

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

**CRA-S-4271-SB-2014 (O&M)
Pronounced on: 29.09.2023**

Sewa Singh

...Appellant

Versus

State of Punjab

...Respondent

CORAM: HON'BLE MRS. JUSTICE RITU TAGORE

Present: Mr. Varun Sharma, Advocate
for the appellant.

Mr. Sandeep Vermani, Addl. AG, Punjab.

RITU TAGORE, J

1. This appeal is directed against the judgment of conviction and the order of sentence dated 02.09.2014, rendered by Judge, Special Court, Kapurthala, in a case bearing FIR No.277 dated 10.11.2012 registered at Police Station, City, Kapurthala under Sections 21/61/85 of Narcotic Drugs and Psychotropic Substances Act, 1985 (in short as 'the Act'), vide which he convicted the accused Sewa Singh, (now appellant), for commission of an offence, punishable under Section 22 of the Act, and sentenced him to undergo rigorous imprisonment for a period of ten years and to pay fine of Rs.1,00,000/- and in default whereof, to further undergo rigorous imprisonment for a period of one year for keeping in conscious possession 300 grams of an intoxicating powder, containing Alprazolam.

Prosecution Case

2. The case of prosecution is that on 10.11.2012, SI Jaswant Singh (PW-3) along with other police officials, was present at Octroi post of village

Fattu DHINGA in connection with patrol duty, where he (PW-3) received a secret information about a clean shaved person (*mona*) possessing an intoxicating powder and waiting for his clients, in the area of Jammu Palace, Kapurthala, if a raid is conducted, he can be apprehended red handed at the spot. Believing the information, SI Jaswant Singh (PW-3) reached the spot along with police party and saw the person. Upon seeing police party, he started to move. On suspicion, SI Jaswant Singh (PW-3) with help of other police officials apprehended said person who, on inquiry, disclosed his name as Sewa Singh (appellant) son of Sh. Joginder Singh resident of Mohalla Santpura, Gali No.7, Police Station City Kapurthala. SI Jaswant Singh (PW-3) disclosed his identity and rank, expressing suspicion about a narcotic substance in his (appellant) conscious possession and also apprised him of his legal right to have his search either from a Magistrate or Gazetted Officer. The appellant placed confidence in SI Jaswant Singh (PW-3) and agreed to undergo a search from him. Consent memo (Exh.PW-1/A) was prepared. Efforts were also made to join some independent person from the public but no one was ready. From the search of appellant, an intoxicating powder wrapped in a polythene bag was recovered from the right pocket (*dub*) of his trouser. Two samples of ten gram of intoxicating powder each were separated and converted into parcels. The remaining powder, on weighment, came to be 280 gram, which was also converted into a sealed parcel. All the above said parcels were taken into possession and sealed with seal bearing impression 'JS' and on Form No.M-29 (Exh.PW-3/E) specimen of seal was also prepared at the spot and seal after use was given to ASI Harbans Singh (PW-1). Entire case property was taken into police possession vide recovery memo (Exh.P-2). Ruqa (Exh.PW-3/A) prepared by SI Jaswant Singh (PW-3) was sent to the police station for registration of criminal case against the appellant, on the basis of which formal FIR (Exh.PW-3/B) was registered.

Appellant was arrested. Personal search memo (Exh.PW-1/D) was also prepared. Rough site plan (Exh.PW-3/C) was prepared and statements of witnesses were also recorded at the spot.

3. After that police party along with the appellant and case property, returned to the police station and were produced before DSP Manjit Singh (then inspector) (PW-5), who verified the case property and facts from the appellant and witnesses, put his seal bearing impression 'MS' on the case property and then secured it in double-key lock of the Malkhana with MHC. On 11.11.2012, appellant along with contraband and inventory report (Exh.PW3/E) were produced before learned Magistrate for obtaining requisite orders on the inventory, which were accordingly passed vide (Exh.PW3/D). Case property was again deposited in Malkhana in safe custody. Sealed sample parcel was sent to FSL, Kharar for analysis and report (Exh.PW3/F) was received. After completion of investigation, the appellant was challaned to face trial in the Court.

Proceedings at the trial

4. Copy of Challan under Section 173 Cr.P.C. along with documents attached thereto was supplied to the appellant free of cost as envisaged under Section 207 Cr.P.C.

5. On finding a *prima facie* case for commission of offence punishable under Section 22 of the Act, the charge was framed against the appellant, to which he pleaded not guilty and claimed trial.

6. To substantiate its case, prosecution examined five witnesses; ASI Harbans Singh (PW-1), HC Ranjit Singh (PW-2), SI Jaswant Singh (PW-3), ASI Arjan Singh (PW-4) and DSP Manjit Singh (PW-5) and also tendered documentary evidence, thereafter, closed the evidence.

7. Statement of the appellant-accused under Section 313 Cr.P.C. was recorded by putting all the incriminating evidence appearing against him, in which he claimed innocence and his false implication in the case. To support his version, he examined Mohinder Dass (DW-1) and SI Hansraj (DW-2).

8. The trial Court after appreciating the evidence available on record concluded that there has been compliance of mandatory provisions of the Act. Since recovery was from a public place, provisions of Section 42 of the Act were not attracted and further observed that the testimonies of the official witnesses are believable and not liable to be rejected merely on the ground that same are not corroborated by independent witnesses, resultantly held that prosecution has successfully proved its case against the appellant-accused beyond reasonable doubt, thereby convicted and sentenced the appellant-accused, as indicated above.

