

305 IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRA-S-503-SB-2000
Reserved on: 17.03.2023
Date of Pronouncement: 11.04.2023

Chhotu [Ram@Hakam](#)(since deceased)through LRs ...Appellants

vs.

State of Haryana ...Respondent

Coram : Hon'ble Mr. Justice N.S.Shekhawat

Present : Mr. H.S Randhawa, Advocate as Amicus Curiae
for the appellant.

Ms. Sheenu Sura, Deputy Advocate General, Haryana,

N.S.Shekhawat J.

Challenging the correctness and illegality of the impugned judgment of conviction and order of sentence dated 16.05.2000, passed by Additional Sessions Judge, Sirsa, whereby the accused Chhotu Ram alias Hakam son of Gurdial Singh was convicted for the offence punishable under Section 18 of NDPS Act (hereinafter referred to as the Act) was sentenced to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs.1 lac, in default of payment of fine, he was to further undergo rigorous imprisonment for a period of one year only.

Chhotu Ram alias Hakam had initially filed the appeal before this Court, which was admitted by this Court vide the order dated 02.06.2000. Vide the order dated 15.03.2007, the sentence imposed on Chhotu Ram alias Hakam, the appellant was ordered to be suspended during the pendency of the present

appeal. On 17.11.2022, learned State counsel, on instructions from SI Suresh Kumar, submitted that the appellant had died. However, learned State counsel submitted that the amount of fine may be recovered from the legal representatives of the appellant, in view of the judgment passed by the Hon'ble Supreme Court in the matter of ***Criminal Appeal No.77 of 2020, titled as "Ramesan (dead) through LR. Girija A Vs. The State of Kerala."***

Learned State counsel moved an application for impleading the LR's of the sole appellant Chhotu Ram alias Hakam (since deceased) and his legal representatives namely, Buta Singh and Rinku, both sons of Chhotu Ram alias Hakam were ordered to be impleaded as legal representatives of the original appellant and the amended memo of parties was taken on record. Ultimately, the Registry of the Court was directed to issue notice to the legal representatives of the appellant. As a consequence, the Registry of the Court issued the notice and they were duly served on 09.03.2023, still no one appeared before this Court to assist the Court on their behalf and finally, this Court appointed Mr. H.S Randhawa, Advocate as Amicus Curiae for the legal representatives of the Chhotu Ram alias Hakam, the original appellant.

The brief facts of the case are that on 16.02.1994, ASI Nand Lal was present in the area of Village Abubshahar along with other police officials and a pedestrian was noticed, who was coming from the side of Village Abubshahar and a plastic bag was hanging on his right shoulder. On seeing the police party, the accused became nervous and he turned back and tried to go away on a fast step to avoid the police. Noticing his suspicious conduct, he was apprehended by the police party. ASI Nand Lal served a notice upon him under Section 50 of the Act and gave him an option to get the search conducted in the

presence of a Magistrate or a Gazetted Officer. The accused opted to get his search conducted in the presence of a Gazetted Officer and his statement was recorded separately in this regard. Jagdish Chand Nagar, DSP, Dabwali arrived at the spot and supervised the search operation. It was found that the accused was carrying 3 kgs of opium in his bag. A sample weighing 10 grams of opium was removed from the seized contraband and the remaining contents were weighed and found to be 2Kgs and 990 grams in all. The two sealed parcels were consequently, sealed and deposited with the MHC of the police station. The sample was sent to the laboratory for chemical analysis and was found that the substance recovered from the accused was opium. Ultimately, a final report under Section 173 Cr.PC was prepared under Section 18 of the NDPS Act. Finding a prima facie case, charge under Section 18 of the Act was ordered to be framed against the appellant Chhotu Ram alias Hakam and he pleaded not guilty and claimed trial.

In support of the prosecution case, the prosecution examined three witnesses. HC Nihal Singh was examined as PW-1, who along with ASI Nand Lal and other police officials was present at the time of recovery of the contraband and arrest of the accused. He along with ASI Nand Lal gave a notice Ex.PB to the accused and gave him an option that his bag was to be searched and he could get the search conducted in the presence of a Gazetted Officer or a Magistrate. The accused opted to get his search conducted in the presence of a Gazetted Officer. Notice Ex.PB and reply Ex.PB/1 were thumb marked by the accused and was signed by the police officials as well as the attesting witnesses. The search was conducted at the instance of Jagdish Chand Nagar, DSP, who had reached at the spot and 3 Kgs of opium was recovered.

