

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

328

CRA-S-2384-SB-2003 (O&M)
Decided on : 20.01.2023

Smt. Kali

...Appellant

Versus

State of U.T. Chandigarh

...Respondent

CORAM: HON'BLE MR. JUSTICE SANJAY VASHISTH

Present: Mr. Abhaysher Singh, Advocate (Legal Aid Counsel),
for the appellant.

Ms. Roopse Sharma, Advocate,
for Mr. Anil Kumar Lamdharia,
Addl. P. P. UT, Chandigarh.

SANJAY VASHISTH, J. (Oral)

1. Present appeal is filed by appellants – Smt. Kali, against the judgment of her conviction dated 06.11.2003 and order of sentence dated 07.11.2003, passed by Ld. Judge, Special Court, Chandigarh, in NDPS Case No.74 of 07.08.2003/26.09.2000, arising from FIR No. 285 dated 23.07.2000, under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for brevity ‘NDPS Act’), registered at Police Station Sector 39, Chandigarh.

2. For the recovery of 12 grams smack, appellant, was sentenced to undergo RI for a period of 01 year and six months, and to pay a fine of Rs.10,000/-, and in default of payment of fine to further undergo RI for 06 months.

FACTS LEADING TO REGISTRATION OF THE FIR:

3. On 23.07.2000 at about 3.00 p.m, police party headed by SI Kuldeep Singh including SI Jai Singh and other police officials was present at police booth Dadu Majra Colony, Chandigarh. After some time, a secret information was received that Gujri and Kali residents of House No. 2676, Dadu Majra Colony, UT, Chandigarh deals in smack in their house and in case their house was raided, at this time, smack can be recovered.

After sending information to the police station, one public person Jaspal Singh, who was joined by the police team reached the house No. 2676, Dadu Majra Colony, Chandigarh. By sending a wireless message, Shri B.D. Bector, DSP was also called on spot at about 4.30 pm and he joined the raiding party. On knocking the doors of the house, Gujri opened the same and purpose of visiting of police party in their house was disclosed by DSP B.D. Bector by projecting his identity.

First of all, search of Gujri was conducted and in connection with the recovery from her possession, a separate case was registered against her under NDPS Act. Thereafter, DSP B.D. Bector served a notice under Section 50 of the NDPS Act upon appellant-Kali, who opted to be searched in the presence of DSP B. D. Bector.

Accordingly, as per instructions of DSP B. D. Bector, a lady constable-Devinder Kaur conducted the search of the accused and on search, 12 grams smack wrapped in a glazed paper was recovered. Two grams smack was separated for sampling. Both the sample parcels and

parcel containing remaining case property were sealed with the seal 'KS' and were taken in police possession. Sample of the seal was also obtained on a piece of cloth. The seal after its use was handed over to Jaspal Singh. Ruqa was sent to the police station on the basis of which FIR was lodged.

By calling ASI Gajjan Singh on spot from the police station, further investigation was conducted by him.

4. After recording of the statement of witnesses and the completion of the investigation, final report under Section 173 (2) Cr. P.C. was submitted. Accordingly, appellant was charge-sheeted for the offence under Section 21 of the NDPS Act to which she pleaded not guilty and claimed trial.

5. Prosecution examined total 12 witnesses and ultimately, appellant was convicted and sentenced as has already been detailed in the initial part of this judgment.

6. Mr. Abhaysher Singh, Advocate, who was appointed as Legal Aid Counsel by this Court vide order dated 15.12.2022 opened his argument with the point that in view of non-compliance of the provisions of NDPS Act, conviction of the appellant cannot sustain.

Notice is available on record as Ex. PC. Translated version of which is reproduced here below:

“ Notice

Ex.PC

My name is Bhagwan Dass Bector. In Chandigarh Police, Chandigarh Administration, I am G. O. (DSP) (Gazetted Officer). I have information that in your possession namely Kali w/o Suka Singh R/o House No. 2676, DMC, Chandigarh there is smack. You are to be

searched. Whether you want to be searched through some Magistrate or Gazetted Officer?

