

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

CRM-M-53080-2022

Date of decision : 23.11.2022

Abhishek Kumar @ Bawa

....Petitioner

Versus

State of Punjab

...Respondent

CORAM: HON'BLE MR. JUSTICE PANKAJ JAIN

Present : Mr. Amit Arora, Advocate
for the petitioner.

Mr. Shiva Khurmi, AAG, Punjab with
SI Dalbir Singh.

PANKAJ JAIN, J. (ORAL)

This petition has been filed under Section 439 Cr.P.C. for grant of regular bail to the petitioner in case F.I.R. No.0061, dated 25.04.2022 registered for the offences punishable under Section 21(c), 29 of Narcotic Drugs and Psychotropic Substance Act, 1985 (for short, 'the NDPS Act') at Police Station Verowal, District Tarn Taran.

2. Ld. Counsel for the petitioner *inter alia* has argued that this is a case wherein mandatory provisions as contained in Section 50 of the NDPS Act have been violated which entitles the petitioner for acquittal. The petitioner is in custody since 25th of April, 2022.

3. Ld. State Counsel submits that since the contraband was recovered from the plastic bag thrown away by the co-accused thus, there was no requirement to comply with provisions of Section 50 of the NDPS

Act. Keeping in view the quantity recovered, the rigors of Section 37 of the NDPS Act will be attracted.

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

5. In the FIR it has been recorded as under :-

“Today I ASI along with ASI Lakhwinder Singh 816, C-II Parwinder Singh 912, CT Harjant Singh 534, CT Sukhdeep Singh 1248 along with private laptop printer and investigation bag on private vehicle were on patrolling duty in search of anti social elements and were going police station Verowal to Nagorke Turn, Dhota, Takhuchak etc., and when police party while patrolling reached at the bridge over the drain at village Dhota then from the front one TVS Scooter bearing No. PB 46 AF 2448 on which three haircut young persons were sitting, was seen coming from the Jandiala Guru side. On seeing the police party on private vehicle in uniform they got perplexed and tried to turn their TVS Scooter backward immediately and then one haircut person sitting on backside of the TVS Scooter took out one plastic bag containing something from his right pocket and thrown it away on the road side. I ASI after stopping the vehicle with the help of other officials got them apprehended and I ASI inquired about the names and addresses of all three haircut young person turn by turn. That the haircut young person who was driving the TVS Scooter disclosed his name as Abhishek Kumar alias Bawa son of Deepak Kumar, resident of Sangar Kalan, Police Station Goindwal Sahib and the haircut young person sitting in between them disclosed his name as Gursharan Singh alias Sunny son of Mangal Singh, resident of Dhota, PS Verowal and the haircut young person sitting behind disclosed his name as Bharat Singh son of Makkhan Singh, resident of Malla, PS Verowal. I ASI inquired from them about the contents of the plastic bag thrown by them and the young person sitting

behind while getting scared disclosed that the same contains heroin. I ASI introduced myself to the three haircut young persons who were got apprehended and also informed them about my place of posting stating that I am ASI Bikar Singh, posted at Police Station Verowal and I am in my uniform and my name plate is affixed upon the same and the search of the plastic bag thrown by you is to be got checked but you are a having a legal right of getting yourself and the plastic bag thrown by you searched either from some Gazetted Officer or in the presence of Magistrate to whom I can call at the spot. All the three young persons reposed confidence upon him and stated that you can get our and the plastic bag thrown by us searched. That the separate consent memo were got prepared on which Abhishek Kumar alias Bawa, Gursharan Singh alias Sunny and Bharat Singh above said put their respective signatures upon the same and witnesses also put their signatures upon the same. Before conducting search the public witness was tried to join into the police party but everyone disclosed their own constraints and did not got ready to join the police party. Thereafter, I ASI in the presence of the other officials conducted searched of all three haircut young person turn by turn as per the rules. Thereafter, as per the my ASI direction accused Bharat Singh above said lifted the plastic bag thrown by him with his own hands and presented the same before me. On checking after opening the same one electronic weighing machine and heroin were got recovered from the same. The recovered heroin was got weighed one electronic weighing machine and the total recovery along with plastic bag turns out to be 265 grams of heroin. The same was kept in the same plastic bag and thereafter one plastic box and parcel was created and the parcel of electronic weighing machine was prepared separately.”

6. Thus, the question that arises is 'once the contraband has been

recovered only from the bag and not from the person of any of the accused even though they have been searched in person, whether Section 50 would be attracted in this case or not ?'

7. In somewhat similar circumstances, Apex Court in the case of **State of Rajasthan vs. Parmanand and another, (2014) 5 SCC 345** while dealing with the same question held as under :-

“....The question is, therefore, whether Section 50 would be applicable to this case because opium was recovered only from the bag carried by respondent No.1 – Parmanand.

10. In Dilip & Anr. v. State of Madhya Pradesh, 2007(1) RCR (Criminal) 586 : 2007(1) Recent Apex Judgments (R.A.J.) 235 : (2007)1 SCC 450, on the basis of information, search of the person of the accused was conducted. Nothing was found on their person. But on search of the scooter they were riding, opium contained in plastic bag was recovered. This Court held that provisions of Section 50 might not have been required to be complied with so far as the search of the scooter is concerned, but keeping in view the fact that the person of the accused was also searched, it was obligatory on the part of the officers to comply with the said provisions, which was not done. This Court confirmed the acquittal of the accused.

