

2. The prosecution's case is that on 18.10.2003, Investigator (SI Ram Chander) along with other police officials was present in village Khanpur Kalan, where he received secret information that Rajbir @ Raj Pal son of Phool Singh deals in selling of charas and even at that point of time he was selling charas near water tank on Kakana Road. Based on this information, the Investigator apprehending Rajbir @ Raj Pal and served a notice upon him under Section 50 of the NDPS Act and apprised him of his right to be searched before a Gazetted officer or a Magistrate. The accused opted to be searched before a Civil Gazetted Officer. Subsequently, the investigator called the Tehsildar, Gohana and in his presence, search was conducted and from the pocket of his shirt, charas was recovered which weighed 200 grams. The police also associated one Rajbir Singh-PW-2 as an independent witness.

3. After that, samples of charas were sent for testing and it was found positive for charas and on completion of the investigation, the officer in-charge of the police station launched prosecution for violation of Section 20 (b) of NDPS Act. The trial Court framed the charge under Section 20(b) of NDPS Act in which the accused did not plead guilty.

4. During the trial, the prosecution examined eight witnesses, namely ASI Parvesh Kumar as PW1, Rajbir as PW2, SI Vijender Singh as PW3, Constable Satyawan as PW4, SI Ram Chander as PW5, HC Ramesh Chander as PW6, Sanjay Bishnoi as PW7 and Sunil Kumar as PW8. In the statement of the accused recorded under section 313 CrPC, the accused took the stand of denial simplicitor. However, he did not lead any evidence in the defence. Vide judgment dated 04.11.2004 passed by Special Judge, Sonapat, the appellant

was convicted and sentenced to imprisonment for a period of two years with a fine of Rs.8,000/-.

5. Feeling aggrieved against the said judgment, the appellant had come up before this Court by filing the present appeal.

6. I have heard learned counsel for the appellant and Mr. Manish Bansal, Sr. DAG, Haryana and gone through the record.

7. Counsel for the appellant submits that notice served upon the appellant under Section 50 of NDPS was defective and inadequate, independent witness joined by the prosecution turned hostile during trial which proves the falsity of case, there is no explanation qua the weighing scale used by the investigator, mandatory provision under Sections 52, 55, 57 of NDPS Act not completed. Even, prosecution failed to produce case property before the Magistrate at the time of his production, and the Trial Court failed to notice the above said illegalities and major discrepancies in the statement of witnesses as such judgment is liable to be set aside and the appellant deserves acquittal.

8. On the other hand, State counsel submits that judgment of the trial Court is reasoned one and every aspect of the trial was taken into notice and appellant was rightly convicted and sentenced.

9. The investigator-SI Ram Chander appeared as PW-5. He corroborated the prosecution version as mentioned above and explicitly stated that he had given an offer to the accused Rajbir under Section 50 of the NDPS Act in presence of PW-2 Rajbir and PW-8-Constable Sunil Kumar. The independent witness Rajbir had appeared as PW-2 and did not support the case of the prosecution. He denied that he was present on the spot. Even during cross-

examination by Public Prosecutor in cross-examination, he did not support the case of the prosecution. Thus, the independent witness Rajbir did not support this memo and turned hostile and did not even support the contents of Ex.PA.

10. The next independent witness was Sanjay Bishnoi, who was the concerned Tehsildar, testified as PW-7. He stated that on receipt of telephonic message, he went to the spot and under his direction; the police had conducted the search of the accused and recovered charas from the pocket of his shirt. He further stated that the investigator had taken out two samples of 20 grams each and had sealed the sample as well as the bulk of remaining charas. Since, the police had seized the charas on prior information from pocket of the shirt worn by the accused, as such, on the face of it Section 50 of NDPS Act was applicable. The investigator PW-5 also admits this position and stated that he had apprised the accused about his right under Section 50 of the NDPS Act and had tendered in the evidence the memo of such option as Ex.PA. A perusal of Ex.PA reveals that it has been mentioned in the option that accused was told that he had a right to be searched in the presence of a Gazetted Police Officer or any other civil Gazetted Officer.

11. In the present case, the option which was required to be given to the accused, as per Section 50 of the NDPS Act, was that he has a right to be searched in the presence of a Magistrate or a Gazetted Officer; whereas the option which was given to him was that whether the accused opted to be searched before a Gazetted Officer or a Civil Gazetted Officer or before him. The word 'Magistrate' was missing from the notice. Reference is made to **Man**

Bahadur v. State of Himachal Pradesh, AIR 2009 Supreme Court 369. Given

this, the mandatory provisions of Section 50 of the NDPS Act were not complied with, which goes to the root of the case and no conviction can be based on such a defective option.

12. For the reasons aforementioned, the impugned judgment of conviction and sentence cannot be upheld. It is set aside accordingly. The appeal is allowed. Bail bonds are discharged.

(ANOOP CHITKARA)
JUDGE

25.07.2023
Jyoti-II

Whether speaking/reasoned	:	Yes
Whether reportable	:	No