

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

CRA-S-2586-SB-2014 (O&M)

Date of Decision:01.09.2023

Jagtar Singh

... Appellant

Versus

State of U.T., Chandigarh

... Respondent

CORAM : HON'BLE MR. JUSTICE HARPREET SINGH BRAR

Present: Mr. B.B.S. Randhawa, Advocate
amicus curiae.

Ms. Simsi Dhir Malhotra, APP, U.T. Chandigarh.

HARPREET SINGH BRAR, J. (ORAL)

1. The present appeal has been preferred against the judgment of conviction and order of sentence dated 29.04.2014 passed by the learned Judge, Special Court, Chandigarh in case bearing FIR No.214 dated 17.08.2012 registered under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act) registered at Police Station Industrial Area, Chandigarh whereby the appellant has been convicted for commission of offence under Section 15 of the NDPS Act and sentenced to undergo rigorous imprisonment for a period of 10 years with a fine of Rs.1 lakh and in default of payment of fine to further undergo rigorous imprisonment for six months.

FACTUAL BACKGROUND

2. In brief, the version put forth by prosecution is that on 17.08.2012, SI Malook Singh along with other police officials was present at the checkpoint near CTU workshop depot for checking suspicious persons owing to incidents of theft that had occurred in the city recently. At about 4:30 PM, one vehicle

bearing registration No.HP-12-B-4448, which was being driven by the accused-appellant, came from the side of cremation ground of village Dadua and the said vehicle was signalled to be stopped by S.I. Malook Singh. On checking the said vehicle, one plastic gunny bag was found lying near driver's seat and another plastic gunny bag was recovered from the small box built behind the seat of the driver. Both gunny bags were found to be containing poppy husk. On the asking of the Investigating Officer, the driver of the vehicle disclosed his name as Jagtar Singh son of Banta Singh, resident of Village Allapur, P.S. Kurali, District Mohali. He could not produce any licence or permit for keeping the poppy husk in his possession. The plastic gunny bags were weighed with the help of a weighing machine and the weight came to be 50 kgs for each bag. Two samples of 2 kgs each were taken from each of the plastic gunny bags and thereafter, they were converted into sealed parcels by SI Malook Singh with his seal bearing impression 'MS'. The seal after use was handed over to SI Balwinder Singh. The sample parcels and the remaining property as well as the vehicle bearing registration No.HP-12-B-4448 were taken into possession vide recovery memo, which was attested by SI Balwinder Singh and Constable Balbir Singh. As the accused appeared to have committed an offence under Section 15 of the NDPS Act by possessing 100 kgs of poppy husk, *ruqa* was sent to the police station on the basis of which FIR was registered.

3. Thereafter, ASI Amarjit Singh, second Investigating Officer reached the spot and the accused along with entire case property was handed over to him. He prepared a rough site plan. On return to the police station, the accused as well as the entire case property was produced before SHO Malkiat Singh, who affixed his own seal bearing impression 'MS' on each of the parcel and deposited the same with MMHC.

4. After completion of investigation, challan against the accused was prepared and presented in the court. As per Section 207 Cr.P.C., copies of documents as relied upon by the prosecution were supplied to the accused free of costs.

5. After considering the rival contentions and perusing the record, commission of offence under Section 15 of the NDPS Act was made out against the accused and thus, he was charged accordingly. The accused-appellant pleaded not guilty to the same and claimed trial.

6. In support of its case, the prosecution examined as many as nine witnesses and thereafter closed its evidence.

7. Statement of the accused-appellant was recorded under Section 313 Cr.P.C. wherein he denied the charge framed against him and pleaded innocence but he did not lead any evidence in his defence.

CONTENTIONS

8. Learned counsel appearing for the appellant argues that provisions of Section 50 of the NDPS Act were not complied with while conducting personal search, as the appellant was not apprised of his legal right to be searched before a Gazetted Officer or a Magistrate. There is also a violation of provisions of Section 52-A of the NDPS Act, as the representative sample was not drawn in the presence of the Magistrate.

9. Learned counsel for the appellant further argues that there is an unexplained delay of 4 days in sending the sample to FSL whereas the same ought to have been sent to FSL within 72 hours.

10. It is submitted that the alleged recovery of contraband was stated to be effected from cabin of the truck, which was being driven by the accused-appellant. One plastic gunny bag of 50 kgs was found lying near the seat of the

driver and another bag of same weight was recovered from the box built behind the seat of driver. The counsel for the appellant argues that photographs Ex.8 to Ex.P-11 would clearly show that there is hardly any space behind the seat of driver to accommodate a huge bag of 50 kgs. The accused-appellant has been falsely implicated in the present case and the alleged recovery has been planted on him. It is further argued that no independent witness was joined despite the fact that the road from where the recovery was made caters to heavy traffic and a workshop of Chandigarh Transport Undertaking also situated nearby. Furthermore, the person who provided the weighing machine was also not examined. Moreover, the complainant and the Investigating Officer in the present case is the same person, which is against the settled proposition of law. Even Form M-29 was not prepared at the spot.