11. In Union of India v. Shah Alam, 2009(3) RCR (Criminal) 158 : 2009(3) Recent Apex Judgments (R.A.J.) 695 : (2009)16 SCC 644, heroin was first recovered from the bags carried by the respondents therein. Thereafter, their personal search was taken but nothing was recovered from their person. It was urged that since personal search did not lead to any recovery, there was no need to comply with the provisions of Section 50 of the NDPS Act. Following Dilip, it was held that since the provisions

of Section 50 of the NDPS Act were not complied with, the High Court was right in acquitting the respondents on that ground.

12. Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application. In this case, respondent No.1 Parmanand's bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of respondent No.2 Surajmal was also conducted. Therefore, in light of judgments of this Court mentioned in the preceding paragraphs, Section 50 of the NDPS Act will have application."

(emphasis supplied)

8. Similar question arose in **S.K. Raju @ Abdul Haque @ Jagga vs. State of West Bengal (2018) 9 SCC 708** wherein Apex Court held that :

“Section 50 of the Act deals with conditions under which search of persons shall be conducted. It states:

"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."

According to Section 50(1), an empowered officer should necessarily inform the suspect about his legal right, if he so requires, to be searched in the presence of a gazetted officer or a magistrate. In *Vijaysinh Chandubha Jadeja v. State of Gujarat ("Vijaysinh")*, 2010(4) RCR (Criminal) 911 : (2011) 1 SCC 609 a Constitution Bench of this Court interpreted Section 50 thus:

"The mandate of Section 50 is precise and clear, viz. if the person intended to be searched expresses to the authorised officer his desire to be taken to the nearest gazetted officer or the Magistrate, he cannot be searched till the gazetted officer or the Magistrate, as the case may be, directs the authorised officer to do so ... 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 ... 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)."

The principle which emerges from Vijaysinh is that the concept of "substantial compliance" with the requirement of Section 50 is neither in accordance with the law laid down in Baldev Singh, nor can it be construed from its language. [Reference may also be made to the decision of a two judge Bench of this Court in Venkateswarlu]. Therefore, strict compliance with Section 50(1)

by the empowered officer is mandatory. Section 50, however, applies only in the case of a search of a person. In Baldev Singh, the Court held "on its plain reading, Section 50 would come into play only in the case of a search of a person as distinguished from search of any premises, etc." In *State of Himachal Pradesh v. Pawan Kumar ("Pawan Kumar")*, 2005(2) RCR (Criminal) 621 : (2005) 4 SCC 350 a three judge Bench of this Court held that the search of an article which was being carried by a person in his hand, or on his shoulder or head, etc., would not attract Section 50. It was held thus:

"In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore, it is not possible to include these articles within the ambit of the word "person" occurring in Section 50 of the Act ...After the decision in Baldev Singh, this Court has consistently held that Section 50 would only apply to search of a person and not to any bag, article or container, etc. being carried by him."

In Parmanand, on a search of the person of the respondent, no substance was found. However, subsequently, opium was recovered from the bag of the respondent. A two judge Bench of this Court considered whether compliance with Section 50(1) was required. This Court held that the empowered officer was required to comply with the requirements of Section 50(1) as the person of the respondent was also searched. [Reference may also be made to the decision of a two judge Bench of this Court in *Dilip v. State of Madhya Pradesh*], 2007(1) RCR (Criminal) 586 : (2007) 1 SCC 450. It was held thus:

"Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag

carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application."

Moreover, in the above case, the empowered officer at the time of conducting the search informed the respondent that he could be searched before the nearest Magistrate or before the nearest gazetted officer or before the Superintendent, who was also a part of the raiding party. The Court held that the search of the respondent was not in consonance with the requirements of Section 50(1) as the empowered officer erred in giving the respondent an option of being search before the Superintendent, who was not an independent officer. It was held thus:

"We also notice that PW 10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate or before the nearest gazetted officer or before PW 5 J.S. Negi, the Superintendent, who was a part of the raiding party. It is the prosecution case that the respondents informed the officers that they would like to be searched before PW 5 J.S. Negi by PW 10 SI Qureshi. This, in our opinion, is again a breach of Section 50(1) of the NDPS Act. The idea behind taking an accused to the nearest Magistrate or the nearest gazetted officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer. Therefore, it was improper for PW 10 SI Qureshi to tell the respondents that a third alternative was available and that they could be searched before PW 5 J.S. Negi, the Superintendent, who was part of the raiding party. PW 5 J.S. Negi cannot be called an independent officer. We are not expressing any opinion on the question whether if the respondents had voluntarily expressed that they wanted to be searched before PW 5 J.S. Negi, the search would have been vitiated or not. But PW 10 SI Qureshi could not have

given a third option to the respondents when Section 50 (1) of the NDPS Act does not provide for it and when such option would frustrate the provisions of Section 50 (1) of the NDPS Act. On this ground also, in our opinion, the search conducted by PW 10 SI Qureshi is vitiated."

