

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

372

CRA-S-1499-SB-2004 (O&M)

Reserved on:-08.12.2022

Date of Decision: 11.01.2023

Javed Ahmed

...Appellant

Versus

State of Punjab

... Respondent

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

Present : Mr. Sukhpreet Singh, Advocate for
Mr. B.S. Sidhu, Advocate
for the appellant.

Mr. Vipin Pal Yadav, Addl. A.G. Punjab.

N.S.SHEKHAWAT, J.

The present appeal challenges the impugned judgment of conviction and order of sentence dated 01.05.2004 passed by the learned Judge, Special Court, Jalandhar, whereby, the present appellant was convicted under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter to be referred as 'the NDPS Act) and sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs. 1,00,000/- alongwith default stipulation.

The brief facts in brief are that on the night intervening 21.12.2000 and 22.12.2000, ASI Som Nath was present at Maqsudan Chowk, Jalandhar, alongwith other police officials and in the meantime, he received a secret information that Javed Ahmad Bhatt, the accused was indulging in smuggling of poppy husk by concealing

the same in the wooden boxes, which were meant for packing apples and used to supply to his customers in huge quantity. The secret informer also informed the police about his exact location alongwith the contraband and further informed that in case the raid was conducted, he could be apprehended at the spot. Finding the information reliable, the concerned police station was informed through ruka Ex.PD and on the basis of the same, formal FIR Ex.PD/1 was registered. The police party joined Lehmbhar Singh, Ex.-Sarpanch and Girdhari Lal as independent witnesses in the police team and raided the disclosed place and it was found that the accused was sitting on the wooden apple boxes covered with tarpaulin. The Investigating Officer raised the suspicion and told him that he suspected that the accused was in possession of some contraband and search was to be conducted. He also apprised the accused of his right to get his search conducted in the presence of a gazetted officer or a Magistrate and the accused expressed his intention to get his search conducted in the presence of gazetted officer and also signed the memo Ex.DE in this regard. In the meantime, on getting the information from the police party, Dharam Singh, DSP, had reached at the spot and introduced himself to the accused and apprised the accused of his legal right to get the search conducted in the presence of a gazetted officer or a Magistrate. However, the accused reposed confidence in the DSP and asked him to proceed further. At the instance of the DSP, the search was conducted and the memos were signed by the DSP as well as independent witnesses. After the search,

42 wooden boxes, which were meant for packing of apples, covered with tarpaulin were recovered, upon which, the accused was earlier sitting. The entire contraband was mixed and two samples of 250 grams each were separated from the entire recovered lot and converted into parcels. The remaining poppy husk was put in 16 bags, each bag containing about 30 kgs of poppy husk and even the sample parcels as well as the remaining poppy husk were converted into parcels. The case property as well as the sample parcels were sealed with the seal of the Investigating Officer as well as the DSP. The IO handed over his seal to Girdhari Lal, independent witness, whereas the DSP kept the seal with himself. Samples, sample seals, wooden boxes and remaining quantity of poppy husk were taken into possession and even personal search of the accused was conducted. The Investigating Officer produced the entire case property including the sample seals before the SHO, who verified the facts and had again put his own seal on the case property. On the same day, the case property was produced before the Magistrate and after production in the Court, it was redeposited with the MHC. The samples were sent to the FSL and vide report Ex.PK, the chemical examiner opined that the contents of sample was that of poppy husk.

After completion of the investigation, the challan was presented under Section 15 of the NDPS Act against the accused. The trial Court vide order dated 05.04.2001 ordered the framing of charges under Section 15 of the NDPS Act against the accused, to which, he pleaded not guilty and claimed trial.

In support of the charge, the prosecution examined 5 witnesses.

Constable Gurpreet Singh was examined as PW1. He stated that on 10.01.2001, MHC Kailash Chander handed over the sample parcels of this case, containing 250 grams of poppy husk duly sealed sent to him for depositing the same in the office of chemical examiner and he deposited the same on the same day. Inspector Jagjit Singh was examined as PW2, who was working as SHO on 22.12.2000. When the accused and the case property were produced before him, he verified the facts of the case and had also put his own seal on all the parcels. The statement of PW3 HC Kailash Chander was formal in nature and the case property was deposited with him at about 07.00 a.m., on 22.12.2000. Girdhari Lal and Lehmbhar Singh, both the independent witnesses, were given up by the prosecution being won over by the accused and could not be examined during the course of trial. DSP, Dharam Singh, was examined as PW4, who had reached the spot after getting the telephonic call from ASI Som Nath. He supported the case of the prosecution in totality. He clearly stated that the accused was sitting on the wooden boxes meant for containing apples and the search was conducted in his presence. SI/SHO Som Nath was examined as PW5, who was part of the police team, who had raided the truck and recovered the huge quantity of poppy husk. He narrated the same facts as mentioned in the FIR. Even all the witnesses of the prosecution were cross-examined at length by the learned defence counsel.

After closure of the evidence by the prosecution, the entire incriminating evidence was put to the accused in the shape of the statement under Section 313 Cr.P.C., and the accused pleaded his false implication. He stated that a false recovery had been planted on him and nothing was recovered from him.

