

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

220

CRM-M-689-2023

Date of Decision: 28.11.2023

Shiv Bhatia

...Petitioner

Versus

State of Punjab

... Respondent

CORAM : HON'BLE MR. JUSTICE N.S.SHEKHAWAT

Present : Mr. Veneet Sharma, Advocate
for the petitioner.

Mr. M.S. Bajwa, DAG, Punjab.

N.S.SHEKHAWAT, J.

1. The petitioner has filed the instant petition under Section 439 of the Cr.P.C. with a prayer to grant a regular bail in case FIR No.27 dated 12.02.2022 registered under Sections 21, 22 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter to be referred as '**the NDPS Act**') at Police Station Majitha Road, Amritsar City, District Amritsar.

2. The FIR in the present case was got registered by ASI Kulwant Singh by alleging that on 12.02.2022, he alongwith other police officials was present on patrolling duty and in the meantime, three persons came on a motorcycle from the side of Amritsar city. On seeing the police party, they tried to turn back and the motorcycle slipped and they fell down. On this, the complainant alongwith other police officials tried to apprehend them and the motorcycle driver cleverly tried to throw a polythene envelope, after taking it out from his right pocket of his pant. There was some substance in the said polythene envelope. He was stopped by ASI Gulzar Masih. In the meantime, the person, who was sitting in the middle of three persons, took out a polythene envelope from his right pocket of the pant worn

by him and even he tried to throw the same on the road, but was apprehended by ASI Hari Singh. The third person cleverly tried to throw a polythene envelope after taking it out from his right pocket of the pant worn by him and tried to throw on the road and he was also apprehended by ASI Sawinder Singh. The complainant asked the names and addresses of the apprehended persons one by one and the driver disclosed his name and address Shiv Kumar @ Billa son of Yograj, resident of House No. 230, Near Shvala Fatak, Shivala Colony, Police Station A Division, Amritsar and the person sitting in the middle disclosed his name and address as Yogesh Kumar Oberoi son of Vijay Kumar, resident of House No. 113, Rani Ka Bagh, Near Shivaji Park, Police Station Cantonment Amritsar and the person apprehended by ASI Sawinder Singh disclosed his name as Shiv Bhatia son of Shashi Bhatia resident of House No. 612, Gali No5, Sharifpura, Police Station A-Division, Amritsar. Before search, a public witness was tried to be associated with the police party, but nobody could be associated. On this, the ASI told the apprehended persons that he had the suspicion that there was some narcotic substance in the polythene envelopes held by them in their hands and they are to be searched and they had a legal right to get the search conducted from the nearest Magistrate or a Gazetted Officer. However, they stated that they wanted to get the search conducted from the Gazetted Officer and on this, the complainant called the Assistant Commissioner of Police, North, Amritsar, from his mobile phone and was made aware of the circumstances of the case and after

15 minutes, Palwinder Singh, the Assistant Commissioner of Police, North, Amritsar, reached at the spot in the Government vehicle. He also gave an offer to the apprehended persons that they could get themselves searched before him or any other Magistrate. Even, he had introduced himself to them. However, the accused stated that they had full faith in him and he could search them. Thereafter, the consent memos were prepared. Ultimately, 1110 loose intoxicant tablets were recovered from the polythene envelope held in hand by Shiv Kumar @ Billa, accused; 1160 loose intoxicant tablets were recovered from the polythene envelope held by Yogesh Kumar Oberoi and 1330 loose intoxicant tablets were recovered from polythene envelope held by Shiv Bhatia. All of them could not produce any permit or licence or any other valid document to keep the above said substance in their possession. With these broad allegations, the FIR in the present case was got registered by ASI Kulwant Singh.

3. Learned counsel for the petitioner contends that in the present case, the present petitioner has been falsely involved by the complainant. In fact, the petitioner was ordered to be released on interim bail on 17.03.2022 by the Court of Special Judge, Amritsar and he had himself surrendered before the Court on 17.11.2022, after receipt of the FSL report. Now, the petitioner has undergone about 01 year of custody. Apart from that, the police had not complied with the mandatory provisions of Section 50 of the NDPS Act and a common offer was given to all the three accused in the present case and in view of the law laid down by the Hon'ble Supreme Court in

the matter of State of Rajasthan Vs. Parmanand and another 2014(2) RCR Criminal 40, AIR 2014 SC 1384, the offer stood vitiated and the petitioner was liable to be enlarged on bail. Learned counsel further contends that each accused has to be individually informed that he has a right to be searched before the Gazetted Officer for before the Magistrate. He further contends that in the present case, the recovery had taken place from the polythene envelopes, which were held by the accused in their respective hands and the police was bound to follow the mandatory provisions of Section 50 of the NDPS Act.

4. On the other hand, the learned State counsel submits that in the present case, the mandatory provisions of Section 50 of the NDPS Act would not apply to the facts of the instant case. He further contends that in the present case, the complainant, i.e. Kulwant Singh had apprised the petitioner, namely, Shiv Bhatia and his co-accused, namely, Shiv Kumar @ Billa and Yogesh Kumar Oberoi about their legal right under Section 50 of the NDPS Act and on their consent, the Assistant Commissioner of Police, North, Amritsar, was called at the spot, who also apprised all the three accused about their legal right. He further contends that in the present case, the recovery is not made from the personal search of the accused and the tablets were recovered from the polythene envelopes, which were held by the accused in their hands. Thus, Section 50 of the NDPS Act would not apply to the facts of the instant case. He further contends that in the present case, Shiv Kumar @ Billa and Yogesh Kumar Oberoi surrendered before the trial Court and the PO proceedings were

initiated against them. It was also prayed that the case was already listed for prosecution evidence and the petitioner did not deserve the concession of bail. Learned State counsel further contends that since the recovery had not taken place from the person of the accused and rather the recovery had taken place from the polythene held by the accused, consequently, the provisions of Section 50 of the NDPS Act would not apply to the facts of the instant case.

