

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARHCRM-31449-2021 in/and
CRM-A-382-2021 (O&M)
Date of Decision: 25.01.2023

State of Punjab

.....Appellant

Vs.

Akashdeep Singh @ Nanni

.....Respondents

CORAM: HON'BLE MR. JUSTICE G.S. SANDHAWALIA
HON'BLE MS. JUSTICE HARPREET KAUR JEEWAN

Present: Mr. Navneet Singh, Sr. D.A.G., Punjab.

HARPREET KAUR JEEWAN, J.CRM-31449-2021

By this application, the applicant-appellant seeks condonation of delay of 40 days in filing the appeal.

In view of the averments made in the application, which is duly supported by an affidavit of Sh. Harneel Singh, PPS, Deputy Superintendent of Police, Sub-Division, Nawanshahar, District Shaheed Bhagat Singh Nagar, the application is allowed and the delay of 40 days in filing the appeal is hereby condoned.

CRM-A-382-2021 (O&M)

1. State has filed the application under Section 378 (3) of the Cr.P.C. seeking leave to appeal, challenging the findings of acquittal recorded by the Judge, Special Court, Shaheed Bhagat Singh Nagar, whereby the respondent Akashdeep Singh @ Nanni, was acquitted of the charge framed against him in FIR No. 103, dated 17.08.2017, registered

under Sections 21 & 22 of Narcotic Drugs & Psychotropic Substances Act, 1985 (herein after referred to as “NDPS Act”) at Police Station Citi Nawanshahr, vide judgment dated 04.09.2019.

2. As per the prosecution story, on 17.08.2017 at about 02:00 p.m., ASI Balbeg Singh (investigating officer) along with other police officials was present near the dry pit near cremation ground in the area of Pandora Mohallan, Nawanshahr, in connection with patrol duty. The respondent was seen standing there with a heavy polythene bag in his right hand and on seeing the police party he got perplexed. On the basis of suspicion, he was apprehended. On enquiry regarding his identity, he revealed his name as Akashdeep Singh @ Nanni, resident of Pandora Mohalla, Nawanshahr, Police Station City Nawanshahr. ASI Balbeg Singh appraised him of his right to be searched in the presence of a gazetted officer or a Magistrate and further informed him that such an officer can be called at the spot. The respondent reposed confidence in ASI Balbeg Singh and search of the said polythene bag led to the recovery of 58 injections of 'Avil', each having quantity 10 ml and 58 injections of 'Buprenorphine', each with quantity 02 ml. Apart from this, 10 grams of intoxicating material was also recovered from the said plastic bag. The contraband were converted into sealed parcels. As per the report of the Forensic Science Laboratory, Ludhiana, the contents of the samples were found containing Pheniramine Maleate [Ex. P-1 (Parcel 1)], Buprenorphine Hydrochloride [Ex. P-2 (Parcel 2)] and Alprazolam (Parcel 2). After completion of the investigation '*challan*' was presented in the Court.

2.1 After presentation of the '*challan*', copies of the documents under Section 207 Cr.P.C were supplied to the respondent and charge under Section 22 of the NDPS Act was framed against him, to which he pleaded not guilty and claimed trial.

2.2 In order to prove the case, prosecution examined ASI-Balbeg Singh PW-1, Head Constable Nirmal Kumar, PW-2, Inspector Raj Kumar, PW-3, ASI Surinder Pal, PW-4 and Head Constable Balvir Singh, PW-5. The respondent alleged false implication in statement under Section 313 of the Cr.P.C. In his defence, the respondent examined Dr. Harinderpal Singh, ENT Surgeon, Sarb Hospital, Nawanshahr as DW-1.

3. After hearing the Public Prosecutor and the learned defence counsel and on perusal of the evidence on record, the trial Court acquitted the respondent giving him benefit of doubt. The trial Court observed that independent witness was not joined. The place of alleged recovery is surrounded by houses and even at some distance from there, market of railway road is situated which has been admitted by the investigating officer (PW-1) but no witness from the said houses or the shops were joined in the investigation. Reliance was placed upon the decision of this Court in **State of Punjab vs. Bhupinder Singh** 2001 (1) RCR (Criminal) 356 (P&H), wherein it was held that the case of the prosecution become doubtful while no independent witness was joined, and when the recovery was effected in a busy locality. Similarly, the decision of the Hon'ble Supreme Court in **Ritesh Chakarvarti vs. State of Madhya Pradesh** 2006 (4) RCR (Criminal) 480, was also relied upon by the trial Court while holding that the prosecution's case become doubtful on account of non-

joining of any independent witness.

