

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

CRA-S-200-SB-2005 (O&M)

Reserved on:-30.01.2023

Date of Decision: 14.02.2023

Balvinder Singh

...Appellant

Versus

State of Haryana

... Respondent

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

Present : Mr. Saurabh Garg, Advocate
for the appellant.

Ms. Sheenu Sura, DAG, Haryana.

N.S.SHEKHAWAT, J.

Challenging the correctness and legality of the judgment of conviction dated 20.01.2005 and order of sentence dated 22.01.2005 passed by the Judge, Special Court, Karnal, whereby, the present appellant was convicted under Section 18(c) of the Narcotic Drugs and Psychotropic Substance Act, 1985 (in short '**the NDPS Act**') and was sentenced to undergo rigorous imprisonment for a period of one year and six months and to pay a fine of Rs. 3,000/-, alongwith the default stipulation, the appellant has preferred the present appeal before this Court.

The prosecution story, as it emerges from the report under Section 173 Cr.P.C., is that on 07.09.2002, ASI Hargian Singh of CIA-II Karnal alongwith other police officials was moving in a police vehicle, and when reached near *katcha* path leading to Dera Malook Singh in the area of village Garhi Khazoor, the appellant/accused was seen coming from the opposite direction carrying a plastic sack (*katta*) in his hand and on noticing the government jeep, turned towards left side and started walking on a

fast pace. The police team found his activity suspicious and he was

apprehended on suspicion. Since the police doubted some contraband in the plastic sack, a notice under Section 50 of the NDPS Act was served upon the accused by ASI Hargian Singh and he was apprised of his right to get his search conducted in the presence of a Magistrate or a gazetted officer of the Department of Excise, Police, Revenue etc. The accused replied in writing and opted to get the bag searched in the presence of a gazetted officer of police department. The consent memo and the reply were duly thumb marked by the accused and was signed by the witnesses. A wireless message was flashed to Devinder Singh, DSP (AEC) Karnal to reach at the spot and he came there with his staff. On the directions of Devinder Singh, DSP, Hargian Singh ASI, searched the plastic sack carried by the accused and on the search, the opium wrapped in a wax paper was recovered. The total quantity of opium weighed to be 600 gms. Out of the total quantity, two samples of 20 gms each were separated and the remaining opium weighed to be 560 gms. The samples so collected by the police and the remainder quantity of the opium were converted into different parcels and were sealed with the seal of "RS" and "DY". The seal of "RS" was handed over to ASI Sube Singh by the Investigating Officer whereas the seal of "DY" was retained by Devinder Singh, DSP, himself. The recovery memos were prepared regarding taking into possession of the sample parcels as well as residue parcels and the *rukka* was sent to the police station for registration of the case, on the basis of which, a formal FIR was recorded. The initial investigation was conducted by Hargian Singh ASI at the spot and the accused was

formally taken into custody. After initial investigation was conducted, the witnesses of the case, the appellant/accused and the parcels were produced before Barjinder Singh SI/SHO, who verified the facts of the case from the accused and the witnesses and affixed seal “RS” on already sealed parcels. On the directions of SI Barjinder Singh, ASI Hargian Singh deposited the case property with the MHC and the accused was lodged in the police lock-up. The report under Section 57 of the NDPS Act was also submitted to the DSP by the Investigating Officer. The samples were sent to the Forensic Science Laboratory Madhuban for analysis and the sample was identified as opium.

The final report under Section 173 Cr.P.C. was filed against the accused after completion of the investigation. The accused was charge sheeted for the offence punishable under Section 18 of the NDPS Act by the learned Judge, Special Court, and the accused pleaded his innocence and claimed trial.

To substantiate the charge, the prosecution examined seven witnesses, who supported the case of the prosecution.

After closure of the evidence, the statement of the accused was recorded under Section 313 Cr.P.C. and he claimed that he was innocent and nothing was recovered from his possession and had been falsely involved in the case.

I have heard learned counsel for the parties and have carefully gone through the evidence lead by the prosecution as well as other material on record.