9. Aggrieved with the findings of conviction and order of sentence, the appellant-accused has preferred the instant appeal.

Contentions

10. The findings of the learned trial Court have been assailed on the following counts, by learned counsel for the appellant:-

- i) Non-compliance of provisions of Section 50, 52-A(2) and 57 of the Act;
- ii) Complainant himself conducted the investigation;
- iii) Non-examination of independent witnesses in the recovery proceedings;
- iv) Unexplained and undue delay in sending the samples to Chemical Examiner;
- v) Unauthorized and unexplained insertion of particulars of the case i.e. FIR, section, police station etc. in the documents of recovery;
- vi) *Inter-alia*, discrepancies with regard to attestation of the documents by the witnesses, format of the documents.

11. Winding up his arguments, learned counsel for the appellant contends that it is the fundamental duty of the prosecution to prove its case beyond reasonable doubts. However, the material omissions and legal infirmities as pointed above have indeed rendered the prosecution case highly suspect. The trial Court failed to appreciate these deficiencies in the case and erred in believing the prosecution while disbelieving the defence version of false implication. Based on these grounds, a prayer for acquittal of the appellant has been made by setting aside the impugned judgment of conviction and sentence.

12. As opposed, learned State counsel has supported the findings of conviction and legality of the sentence. It is stated that compliance of mandatory provisions of the Act has been made throughout from the time of search and seizure of the contraband from the appellant. The evidence shows that appellant was apprised of his legal right to be searched either from a Magistrate or Gazetted Officer and appellant gave his consent to be searched from the Investigating Officer, resultantly a memo of consent (Exh.PW-1/A) was prepared in this regard. The search was duly effected by following the procedure and contraband was found from his conscious possession, regarding which he failed to produce any permit or licence. There is complete link evidence commencing from seizure of contraband till its testing, which is supplemented by the testimonies of Arjan Singh (PW-4), the MHC, HC Ranjit Singh (PW-2) the messenger, who deposited the case property in the office of Chemical Examiner and its report (Exh.PW-3/F), proving that contraband remained intact and safe throughout till it was tested and found to be containing an intoxicating powder, Alprazolam. The delay in sending the sample to the office of Chemical Examiner, as such is of no consequence and referred to

‘Hardip Singh Vs. State of Punjab’ 2008 (4) R.C.R. (Criminal) 97. Learned

State counsel while relying upon '**Raveen Kumar Vs. State of Himachal Pradesh**' 2020 (4) R.C.R. (Criminal) 873 submits that statements of witnesses cannot be discarded merely on the ground that they are official witnesses unless the witnesses appear to be biased against the appellant-accused. The defence side failed to impeach their testimony on any count. The defence witnesses failed to probabalise the plea of false complicity of the appellant and same has been rightly rejected by the trial Court. The learned State counsel submits that statements of the prosecution witnesses have remained consistent and impeccable on the material allegations against the appellant-accused. By referring to a recent judgment of the Constitutional Bench of Hon'ble the Supreme Court in '**Mukesh Kumar Vs. State**' (Narcotic Branch Of Delhi) 2020 SCC OnLine SC 700, learned State counsel contended that if complainant has himself conducted the investigation would not *per se* make the ground to doubt the recovery unless bias is made out by the appellant, which in the circumstances, appellant failed to make out. It is submitted that there is no merit in the appeal and same be dismissed.

13. Appellant has challenged both his conviction and sentence; therefore, it becomes imperative to evaluate the findings of learned trial Court in the context of submissions raised by learned counsel for the appellant and the State.

14. Before I contemplate and examine the rival submissions, it is apposite to have brief view of the evidence.

Prosecution evidence

i) ASI Harbans Sigh (PW-1) is a recovery witness, who remained associated with the Investigating Officer SI Jaswant Singh (PW-3). He supported the recovery of contraband from the appellant including preparing sealed parcels and carrying out the necessary documentation in this regard.

ii) HC Ranjit Singh (PW-2), is an official witness, who had deposited the case property in the office of Chemical Examiner, Kharar. He deposed that during the period case property remained in his custody, it was safe and intact.

iii) SI Jaswant Singh (PW-3), is the Investigating Officer of the present case. He, testified about the entire prosecution case from the time of receiving secret information, apprehending the appellant, informing the appellant about his legal right to be searched either from Magistrate or Gazetted Officer, taking his consent, and thereafter search, seizure and recovery of contraband 300 grams of intoxicating powder (Alprazolam) from conscious possession of the appellant, without a permit or licence. He also spoke about drawing of sample parcels, sealing the case property with his seal impression 'JS', preparing seal impressions and Form No.M-29 at the spot and taking the entire case property in possession vide recovery memo (Exh.PW-1/B). He proved the consent memo (Exh.PW-1/A). Also spoke about preparing the rough site plan (Exh.PW-3/C), sending the ruqa (Exh.PW-3/A) to police station and registration of the FIR (Exh.PW-3/B), arrest of the appellant, and proved the arrest memo (Exh.PW-1/D) and personal search memo (Exh.PW-1/C). He also deposed about handing over the case property and Form No.M-29 to Inspector/SHO Manjit Singh for authentication, and sealing of the case property with seal bearing impression 'MS' by Inspector/SHO Manjit Singh. Also also deposed that on 11.11.2012, he produced the case property and appellant before learned Magistrate, got the inventory (Exh.PW-3/E) authenticated from him and obtained the order (Exh.PW-3/D). He identified bulk parcels (Exh.P-1), second sample parcel (Exh.P-2) and Form No.M-29 (Exh.P-3).