5. I have heard the learned counsel for the parties and perused the record.

6. The Hon'ble Supreme Court in the matter of **Ranjan Kumar Chadha Vs. State of Himachal Pradesh, 2023(4) RCR Criminal 458** has held as follows:-

“89. Thus, in Pawan Kumar (supra) the larger Bench while answering the reference in no uncertain terms stated that "a bag, briefcase or any such article or container, etc. can, under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body of a human being." The Court reasoned that a person of varying capacity can carry different items on his or her body but that does not make those items as a part of body. The Court observed, "Depending upon the physical capacity of a person, he may carry any number of items like a bag, a briefcase, a suitcase, a tin box, a thaila, a jhola, a gathri, a holdall, a carton, etc. of varying size,

dimension or weight. However, while carrying or moving along with them, some extra effort or energy would be required. They would have to be carried either by the hand or hung on the shoulder or back or placed on the head. 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, Pawan Kumar (supra) concluded that an external article which does not form part of body is outside the ambit of the word "person" occurring in Section 50 of the NDPS Act".

The Hon'ble Apex Court has further held as under:-

"106. The Court went on to hold that Section 50 would be applicable only to the personal searches and not to the searches of vehicles or bags. This was in line with the ratio laid down in Pawan Kumar (supra) and Baldev Singh (supra). This Court held that:-

"15. As regards applicability of the requirements under Section 50 of the Act are concerned, it is well settled that the mandate of Section 50 of the Act is confined to "personal search" and not to search of a vehicle or a container or premises.

16. The conclusion (3) as recorded by the Constitution Bench in Para 57 of its judgment in Baldev Singh clearly states that the conviction may not be based "only" on the basis of possession of an illicit article

recovered from personal search in violation of the requirements under Section 50 of the Act but if there be other evidence on record, such material can certainly be looked into.

17. In the instant case, the personal search of the accused did not result in recovery of any contraband. Even if there was any such recovery, the same could not be relied upon for want of compliance of the requirements of Section 50 of the Act. But the search of the vehicle and recovery of contraband pursuant thereto having stood proved, merely because there was noncompliance of Section 50 of the Act as far as "personal search" was concerned, no benefit can be extended so as to invalidate the effect of recovery from the search of the vehicle. Any such idea would be directly in the teeth of conclusion (3) as aforesaid."

(Emphasis supplied)

7. In the present case, the recovery had not taken place from the person of the accused and it cannot be said that the recovery would stand vitiated. In fact, the Hon'ble Supreme Court has held in the matter of **Ranjan Kumar Chadha's case (supra)** as follows:-

*"109. Akhilesh Bharti (supra) referred to above was considered by a co-ordinate Bench of the Delhi High Court in **Kamruddin v. State (NCT of Delhi), 2022 SCC OnLine Del 3761**, and held as under:-*

"23. In the decision of S.K. Raju (supra), the Hon'ble

Supreme Court has clearly held that since the search of the person of the appellant therein was also involved, therefore, Section 50 of the NDPS Act would be attracted in that case and accordingly the requirement of Section 50(1) of the NDPS Act was insisted.

*24. So far as the decision relied upon by learned APP for the state in the case of **State of HP v. Pawan Kumar** is concerned, it is to be stated that in paragraph No. 17 of the decision in the case of S.K. Raju (supra) the Hon'ble Supreme Court has taken note of the decision in the case of Pawan Kumar (supra). The distinction between the two situations has been considered and if a bag, article or container etc. being carried by an accused is subjected to search independently without there being any search of the person of the appellant, the decision in the case of Pawan Kumar (supra) would have application. However, in a case where the person of accused is subjected to search along with the search of bag, article or container which he holds in his hand, there is requirement of compliance of Section 50 of the NDPS Act."*

(Emphasis supplied)

110. It appears that the Delhi High Court laboured under an erroneous impression that in Pawan Kumar (supra) the search was only of the bag and not of the accused. However, at the cost of repetition, we state that in Pawan Kumar (supra) the search was of both the accused as well as the bag which he was carrying. This is evident from para 2 of the judgment in Pawan Kumar (supra) wherein it has been observed as under:-

"2. ... A search of the accused and the bag being carried by him was then conducted and 360 gm of opium wrapped in polythene was found inside the bag. ..."

(Emphasis supplied)

9. Thus, it is apparent that the provisions of Section 50 of the NDPS Act would not apply to the facts of the instant case and the search of the accused was conducted under the provisions of the NDPS Act and since the search had taken place from the polythene envelopes, which were held by the accused in their respective hands, Section 50 of the NDPS Act would not be applicable to the facts of the instant case.

10. Still further, in the present case, it is evident from the status report filed by the State of Punjab that the parcels of the contraband were deposited with the Regional Forensic Science Laboratory, Amritsar and the report has been received. As per the FSL report, ingredients of all the tablets were found to be "Alprazolam" and the average weight of 1330 tablets recovered from the present petitioner was found to be 122 mg/tablet. Thus, the total

weight of 1330 intoxicant tablets recovered from the present petitioner comes out to be 162.26 grams of “Alprazolam”, which falls within the ambit of “commercial quantity” as per the provisions of the NDPS Act.

11. In view of the above, finding no merit in the instant petition, the same is ordered to be dismissed.

28.11.2023

amit rana

(N.S.SHEKHAWAT)
JUDGE

Whether reasoned/speaking

:

Yes/No

Whether reportable

:

Yes/No