Learned counsel for the appellant had vehemently argued that the Investigating Officer had not complied with the mandatory provisions of Section 50 of the NDPS Act. Since the provisions of the NDPS Act are stringent, the police was under a legal obligation to ensure the strict compliance of Section 50 of the NDPS Act. The appellant/accused was an illiterate person and his thumb impressions were obtained by the police on plain papers. Still further, from a perusal of the notice Ex. P4 under Section 50 of the NDPS Act, it is apparent that only partial offer was given to the present appellant. Hargian Singh ASI, Investigating Officer vide notice Ex.P4 gave offer to the present appellant to get his search conducted in the presence of some Magistrate or gazetted officer of the excise, police or revenue department. The said submission has been opposed by the learned State counsel on the ground that there was no need of compliance of Section 50 of the NDPS Act in the instant case as the recovery of the contraband had taken place from a plastic sack held by the accused in his hand and not from the personal search. Thus, the provisions of Section 50 NDPS Act would not be applicable to the facts of the instant case. I agree with the submissions made by the learned State counsel as the submissions made by the learned counsel for the appellant are based on misinterpretation of Section 50 of the NDPS Act. In the instant case, finding the activity of the appellant suspicious, he was apprehended by the police party and he was found to be holding a plastic sack in his hand. After calling the gazetted officer Davinder Singh, DSP (AEC) Karnal, search was conducted on

his direction and 600 gms of opium wrapped in wax paper was recovered from the plastic sack. Thus, the recovery was effected from the bag held by the accused and no recovery effected from his personal search. Thus, provisions of Section 50 of the NDPS Act would not apply to the fact of the instant case and the arguments raised by the learned counsel for the appellant is without any substance. It has been held by the Hon'ble Supreme Court in the matter of **Jarnail Singh Vs. State of Punjab, AIR 2011, SC 964** as follows:-

12. The next submission made by Mr. Ujjal Singh is that there has been non compliance of Section 50 of the Narcotic Drugs and Psychotropic Substances Act, in that requisite option was not given to the appellant, as to, whether he wanted to be searched in the presence of a Gazetted Officer or a Magistrate. We are unable to accept the aforesaid submission. Inspector Ram Pal (PW4) has clearly stated that the option was duly given to the appellant. The appellant had, in fact, signed on the consent statement expressing his confidence to be searched in presence of the aforesaid witness. Similarly, Satpal Singh PW5 has also stated that before affecting the search, the accused/appellant was given the necessary option as to whether he wanted to be searched before a Gazetted Officer or a Magistrate. This witness also stated that the appellant reposed his confidence in Inspector Rampal. In such circumstances, it cannot be held that there was non compliance with Section 50 of the Narcotic Drugs and Psychotropic Substances Act.

12.1 This apart, it is accepted that the narcotic/opium, i.e., 1 kg. and 750 grams was recovered from the bag

*(thaili) which was being carried by the appellant. In such circumstances, Section 50 would not be applicable. The aforesaid Section can be invoked only in cases where the drug/narcotic/NDPS substance is recovered as a consequence of the body search of the accused. In case, the recovery of the narcotic is made from a container being carried by the individual, the provisions of Section 50 would not be attracted. This Court in the case of **Kalema Tumba v. State of Maharashtra, 1999(4) RCR (Criminal) 575 : (1999) 8 SCC 257** discussed the provisions pertaining to 'personal search' under Section 50 of the Narcotic Drugs and Psychotropic Substances Act and held as follows;*

"..... if a person is carrying a bag or some other article with him and narcotic drug or psychotropic substance is found from it, it cannot be said that it was found from his person.

*" Similarly, in the case of **Megh Singh v. State of Punjab, 2003(4) RCR (Criminal) 319 : 2004(1) Apex Criminal 482 : (2003) 8 SCC 666** this Court observed that;*

"A bare reading of section 50 shows that it applies in case of personal search of a person. It does not extend to a search of a vehicle or container or a bag or premises."

*The scope and ambit of Section 50 was also examined by this Court in the case of State of **Himachal Pradesh v. Pawan Kumar, 2004(4) RCR (Criminal) 543 : 2004(3) Apex Criminal 618 : (2005) 4 SCC 350**. In paragraphs 10 and 11, this Court observed as follows:-*

"10. We are not concerned here with the wide definition of the word "person", which in the legal world includes corporations, associations or body of individuals as factually in these type of cases search of their premises

can be done and not of their person. Having regard to the scheme of the Act and the context in which it has been used in the section it naturally means a human being or a living individual unit and not an artificial person. The word has to be understood in a broad common-sense manner and, therefore, not a naked or nude body of a human being but the manner in which a normal human being will move about in a civilised society. Therefore, the most appropriate meaning of the word "person" appears to be -- "the body of a human being as presented to public view usually with its appropriate coverings and clothing". In a civilised society appropriate coverings and clothings are considered absolutely essential and no sane human being comes in the gaze of others without appropriate coverings and clothings. The appropriate coverings will include footwear also as normally it is considered an essential article to be worn while moving outside one's home. Such appropriate coverings or clothings or footwear, after being worn, move along with the human body without any appreciable or extra effort. Once worn, they would not normally get detached from the body of the human being unless some specific effort in that direction is made. For interpreting the provision, rare cases of some religious monks and sages, who, according to the tenets of their religious belief do not cover their body with clothings, are not to be taken notice of. Therefore, the word "person" would mean a human being with appropriate coverings and clothings and also footwear.