3.1 Apart from this, the trial Court observed that the investigating officer has admitted that the respondent was not taken before any Magistrate or a gazetted officer before or after conducting his search. It was observed that personal search of the respondent was also carried out which is admitted by PW-2 ASI Surinder Pal as such the compliance of the provisions of Section 50 of the Act was mandatory. In such circumstances, the trial Court observed that the trial stood vitiated due to non-compliance of Section 50 (1) of the NDPS Act.

3.2. The trial Court has also taken into consideration the testimony of PW-4 ASI Surinder Pal, regarding the fact that the print out of all the statements recorded under Section 161 of the Cr.P.C. and consent memo were taken out at the spot before effecting the recovery but it was observed that all the said documents are having the particulars of FIR, i.e. date, number and the sections of the NDPS Act under which the FIR was registered. It was found doubtful as to how before conducting the search of the respondent these facts were known to the investigating officer. It was concluded that all the documents prepared by the investigating officer were manipulated later on in order to complete the paper formality and the proceedings conducted by the investigating officer were found to be not genuine.

4. Learned counsel for the State submitted that the findings arrived at by the trial Court are not illegal sustainable. Non-joining of independent witness is not fatal to the prosecution case. In the present case, the investigating officer (PW-1) as well as the witness of recovery (PW-4)

have specifically stated that they had made efforts to join the independent witness but no one came forward. In such circumstances, non-joining of independent witness should have been ignored by the trial Court.

4.1 The learned State counsel further submitted that the trial Court has held non-compliance of Section 50 of the NDPS Act on account of the fact that the respondent was not taken before the gazetted officer or before a Magistrate. The said findings of the trial Court are contrary to the evidence on record, i.e. the consent memo Ex. PW-1/A, as per which, the offer was given to the respondent but he opted to be searched by the investigating officer. Therefore, in such a situation, there was no occasion to call the Gazetted officer or the Magistrate on the spot. There can be no specific language in which the offer should be made. The evidence on record proves that the offer was given as per the provisions of Section 50 of the NDPS Act. Hence, the findings of the trial Court are liable to be set aside.

5. We have considered the aforesaid submissions and perused the record. As per the prosecution case, the recovery of 58 injections of 'Avil' each containing 10 ml, 58 injections of 'Buprenorphine', each containing 02 ml and 10 gram of intoxicating powder was recovered from the respondent from a plastic bag which was carried by him. It is not disputed that apart from the search of the plastic bag, the personal search of the respondent was also conducted. Ex. PW-1/H1 is the memo of the personal search of the respondent which is admittedly have been prepared at the time of alleged recovery from the respondent. As per the testimony of ASI-Balbeg Singh, PW-1, who was the investigating officer, the search of the

respondent was conducted on the basis of suspicion as he was apprehended when he got perplexed on seeing the police party. With regard to the compliance of Section 50 of the Act, the investigating officer made the following statement in his examination-in-chief.

“.....I disclosed my name, rank and place of posting to the accused and apprised him that it appears that there is some intoxicant substance in his possession in the Moni Lafaafa. I made aware to accused that he has a legal right to get her search conducted in the presence of Gazetted officer or Magistrate and arrangement in this regard can be made by me. But the accused reposed faith in me. I record consent statement of accused as Ex. PW-1/A.

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.....Thereafter accused was arrested by me vide memo Ex. PW-1/H and his personal search was conducted vide memo Ex. PW-1/H1.”

(Emphasis applied by this Court)

6. A perusal of the aforesaid statement of the investigating officer indicate that he did not give any offer to the respondent that he can be taken before a Magistrate or a gazetted officer for conducting his search. In the cross-examination, the investigating officer (PW-1) has stated that he did not take the respondent before any Magistrate or gazetted officer before or after conducting his search. He has also admitted in the cross-examination that he has not given any offer to the respondent that he can be searched by him despite that he reposed confidence in him. As per the contents of the consent memo Ex. PW-1/A and the admission of the investigating officer, no such offer in a clear terms was given to the respondent that he can be taken before a Magistrate or a gazette officer in whose presence the

searched can be conducted. Apart from this, the respondent was not taken before any such officer for conducting the search.