iv) ASI Arjan Singh (PW-4) is the MHC, who retained the case property in safe and intact condition during the period it remained in his custody.

v) DSP Manjit Singh (PW-5) was working as SHO P.S. City Kapurthala on 10.11.2012 before whom the investigating officer SI Jaswant Singh (PW-3) produced the appellant along with the case property and documents prepared in this regard for his verification and authentication, who verified the facts of the case from the appellant and the witnesses and also affixed his own seal bearing impression 'MS'. He retained the case property along with Form No.M-29 in double lock with MHC ASI Arjan Singh (PW-4) and on 11.11.2012, he handed the case property and the appellant to the investigating officer for producing before Illaqa Magistrate for authentication of the inventory. He also deposed that he kept the case property in safe condition and did not allow anyone to tamper with the same nor he tampered with the same, during the period it remained in his custody. He identified seal impressions on Form No.M-29 as (Exh.P-4).

Defence evidence

i) Mohinder Dass, son of Ujagar Singh (DW-1) deposed that appellant was a tenant in his house from 2005 to 2007 and was performing the duty of a home guard. He was never involved in any case of buying or selling intoxicating substance nor was he arrested from his house during the period he remained his tenant.

ii) SI Hans Raj No.1522 (No.28612 previous number), Headquarter, Punjab Home Guard, Kapurthala (DW-2), brought the attendance register for the period from 01.01.2010 to 31.03.2014 and deposed that he used to maintain the aforesaid register to mark the attendance of home guards at P.S. City Kapurthala and tendered the copy of certificate (Exh.DW-2/A). He further deposed that appellant was posted as a gunman to then SHO P.S. City Kapurthala and as per the attendance register, appellant remained on duty from 01.11.2012 to 12.11.2012 as per the extract of the register (Exh.DW-2/B), bearing the entries in his hand.

Analysis and Reasoning

15. Hon'ble the Supreme Court in '**Noor Aga Vs. State of Punjab**' **2008 (4) R.A.J. 381 : 2008 (3) R.C.R. (Criminal) 633** has held that 'under the Narcotic Drugs and Psychotropic Substances Act, the extent of burden to prove the foundational facts on the prosecution, i.e., proof beyond all reasonable conduct is more onerous. A heightened scrutiny test would be necessary to be invoked. It is so because whereas, on one hand, the Court must strive towards giving effect to the parliamentary object and intent in the light of the international conventions, but on the other hand, it is also necessary to uphold the individual human rights and dignity as provided for under the UN Declaration of Human Rights but insisting upon scrupulous compliance of the provision of the Act for the purpose of upholding the democratic values, it is necessary for giving effect to the concept of 'wider civilization'. It is further observed that while deciding such cases, the Courts must always remind itself that it is a well settled principle of criminal jurisprudence that more serious the offence, the stricter is the degree of proof. Therefore, a higher degree of assurance would be necessary to convict an accused under the Narcotic Drugs and Psychotropic Substances Act.'

16. The law relating to degree of proof required in Narcotic Drugs and Psychotropic Substances Act, 1985 was again reiterated by a Division Bench judgment of this Court passed in '**Didar Singh @ Dara Vs. State of Punjab**', **2010 (3) R.C.R. (Criminal) 337**, in the following terms:-

"20. Under the Narcotic Drugs and Psychotropic Substances Act, not only the very possession of the narcotics, drugs and psychotropic substances has been made an offence but severe punishment without exception has also been provided. The Act also provides for presumption of guilt emerging from possession of Narcotics Drugs and Psychotropic Substances. In case of commercial quantity of the narcotics,

drugs and psychotropic substances, the minimum sentence of 10 years rigorous imprisonment besides minimum fine of Rupees one lakh has been provided.”

17. Keeping in mind the above principles of law, let me deal with various submissions raised on behalf of the appellant.

18. At the very outset, it is required to be noted that prosecution has attempted to conceal the identity of the appellant. The prosecution witnesses claimed ignorance about the appellant being posted and working as a gunman to the then SHO P.S. City Kapurthala. On the contrary, aforesaid fact has been proved by SI Hansraj (DW-2), who brought the attendance register pertaining to the appellant for the period 01.01.2010 to 31.03.2014 and tendered its extract as (Exh.DW-2/A and Exh.DW-2/B). According to him, appellant remained on duty till 09.11.2012 and was absent from duty on the date of occurrence (10.11.2012). The statement of the above witness has remained unchallenged on the material aspect of appellant's posting as a gunman with SHO P.S. City Kapurthala. ASI Jaswant Singh (PW-3) and ASI Harbans Singh (PW-1) have deposed that they were posted at P.S. City Kapurthala. It is, thus, unbelievable that these witnesses did not know the appellant. ASI Harbans Singh (PW-1) refuted that appellant was working as PHG at Police Station City Kapurthala as a gunman of Inspector Manjit Singh (PW-3). Similarly, SI Jaswant Singh (PW-3) also feigned ignorance about the posting of the appellant at P.S. City Kapurthala and denied that appellant's habit of excessive drinking of liquor offended the SHO concerned leading to false registration of the case against him. ASI Arjan Singh (PW-4) MHC admitted that Hansraj (DW-2) used to mark the attendance of SPO in P.S. City Kapurthala but feigned ignorance that salary of the appellant was prepared by Hansraj (DW-2). SI Jaswant Singh (PW-3) admitted that PHG Hansraj was member of the raiding party. The documents