The separate parcels of sample and the remainder quantity of the contraband were prepared and were sealed with the seal “NL” of Nand Lal, ASI and “JN” of Jagdish Nagar, DSP and were taken into possession vide the memo Ex.PD. Mahinder Singh Constable and DSP also attested the said memos. The prosecution further examined ASI Nand Lal as PW-2, who was headed the raiding team which apprehended the accused at the spot and the contraband was recovered from him. Separate parcels of the sample and the remaining opium were prepared in this regard and even he had affixed the seal “NL” and the case property was taken into possession by the police. On reaching the police station, he had deposited the case property with the MHC without any tampering by any one. Amar Singh SI/SHO had verified the investigation and found it correct. Jagdish Nagar, DSP had used his seal “JN” and handed over the same to the Nihal Singh. In his cross-examination he admitted that Nihal Singh returned the seal to him after 8/10 days in CIA staff. The prosecution further examined PW-3, Jagdish Nagar DSP, who had reached at the spot and the recovery was effected in his presence by the police. After examining the witnesses, the prosecution evidence closed by the learned State counsel.

The statement of accused under Section 313 Cr.PC was recorded, who pleaded his false implication in the case at the instance of Radha Ram Sarpanch due to party faction in the village. The accused examined Constable Satbir Singh as DW-1, who had brought the summoned Roznamcha dated 16.02.1994 of Police Station Sadar, Dabwali. According to DDR No.29 dated 16.02.1994, the case property of the present case was deposited at 08:10 PM by Nand Lal, ASI.

I have heard the learned counsel for the parties and with their able assistance, I have gone through the trial Court record carefully.

Learned counsel for the appellant vehemently argued that in the instant case, the mandatory provisions of Section 50 of the NDPS Act were not complied with and the appellant was liable to be acquitted only on this ground alone. The said submission has been opposed by the learned State counsel by contending that since the recovery of the contraband had taken place from the bag and not from personal search, the provisions of Section 50 of the NDPS Act would not be attracted in the instant case. It has been held by the Hon'ble Supreme Court in the matter of **“Kallu Khan Vs.State of Rajasthan 2022 AIR (Supreme Court)50: 2022 (1) RCR (Criminal) 367 as follows:-**

“15.Simultaneously, the arguments advanced by the appellant regarding non-compliance of Section 50 of NDPS Act is bereft of any merit because no recovery of contraband from the person of the accused has been made to which compliance of the provision of Section 50 NDPS Act has to follow mandatorily. In the present case, in the search of motor cycle at public place, the seizure of contraband was made, as revealed. Therefore, compliance of Section 50 does not attract in the present case. It is settled in the case of Vijaysinh(supra) that in the case of personal search only, the provisions of Section 50 of the Act is required to be complied with but not in the case of vehicle as in the present case, following the judgments of Surinder Kumar (supra) and Baljinder Singh (supra). Considering the facts of this Court, the argument of non-compliance of Section 50 NDPS Act advanced by the counsel is hereby repelled.”

Keeping in view the aforesaid principles of law and the evidence led by the prosecution in the instant case, it is observed that in the instant case, the recovery had taken place from a bag and not from the personal search of the accused. Thus, the submissions made by learned counsel for the appellant is without any substance and are rejected.

Learned counsel for the appellant vehemently argued that the provisions of Section 52 as well as Section 52A were not complied by the prosecution. Learned counsel further submitted that even though the provisions of Section 52 and 52A are not mandatory in nature, still the non-compliance would make the recovery of the contraband suspicious. The said submissions have been opposed by the learned State counsel by contending that the provisions of Section 52 and 52A are not mandatory in nature and the police officials had followed the procedure, as enshrined in Section 52 and Section 52A of the Act. I have heard learned counsel for both the sides and have also marshaled the evidence led by the prosecution.

Looking at the issue from the aspect of Section 52A of NDPS Act, it is seen that sub-section (2)(c) provides a procedure to be followed by the IO, where an application is required to be filed before the Magistrate for the purpose of allowing to draw the samples from the seized substance. Section 52A prior to the Amendment Act 16 of 2014 read as follows:-

"52A. Disposal of seized narcotic drugs and psychotropic substances.

