

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRM-A-50-2022 (O&M)

Date of Decision: February 7, 2023

State of PunjabAppellant

Versus

Pardeep Kumar @ DeepaRespondent

CORAM: HON'BLE MR. JUSTICE HARKESH MANUJA

Present: Mr. Ravinder Singh, AAG Punjab for the appellant.

HARKESH MANUJA, J (ORAL)

The present application has been filed under Section 378(3) Cr.P.C. for grant of leave to appeal against the judgment passed by the Special Court, Shaheed Bhagat Singh Nagar dated 12.02.2020, whereby acquittal has been recorded in favour of respondent in FIR No. 24 dated 07.03.2018 under Section 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short 'NDPS Act'), P.S. Sadar Nawanshahr.

Respondent/ accused was subjected to a trial on account of offence under section 22 of NDPS Act, when on 7.3.2018 during a nakabandi at canal bridge of Village Kishanpura, alleged recovery of one polythene envelope, containing 9 intoxicating injections of Buprenorphine each measuring 2 ML, was made from the right pocket of pant worn by him. It was admitted by PW-5 ASI Paramjeet Singh, investigating officer of the case, as well as by other police officials that search of the accused was not conducted in the presence of Gazetted Officer or a Magistrate . Though accused was apprised of his legal right of getting himself searched in the presence of Gazetted Officer or a Magistrate, but accused reposed his

confidence in the investigating officer and a Consent Memo, proved on record as exhibit PW-3/A, was prepared accordingly. Trial Court having relied upon decisions rendered by the Hon'ble Apex Court in "**Arif Khan @ Agha Khan v. State of Uttarakhand, 2018 (2) RCR (Criminal) 931**" and "**Vijaysinh Chandubha Jadeja v. State of Gujarat, 2010 (4) RCR (Criminal) 911**" and acquitted the respondent/ accused as mandatory procedure, prescribed under section 50 of the NDPS Act, was not complied.

A feeble attempt has been made by the learned State Counsel to justify that section 50 of the NDPS Act has been duly complied as offer was made to the accused to be searched either by a Magistrate or a Gazetted Officer.

In fact, it is the admitted case of the appellant that neither the accused was taken before any Gazetted Officer or a Magistrate, nor any of the police officials present at the time of alleged recovery was magistrate or a gazetted officer. Therefore, in view of **Arif Khan's** case (Supra) this argument cannot be sustained whereby Hon'ble Apex Court has observed that:

"27. We do not agree to this finding of the two Courts below as, in our opinion, a search and recovery made from the appellant of the alleged contraband "Charas" does not satisfy the mandatory requirements of Section 50 as held by this Court in the case of Vijaysinh Chandubha Jadeja (supra). This we say for the following reasons.

28. First, it is an admitted fact emerging from the record of the case that the appellant was not produced before any Magistrate or Gazetted Officer; Second, it is

also an admitted fact that due to the aforementioned first reason, the search and recovery of the contraband "Charas" was not made from the appellant in the presence of any Magistrate or Gazetted Officer; Third, it is also an admitted fact that none of the police officials of the raiding party, who recovered the contraband "Charas" from him, was the Gazetted Officer and nor they could be and, therefore, they were not empowered to make search and recovery from the appellant of the contraband "Charas" as provided under Section 50 of the NDPS Act except in the presence of either a Magistrate or a Gazetted Officer; Fourth, in order to make the search and recovery of the contraband articles from the body of the suspect, the search and recovery has to be in conformity with the requirements of Section 50 of the NDPS Act. It is, therefore, mandatory for the prosecution to prove that the search and recovery was made from the appellant in the presence of a Magistrate or a Gazetted Officer.

29. Though, the prosecution examined as many as five police officials (PW-1 to PW-5) of the raiding police party but none of them deposed that the search/recovery was made in presence of any Magistrate or a Gazetted Officer.

30. For the aforementioned reasons, we are of the considered opinion that the prosecution was not able to prove that the search and recovery of the contraband (Charas) made from the appellant was in accordance with the procedure prescribed under Section 50 of the NDPS Act. Since the non-compliance of the mandatory procedure prescribed under Section 50 of the NDPS Act is fatal to the prosecution case and, in this case, we have found that the prosecution has failed to prove the compliance as required in law, the appellant is entitled to claim its benefit to seek his acquittal."

Arif Khan’s case (Supra) has been followed by division bench of this Court in catena of judgments.

In addition to that, no independent witness was joined by the police party during search though recovery was made during a naka in daytime, it further makes the story of the prosecution doubtful.

Accordingly, in the absence of any perversity in the judgment under appeal, I am of the considered opinion that no interference is warranted in the judgment of acquittal which has been rendered in favour of the accused. Accordingly, the present application stands dismissed.

February 07, 2023
sanjay

[HARKESH MANUJA]
JUDGE

Whether speaking/reasoned
Whether reportable?

yes/no
yes/no