11. Per contra, learned counsel appearing on behalf of the respondent-State argues that provisions of Section 50 of the NDPS has no application to this case, as the contraband was recovered from the truck being driven by the accused-appellant and not from the person of the accused. It is further argued that provisions of Section 52-A of the NDPS Act have been duly complied with as after preparation of inventory, an application for attestation of the same was moved before the learned Judicial Magistrate 1st Class on 18.08.2012 whereupon order of even date was passed by the learned Judicial Magistrate 1st Class certifying the inventory to be correct and the photographs of the case property were also taken in his presence.

12. Learned State counsel further argues that the accused is not entitled to acquittal on the sole ground that the complainant himself was the Investigating Officer unless and until it is proved that the accused suffered the vice of unfairness or bias, which has to be decided on a case to case basis. It is also

argued that the delay of 4 days in sending the samples to the FSL is not fatal to the prosecution case, as all the official witnesses supported the prosecution case and there was no evidence produced in rebuttal that the case property was tampered with. Even the Chemical Examination Report, which was placed on record as Ex.PW5/A proved that the samples Exhibit 1 and Exhibit 2 were found to be that of poppy straw.

ANALYSIS AND OBSERVATION

13. This Court has heard learned counsel for the parties and has gone through the records with their able assistance.

14. Learned counsel for the appellant has forcefully argued that provisions of Section 50 of the NDPS Act were not complied with, as the appellant was not made aware of his legal right to be searched before a Gazetted Officer or a Magistrate. The above contention of the learned counsel for the appellant, when tested on the anvil of the facts and circumstances of the present case, finds merit. Undisputedly, the alleged contraband was recovered from the cabin of the truck but the search memo, which was placed on record as Ex.PH, would clearly show that the accused-appellant was also subjected to personal search. Therefore, the case in hand is a case of composite search, meaning thereby, when along with the bag/vehicle/receptacle of the accused, his body is also searched, the rigor of Section 50 of the NDPS Act would be made applicable.

15. A two Judge Bench of the Hon'ble Supreme Court in ***State of Rajasthan Vs. Parmanand and another (2014) 5 SCC 345*** speaking through Justice Ranjana P. Desai has held as under:-

“15. 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 1 Parmanand's bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of Respondent 2 Surajmal was also conducted. Therefore, in the light of the judgments of this Court mentioned in the preceding paragraphs, Section 50 of the NDPS Act will have application.”

A three Judge Bench of the Hon'ble Supreme Court in ***S.K. Raju alias Abdul Haque alias Jagga Vs. State of W.B. (2018) 9 SCC 708*** speaking through Justice Dr. D.Y. Chandrachud has held as under:-

“20. The question which arises before us is whether Section 50(1) was required to be complied with when charas was recovered only from the bag of the appellant and no charas was found on his person. Further, if the first question is answered in the affirmative, whether the requirements of Section 50 were strictly complied with by PW 2 and PW 4.

21. As evidenced by Ext. 3, a first option was given to the appellant. PW 2 informed him that it was his legal right to be searched either in the presence of a Magistrate or in the presence of a gazetted officer. The appellant was then asked to give his option by indicating whether he wanted to be searched by a Magistrate or a gazetted officer. The appellant indicated that he wanted the search to be carried out in the presence of a gazetted officer. When PW 4 arrived, he was introduced to the detainee as a gazetted officer. As evidenced by Ext. 4, PW 4 then gave the appellant a second option. He inquired of him again, whether he wanted to be searched in the presence of a gazetted officer or in the presence of a Magistrate. The appellant reiterated his desire to be searched in the presence of a gazetted officer. Before the search of the appellant

commenced, the gazetted officer asked the appellant whether he wanted to search PW 2 before his own search was carried out by PW 2. The appellant agreed to search PW 2 before the latter carried out his search. On conducting the search, only personal belongings of PW 2 were found by the appellant. On the search of the appellant in the presence of the gazetted officer, a biscuit-coloured jute bag was recovered from the appellant, and Rs 2400 cash in the denomination of 24 notes of Rs 100 each was found in the left pocket of the appellant's trouser. When the bag was opened, a black polythene cover containing nineteen rectangular broken sheets of a blackish/deep brown colour weighing 1.5 kg was recovered. The sheets were tested and were found to be charas.

