

IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH

(387)

2023:PHHC:067871
CRA-S-4011-SB-2017
Judgement reserved on : 29.04.2023
Date of Decision: 11.05.2023

Harjeet Singh

--Petitioner

Versus

State of UT, Chandigarh

--Respondent

CORAM:- HON'BLE MR. JUSTICE RAJESH BHARDWAJ.

Present:- Mr. Suvir Sidhu, Advocate and
Mr. Harlove Singh Rajput, Advocate
for the appellant.

Mr. Y.S. Rathore, Addl. P.P., U.T., Chandigarh
assisted by Ms. Sudha Singh, Advocate.

RAJESH BHARDWAJ.J

1. The present appeal has been filed by the appellant against the order of conviction and sentence dated 1.6.2015 passed by learned Judge, Special Court, Chandigarh, whereby appellant had been convicted for the offence under Section 21 of NDPS Act and sentenced to undergo RI for 28 days.

2. Brief facts of the case are that SI Mohan Singh along with HC Kulwant Singh, Constable Sharandeep and Constable Ajay was on patrolling duty on 12.2.2014. A *Naka* was laid at the turn of Rehri Market, Sector 41, Chandigarh for checking the suspicious persons due to the increasing theft and snatching incidents taking place in the city. At about 6 pm, they stopped a person coming from the side of Sector 41-42, Chandigarh. On seeing the police party he got perplexed and started moving back. On suspicion he was apprehended. He took out a polythene from the right pocket of his pant and tried to throw the same, however, SI

Mohan Singh caught hold his hand and prevented him from throwing the polythene. On checking the same it was found containing heroin. On the asking of SI Mohan Singh he disclosed his name as Harjit Singh. He failed to produce any licence for carrying the contraband recovered. On weighing, the same was found to be 10 grams. Two samples of 2 grams each were taken out of the polythene and were sent to the CFSL and the remaining 6 grams was kept in the same polythene. The same was taken into possession vide recovery memo Ex.PB. The accused was found to have committed an offence under Section 21 of NDPS Act. The Ruka Ex.PC was sent to the police station concerned on the basis of which FIR Ex.PD was registered. On the registration of the same investigation commenced. Appellant was arrested on the spot. On conclusion of the investigation challan was presented and charges were framed. The prosecution examined SI Mohan Singh, IO as PW-1, HC Kulwant Singh, the recovery witness as PW-2, SI Jaspal Singh, the second IO as PW-3, HC Vinod Kumar, who deposited the samples with CFSL as PW-4, SI Surender Gautam with whom the case property was deposited as PW-5, HC Yashpal, who prepared the site plan as PW-6 and Constable Parveen, who produced the case property before the court and thereafter deposited the same in Malkhana as PW-7. Besides these witnesses, documentary evidence was also produced. After conclusion of prosecution evidence, statement of the appellant was recorded under Section 313 Cr.P.C, wherein he pleaded innocence and false implication. However, he led no evidence in defence. Thereafter, learned Trial Court heard the arguments of both the sides and on conclusion of the proceedings learned Trial Court found the prosecution having proved the charges framed against the appellant and thus he was convicted and

sentenced as stated above under Section 21 of the NDPS Act.