(1) The Central Government may, having regard to the hazardous nature of any narcotic drugs or psychotropic substance, their vulnerability to theft substitution, constraints of proper storage space or any other relevant considerations, by notification published in the Official Gazette, specify such narcotic drugs or psychotropic substance or class of narcotic drugs or class of psychotropic substances which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time, determine after following the procedure hereinafter specified.

(2) Where any narcotic drugs or psychotropic substances has been seized and forwarded to the officer in charge of the nearest police station or to the officer empowered under Section 53, the officer referred to in subsection (1) shall prepare an inventory of such

narcotic drugs or, psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings under this Act and make an application, to any Magistrate for the purpose of,-

(a) Certifying correctness of the inventory so prepared: or

(b) Taking, in the presence of such Magistrate, photographs substances and certifying such photographs as true; or

(c) Allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

(3) Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1972) or the Code of Criminal Procedure, 1973 (2 of 1974), every Court trying an offence under this Act. shall treat the inventory, the photographs of narcotic drugs or psychotropic substances and any list of samples drawn under subsection (2) and certified by the Magistrate, as primary evidence in request of such offence.”

Although in ***Gurbax Singh v. State of Haryana reported as (2001)***

3 SCC 28, the Supreme Court held Section 52 of NDPS Act to be directory but still gave a word of caution that the provisions cannot be ignored by the Investigating Officer. While acquitting the accused for not following the procedure prescribed, it was held as under:-

“9. In our view, there is much substance in this submission. It is true that provisions of Sections 52 and 57 are directory. Violation of these provisions would not ipso facto violate the trial or conviction. However, IO cannot totally ignore these provisions and such failure will have a bearing on appreciation of evidence regarding arrest of the accused or seizure of the article. In the

present case, IO has admitted that seal which was affixed on the muddamal article was handed over to the witness PW 1 and was kept with him for 10 days. He has also admitted that the muddamal parcels were not sealed by the officer in charge of the police station as required under Section 55 of the NDPS Act. The prosecution has not led any evidence whether the chemical analyser received the sample with proper intact seals. It creates a doubt whether the same sample were sent to the chemical analyser. Further, it is apparent that the IO has not followed the procedure prescribed under Section 57 of the NDPS Act of making full report of all particulars of arrest and seizure to his immediate superior officer. The conduct of panch witness is unusual as he offered himself to be a witness for search and seizure despite being not asked by the IO, particularly when he did not know that the substance was poppy husk, but came to know about it only after being informed by the police. Further, it is the say of the Panch witness that muddamal seal used by the PSI was a wooden seal. As against this, it is the say of PW 2 SI/IO that it was a brass seal. On the basis of the aforesaid evidence and faulty investigation by the prosecution, in our view, it would not be safe to convict the appellant for a serious offence of possessing poppy husk.”

The apparent conflict in the manner of drawing a sample as provided in Section 52A(2)(c) of NDPS Act on one hand and the Standing Order 1/89 on the other hand came to be considered by the Supreme Court in **Union of India (UOI) v Mohanlal and Ors, reported as (2016) 3 SCC 379** where it was held as under:-

"Seizure and sampling:

12. Section 52-A(1) of the NDPS Act, 1985 empowers the Central Government to prescribe by a notification the procedure to be followed for seizure, storage and disposal of drugs and psychotropic substances. The Central Government have in

exercise of that power issued Standing Order No. 1/89 which prescribes the procedure to be followed while conducting seizure of the contraband. Two subsequent standing orders one dated 10.05. 2007 and the other dated 16.01.2015 deal with disposal and destruction of seized contraband and do not alter or add to the earlier standing order that prescribes the procedure for conducting seizures Para 2.2 of the Standing Order 1/89 states that samples must be taken from the seized contrabands on the spot at the time of recovery itself. It reads:

2.2 All the packages/containers shall be serially numbered and kept in lots for sampling Samples from the narcotic drugs and psychotropic substances seized, shall be drawn on the spot of recovery, in duplicate, in the presence of search witnesses (Panchas) and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchnama drawn on the spot.