*Sd/-
DSP/South
dated 23.07.2k*

Ex. PC/1

Search in your presence, I have no objection.

Attested of DSP/South *R.T.I.*

*Kali w/o Suka Singh,
23.07.2k, H. No. 2676,
DMC, Chandigarh,
Sd/-P.P.Maloya*

sd/- Jaspal Singh

*Sd/- Kuldeep Singh/
PP Maloya*

l/c Davinder Kaur 547/cp.”

While referring to notice under Section 50 of the Act, Learned Counsel for the appellant argues that Section 50 contemplates two components.

First component is option to be searched by a Magistrate or Gazetted Officer and second to apprise notice of his/her legal right before whom so ever he/she wants to be searched.

At the time of giving of option of search, DSP BD Bector ought not to have immediately explained his status of being a Gazetted Officer with the document Ex. PC.

Counsel further argues that from the notice under Section 50 of the NDPS Act (reproduced here above), it is clear that on both the counts, the Gazetted officer has failed to comply with the provisions of NDPS Act in its letter and spirit.

While submitting so, counsel relied upon the judgment passed by this Court in case *Ajay Malik and others* v. *State of UT Chandigarh*, 2009 (3) RCR (criminal) 649, Law Finder ID # 198859.

7. Other argument addressed by learned Legal Aid Counsel is that provisions of Section 52-A have not been complied by the prosecution agency. Said provision of law deals with the disposal of seized narcotic drugs and psychotropic substances like manner of preparing its inventory, sampling and inventory and production of the contraband before the Magistrate.

Sections 52-A (2) and 52-A (3) of The Narcotic Drugs and Psychotropic Substances Act, 1985 says as under:

“52A. Disposal of seized narcotic drugs and psychotropic substances.&”

(1) XXXXX XX XXXX

(2) Where any narcotic drug or psychotropic substance 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 or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances 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 or psychotropic substances 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 or substances 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 subsection (2), the Magistrate shall, as soon as may be, allow the application.

(4) XXXX XXXX XXXXX”

Learned counsel for the appellant submits that there is no evidence available on record regarding the compliance of said provisions of law in any manner.

Rather counsel submits that preparing and sampling and sealing of the same on spot is nowhere prescribed, therefore, the procedure mentioned under Section 52-A (2) is required to be followed.

8. That, to oppose the submission addressed by learned counsel for the appellant, learned counsel for UT, Chandigarh submits that all the required evidence against the accused to held him guilty has been collected and same has been lead by the prosecution before the Court also.

Learned State counsel also submits that quality of the evidence available on record is unimpeachable, where the Investigating Officer ASI Gajjan Singh (PW12) and DSP Bector (PW4) have proved their presence on the spot, recovery from the appellant and that too after joining of the independent witness Jaspal Singh (PW-3). Therefore, counsel for UT also

argues that notice under Section 50 of the NDPS Act Ex. PC and endorsement regarding response of the appellant upon the notice recorded as EX. PC/1, clearly shows serving of a valid notice in lawful manner. Thus, appeal is liable to be dismissed, without there being any merit.

9. I have considered the submissions addressed by both the counsel and also gone through the record available with me.

Legal notice under Section 50 of the NDPS Act is sought to be proved by Sh. B.D. Bector, DSP (PW-4), who is a Gazetted Officer in the present case. Relevant part of the cross-examination of PW-4 has been reproduced here below:

“ Nothing else was present at that time. IO had not given any notice under Section 50 of the NDPS Act to the accused. I cannot tell whether the witnesses have attested the notice Ex. PC with date. I do not remember whether witnesses have attested the recovery memo with date or not”.

Now, this extracted deposition is required to be examined with the statement of Jaspal Singh (PW-3) to whom prosecution claims to be an independent witness.