3. Learned counsel for the appellant has vehemently contended that the appellant had been falsely implicated in this case. He submits that as per case of the prosecution, recovery of the alleged contraband was effected from the appellant by SI Mohan Singh along with his team on 12.2.2014 at about 6 PM at the Naka laid on the turn of Rehri Market, Sector 41, Chandigarh. He submits that evidently the recovery was effected from the appellant at a public place but investigating agency did not join any independent witness. He submits that from the evidence produced on record, it is apparent that the investigating agency did not even try to associate any independent witness. It is submitted that SI Mohan Singh, PW-1 has deposed that the appellant tried to throw the polythene packet by taking out from his pocket but he prevented him from throwing the same and thus recovery was effected on suspicion from his hand. He submits that once the recovery of the contraband is effected from the hand of the appellant the same amounts to recovery made from the search of the body of the appellant and hence the statutory provisions of Section 50 of NDPS Act, which are mandatory in nature were bound to be complied with. However, from the evidence produced on record, it is evident that the investigating agency had simply effected the recovery from the appellant without giving any offer under Section 50 of NDPS Act to the appellant. He submits that compliance of Section 50 of NDPS Act is mandatory in nature especially when the recovery of contraband is effected from the search of the body of the accused. Counsel submits that in the present case SI Mohan Singh has made the recovery of the alleged contraband from the hand of the appellant but as he failed to give any offer under Section 50 of NDPS Act to the

appellant, the conviction and sentence awarded by the learned Trial Court are unsustainable in the eyes of law. It is further submitted that from the oral and documentary evidence produced by the prosecution, it is apparent that the recovery was effected from a public place and the investigating agency did not join any independent witness which further creates a serious doubt in the case of the prosecution foisted on the appellant. He submits that the recovery of the contraband was effected on 12.2.2014 and as submitted by HC Vinod Kumar, PW-4, who deposited the samples with the CFSL on 13.2.2014, it is evident that the samples had been deposited after a delay of one day. He submits that the recovery was effected in Chandigarh and the CFSL was situated in Chandigarh itself. Thus, there is no explanation regarding depositing the samples on the next day, when the recovery was effected on 12.2.2014. Counsel has relied upon the judicial precedents in cases of *Jaspal Singh @ Pala Vs. State of Punjab (Criminal Appeal No.S-1888-SB-2016 decided on 9.3.2017)* and *Sanjeev & Anr. Vs. State of Himachal Pradesh, 2022 LiveLaw (SC) 267*. It is submitted that in view of the above facts and circumstances of the case, prosecution has miserably failed to prove its case beyond reasonable doubt and thus the conclusion arrived at by the learned Trial Court in convicting the appellant vide impugned judgement is totally perverse being against the evidence on record and the law settled and hence deserves to be set aside by acquitting the accused from the charges framed against him.

4. On the other hand, learned State counsel has vehemently opposed the submissions made by counsel for appellant. He has submitted that the appellant was apprehended by the investigating agency while they were holding a Naka at the turn of Rehri Market, Sector 41, Chandigarh.

He submits that on seeing the police party the appellant tried to escape from the spot, however, he was apprehended on suspicion and as he made an attempt to throw away the polythene being carried in his pocket, SI Mohan Singh prevented him from throwing the same and on checking the same, it was found containing 10 grams of heroin. It is submitted that it was a chance recovery effected from the appellant. He further submits that recovery was effected from the polythene being carried by the appellant and thus Section 50 of NDPS Act would not be attracted in this case. He submits that the prosecution has produced overwhelming evidence by producing the witnesses i.e. PW-1 to PW-7 besides the documentary evidence. It is further submitted that the material contradictions as alleged by counsel for the appellant are minor in nature and are not sufficient enough to discredit the case of prosecution and thus the view taken by learned Trial Court in convicting and sentencing the appellant did not suffer from any infirmity and hence the present appeal deserves to be dismissed.

5. I have heard learned counsel for the parties at length and have gone through the record carefully.

6. As is evident from the facts, case of the prosecution is that a Naka was laid by the police party at the turn of Rehri Market, Sector 41, Chandigarh and the appellant was seen coming from the side of Sector 41-42, Chandigarh. On seeing the police party he tried to escape from the spot but he was apprehended. He also tried to throw the polythene being carried by him but was prevented by SI Mohan Singh from throwing the same. On checking of polythene, recovery of 10 grams of heroin was effected.

