

IN THE HIGH COURT OF PUNJAB AND HARYANAAT CHANDIGARH

CRM-A No.555 of 2023 (O&M)

Date of Decision:05.10.2023

State of Haryana

... Appellant

Versus

Anil Kumar @ Shukla and another

... Respondents

**CORAM : HON'BLE MR. JUSTICE RAJ MOHAN SINGH
HON'BLE MR. JUSTICE HARPREET SINGH BRAR**

Present: Mr.Rahul Dev Singh, Addl. A.G., Haryana,
for the applicant-appellant.

HARPREET SINGH BRAR, J. (ORAL)**CRM No.19208 of 2023**

Prayer in the application is for condonation of delay of 65 days in filing the application seeking grant of leave to appeal.

For the reasons stated in the application, the same is allowed and delay of 65 days in filing the instant application is condoned.

CRM-A No.555 of 2023

1. This is an application preferred by the State of Haryana under Section 378 (3) Cr.P.C. seeking grant of leave to appeal against the judgment dated 03.09.2022 passed by the learned Additional Sessions Judge-cum-Special Judge (under NDPS Act), Kurukshetra whereby the accused-respondents in case bearing FIR No.199 dated 16.05.2019 registered under Sections 15 and 27 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act) at Police Station Sadar Thanesar were acquitted.

FACTUAL BACKGROUND

2. The case of the prosecution as projected before the learned trial Court is that on 16.05.2019, ASI Mahinder Singh along with other police officials was

present at Umri Chowk, Kurukshetra in the official vehicle bearing registration No.HR65-9680 when a secret informer met ASI Mahinder Singh and informed him that Anil Kumar @ Shukla son of Rajeshwar, resident of Bhugetapur Hathala, District Kannojo (UP), who was Driver of a Container bearing Registration No.HR67A-7133, had stored large quantity of poppy husk on the roof of the Container and was proceeding from Gujarat to Baddi via G.T. Road Karnal. It was further informed that if a *nakabandi* was done, the said Container could be intercepted and large quantity of poppy straw could be effected from it.

3. Believing the information given by the secret informer to be true, ASI Mahinder Singh prepared a notice under Section 42 of the NDPS Act and sent the same to Anil Kumar, DSP (HQ), Kurukshetra. Thereafter, he tried to join an independent witness at Umri Chowk itself but no one came forward. ASI Mahinder Singh along with other police officials put *nakabandi* on the road coming from Karnal towards Kurukshetra. After about 10 minutes, the Container bearing registration No.HR67A-7133 was seen coming from Karnal side, heading towards Kurukshetra, which was signalled to stop by ASI Mahinder Singh. On being enquired, the driver of the said Container disclosed his identity as Anil @ Shukla son of Rajeshwar, resident of Bhugetapur, Hatha, P.S. Tirwa, District Kannojo (UP). A written notice under Section 50 of the NDPS Act was served upon him by ASI Mahinder Singh, who responded to the same by stating that he did not want to be searched in the presence of a Magistrate but gave his willingness for conducting a search in the presence of a Gazetted Officer. Thereafter, ASI Mahinder Singh called Anil Kumar, DSP (HQ) by making a telephonic call from his mobile No.9416170605 to his official No.7056700102 and apprised him of entire facts and requested him to come to the spot. After about 35 minutes, Anil Kumar, DSP (HQ) reached on the spot along with his

staff. He gave his introduction to the accused that he is a Gazetted Officer. He tried to join independent witnesses by stopping the vehicles plying on the G.T. Road but no one had shown willingness for the said purpose. He had seen and signed the notice under Section 50 of the NDPS Act and directed ASI Mahinder Singh to conduct the personal search of the accused as well as search the vehicle in question. On personal search of the accused nothing was recovered but on search of the vehicle, 18 white coloured plastic bags of poppy husk were recovered from the roof the Container. On being measured, weight of 17 plastic bags came to be 25 kgs. each whereas the 18th bag was weighed at 20 kgs. All the 18 bags were marked as P-1 to P-18 and converted into parcels. ASI Mahinder Singh had affixed two seals of 'MS' on all the 18 bags. DSP Anil Kumar also affixed two seals of 'AK' on all the 18 parcels. From the dashboard of the said Container, RC of one motor cycle, which was owned by one Vijay Kadyan son of Balbir Singh, resident of House No.712C, HUDA, Sector 1, Panipat, driving licence bearing No.UP74200311111183 issued in the name of Anil Kumar son of Rajehswar, resident of Muraiya Buzurg, District Kannoj as well as the bill/bilty, which was issued from Ahamdabad to Baddi, from Daman to Parwanoo and from Andheri to Solan were recovered and taken into possession. The entire case property along with documents and the said vehicle was taken into possession vide separate recovery memo.