11. 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. 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."

It has come in evidence that although the body search of the appellant was conducted but no recovery of any narcotic was made. The body search only led to the recovery of Rs. 25/- from his pocket.

Learned counsel for the appellant further submitted that there are various discrepancies in the submissions of the official witnesses and the prosecution case is rendered doubtful. In fact, I have carefully perused the judgment recorded by the learned trial Court in this regard. The learned trial Court has discussed in detail various minor contradictions, which are appearing in the testimonies of PW3 DSP Devinder Singh, PW4 ASI Sube Singh and PW5 ASI Hargian Singh. However, it is apparent that these witnesses had got a chance to appear as a witness in the learned trial Court after a lapse of several months and such minor contradictions/inconsistencies are

bound to appear in the testimonies of official witnesses, who conducted several raids during this time period at different places. Even, the learned trial Court discussed the said minor contradictions in detail and the same submissions have been made regarding the contradictions, which are liable to be ignored.

Still further, the learned counsel for the appellant further submitted that the prosecution had not complied with Section 52-A of the NDPS Act and the case of the prosecution was liable to be rejected on this ground alone. However, the learned trial Court has correctly recorded a finding that violation of Section 52-A of the NDPS Act does not vitiate the trial. The provisions of Section 52-A of the NDPS Act are directory in nature and the non-compliance thereof could not have the effect of vitiating the trial. The said submission is without any substance and is unsustainable.

Still further, I have carefully perused the trial Court record and all the official witnesses have withstood the test of cross-examination. The prosecution witnesses were searchingly cross-examined but their testimonies could not be shattered in any manner.

No other submissions are raised during the course of arguments.

The learned trial Court has recorded valid and good reasons, while convicting the appellant of the charge under Section 18 of the NDPS Act and the impugned judgment is liable to be affirmed and upheld by this Court.

Vide impugned order of sentence, the present appellant was sentenced to undergo rigorous imprisonment for a period of one year and six months and was ordered to pay a fine of Rs. 3,000/- for the offence punishable under Section 18 of the NDPS Act. However, this Court is conscious of the fact that the recovery of the contraband was effected from the present appellant on 07.09.2002 and he is facing the agony of trial/appeal since last more than 20 years. As per the impugned judgment, he was aged about 35 years at the time of framing of the charge sheet by the learned Judge, Special Court, Karnal. During the course of hearing, the learned State counsel has submitted the custody certificate of the present appellant. As per the said custody certificate, the appellant has undergone 01 year and 12 days of actual sentence. The custody certificate further shows that for the last more than 21 years, no other criminal case was registered against the present appellant. Even his sentence was suspended by this Court on 26.02.2003 and for the last about 18 years, he was not found involved in any criminal activity. Even the learned counsel for the appellant had vehemently urged that he was sole bread earner of the family and was not a previous convict. Even, he is aged about 57 years at present. Thus, no purpose would be served by sending the present appellant behind the bars at this stage. Even otherwise, the recovery of opium from the present appellant was non-commercial in nature. Thus, the ends of justice will be suitably met, if his sentence is reduced to the period already undergone by him. However, the amount of fine is enhanced from Rs. 3,000/- to Rs. 30,000/-, which

shall be deposited by the appellant in the Punjab and Haryana High Court Bar Association Lawyer's Family Welfare Fund within a period of three months from today, failing which, the appellant shall undergo further rigorous imprisonment for a period of two months, as observed by the learned trial Court.

With the above modifications, the appeal is partly allowed and the impugned judgment of conviction is upheld, whereas the order of sentence is modified to the extent that the sentence imposed on the present appellant is reduced to the period already undergone by him. However, the amount of fine is enhanced to Rs. 30,000/- as observed, which shall be deposited by him within a period of three months from today.

The appeal stands disposed off accordingly.

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

14.02.2023
amit rana

(N.S.SHEKHAWAT)
JUDGE

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