relating to recovery also do not mention the standing of the appellant as a gunman. All the prosecution witnesses were posted at P.S. Kapurthala, where appellant was posted. So, the identification of the appellant as an unknown person by witnesses is simply not believable. In fact, it lends support to the version of the appellant that a false case was foisted upon him due to the alleged annoyance of the then SHO P.S. Kapurthala. The trial Court, however, erred in brushing aside lightly this material circumstance which indeed had an impact on the credibility of prosecution case.

19. Addressing the argument regarding the failure to comply with Section 50 of the Act, the counsel for the appellant argues that obtaining the appellant's consent on a typed form raises doubts whether appellant was made aware of his legal right to be searched from the Magistrate or Gazetted Officer, as required under Section 50 of the Act. Further, office of Magistrate was at a short distance of 2 ½ kms. from the place of recovery, as stated by SI Jaswant Singh (PW-3) and no effort was made to take the appellant before the learned Magistrate for conducting his search. The evidence thus, does not establish that Investigating Officer made any meaningful compliance of Section 50 of the Act in the present recovery, which is contrary to guidelines outlined in Full Bench decision of Hon'ble the Apex Court in '**State of Punjab Vs. Baldev Singh**' **1999 (3) R.C.R. (CrI.) 533**. The learned counsel urged that this has vitiated the entire recovery. The trial Court failed to consider this illegality and wrongly convicted the appellant. Contra, State counsel submits that compliance of Section 50 of the Act has been made in the present case.

20. Here, it is apposite to go through provisions of Section 50 of the Act, which reads 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."

21. Hon'ble the Supreme Court in case of '**Kalema Tumba Vs. State of Maharashtra**' 1999 (4) R.C.R. (Criminal) 575 discussed the provisions pertaining to 'personal search' under Section 50 of the Act and held as under:-

"..... 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."

22. The scope and ambit of Section 50 was examined by Hon'ble the Supreme Court in the case of '**State of Himachal Pradesh Vs. Pawan Kumar, 2005 (2) R.C.R. (Criminal) 621: 2005 (4) SCC 350**'. In paragraphs 10 and 11, it was observed as under:-

"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 hold all, 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."

23. Later, the Constitutional Bench of Hon'ble the Supreme Court in a decision rendered in '**Vijaysinh Chandubha Jadeja Vs. State of Gujarat**' (2011) 1 SCC 609, observed that the requirements of Section 50 of the NDPS Act are mandatory and, therefore, the provisions of Section 50 must be strictly complied with. It is held that it is equally mandatory on the part of the authorised officer to make the suspect aware of the existence of his right to be searched before a Gazetted Officer or a Magistrate, if so required by him and this requires a strict compliance. It is ruled that the suspect person may or may not choose to exercise the right provided to him under Section 50 of the NDPS Act but so far as the officer is concerned, an obligation is cast upon him under Section 50 of the NDPS Act to apprise the suspect of his right to be searched before a Gazetted Officer or a Magistrate.

24. Reverting to the facts of the present case, contraband was recovered from the right pocket (*dub*) of the appellant. ASI Harbans Singh

(PW-1) the recovery witness and SI Jaswant Singh (PW-3) the Investigating Officer have deposed in this regard. So, the provisions of Section 50 of the Act are applicable here. However, from the perusal of the statements of material witnesses, it is not made out that strict and meaningful adherence to the provision of Section 50 of the Act was ever made. Evidently, the consent memo (Exh.PW-1/A) is a typed proforma, wherein FIR number, name of the appellant and his particulars etc. has been filled in. It bears the signature of the appellant and attesting witness ASI Harbans Singh (PW-1). SI Jaswant Singh (PW-3), I.O. has deposed that after apprehending the appellant pursuant to the information received regarding his possessing some intoxicating substance, he (I.O.) expressed his suspicion to the appellant and informed him of the need of a search. He also deposed that he made the appellant aware of his legal right to get his search conducted from a Magistrate or Gazetted Officer but appellant expressed his desire to be searched from him. Accordingly, consent memo (Exh.PW-1/A) was prepared, signed by the appellant and attested by the other witness. A close scrutiny of the testimonial account of the material witnesses does not show that the consent memo was ever read over and explained to appellant. It has simply been stated by the witnesses that a consent memo was prepared, and appellant was informed of right to have his search conducted from a Gazetted Officer or a Magistrate.

25. To my mind, merely informing the appellant that he has right under the Act without specifying and explaining what right the appellant has under the Act would not constitute a strict and meaningful compliance of the mandatory provisions of the Act. On the contrary, SI Jaswant Singh (PW-3) pleaded his ignorance about the illiteracy of the appellant. For a while, if it is assumed that appellant could read the consent memo, the name of the I.O. is not mentioned therein to presume that appellant had opted for his search from him (I.O). This

leads to other possible conclusions, firstly, appellant may not have been made to understand or read the contents of the memo, or the entire proceedings of recovery were false as alleged by the appellant. Had the appellant read and understood the contents of memo, he would have had a choice of a Gazetted Officer or Magistrate. Thirdly, I.O. beyond the purview of the memo, offered the appellant to get his search conducted from him. The explanation of how the appellant chose to have the search conducted from the I.O. is, therefore, missing.