7. Though learned counsel for the appellant has argued regarding non-joining of the independent witness and the main thrust of his arguments

is regarding the compliance of Section 50 of NDPS Act which is mandatory in nature. It is evident from the case of the prosecution that the recovery of alleged contraband was effected from the appellant from the polythene which he tried to throw after seeing the police party. Evidently, recovery was effected in a public place. There is nothing on record to show that the police party made any effort to join any independent witness at the time of search of the appellant. Besides this the alleged contraband had been recovered from the appellant when he tried to throw away the polythene being carried by him in his pocket. Thus the contraband was in the hand of the appellant when it was recovered by SI Mohan Singh, PW-1. The police party did not give any offer under Section 50 of NDPS Act to the appellant. The provisions of Section 50 of NDPS Act are as under:-

50. Conditions under which search of persons shall be conducted.

(1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be

searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.”

8. Hon'ble Supreme Court has settled the law by holding that in case of the search of the body of the accused, compliance of Section 50 of NDPS Act is imperative in nature. Reliance in this regard can be placed upon the judicial precedents in cases of ***Sanjeev Vs. State of Himachal Pradesh, 2022(2) R.C.R (Criminal) 341, State of Rajasthan Vs. Parmanand, 2014(3) SCR 522***. Hon'ble Constitutional Bench of Supreme Court in case of ***Vijaysinh Chandubha Jadeja Vs. State of Gujarat, 2011(1) SCC 609*** has held as under:-

*“17. For this purpose, it would be necessary to recapitulate the conclusions, arrived at by the Constitution Bench in ***State of Punjab Vs. Baldev Singh, 1993(3) RCR (Criminal) 533***. We are concerned with the following conclusions:-*

*57. (1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the person concerned of his right under sub-section (1) of ***Section 50*** of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.*

(2) That failure to inform the person concerned about the existence of his right to be searched before a gazetted officer or a Magistrate would cause prejudice to an accused.

(3) That a search made by an empowered officer, on prior information, without informing the person of his right that if he so requires, he shall be taken before a gazetted officer or a Magistrate for search and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of [Section 50](#) of the Act.

xxxxxxxxxxxxxxxxxxxxxx (5) That whether or not the safeguards provided in [Section 50](#) have been duly observed would have to be determined by the court on the basis of the evidence led at the trial. Finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of [Section 50](#) and, particularly, the safeguards provided therein were duly complied with, it would not be permissible to cut short a criminal trial.

(6) That in the context in which the protection has been incorporated in [Section 50](#) for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of [Section 50](#) are mandatory or directory, but hold that failure to inform the person concerned of his right as emanating from sub-section (1) of [Section 50](#), may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law.

(7) That an illicit article seized from the person of an accused during search conducted in violation of the

safeguards provided in Section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search.”

9. It is not the case of the prosecution that polythene from which the police party recovered the contraband was already thrown away by the appellant but it was in the hand of the appellant. Thus, in the opinion of this court and in the light of the law laid down, compliance of Section 50 of NDPS Act is imperative in nature which had not been made the present case. The contraband recovered from the appellant was found to be 10 grams heroin which is a non-commercial quantity. There is nothing on record to show that the appellant has any criminal antecedents as he has never been involved in any other case of the similar nature. As already discussed above, the police party did not join any independent witness in this case. There is no gainsaying that NDPS Act is a special Act and has the provisions for the stringent punishment. Hence, the standard of investigation is also required to be meeting all those parameters, which rule out the false implication of an innocent citizen. However, in the case in hand, the prosecution has failed to rule out the false implication of the appellant.

10. Thus, in view of the findings recorded above, this court has no doubt in its mind to hold that the prosecution has failed to prove its case beyond the reasonable doubt as the compliance of provisions of Section 50 of NDPS Act has not been made in this case. Resultantly, the present appeal

is allowed. The impugned order convicting and sentencing the appellant is set aside and the appellant is acquitted of the charges framed against him.

(RAJESH BHARDWAJ)
JUDGE

11.05.2023

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Whether speaking/reasoned:	Yes/No
Whether Reportable:	Yes/No