In defence, the accused examined Prem Kumar son of Mehanga Ram as DW1, Manager of Hotel Narula, Jalandhar. He stated that on 20.12.2000, he was working as Manager in the said hotel and one Javed Ahmad Bhatt had booked a room in his hotel and police had arrested them. The accused was arrested alongwith one more person, however, he could not identify whether Javed Ahmad Bhatt present in the Court was the same person, who stayed in their hotel. The entry was made by the customer. He further admitted that register was in torn condition and in the shape of loose sheets and he could not see whether the accused present in the Court stayed in his hotel or not. Lehmbhar Singh was examined as DW2 and he refused to support the case of the prosecution. He stated that the accused was never arrested by the police in his presence nor any contraband was recovered in his presence. He further admitted that memos Ex.PB, Ex.PC and Ex.PE were bearing his signatures. Girdhari Lal son of Sewa Ram was examined as DW3, who stated that nothing was recovered in his presence from Javed Ahmad Bhatt on 22.12.2000. He used to sign in Punjabi but the police did not obtain his signatures on 22.12.2000.

I have heard learned counsel for the parties and perused the trial Court record with their able assistance.

Learned counsel for the appellant has vehemently argued that the mandatory provisions of Section 50 of the NDPS Act had not been complied with. No proper offer had been given to the appellant nor the appellant had been apprised regarding his legal right. Even the consent memo prepared by DSP did not mention regarding disclosing of legal right to the appellant and, thus, the accused is liable to be acquitted by this Court. Learned counsel further submitted that the appellant was not in conscious possession of the contraband. The alleged recovery was made from wooden boxes at Sabji Mandi market, on which, the appellant was allegedly sitting. Still further, even the appellant never tried to run away from the spot. Even, the place of recovery did not belong to the appellant and the appellant had been falsely implicated in the instant case. Apart from that, the mandatory provisions of Section 42 of the NDPS Act had not been complied with. Still further, the alleged recovery had taken place on 22.12.2000 and sample was sent on 10.01.2001 after a long and unexplained delay of about 19 days, thus, the police had failed to comply with the mandatory provisions and the appeal is liable to be allowed by this Court.

The submissions made by the learned counsel for the appellant have been vehemently opposed by the learned counsel for the State by submitting that the learned trial Court had recorded well reasoned findings based on due appreciation of evidence. He further

stated that the mandatory provisions of Section 42 of the NDPS Act had been complied with and the appeal is liable to be dismissed by this Court.

In the instant case, the police had received the secret information on the night intervening 21.12.2000 and 22.12.2000 to the effect that Javed Ahmad Bhatt, the appellant/accused was indulging in smuggling of poppy husk by concealing the same in wooden boxes, which are meant for storing the apples. In pursuance to that, the search was conducted and the poppy husk, which was hidden in the wooden boxes was recovered from the truck. Thus, the recovery had taken place from the truck and not from personal search of the accused. Thus, the provisions of Section 50 of the NDPS Act would not be applicable and non-compliance would not be fatal to the proceedings initiating under the NDPS Act.

It has been held by the Hon'ble Supreme Court of India in the matter of Ajmer Singh Vs. State of Haryana, 2010(3) SCC 746 as follows:-

13. The learned counsel for the appellant contended that the provision of Section 50 of the Act would also apply, while searching the bag, brief case etc., carried by the person and its non-compliance would be fatal to the proceedings initiated under the Act. We find no merit in the contention of the learned counsel. It requires to be noticed that the question of compliance or non-compliance of Section 50 of the Narcotic Drugs and Psychotropic Substances Act is relevant only where search of a person is involved and the said Section is not applicable nor attracted where no search of a person is

*involved. Search and recovery from a bag, brief case, container, etc., does not come within the ambit of Section 50 of the Narcotic Drugs and Psychotropic Substances Act, because firstly, Section 50 expressly speaks of search of person only. Secondly, the Section speaks of taking of the person to be searched by the Gazetted Officer or Magistrate for the purpose of search. Thirdly, this issue in our considered opinion is no more res-integra in view of the observations made by this court in the case of **Madan Lal v. State of Himachal Pradesh 2003(4) RCR (Criminal) 100 : 2004(1) Apex Criminal 426 : 2003 Cr.L.J. 3868.** The Court has observed :*

*"A bare reading of Section 50 shows that it only applies in case of personal search of a person. It does not extend to search of a vehicle or a container or a bag or premises (See **Kalema Tumba v. State of Maharashtra and Anr. (1999(4) RCR (Criminal) 575 : JT 1999 (8) SC 293), State of Punjab v. Baldev Singh (JT 1994 (4) SC 595), Gurbax Singh v. State of Haryana 2001(1) RCR (Criminal) 702 : (2001 (3) SCC 28).** The language of section is implicitly clear that the search has to be in relation to a person as contrast to search of premises, vehicles, or articles. This position was settled beyond doubt by the Constitution Bench in Baldev Singh's case (supra). Above being the position, the contention regarding non-compliance of Section 50 of the Act is also without any substance."*

*14. In **State of Himachal Pradesh v. Pawan Kumar, [2005(2) RCR (Criminal) 622 : 2005(2) Apex Criminal 1 : 2005 4 SCC 350]**, this Court has stated :*

"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 or a human being. 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, it is not possible to include these articles within the ambit of the word "person" occurring in Section 50 of the Act."