13. Most of the States, however, claim that no samples are drawn at the time of seizure. Directorate of Revenue Intelligence is by far the only agency which claims that samples are drawn at the time of seizure, while Narcotics Control Bureau asserts that it does not do so. There is thus no uniform practice or procedure being followed by the States or the Central agencies in the matter of drawing of samples. This is, therefore, an area that needs to be suitably addressed in the light of the statutory provisions which ought to be strictly observed given the seriousness of the offences under the Act and the punishment prescribed by law in case the same are proved. We propose to deal with the issue no matter briefly in an attempt to remove the confusion that prevails regarding the true position as regards drawing of samples.

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15. It is manifest from Section 52A(2)(c) that upon seizure of the contraband the same has to be forwarded either to the officer in charge of the nearest police station or to the officer empowered Under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory (b) certifying photographs of such drugs or substances taken before the Magistrate as true and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.

16. Sub-section (3) of Section 52-A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer in charge of the Police Station or the officer empowered,

the officer concerned is in law duty bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct.

17. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with Sub-section (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure.

18. Be that as it may, a conflict between the statutory provision governing taking of samples and the standing order issued by the Central Government is evident when the two are placed in juxtaposition. There is no gainsaid that such a conflict shall have to be resolved in favour of the statute on first principles of interpretation but the continuance of the statutory notification in its present form is bound to create confusion in the minds of the authorities concerned instead of helping them in the discharge of their duties. The Central Government would, therefore, do well, to re-examine the matter and take suitable steps in the above direction.

19. There is in our opinion no manner of doubt that the seizure of the contraband must be followed by an application for drawing of samples and certification as contemplated under the Act. There is equally no doubt that the process of making any such application and resultant sampling and certification cannot be left to the whims of the officers concerned. The scheme of the Act in general and Section 52-A in particular, does not brook any delay in the matter of making of an application or the drawing of samples and certification. While we see no room for prescribing or reading a time frame into the provision, we are of the view that an application for sampling and certification ought to be made without undue delay and the Magistrate on receipt of any such application will be expected to attend to the application and do the needful, within a reasonable period and without any undue delay or procrastination as is mandated by Sub-section (3) of Section 52A)

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31. To sum up we direct as under:

31.1. No sooner the seizure of any narcotic drugs and psychotropic and controlled substances and conveyances is effected, the same shall be forwarded to the officer in charge of the nearest police station or to the officer empowered under Section 53 of the Act. The officer concerned shall then approach the Magistrate with an application under Section 52-A(2) of the Act, which shall be allowed by the Magistrate as soon as may be required under sub-section (3) of Section 52-A, as discussed by us in the body of this judgment under the heading "seizure and sampling. The sampling shall be done under the supervision of the Magistrate as discussed in Paras 15 to 19 of this order."

In my considered opinion, the procedure adopted by the prosecution in the present case for drawing the sample neither confirms to the procedure prescribed under Section 52A of the NDPS Act nor under the standing order No.1/89 dated 13.06.1989, issued under Sub-Section 1 of Section 52A of the NDPS Act by the Department of Revenue, Ministry of Finance, Government of India. The prosecution neither filed an application before the Magistrate for drawing the samples under his supervision nor followed the procedure of drawing a representative sample as provided in the standing order No.1 of 1989.

Learned counsel for the appellant further contended that the provisions of Section-55 of the Act were also not complied by the prosecution. Section-55 has been reproduced below for ready reference:-

“55. Police to take charge of articles seized and delivered:- *An officer In-charge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that police station and which may be delivered to him and shall allow any officer who*

may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer In-charge of the police station.”

Section 55 clearly provides that after production of the case property before the SHO, SHO shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that police station. In the instant case, there is no evidence to show that the case property was produced before the SHO and the Investigating Officer had deposited case property with the SHO of the concerned police station. The prosecution has examined Nand Lal ASI as PW-2, who nowhere stated that the case property was produced before Amar Singh SI/SHO. Rather he stated that after bringing the case property to the police station, it was deposited with MHC of the police station. Thus, even though the provisions of Section 55 was not mandatory in nature, but this non-compliance cannot be simply ignored by this Court.