Complete examination-in-chief of said witness says as under:

“PW-3

Jaspal Singh 5/0 nishan "ingh, A0e. 40 years. Havens. R/o 214, Nillage Haloya, UT Chandigarh. on SA. On 23.7.2k I went to Daddu Majra colony in search of work. There a police official Kuldip Singh met me. I do not know his designation. Other police officials were also with him at that time. The police party told me that the smack has to be recovered from Daddu Hajra, colony. Chd. Thereafter, we went to the house of the accused situated in Dddu Hajra Colony, Chd. The door of the house of the accused was

knocked. Two ladies out of whom one was the accused present in the Court came out. Thereafter, I alongwith police party went inside the house of accused and search was conducted. the accused present in the Court was also searched by a lady constable. She took out a bundle from the personal search of the accused. that bundle contained smack. 12 gms. Smack was recovered from the accused present in the Court. Smack was also recovered from the other lady. The recovered xxxxx smack was sealed. Again said two grams was taken as sample but I cannot say how that two grams smack was dealt with. The recovered smack was sealed in to parcels. Thereafter, the police took us to the police station. My signatures were obtained at the spot. Nothing else was done at the spot.”

From the said deposition in examination-in-chief, it is clear that no where he has stated a word about serving of notice under Section 50 of the NDPS Act. Even, he does not say that he has signed any notice of offer given to the appellant and even in the last part of the statement, he says that “*My signatures were obtained at the spot. Nothing else was done at the spot.*”

It is surprising that witness Jaspal Singh (PW-3) is otherwise claimed by prosecution as its independent witness and he has signed in the bottom of the notice Ex. PC and answer to the notice as Ex. PC/1. Despite this, prosecution failed to get him declared hostile. There is no such deposition, that any kind of notice or answer to the notice was reduced into writing. Being material prosecution witness, who is produced as an independent witness by prosecution, his statement before Court suggests that, in fact, no such notice was served or if served, it was done only for formality sake, as nothing was there in knowledge of its signatory.

10. About the contents of the notice also, this court has examined

the judgment relied by learned Legal Aid Counsel, i.e. Ajay Malik's Case (Supra). Relevant part observed by the Hon'ble Apex Court in regard to Section 50 of the NDPS Act is reproduced here below:

"No immediate parallel could be taken from any of these decisions but one thing is clear that the accused had not been given a fair option of either being apprised that they had a right or that they had a right to be examined by any Gazetted Officer. It almost seemed like closing an option for them by suggesting that a Gazetted Officer, who is Deputy Superintendent of Police was available and whether they would accept such an option. The requirement of Section 50, in my opinion, was clearly breached, if a strict and technical construction should be placed on the words used while sounding the option."

Thus, in view of the submissions addressed and the fact mentioned in the Notice that Deputy Superintendent of Police offered himself for conducting search, this Court finds that prosecution has completely failed to comply with the mandatory provisions of Section 50 of the NDPS Act.

Non-compliance of Section 52 of the NDPS Act.

11. As far as next argument i.e. non compliance of Section 52-A (2) of the NDPS Act is concerned, counsel relied upon the statement of SI Gajjan Singh (PW-12) and submits that as per his deposition, nowhere it comes up that the said provision was complied with at any point of time.

Relevant extracted part of his evidence is reproduced hereinbelow:

"The case property was produced before the Magistrate when the accused was produced before him for the first time. I do not remember whether

any note was made regarding the same by Magistrate or not. However I have mentioned in the remand paper about production of case property. It is wrong to say that I did not write this fact on remand paper. I have seen the application Ex.DC for judicial remand where the fact of production of case property in court was not mentioned. SI Kuldip Singh has prepared the parcels at the spot. PW Jaspal Singh came on feet. The SHO had affixed his seal on the case property and signed the parcel. The SHO had called the MMHC to this office and handed over the case property to him there.