26. It has come in the statement of the witnesses that office of the Magistrate was hardly at a distance of two and half kilometer away from the place of recovery. However, there is no evidence indicating that I.O. informed the appellant of his duty to take him before the concerned officer 'if he so requires' the expression used in the Section, for his search. Thus, in the given circumstances, it is held that proper and requisite offer/choice as mandated under the Act was not given to the appellant so as to say strict compliance of mandatory provisions of Section 50 of the Act was made. A gainful reference can be made to the guidelines laid in **Baldev Singh (supra)**, stating that it is imperative and obligatory on the officer to inform the accused of his right of search before the Magistrate or Gazetted Officer.

27. It is clearly discernible from the provisions of Section 50 of the Act that duty so cast on the empowered officer is not mere a ritualist formality but a statutory mandate, which has to be followed in letter and spirit. Any infraction of it would invalidate the entire proceedings taken under the Act. Justness and fairness of a trial is also implicit in Article 21 of the Constitution. The facts and circumstances as discussed above, shows non-compliance of provisions of Section 50 of the Act, this has vitiated the entire recovery proceedings.

28. Now taking up the issue of non-compliance of Section 52-A (c) of the Act, learned counsel for the appellant contends that the seizure of contraband does not conform to the provisions of Section *ibid* and the law laid down in '**Union of India Vs. Mohan Lal**' (2016) 3 SCC, 379, as work of drawing sample was done by SI Jaswant Singh (PW-3) without taking recourse to sub-Section (2) of Section 52-A of the Act. No representative sample, as required under Section 52-A (2) (c) of the Act, was drawn in the presence of the learned Magistrate. This has vitiated the proceedings of recovery, altogether.

29. It is relevant to notice the provisions of Section 52-A of the Act, which reads is as follows:-

"52A. Disposal of seized narcotic drugs and psychotropic substances.

(1) The Central Government may, having regard to the hazardous nature, vulnerability to theft, substitution, constraint of proper storage space or any other relevant consideration, in respect of any narcotic drugs, psychotropic substances, controlled substances or conveyances, by notification in the Official Gazette, specify such narcotic drugs, psychotropic substances, controlled substances or conveyance or class of narcotic drugs, class of psychotropic substances, class of controlled substances or conveyances, which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time, determine after following the procedure hereinafter specified.

(2) Where any narcotic drugs, psychotropic substances, controlled substances or conveyances has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs, psychotropic substances, controlled substances or conveyances containing such details relating to their description, quality, quantity, mode

of packing, marks, numbers or such other identifying particulars of the narcotic drugs, psychotropic substances, controlled substances or conveyances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs, psychotropic substances, controlled substances or conveyances in any proceedings under this Act and make an application, to any Magistrate for the purpose of --

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such Magistrate, photographs of such drugs, substances or conveyances and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

(3) Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs, psychotropic substances, controlled substances or conveyances and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence."

30. Hon'ble the Supreme Court in **Mohan Lal (supra)** held as under:-

"13. It is manifest from Section 52-A (2) (c) (supra) that upon seizure of the contraband the same has to be forwarded either to the officer in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory (b) certifying photographs of

such drugs or substances taken before the Magistrate as true and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn. Sub-section (3) of Section 52-A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer in charge of the Police Station or the officer empowered, the officer concerned is in law duty bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A (4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-section (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure.”

31. In ‘**Simarnjit Singh Vs. State of Punjab**’ 2023 SCC OnLine SC 906, Hon’ble the Supreme Court while acquitting the accused relied upon **Mohan Lal (supra)** and held that mandate of Section 52-A of the Act was not complied with, and made the following observations in para No. 9 and 10 :-

“9. Hence, the act of PW-7 of drawing samples from all the packets at the time seizure is not in conformity with the law laid down by this Court in the case of Mohanlal. This creates

a serious doubt about the prosecution's case that substance recovered was a contraband.

10. Hence, the case of prosecution is not free from suspicion and the same has not been established beyond a reasonable doubt. Accordingly, we set aside the impugned judgments insofar as the present appellant is concerned and quash his conviction and sentence."

32. Again, a two Judge Bench of Hon'ble the Supreme Court in '**Mangilal Vs. State of Madhya Pradesh**' 2023 SCC OnLine 862, while acquitting the accused, has observed that mandate of Section 52-A of the Act has to be complied with by observing that:-

"8. Before any proposed disposal/destruction mandate of Section 52A of the NPDS 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 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."

33. Adverting to the facts of the present case, evidently no request was made by the I.O. to the learned Magistrate for drawing up the representative

sample. Order dated 11.11.2012 (Exh.PW-3/D) as passed by the learned

Magistrate does not show that any representative sample was drawn. The order (Exh.PW-3/D) indicates that case property mentioned in the inventory was produced before the learned Magistrate, with request to authenticate, who after seeing the same, signed the said application and ordered for deposit of the case property except the sample to be sent to the laboratory, in Judicial Malkhana.

