan vs. State of Uttarakhand** (supra) wherein

the same question which has been canvassed in the present petition was raised and the Apex Court while dealing with the same held as under :-

“21. What is the true scope and object of Section 50 of the NDPS Act, what are the duties, obligation and the powers conferred on the authorities under Section 50 and whether the compliance of requirements of Section 50 are mandatory or directory, remains no more *res integra* and are now settled by the two decisions of the Constitution Bench of this Court in ***State of Punjab v. Baldev Singh 1999(3) RCR (Criminal) 533 : (1999) 6 SCC 172 and Vijaysinh Chandubha Jadeja (supra)***.

22. Indeed, the latter Constitution Bench decision rendered in the case of Vijaysinh Chandubha Jadeja (*supra*) has settled the aforementioned questions after taking into considerations all previous case law on the subject.

23. Their Lordships have held in Vijaysinh Chandubha Jadeja (*supra*) that the requirements of Section 50 of the NDPS Act are mandatory and, therefore, the provisions of Section 50 must be strictly complied with. It is held that it is imperative on the part of the Police Officer to apprise the person intended to be searched of his right under Section 50 to be searched only before a Gazetted officer or a Magistrate. It is held that it is equally mandatory on the part of the authorized officer to make the suspect aware of the existence of his right to be searched before a Gazetted Officer or a Magistrate, if so required by him and this requires a strict compliance. It is ruled that the suspect person may or may not choose to exercise the right provided to him under Section 50 of the NDPS Act but so far as the officer is concerned, an obligation is cast upon him under Section 50 of the NDPS Act to apprise the suspect of his right to be searched before a Gazetted Officer or a Magistrate. (See also ***Ashok Kumar Sharma v. State of Rajasthan, 2013(2) RCR (Criminal) 1 : 2013 (2) SCC 67 and Narcotics Control Bureau v. Sukh Dev Raj Sodhi, 2011(3) RCR (Criminal) 370 : 2011 (6) SCC 392***)

24. Keeping in view the aforementioned principle of law laid down by this Court, we have to examine the question arising in this case as to whether the prosecution followed the mandatory procedure prescribed under Section 50 of the NDPS Act while making search and recovery of the contraband "Charas" from the appellant and, if so, whether it was done in the presence of a Magistrate or a Gazetted Officer so as to make the search and recovery of contraband "Charas" from the appellant in conformity with the requirements of Section 50.

25. In our considered view, the evidence adduced by the prosecution neither suggested and nor proved that the search and the recovery was made from the appellant in the presence of either a Magistrate or a Gazetted Officer.

26. It is the case of the prosecution and which found acceptance by the two Courts below that since the appellant (accused) was apprised of his right to be searched in the presence of either a Magistrate or a Gazetted Officer but despite telling him about his legal right available to him under Section 50 in relation to the search, the appellant (accused) gave his consent in writing to be searched by the police officials (raiding party), the two Courts below came to a conclusion that the requirements of Section 50 stood fully complied with and hence the appellant was liable to be convicted for the offence punishable under the NDPS Act.

27. We do not agree to this finding of the two Courts below as, in our opinion, a search and recovery made from the appellant of the alleged contraband "Charas" does not satisfy the mandatory requirements of Section 50 as held by this Court in the case of Vijaysinh Chandubha Jadeja (supra). This we say for the following reasons.

28. First, it is an admitted fact emerging from the record of the case that the appellant was not produced before any Magistrate or Gazetted Officer; Second, it is also an admitted fact that due to

the aforementioned first reason, the search and recovery of the contraband "Charas" was not made from the appellant in the presence of any Magistrate or Gazetted Officer; Third, it is also an admitted fact that none of the police officials of the raiding party, who recovered the contraband "Charas" from him, was the Gazetted Officer and nor they could be and, therefore, they were not empowered to make search and recovery from the appellant of the contraband "Charas" as provided under Section 50 of the NDPS Act except in the presence of either a Magistrate or a Gazetted Officer; Fourth, in order to make the search and recovery of the contraband articles from the body of the suspect, the search and recovery has to be in conformity with the requirements of Section 50 of the NDPS Act. It is, therefore, mandatory for the prosecution to prove that the search and recovery was made from the appellant in the presence of a Magistrate or a Gazetted Officer."

(emphasis supplied)

9. In view of the aforesaid law laid down in **Chadubha Jadeja's** case (supra) as interpreted by the Apex Court in **Arif Khan @ Agha Khan's** case (supra) it can thus be said that in the present case *prima facie* Counsel for the petitioner has raised a debatable question w.r.t. compliance of Section 50 of the NDPS Act. Apart from that as per the admitted position investigation stands concluded and the challan has been presented and, thus, there can't be any apprehension w.r.t. tampering of evidence at the hands of the petitioner. Consequently, the present petition is allowed.

10. The petitioner is ordered to be released on bail on his furnishing bail/surety bonds to the satisfaction of the Ld. Trial Court/Duty Magistrate, concerned. However, in addition to conditions that may be imposed by the Trial Court/Duty Magistrate concerned, the petitioner shall

remain bound by the following conditions :-

- (i) The petitioner shall not mis-use the liberty granted.
- (ii) The petitioner shall not tamper with any evidence oral or documentary during the trial.
- (iii) The petitioner shall not absent himself on any date before the trial.
- (iv) The petitioner shall not commit any offence similar to the one alleged in the present case.
- (v) The petitioner shall deposit his passport, if any with the trial Court.
- (vi) The petitioner shall give his cellphone number to the police authorities and shall not change his cell-phone number without permission of the trial Court.
- (vii) The petitioner shall not in any manner try to delay the trial.

11. In case of breach of any of the aforesaid conditions and those which may be imposed by the Trial Court, the prosecution shall be at liberty to move cancellation of bail of the petitioner.

12. Needless to say that anything observed hereinabove shall not be construed to be an expression of opinion on the merits of the case.

13. Ordered accordingly.

December 15, 2022
Dpr

(PANKAJ JAIN)
JUDGE

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