Apart from that, I have carefully gone through the impugned judgment passed by the learned Trial Court and evidence on record. As per the testimony of PW-2, Nand Lal ASI, he had taken out a sample out of the total recovered opium and separate parcels of the sample and the remainder quantity of the opium were prepared. The parcels were sealed with the seal “NL” and after use, PW-2 Nand Lal ASI handed over his seal “NL” to Nihal Singh. In his cross-examination, PW-2 Nand Lal ASI admitted that Nihal Singh had returned the seal to him after 8/10 days in CIA staff. In the instant case, the recovery of

the contraband had taken place on 16.02.1994, whereas the sealed sample was sent to the FSL for examination on 02.03.1994. i.e after a delay of 14 days. As per PW-2 ASI Nand Lal, the seal was returned by Nihal Singh to him after 8/10 days i.e by 26.02.1994. Consequently, it is apparent that many days prior to send the sample to the FSL, the seal of the IO was with him and there are chances of substance being changed and the containers/parcels being re-sealed cannot be ruled out in the instant case. It has been held by this Court in the matter of ***Criminal Appeal No. 136-SB of 1992, decided on 23.11.2004, titled as “Baldev Singh Vs. State of Punjab”:-***

“12 There is yet another staggering circumstance, which has shaken the foundation of the prosecution case to an irreparable extent. In this case, the prosecution has failed to prove all the links starting from seizure of the contraband till the same reached to the office of Chemical Examiner in order to show that seal of the sample remained untempered with throughout. PW-2 St Balbir Singh has categorically stated that after sealing the sample of the alleged contraband as well as the remaining recovered contraband, the seal was handed over to Piara Singh, the independent witness. But the said witness has not been examined. It is well settled that till the case property has not been despatched to the office of the forensic Science Laboratory, the seal should not be available to the prosecuting agency and in absence of such safeguard, the possibility of the seal being tampered with, substance being changed and the containers being re-sealed cannot be ruled out. In the instant case, Form M 29 was prepared on 22.8.1990, on which specimen of the seal was fixed. The said form was supposed to be deposited with the alleged contraband in the Malkhana, but as per affidavit of HC Gurcharan Singh, Ex. PE, it is not clear that the said form was deposited in the Malkhana on 6.8.1990, when the recovered contraband along with

*samples was deposited. In **Shafiullah v. State, 1993(49) DLT 193**, where the seals remained with the police officers after use and the CFSL form was neither prepared on the spot nor deposited in the Malkhana, such circumstance was held to be fatal to the prosecution case. In **Mool Chand Vs. The State. 1992 (2) RCR (Criminal) 353 (SC): 1993 (II) CCR 964**, Delhi High Court observed as under:-*

“...The very name given to this form as CFSL Form suggests the object of its preparation at the time of seizure of a contraband article and separation of its representative sample. The specimen seal impressions used at that time are affixed on it, so that it can be deposited with case property in the Malkhana and forwarded to CFSL along with the sample parcel so that seal impressions affixed on the sample parcel are duly compared with the seal impression on the CFSL form. The idea behind taking such precaution is to complete a material link in the prosecution evidence by eliminating the possibility of the sample being tampered with. The sentence provided under this Act is very severe. It cannot be less than 10 years R.I. and a fine of Rupees one lac. If the sentence is so severe, the Courts will naturally insist for the standard of proof also beyond shadow of all reasonable doubt against an accused. Suspicion, however strong cannot take the place of positive proof...”

13. Thus, from the aforesaid facts, it is clear that in the instant case, the prosecution has failed to establish that the adequate precautions were taken by the prosecuting agency to eliminate possibility of the sample being tampered with. The benefit arising out of such a doubtful situation must necessarily go to the appellant.”

In view of the above discussion, it is apparent that there was non-compliance of provisions of Section 52, Section 52A and Section 55 of the NDPS Act by the prosecution. Even though the provisions of Section 52, Section 52A and Section 55 are directory in nature, but the non-compliance of said statutory provisions raises suspicion about the recovery of the contraband

from the appellant and serious prejudice has been caused to him. For the reasons recorded hereinbefore, this appeal succeeds and is accepted by setting aside the impugned judgment of conviction and order of sentence dated 16.05.2000, passed by Additional Sessions Judge, Sirsa. Sequelly, the appellant is ordered to be acquitted of the charge framed against him. The bail bonds and the surety bond shall stand discharged.

All pending applications, if any, are also disposed off, accordingly.

Case property, if any, be dealt with, and destroyed after the expiry of period of limitation for filing the appeal, in accordance with law.

The Trial Court record be sent back.

I record by appreciation for Mr. H.S. Randhawa, learned Amicus Curiae, who had rendered able assistance to this Court.

11.04.2023
Hitesh

(N.S.SHEKHAWAT)
JUDGE

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