7. We have also observed that the place of recovery was not a secluded place. The investigating officer (PW-1) has stated in the cross-examination and the place of recovery is about 01 kilometers from police station. His cross-examination further reveals that the place of recovery is surrounded by houses and even a market of railway road is situated at some distance. He did not call anyone from the said houses or the shops for joining the proceedings. As per his admission the police party remained at the spot for about 2½ hours, in such circumstances, by not calling anyone from the market or from nearby houses to give independent corroboration to the proceedings conducted by the police officials requires that evidence should be properly scrutinized. Apart from it, none of the officer bearers of the Municipal Corporation or the Gram Panchayat were called at the spot. These circumstances clearly indicate that these proceedings were conducted in camera and causes a serious doubt when considered in view of the fact that neither the respondent was informed about his right in clear terms that he can be taken before a Magistrate or a Gazetted officer for conducting his personal search nor he was actually taken before any such officer.

8. Thus, apparently once the personal search, as such had been carried out as per the admission of the police official, the Gazetted Officer or the Magistrate was not accompanying the police party and thus, there is violation of Section 50 of the NDPS Act in view of the law laid down by the Apex Court in **State of Rajasthan vs. Parmanand and others**, 2014

(2) RCR (Crl.) 40. Relevant portion of the judgment reads thus:-

“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.”

9. The obligation of the authorities under Section 50 of the NDPS Act has come up for consideration before the Hon'ble Supreme Court in various cases. The Constitution Bench of Hon'ble Supreme Court in the case of **Vijaysinh Chandubha Jadeja v. State of Gujarat** (2011) 1 SCC 609, has held that requirement of Section 50 of the NDPS Act is a mandatory requirement and the provisions of Section 50 must be strictly complied with. In view of the ratio of the decision in Vijaysinh Chandubha Jadeja's case, it is clear that the requirement under the said Section is not complied with by merely informing the respondent of his option to be searched either in the presence of a gazetted officer or before a Magistrate. The requirement is satisfied, if the respondent is actually brought before the gazetted officer or the Magistrate and the Hon'ble Constitution Bench in the said case made it clear that in order to impart authenticity, transparency and creditworthiness to the entire proceedings, an endeavour should be made by the prosecuting agency to produce the suspect before the nearest Magistrate.

10. In Arif Khan @ Agha Khan vs. State of Uttarkhand 2018

(2) RCR (Criminal) 931, the decision in Vijaysingh Chandubha Jadejas's case (*supra*), was relied upon and the Hon'ble Apex Court 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 vs. BaldevSingh](#) (1999) 6 SCC 172 and [Vijaysinh ChandubhaJadeja](#) (*supra*).

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

23. Their Lordships have held in [VijaysinhChandubhaJadeja](#) (*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 vs. State of Rajasthan](#), 2013 (2) SCC 67 and [Narcotics Control Bureau vs. SukhDev Raj Sodhi](#), 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 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).....”

11. In view of the ratio of the aforesaid decisions and keeping in view the facts of the present case that the respondent was neither given the offer in clear terms that for conducting his search he can be taken before a Gazetted Officer or a Magistrate nor did the investigating officer conduct the search of the respondent in the presence of any such officer, apart from this, he did not make any effort to join an independent witness, clearly makes the prosecution case doubtful.

12. As such, in view of the aforesaid reasons, we are of the considered opinion that the trial Court has properly appreciated the evidence on that part while granting the benefit of doubt to the respondent. No other view is possible then the view taken by the trial Court.

13. Even otherwise in view of the decision of the Hon'ble Supreme Court of India in **Sidhartha Vashisht @ Manu vs. State (NCT of Delhi)** 2010 AIR (SC) 2352, laying down the principles for dealing with the appeals particularly against the order of acquittal, it has been held that an order of acquittal is to be interfered only when there are "compelling and substantial reasons" for doing so. In the present case, there is no such evidence or material which has been misread or ignored by the trial Court. The trial Court has properly appreciated the fact that the mandatory provision of Section 50 of the NDPS Act has not been complied with, coupled with the fact that the independent witness though could have been arraigned were not joined and has rightly thus held that prosecution case is doubtful.

14. Accordingly, no interference is called for in the findings of the acquittal recorded by the trial Court and the application for grant of leave

to appeal stands dismissed.

Pending miscellaneous applications, if any, also stand disposed
of.

(G.S. SANDHAWALIA)
JUDGE

(HARPREET KAUR JEEWAN)
JUDGE

January 25, 2023
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Whether Speaking	Yes
Whether Reportable	No