

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

CRA-S-5123-SB-2014 (O&M)

Date of Decision:01.09.2023

Atma Singh

... Appellant

versus

State of Punjab

... Respondent

CORAM : HON'BLE MR. JUSTICE HARPREET SINGH BRAR

Present: Mr. D.C. Mittal, Advocate and
Mr. Ujval Mittal, Advocate
for the appellant.

Ms. Ishma Randhawa, Addl. A.G., Punjab.

HARPREET SINGH BRAR, J. (ORAL)

1. The present appeal has been preferred against the judgment of conviction and order of sentence dated 27.11.2014 passed by the learned Judge, Special Court, Mansa in case bearing FIR No.09 dated 06.03.2011 registered under Section 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act) at Police Station Budhlada whereby the appellant has been convicted for commission of offence under Section 22 of the NDPS Act and sentenced to undergo rigorous imprisonment for a period of 3 years with a fine of Rs.5000/- and in default of payment of fine to further undergo rigorous imprisonment for a period of 3 months.

FACTUAL BACKGROUND

2. In brief, the version put forth by prosecution is that on 06.03.2011, ASI Jaspal Singh along with other police officials was on patrolling duty in government vehicle bearing No.PB-31-C-8265 and when they were present on

the bridge of drain in the area of Borawal, one Gurmail Singh s/o Mukhtiar Singh came there from Bhikhi side and joined the police party. At about, 10:15 AM, one person, who was coming on motorcycle from the side of Dhalewan with plastic bag hanging on his right shoulder, stopped on seeing the police party and tried to turn back. ASI Jaspal Singh apprehended him. On enquiry, he disclosed his name Atma Singh alias Nikka. ASI Jaspal Singh informed him that he had suspicion of there being some intoxicant in the plastic bag, which he was carrying and therefore, wants to conduct a search. He was apprised of his legal right to be searched by a Gazetted Officer or a Magistrate and that he can be produced before them for search. The accused had reposed confidence in the Investigating Officer and therefore, his consent memo was prepared. On search of the plastic bag, intoxicating powder was recovered. The Investigating Officer separated 10 gm intoxicating powder as sample and prepared a parcel. Remaining powder was weighed along with plastic bag, weight of which came to be 490 gms and a separate bulk parcel was prepared in the same plastic bag. Both the parcels were sealed by the Investigating Officer with his seal bearing impression 'JS'. Seal after use was handed over to HC Nahar Singh. Case property and the motorcycle bearing No.PB-44-A-8108 along with RC was taken into police possession vide recovery memo. Personal search of accused was conducted and search memo in this regard was also prepared. As the accused was found in possession of 500 gms of an intoxicating powder without any permit or licence, ruqa was sent for registration of FIR. Spot inspection was conducted and site plan was prepared. Statements of the witnesses were recorded. Accused was arrested and arrest memo was prepared.

3. The case property was produced before ASI Iqbal Singh, who verified the facts and affixed his seal bearing impression 'IS' on the parcels. Samples were

sent for chemical examination. On receipt of the report of Chemical Examiner and completion of investigation, accused was challaned under Section 22 of the NDPS Act.

4. On presentation of challan and appearance of the accused in the Court, copies of documents relied upon by the prosecution were supplied to him, as required under Section 207 Cr.P.C.

5. Finding a *prima facie* case, charge under Section 22 of the NDPS Act was framed against the accused to which he pleaded not guilty and claimed trial.

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

7. Statement of accused as required under Section 313 Cr.P.C. was recorded and the incriminating evidence was put to him. The accused denied the same and pleaded innocence but he did not lead any evidence in his defence.

CONTENTIONS

8. Learned counsel for the appellant argues that there is non-compliance of Section 50 of the NDPS Act as personal search of the accused-appellant was conducted but the accused-appellant was not made aware of his legal right as per the provisions enshrined under Section 50 of the NDPS Act. He further argues that provisions of Section 52-A of the NDPS were also not complied with as no representative sample was drawn in the presence of the Magistrate. Further, there is an unexplained delay of 9 days in sending the representative sample to the FSL, Kharar, Mohali, whereas the same ought to have been sent to the Chemical Examiner within 72 hours.

9. It is further argued that the recovery memo does not bear the signature of the accused. Furthermore, the complainant and the Investigating Officer is the same person and therefore, possibility of bias and ill-will at the hands of said

official against the accused-appellant cannot be ruled out. Moreover, the official who sent ruqa to the police station was not examined. It is vehemently argued by counsel for the appellant that on the inventory so prepared by the officer-in-charge of the concerned police station and request for depositing the case property, number of the FIR was not mentioned, instead, a dash was left, which shows that number of the FIR was added later on.

10. Per contra, learned counsel appearing on behalf of the respondent-State argues that provisions of Section 50 were duly complied with. It is further argued that the accused is not entitled to an 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 delay of 9 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 report of the Chemical Examiner, which was placed on record as Ex.PJ proved that the sample contained Dextropropoxyphene.

ANALYSIS AND OBSERVATION

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

12. 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 polythene bag but

the search memo, which has been 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.

13. 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.”

14. In the present case, PW-1 ASI Jaspal deposed that the accused-appellant was apprised of his right to get his search done at the spot before him or a Gazetted Officer or a Magistrate and on personal search of the accused-appellant, currency of Rs.60/- was recovered from him. It is settled position of law that once the Investigating Officer gives a third option also i.e. the accused can be searched by him, the offer is vitiated and provisions of Section 50 of the NDPS Act stand violated.

15. A glaring omission on the part of the Investigating Officer is 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.”

16. 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.”

17. Admittedly, the sample was sent for chemical examination to FSL, Kharar, Mohali after a delay of 9 days. 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 9 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 Bachao Andolan [(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.”

18. The delay in sending samples to the Chemical Examiner also makes ratio of law in **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 in favour of the appellant in order to set aside his conviction on account of delay in sending the sample to chemical examiner.

19. Another conspicuous omission on the part of the Investigating Officer was that the recovery memo (Ex.PB) did not bear the signature of the accused-appellant. A private person namely Gurmail Singh had joined the police party and also signed the recovery memo but he was not made a witness by the prosecution for the reason best known to it. Furthermore, the FIR number has been mentioned on the recovery memo (Ex.PB) which puts a serious dent on the prosecution version. In his cross-examination, PW1 ASI Japsal Singh stated that the powder so recovered was whiten in colour whereas PW3 ASI Nahar Singh in his cross-examination stated that the powder had a brownish shade.

20. 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 27.11.2014 passed by the learned Judge, Special Court, Mansa are set aside. The appellant-Atma Singh is acquitted of the charges framed against him. His bail bonds and surety bonds stand discharged.

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

22. 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/No
	Whether reportable	Yes/No