After discussion on the interpretation of the word 'person', this Court concluded :

"that the provisions of section 50 will come into play only in the case of personal search of the accused and not of some baggage like a bag, article or container, etc. which (the accused) may be carrying"

The court further observed :

"In view of the discussion made, Section 50 of the Act can have no application on the facts and circumstances of the present case as opium was allegedly recovered from the bag, which was being carried by the accused."

Thus, the submissions by the learned counsel for the appellant that mandatory provisions of Section 50 of the NDPS Act were not complied with is devoid of merit and is rejected.

Still further, learned counsel for the appellant vehemently argued that the present appellant was not in conscious possession of the contraband and he was arrested on 20.12.2000 from a different place and a false case was planted on him. First of all, to prove his *alibi*, the appellant had examined DW1 Prem Kumar, who stated that he was working as a Manager in Hotel Narula, Jalandhar and as per the entry in register Ex.D1, one Javed Ahmad Bhatt had booked a room in the hotel on 20.12.2000 and room No. 109 was allotted to him. The police had arrested the accused alongwith one another person Arshid Ahmed. However, the said testimony of DW1 Prem Kumar is of no help to the present appellant as DW1 Prem Kumar categorically stated that he could not identify whether Javed Ahmad Bhatt present in the Court was the same person who stayed in their hotel. Moreover, the entry was made by the customer who had stayed in room No. 109. Apart from that, Ex.D1 was admittedly in the shape of loose sheets and in torn condition. Such loose sheets could be procured from any where and no authenticity can be attached to such a document. Moreover, at the time, when the raid was conducted, the present appellant/accused was found sitting on the truck, in which, 480 kgs of poppy husk was found loaded in wooden boxes meant for apples. Even, the raid was conducted on the basis of a secret information, specifically intimating him as the smuggler and on search, he was found in possession of the contraband. Still further, the appellant has failed to mention any reason for false implication of the appellant. Even the appellant is stated to be resident of Sri Nagar

(Jammu and Kashmir) and the police at Police Station Sadar Jalandhar (Punjab) had no reason to falsely involve the appellant and that too by planting the huge quantity of poppy husk, i.e. 480 kgs. I find no substance in the arguments raised by the learned counsel for the appellant and the findings recorded by the learned trial Court are upheld.

Still further, the learned counsel for the appellant vehemently argued that the alleged recovery had taken place on the night intervening 21.12.2000 and 22.12.2000 whereas the sample was sent to the chemical examiner on 10.01.2001 and there was no explanation with regard to the said delay. However, from the perusal of the evidence led by the prosecution, it is apparent that MHC Kailash Chander had stepped into the witness box as PW3 and he tendered into evidence his affidavit Ex.PA. He clearly stated that the case property remained in his custody and there was no tampering with the case property. Even, the parcel was handed over to PW1 Constable Gurpreet Singh PW1 and he handed over the same to the chemical examiner on the same day. Apart from that, the appellant had failed to show that any prejudice had been caused to him by delay in sending the samples, whereas, there was ample evidence to the contrary to show that the sample remained in Malkhana intact and no one tampered with the same. Thus, the delay in sending the sample is of no consequence and no benefit can be derived by the appellant from the same.

I have gone through the findings recorded by the learned trial Court with regard to the alleged violation of Section 42 of the NDPS Act by the police officials and find no substance in the arguments raised by the learned counsel for the appellant. Section 43 of the NDPS Act deals with the power of seizure and arrest of the suspected in a public place. The learned trial Court has correctly recorded the material difference between the provisions of Sections 42 and 43 of the NDPS Act. Section 42 of the NDPS Act requires recording of reasons for belief and for taking down of information received in writing with regard to the commission of an offence before conducting search and seizure; whereas Section 43 of the NDPS Act does not contain any such provision and, as such, while acting under Section 43 of the NDPS Act, the empowered officer has the power of seizure of the article etc., and arrest of a person, who is found to be in possession of any narcotic drugs and substance in a public place, where such possession appeared to him to be unlawful.

In view of the above discussion, I find no legal infirmity in the judgment passed by the learned trial Court and the findings recorded by the trial Court are affirmed. As a consequence, the appeal is dismissed and the impugned judgment of conviction and order of sentence dated 01.05.2004 passed by the learned Judge, Special Court, Jalandhar, are upheld.

The appellant/accused is directed to surrender within 15 days from today, failing which, the CJM concerned shall issue non-bailable warrants against the present appellant/accused and shall

commit him to custody to serve the remaining sentence of imprisonment.

All pending applications, if any, are disposed of, accordingly.

The case property, if any, may be dealt with as per the rules after expiry of period of limitation for filing the appeal.

Records of the Court below be sent back.

11.01.2023
amit rana

(N.S.SHEKHAWAT)
JUDGE

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