34. Section 52-A of the Act was inserted by Act No.2 of 1989 which came into force w.e.f. 29.05.1989. Section 52-A (2) (c) of the Act provides for drawing a representative sample of the seized contraband in the presence of a Magistrate. Inventory application (Exh.PW-3/E) does not indicate any such request was made before the learned Magistrate. A fair trial is again a human right. Every action of the authorities under the Act must be construed having regard to the provisions of the Act as also the right of an accused to have a fair trial. Thus, there has been a clear violation of mandatory provisions of Section 52-A, which has rendered the prosecution case doubtful.

35. No doubt non-association of independent witnesses in the recovery proceedings is not fatal for the case of the prosecution and would not *ipso facto* entitle one to seek acquittal, though a heightened standard of care is imposed upon the Court in such instances to scrutinize the evidence of the prosecution. Hon'ble the Supreme Court in '**Kishan Chand Vs. State of Haryana**' 2013 (2) SCC 502 has observed that failure of investigating officer to associate an independent witness at the time of recovery creates a dent in the case of the prosecution.

36. Recovery in the present case has been effected from the appellant from a busy place i.e. near Jammu Palace Kapurthala, a thoroughfare. SI Jaswant Singh (PW-3) though stated that before conducting the search of appellant, he tried to join independent persons from general public but none was ready. At the same time, he also failed to give the names of the persons he

attempted to approach during the proceedings. ASI Harbans Singh (PW-1) on the other hand, contrary to his earlier version given in examination-in-chief, categorically stated in his cross-examination that no independent witness was joined by the I.O. From the statements of the witnesses neither any earnest effort seems to have been made to associate independent witnesses nor any cogent explanation is forthcoming for non-joining of independent witnesses despite their availability at the spot. An afterthought version appears to have been given to show that an effort was made to join the witnesses from the public. This has cast a doubt on the case of the prosecution. Ratio of the judgment in **Raveen Kumar (supra)** cannot be applied with full force to the facts of the present case being distinguishable.

37. The other primary issue debated by the counsel for the appellant is the effect of the complainant SI Jaswant Singh (PW-3) also being the I.O. of this case. While relying upon '**State of Rajasthan Vs. Parmanand and another**' **2014 (3) SCR 522** and '**Mohan Lal Vs. State of Punjab**' **(2018) 17 SCC 627**, learned counsel for the appellant contended that SI Jaswant Singh (PW-3) should have recused himself from investigating the case as it raises doubts regarding the impartial nature of investigation, particularly when the appellant has raised the issue of his false complicity in the case. It is stated that biasness towards the appellant is writ large as all the prosecution witnesses have tried to conceal the identity of the appellant as a gunman of the then SHO posted in the Police Station, Kapurthala. Contra, learned State counsel has urged that a Constitutional Bench of Hon'ble the Supreme Court in '**Mukesh Singh Vs. State**' **(Narcotic Branch of Delhi) 2020 SCC OnLine 700** has authoritatively settled the law on permissibility of the complainant also being the investigating officer in NDPS cases. Learned counsel for the State submits that appellant led

no evidence or circumstance to establish that complainant was biased towards him.

38. The appellant has suggested to prosecution witnesses that he was falsely implicated in the present case at the behest of Inspector Manjit Singh, the SHO, who was irked with his (appellant) behavior on account of his habit of consuming liquor. The appellant also suggested to the witnesses that at the relevant time, he was posted at P.S. City Kapurthala. However, all the PWs feigned ignorance in this regard. ASI Harbans Singh (PW-1) denied that appellant was working as PHG (Punjab Home Guard) at Police Station, Kapurthala. He also denied that appellant was working as a body guard of Inspector Manjit Singh or that appellant was falsely implicated in the present case. SI Jaswant Singh (PW-3), the Investigating Officer expressed ignorance if the appellant was doing a duty as SPO under SHO P.S. City Kapurthala on the day of occurrence. He also denied the suggestion that on the day of occurrence the appellant had been working as gunman of SHO Manjit Singh or that all the witnesses mentioned in the Challan were posted in P.S. City, Kapurthala alongwith the appellant. He admitted that PHG Hansraj (DW-2) was also member of the raiding party. In these circumstances, when PWs tried to suppress the identity of the appellant, it unerringly goes to establish that they were biased towards the appellant being colleagues of Manjit Singh (PW-5), with whom appellant was not sharing good relations while working under him as his gunman. The *fard jamatalshi* (Exh.PW-1/C), memo of consent (Exh.PW-1/A), memo of arrest and information (Exh.PW-1/B) nowhere discloses the identity of Sewa Singh, working as a gunman. In **Mukesh Singh (supra)**, it has been observed by Hon'ble the Supreme Court that there is no bar under the Act for the informant/complainant to be an investigator. Rather, the provisions of the Act permit the same. Whether the investigation has been

conducted by concerned informant was fair investigation or not, is always to be decided at the time of the trial. Therefore, there is no reason to doubt the credibility of the informant and doubt the entire case of prosecution solely on the ground that informant has investigated the case. The question of prejudice or biased has to be established and decided on the facts of each case without any universal generalization.'

39. It is to be noticed that prior information had been received by the I.O. Further, the office of the Magistrate was at a short distance of 2 ½ kms. from the place of recovery. Admittedly, investigating officer did not take the appellant for his search to the nearest Magistrate. From the facts as discussed above, it can be safely concluded that prosecution witnesses much less the investigating officer were biased towards the appellant. The act of the investigating officer in opting to conduct the investigation has certainly vitiated the investigation of the case. It must be remembered that the doctrine of bias is a leg of principles of natural justice. If the circumstances are such that it would create a reasonable apprehension of bias in the mind of onlookers, it is sufficient to invoke the doctrine of bias. The test for likelihood of bias and reasonable apprehension of bias are interchangeable and parameters for both can be construed to be similar. An illegal search, thus, cannot entitle the prosecution to raise a presumption under Section 54 of the Act. Such presumption can only be raised after the prosecution has established that accused (appellant herein) was found to be in possession of contraband in a search conducted in accordance with mandate of Section 50 of the Act.