22. PW 2 conducted search of the bag of the appellant as well as of the appellant's trousers. Therefore, the search conducted by PW 2 was not only of the bag which the appellant was carrying, but also of the appellant's person. Since the search of the person of the appellant was also involved, Section 50 would be attracted in this case. Accordingly, PW 2 was required to comply with the requirements of Section 50(1). As soon as the search of a person takes place, the requirement of mandatory compliance with Section 50 is attracted, irrespective of whether contraband is recovered from the person of the detainee or not. It was, therefore, imperative for PW 2 to inform the appellant of his legal right to be searched in the presence of either a gazetted officer or a Magistrate. From Ext. 3, it can be discerned that the appellant was informed of his legal right to be searched in the presence of a Magistrate or a gazetted officer. The appellant opted for the latter alternative. Ext. 4 is a record of the events after the arrival of PW 4 on the scene. After the arrival of PW 4,

the appellant was once again asked by him, whether he wished to be searched in the presence of a gazetted officer or a Magistrate. This was the second option which was presented to him. When he reiterated his desire to be searched before a gazetted officer, PW 4 inquired of the appellant whether he wished to search PW 2 before his own search was conducted by PW 2. The appellant agreed to search PW 2. Only the personal belongings of PW 2 were found by the appellant. It was only after this that a search of the appellant was conducted and charas recovered. Before the appellant's search was conducted, both PW 2 and PW 4 on different occasions apprised the appellant of his legal right to be searched either in the presence of a gazetted officer or a Magistrate. The options given by both PW 2 and PW 4 were unambiguous. Merely because the appellant was given an option of searching PW 2 before the latter conducted his search, would not vitiate the search. In Parmanand, in addition to the option of being searched by the gazetted officer or the Magistrate, the detainee was given a "third" alternative by the empowered officer which was to be searched by an officer who was a part of the raiding team. This was found to be contrary to the intent of Section 50(1). The option given to the appellant of searching PW 2 in the case at hand, before the latter searched the appellant, did not vitiate the process in which a search of the appellant was conducted. The search of the appellant was as a matter of fact conducted in the presence of PW 4, a gazetted officer, in consonance with the voluntary communication made by the appellant to both PW 2 and PW 4. There was strict compliance with the requirements of Section 50(1) as stipulated by this Court in Vijaysinh ."

16. In the present case, there is not an iota of evidence produced on record by the prosecution to prove that the accused-appellant was made aware of his right to be searched by a Gazetted Officer or a Magistrate at the time of his personal search and that an offer of search was given to him as enshrined under Article 50 of the NDPS Act. Rather PW-1 SI Malook in his cross-examination stated that *‘it is correct that no notice under Section 50 was served upon the accused since it was a chance recovery.’*

17. A glaring omission on the part of the Investigating Officer is the non-compliance of Section 52-A of the NDPS Act. The mandate of Section 52-A of the NDPS Act requires the representative sample to be drawn in the presence of the Magistrate but in the present case, no such exercise was done, which would render the case of the prosecution highly doubtful. A two Judge Bench of the Hon’ble Supreme Court in ***Union of India vs. Mohanlal and another, 2016 (1) RCR (Criminal) 858***, speaking through Justice T.S.Thakur has held as under:-

“20. To sum up we direct as under:

(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 52A(ii) of the Act, which shall be allowed by the Magistrate as soon as may be required under Sub-Section 3 of Section 52A, 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 13 and 14 of this order.”

18. Recently, a two Judge Bench of the Hon’ble Supreme Court in ***Mangilal vs. The State of M.P.***, CrI. Appeal No. 1651 of 2023 decided on July 12, 2023, speaking through Justice M.M. Sundresh, while acquitting the accused, has

observed that the mandate of Section 52-A of the NDPS Act has to be duly complied with. The following was observed:-

“8. Before any proposed disposal/destruction mandate of Section 52A of the NDPS Act requires to be duly complied with starting with an application to that effect. A Court should be satisfied with such compliance while deciding the case. The onus is entirely on the prosecution in a given case to satisfy the Court when such an issue arises for consideration. Production of seized material is a factor to establish seizure followed by recovery. One has to remember that the provisions of the NDPS Act are both stringent and rigorous and therefore the burden heavily lies on the prosecution. Non-production of a physical evidence would lead to a negative inference within the meaning of Section 114(g) of the Indian Evidence Act, 1872 (hereinafter referred to as the Evidence Act). The procedure contemplated through the notification has an element of fair play such as the deposit of the seal, numbering the containers in seriatim wise and keeping them in lots preceded by compliance of the procedure for drawing samples.”