The question which arises before us is whether Section 50(1) was required to be complied with when charas was recovered only from the bag of the appellant and no charas was found on his person. Further, if the first question is answered in the affirmative, whether the requirements of Section 50 were strictly complied with by PW-2 and PW-4.

11. As evidenced by Exhibit-3, a first option was given to the appellant. PW-2 informed him that it was his legal right to be searched either in the presence of a magistrate or in the presence of a gazetted officer. The appellant was then asked to give his option by indicating whether he wanted to be searched by a magistrate or a gazetted officer. The appellant indicated that he wanted the search to be carried out in the presence of a gazetted officer. When PW-4 arrived, he was introduced to the detainee as a gazetted officer. As evidenced by Exhibit-4, PW-4 then gave the appellant a second option. He inquired of him again, whether he wanted to be searched in the presence of a gazetted officer or in the presence of a magistrate. The appellant reiterated his desire to be searched in the presence of a gazetted officer. Before the search of the appellant commenced, the gazetted officer asked the appellant whether he wanted to search PW-2 before his own search was carried out by PW-2. The appellant agreed to search PW-2 before the latter carried out his search. On conducting the search, only personal belongings of PW-2 were found by the appellant. On the search of the appellant in the presence of the gazetted officer, a biscuit colour jute bag was recovered from the appellant, and L 2,400/- cash in the denomination of 24 notes of L 100/- each was found in the left

pocket of the appellant's trouser. When the bag was opened, a black polythene cover containing nineteen rectangular broken sheets of a blackish/deep brown colour weighing 1.5 kilograms was recovered. The sheets were tested and were found to be charas.

PW-2 conducted a search of the bag of the appellant as well as of the appellant's trousers. Therefore, the search conducted by PW-2 was not only of the bag which the appellant was carrying, but also of the appellant's person. Since the search of the person of the appellant was also involved, Section 50 would be attracted in this case. Accordingly, PW-2 was required to comply with the requirements of Section 50(1). As soon as the search of a person takes place, the requirement of mandatory compliance with Section 50 is attracted, irrespective of whether contraband is recovered from the person of the detainee or not. It was, therefore, imperative for PW-2 to inform the appellant of his legal right to be searched in the presence of either a gazetted officer or a magistrate. From Exhibit-3, it can be discerned that the appellant was informed of his legal right to be searched in the presence of a magistrate or a gazetted officer. The appellant opted for the latter alternative. Exhibit-4 is a record of the events after the arrival of PW-4 on the scene. After the arrival of PW-4, the appellant was once again asked by him, whether he wished to be searched in the presence of a gazetted officer or a magistrate.”

(emphasis supplied)

9. As is evident from the contents of FIR, the petitioner was searched in person even though recovery was affected from bag thrown by a co-accused in violation of Section 50 of the NDPS Act. Stand of State is that Section 50 was not required to be complied with. As per contents of

FIR admittedly petitioner was not searched in presence of Gazetted Officer or Magistrate. Thus, it is a case where Section 50 was not complied with at the time of search conducted on the person of the petitioner. No recovery has been effected from the petitioner and he is also not accused of having thrown the bag on the ground. In the considered opinion of this Court a debatable question arises in the present case w.r.t. violation of the provisions contained in Section 50 of the NDPS Act which may lead to acquittal of the accused. There is no other case against the petitioner. Investigation is complete. Challan stands presented. Petitioner is in custody since 25th of April, 2022.

10. Keeping in view the violation of Section 50 of the NDPS Act, this Court is *prima facie* satisfied that there is a reasonable ground to believe that the petitioner may not be held guilty of offence and is not likely to commit any offence while on bail keeping in view his clean antecedents.

11. In view of aforesaid discussion, following order is passed :-

- (i) The present petition is allowed.
- (ii) Petitioner be released on bail subject to satisfaction of the Trial Court/Duty Magistrate concerned in F.I.R. No.0061, dated 25.04.2022 registered for the offences punishable under Section 21(c), 29 of NDPS Act at Police Station Verowal, District Tarn Taran.
- (iii) The observations made hereinabove are purely for the disposal of the present petition and the Trial Court shall not be influenced by the said observations and the same shall not be construed as expressions on the merits of the case.
- (iv) The petitioner shall appear before the Investigating

Officer on every Saturday between 9.00 AM to 11.00 AM.

- (v) The petitioner shall not intimidate or attempt to influence any of the witnesses.
- (vi) The petitioner shall not commit any of the offence while on bail.
- (vii) The petitioner shall not leave India without permission of the Court and shall deposit passport with the Trial Court within a week.
- (viii) The petitioner shall not mis-use the liberty granted.
- (ix) The petitioner shall not tamper with any evidence oral or documentary during the trial.
- (x) The petitioner shall not absent himself on any date before the trial.
- (xi) 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.
- (xii) The petitioner shall not in any manner try to delay the trial.

12. 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.

13. Ordered accordingly.

November 23, 2022

Dpr

(PANKAJ JAIN)
JUDGE

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No