40. Taking upon the other submission of the counsel for the appellant that the documents like consent memo, recovery memo, personal search memo and arrest memo contain the particulars of the FIR, Police Station etc. SI Jaswant Singh (PW-3) has deposed that he had incorporated the FIR number on

search memo, *jamatalashi* memo and consent memo. At the same time, he also admitted that he did not clarify that the documents were prepared before the registration of the FIR by leaving the space for insertion of the FIR number etc. In the absence of any reasonable explanation forth coming with regard to reflecting the details of the FIR etc. on the consent memo, recovery memo raises a serious doubt over the investigation conducted by the I.O. In '**Kamaljit Singh @ Pappu Vs. State of Punjab**' 2020 (14) SCC 9, similar issue was dealt with where the investigation was found to be suspicious on the ground that FIR number was mentioned on the memo which were prepared much prior to the registration of the FIR. Coordinate Bench of this Court in '**Kewal Singh Vs. State of Punjab**' 2018 (4) R.C.R. (Criminal) 580, has also discarded the investigation on the ground of mentioning of FIR number on the memos during investigation prior to registration of the FIR.

41. Apart from the above ambiguity in the case of the prosecution, the documents such as consent memo (Exh.PW-1/A), *jamatalashi* memo (Exh.PW-1/C), arrest and information memo (Exh.PW-1/D) have been attested by a single witness ASI Harbans Singh (PW-1), whereas recovery memo (Exh.PW-1/B) which is hand written document unlike the above typed documents, shown to have been attested by two witnesses. All the above documents were shown to have been prepared and attested at the spot. The above said deviation creates doubt regarding the authenticity of these documents and having prepared in the manner alleged. Furthermore, the recovery memo (Exh.PW-1/B) a material document is not shown to be attested by the appellant, whereas the other documents like consent memo, arrest memo, personal search memo, *jamatalashi* memo are shown to be attested by the appellant. This again raises a doubt about the manner of preparation of recovery memo, which is a document of effecting recovery of the alleged contraband from the appellant.

Coordinate Bench of this Court in '**Sandeep Kumar Vs. State of Punjab**' 2019

(4) R.C.R. (Criminal) 741, has taken the above circumstance as doubtful alongwith other inadequacies of the prosecution case while acquitting the accused-appellant.

42. Dealing with the submission of delay of 10 days in sending the sample to the Chemical Examiner, Kharar. The contraband was allegedly recovered from the appellant on 10.11.2012. According to the statement of ASI Arjan Singh (PW-4) MHC, he handed over the sealed parcel weighing 10 gram, bearing seals impression 'JS/MS' alongwith the docket to HC Ranjit Singh (PW-2) on 20.11.2012 for depositing in the office of Chemical Examiner, Kharar. HC Ranjit Singh (PW-2) in his affidavit (Exh.PW-2/A) stated that on 20.11.2012, he took the sample duly sealed with the seal of 'JS/MS' alongwith Form No.M-29 and deposited in the office of Chemical Examiner, Kharar. Affidavit of Arjan Singh (PW-4) MHC, nowhere mentions that he had handed over Form No.M-29 and sample seals to HC Ranjit Singh. On the contrary, HC Ranjit Singh has stated that Form No.M-29 and sample seals were also given to him. The aforesaid discrepancy has remained irreconcilable, thereby making their statements unreliable. Furthermore, SI Jaswant Singh (PW-3) failed to give cogent explanation for the delay in sending the sample to the office of Chemical Examiner. Similarly, ASI Arjan Singh (PW-4) MHC was unable to give the reasons for withholding the samples with him for a period of ten days. A representative sample of any contraband after its seizure and deposit in Malkhana or with concerned SHO is required to be sent to Chemical Examiner within 72 hours as per the instructions issued vide standing order No.1 of 1988 dated 15.03.1988 issued by Narcotics Control Bureau. The sanctity of the instructions came up for consideration in **Noor Aga (supra)** wherein it was observed as under:-

“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 the 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.”

43. The investigating officer is obliged to follow the procedural safeguards as provided in the instructions as long as they do not override the provisions of the NDPS Act and supplement the procedural protection given in the Act. In **‘State of Punjab Vs. Baldev Singh’ (1999) 6 SCC 172**, it was stated:

"It must be borne in mind that severer the punishment, greater has to be the care taken to see that all the safeguards provided in a statute are scrupulously followed."