19. Admittedly, the sample was sent after a delay of 4 days for chemical examination to CFSL, Sector 36-A, Chandigarh. As per instructions issued vide Standing Order No.1 of 1988 dated 15.03.1988 by the Narcotics Control Bureau, the representative sample is required to be sent to the Chemical Examiner within 72 hours. The Standing Orders are mandatory in nature and the omission on the part of the Investigating Officer with regard to non-compliance of Section 52-A of the NDPS Act coupled with the violation of Standing Order No.1 of 1988 *ibid* in sending the sample after a delay of 4 days would tantamount to be a serious flaw in the investigation, which suffocates the prosecution case completely. The sanctity of the statutory instructions contained in the Standing Orders issued by the Narcotics Control Bureau came up for consideration before the Hon’ble

Supreme Court in **Noor Aga vs. State of Punjab, 2008 (16) SCC 417**, where a two Judge Bench, speaking through Justice S.B.Sinha, has held as under:-

“32. Recently, this Court in State of Kerala &Ors. v. Kurian Abraham (P) Ltd. &Anr. [(2008) 3 SCC 582], following the earlier decision of this Court in Union of India v. Azadi BachaoAndolan [(2004) 10 SCC 1] held that statutory instructions are mandatory in nature.

Logical corollary of these discussions is that the guidelines such as those present in the Standing Order cannot be blatantly flouted and substantial compliance therewith must be insisted upon for so that sanctity of physical evidence in such cases remains intact. Clearly, there has been no substantial compliance of these guidelines by the investigating authority which leads to drawing of an adverse inference against them to the effect that had such evidence been produced, the same would have gone against the prosecution.”

20. The delay of 4 days in sending samples to the Chemical Examiner also makes the ratio of law in **Union of India Vs. Bal Mukund and others 2009 (2) RCR (Criminal) 574, Malkiat Singh alias Kala Vs. State of Punjab 2009 (1) RCR (Criminal) 353** and **State of Rajasthan Vs. Gurmail Singh 2005 (2) RCR (Criminal) 58** applicable to the present case.

21. Another conspicuous omission on the part of the Investigating Officer was with regard to ensuring safe custody of the bulk as well as the representative sample. In the manner in which the bulk and representative sample were handled, possibility of tampering with both the sealed parcels cannot be ruled out. Form M-29 was not prepared. The person from whom the weighing machine was arranged was not examined. PW1 SI Malook Singh stated in his cross-examination that ‘no mobile phone was recovered from the possession of accused’ whereas Ex.PH i.e. the search memo, which bears signature of SI Malook Singh depicts that one mobile phone make Micromax was recovered from the accused. PW3 HC Balbir, who took *ruqa* to the police station for

registration of FIR in his cross-examination stated that one mobile phone was recovered from the accused. Therefore, there is a stark contradiction in the statements of official witnesses, who were signatories to the search memo Ex.PH. Further, no explanation is forthcoming with regard to non-joining of any independent witness during the course of investigation, even though the recovery was made from a road, which is frequently visited by the general public.

22. It is well settled law that non-examination of an independent witness is not fatal to the case of the prosecution but in the instant case neither any effort was made to associate any independent witness nor any explanation is forthcoming for not doing so. A two Judge Bench of the Hon'ble Supreme Court in ***Krishan Chand vs. State of H.P. AIR 2017 (SC) 3751*** has laid down the ratio that the failure of the Investigating Officer to associate an independent witness at the time of recovery creates a dent in the case of the prosecution. A two Judge Bench of the Hon'ble Supreme Court in ***Gorakh Nath Prasad vs. State of Bihar, 2018(1) RCR (Criminal) 108*** has acquitted the accused holding that the case of the prosecution cannot be entirely based upon the statements of the official witnesses when no independent witness has been joined in the investigation.

23. There are gaping holes and inadequacies in the prosecution evidence and the link evidence is completely missing. The prosecution has miserably failed to knit together the chain of circumstances which point towards the hypothesis of the complicity of the appellant beyond a reasonable shadow of doubt. Resultantly, the appeal is allowed. The judgment of conviction and order of sentence dated 29.04.2014 passed by the learned Judge, Special Court, Chandigarh are set aside. The appellant-Jagtar Singh is acquitted of the charge framed against him. His bail bonds and surety bonds stand discharged.

24. Pending miscellaneous application(s), if any, shall also stand disposed of.

25. The case property, if any, may be dealt with as per rules after expiry of period of limitation for filing the appeal(s). Record of the case be sent back to the Court below.

(HARPREET SINGH BRAR)
JUDGE

September 01, 2023
Pankaj*

Whether speaking/reasoned	Yes
Whether reportable	Yes