No statement U/s 161 Cr.P.C. of PW Jaspal Singh and other police official regarding the proceeding in the police station was recorded. I do not know to whom the seal was given by SHO. I also cannot say whether the SHO has kept his seal with him.”

12. While relying upon the judgment of **Union of India v. Mohanlal and anr., 2016 (1) RCR (Criminal) 858 = Law Finder ID #736803**, learned counsel submits that seizure and sampling of narcotic drugs, process of drawing of sample has to be done under the supervision of the Magistrate and the entire case has to be certified by him to be correct.

It has already been submitted by counsel for the appellant that there is no provision in NDPS Act, which mandates the taking of samples at the time of seizure.

Relevant law point discussed and as held by Hon’ble Apex Court is reproduced here below:

“13. It is manifest from Section 52A (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. That is perhaps why none of the States claim to be taking samples at the time of seizure. Be that as it may, a conflict between the statutory provision governing taking of samples and the standing order issued by the Central Government is evident when the two are placed in juxtaposition. There is no gainsaid that such a conflict shall have to be resolved in favour of the statute on first principles of interpretation but the continuance of the statutory notification in its present form is bound to create confusion in the minds of the authorities concerned instead of helping them in the discharge of their duties. The Central Government would, therefore, do well, to re-examine the matter and take suitable steps in the above direction.

14. Mr. Sinha, learned Amicus, argues that if an

amendment of the Act stipulating that the samples be taken at the time of seizure is not possible, the least that ought to be done is to make it obligatory for the officer conducting the seizure to apply to the Magistrate for drawing of samples and certification etc. without any loss of time. The officer conducting the seizure is also obliged to report the act of seizure and the making of the application to the superior officer in writing so that there is a certain amount of accountability in the entire exercise, which as at present gets neglected for a variety of reasons. There is in our opinion manner of doubt that the seizure of the contraband must be followed by an application for drawing of samples and certification as contemplated under the Act. There is equally no doubt that the process of making any such application and resultant sampling and certification cannot be left to the whims of the officers concerned. The scheme of the Act in general and Section 52-A in particular, does not brook any delay in the matter of making of an application or the drawing of samples and certification. While we see no room for prescribing or reading a time frame into the provision, we are of the view an application for sampling and certification ought to be made without undue delay and the Magistrate on receipt of any such application will be expected to attend to the application and do the needful, within a reasonable period and without any undue delay or procrastination as is mandated by sub-section (3) of Section 52A (supra). We hope and trust that the High Courts will keep a close watch on the performance of the Magistrates in this regard and through the Magistrates on the agencies that are dealing with the menace of drugs which has taken alarming dimensions in this country partly because of the ineffective and lackadaisical enforcement of the laws and procedures and cavalier manner in which the agencies and at times Magistracy in this country addresses a problem of such serious dimensions”.

13. If evidence of the PW12-Gajjan Singh is examined keeping in view of the observations made in the judgment of Hon’ble Apex Court in the case of **Mohanlal (Supra)**, it is clear that there is no material available on record to meet out all the steps as enacted in the Act and incorporated by

the Hon’ble Apex Court in Mohanlal’s case (Supra). Thus, on this scale also, there is substance in the law point addressed by learned counsel for the appellant as the State has failed to lead evidence to meet out the legal provision of the Act.

14. In view of the submission recorded here above and keeping in view of the precedents guided by the principals of law as incorporated in the judgments referred here above, judgement of conviction dated 06.11.2003 and order of sentence dated 07.11.2003 passed by Ld. Judge, Special Court, Chandigarh, are hereby *set-aside*, and consequently, **appeal is allowed by acquitting the appellant- Smt. Kali** from all the charges levelled against her.

Appeal stands disposed of.

(SANJAY VASHISTH)
JUDGE

20.01.2023
Riya/Pkapoor

Whether speaking/reasoned:
Whether Reportable:

YES / NO
YES / NO