44. This Court in **‘Malkiat Singh @ Kala Vs. The State of Punjab’ 2009 (1) R.C.R. (Criminal) 353**, while relying upon the observations made by Hon’ble the Supreme Court in **‘State of Rajasthan Vs. Gurmail Singh’ 2005 (2) R.C.R. (Criminal) 58**, with regard to delay in sending the samples to Chemical Examiner, observed that:-

"11. It was next submitted by the Counsel for the appellant, that though the alleged recovery was effected on 03.07.1997, yet the samples were sent to the office of the Chemical Examiner on 08.07.1997 and, thus, the delay of 5 days, in sending the same to the office of the Chemical Examiner, remained unexplained and, as such the possibility of tampering with the same, until the same reached the Laboratory, could not be ruled out. No explanation, whatsoever, was furnished, as to why the samples were not sent to the office of the Chemical Examiner, for about 05

*days. Had any explanation been furnished, the matter would have been considered, in the light thereof, but in the absence of any explanation, having been furnished, in this regard, the Court cannot coin any of its own. In **Gian Singh v. State of Punjab, 2006(2) R.C.R. (Criminal) 611 (P&H)**, there was a delay of 14 days, in sending the sample to the office of the Chemical Examiner. Under these circumstances, it was held that the possibility of tampering with the sample, could not be ruled out, and the link evidence was incomplete. Ultimately, the appellant was acquitted, in that case. In '**State of Rajasthan vs. Gurmail Singh' 2005 (2) R.C.R. (Criminal) 58 : 2005(1) Apex Criminal 521 (SC)**., the contraband remained in the Malkhana for 20 days. The malkhana register was not produced, to prove that it was so kept in the malkhana, till the sample was handed over to the Constable. In these circumstances, in the aforesaid case, the appellant was acquitted. In **Ramji Singh v. State of Haryana, 2007(3) RCR (Criminal) 452 (P&H)**, the sample was sent to the office of the Chemical Examiner after 72 hours, the seal remained with the police official, and had not been handed over to any independent witness. Under these circumstances, it was held that this circumstance would prove fatal to the case of the prosecution. No doubt, the prosecution could lead other independent evidence, to prove that none tampered with the sample, till it reached the office of the Forensic Science Laboratory. The other evidence, produced by the prosecution, in this case, to prove the link evidence, is not only deficient, but also unreliable. In the instant case, the principle of law, laid down, in the aforesaid authorities, is fully applicable to the facts of the present case. The delay of 05 days, in sending the samples to the office of the Chemical Examiner, and non-strict proof, by the prosecution, that the same was not tampered with, till it was deposited, in that office, must prove fatal to the case of the prosecution, as the possibility of tampering with the same,*

could not be ruled out. The submission of the Counsel for the appellant, in this regard, being correct, is accepted."

45. As noticed above, the witnesses have not furnished any explanation for the delay in sending the sample to the Chemical Examiner. If any explanation had been furnished by the witnesses, the matter would have been considered in light thereof. However, in absence of any explanation of delay of ten days in sending the samples to the office of Chemical Examiner and further with no clarity in the statements of the witnesses (HC Ranjit Singh and Arjan Singh, MHC) about deposit of the sample seal in the office of Chemical Examiner, possibility of tampering of the sample cannot be ruled out under these circumstances. In view of the peculiar facts of the case, as noted above, the observations made in **Hardip Singh (supra)** cannot be taken as parallel to this case.

46. Insofar as the contention of non-compliance of Section 57 of the Act is concerned, learned counsel for the appellant failed to show that report of the arrest of the appellant was not made to his superior officer by the investigating officer as required under the Act. The statement of SI Jaswant Singh (PW-3) indicates that after effecting recovery of contraband from the appellant, he sent ruqa (Exh.PW-3/A) to the police station. Furthermore, the provisions of Section 57 have been held to be directory, and its non-compliance has not taken to have such consequences so as to vitiate the proceedings, as held in '**Gurmail Chand Vs. State of Punjab**' 2020 SCC OnLine SC 738, decided on 23.01.2023. The investigating officer, SI Jaswant Singh (PW-3), has deposed that he was having the weighing scale with him at the time of recovery. Therefore, his statement with respect to the precise weight of the contraband cannot be doubted with.

47. It is the bounden duty of the prosecution to establish its case beyond reasonable doubt by bringing cogent and qualitative evidence. It is settled principle of criminal jurisprudence that more serious the offence, stricter the degree of proof. Under the NDPS Act, the extent of burden to prove the foundational facts on the prosecution are more onerous, a higher degree of assurance would be necessary to convict a person under the NDPS Act.

Conclusion

48. In view of the discussion held above and the cumulative effect of the infirmities, the prosecution has failed to prove its case against the appellant-accused beyond a shadow of reasonable doubt. The trial Court failed to appreciate the inadequacies and infirmities as discussed hereinabove, in the case of prosecution and fell in error in holding the appellant guilty. The findings of the trial Court, holding the appellant guilty, cannot be sustained in the eyes of law and are liable to be set aside.

49. No other argument urged

50. As an upshot of the aforesaid discussion, appeal is allowed and the appellant is acquitted of the charge by setting aside the impugned judgment of conviction and order of sentence.

51. The appellant is on bail on account of suspension of his sentence vide order dated 27.02.2017, passed by Coordinate Bench. In view of the provisions of Section 437-A of Cr.P.C. 1973, appellant is directed to execute bonds, to the satisfaction of learned trial Court/successor Court, within a period of 15 days from receiving the certified copy of this judgment, which shall remain in force for six months in terms of Section 437-A Cr.P.C. Copy of this judgment along with trial Court record be sent forthwith to learned trial Court. A copy of judgment, if applied for, be made available to the appellant.

52. Pending miscellaneous applications, if any, stand disposed of accordingly.

(RITU TAGORE)
JUDGE

Pronounced on 29th September, 2023.
Manpreet

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