4. The second Investigating Officer namely ASI Sharanjeet Singh was also called on the spot and ASI Mahinder Singh had handed over him the accused and witnesses along with case file. ASI Sharanjeet Singh inspected the spot of recovery and prepared a site plan on the demarcation of the witnesses. The accused was arrested after serving upon him notice under Section 52 of the NDPS Act. A mobile phone was also recovered from the accused and recovery memo

was prepared for the same. After completion of the investigation, entire case property, the accused and witnesses were produced before SHO Surinder Kumar, P.S. Sadar, Thanesar and he was also apprised of all the facts of the case. SHO Surinder Singh had verified all facts of the case from the accused as well as the witnesses. He also made an endorsement on the report submitted by ASI Sharanjeet Singh under Section 55 of the NDPS Act. On 17.05.2019, the accused-Anil Kumar was interrogated and he had suffered a disclosure statement. An application under Section 52-A of the NDPS Act along with the case property was submitted before the learned Additional Chief Justice Magistrate, Kurukshetra for preparation of inventory. Photographs of the case property were clicked in the presence of the learned ACJM, Kurukshetra and he affixed his seal on Form No.29 and sample seal impression sheet. Thereafter, he prepared the inventory and passed an order granting five days police remand of the accused. The case property along with sample seal impression was deposited with MHC P.S. Sadar, Thanesar. The co-accused Ravinder Kumar @ Ravi was also apprehended at the instance of the accused Anil Kumar, who suffered his disclosure statement on 18.05.2019. Per Ravinder Kumar's disclosure, two mobile phones were recovered from his residential house, which were converted into parcels and sealed with two seals of impression 'SS'. On 19.05.2019, accused Anil Kumar had led the police party to the place from where he purchased the poppy straw. The said place was demarcated and a report under Section 57 of the NDPS Act was submitted to the DSP (HQ) in this regard. Further, the accused were sent to judicial custody and the case property was deposited with MM of the Police Station Sadar, Thanesar. Statements of witnesses were recorded and after completion of the investigation, challan was presented against the accused before the learned trial Court.

5. Copies of report under Section 173 Cr.PC and documents attached thereto were supplied to the accused free of costs, as required under section 207 Cr.PC.

On finding a *prima facie* case against the accused Anil Kumar @ Shukla and Ravinder Kumar @ Ravi for commission of offence under Section 15 and 27-A of the NDPS Act respectively, charges were framed against them to which they pleaded not guilty and claimed trial.

6. In order to prove its case, prosecution examined as many as 16 witnesses. After completion of the prosecution evidence, statements of the accused were recorded under Section 313 Cr.P.C. after all incriminating circumstances were put to them. They denied all allegations and pleaded their innocence. They examined one witness in their defence. The learned trial Court examined all the witnesses and after appreciation of the evidence led before it, came to the conclusion that the prosecution had failed to prove its case beyond a shadow of reasonable doubt and thus, acquitted both the accused. Aggrieved by the judgment passed by the learned trial Court, the appellant-State has approached this Court for seeking leave to appeal.

CONTENTIONS

7. Learned counsel for the appellant assails the judgment dated 03.09.2022 passed by the learned trial Court acquitting both the accused by contending that the prosecution had proved its case up to the hilt, however, the learned trial Court has gravely erred in concluding that provisions of Section 42 of the NDPS Act were not complied with as it has no applicability in the facts and circumstances of the present case, and only proviso to Section 43 of the NDPS Act would be applicable, as the recovery was effected from a vehicle, which was in transit.

8. It is further argued that the learned trial Court has failed to appreciate that as per Section 41 (2) of the NDPS Act, if any officer of Gazetted rank of the

police as is empowered by the State Government by a general or special order, has reason to believe from personal knowledge or information given by any person or taken in writing that person has committed an offence punishable under this Act or that any narcotic drug or psychotropic substance or controlled substance in respect of which any offence under this Act has been committed, may authorize any officer subordinate to him but superior in rank to a Peon, Sepoy or a Constable to arrest such a person or search a building, conveyance or place whether by day or by night or himself arrest such a person or search a building, conveyance or place. ASI Mahinder Singh on receipt of secret information called upon DSP (HQ) to the spot, who being an officer of Gazetted rank directed ASI Mahinder Singh to conduct the search and therefore, ASI Mahinder Singh, being a regular Head Constable and superior in rank to a Peon, Sepoy or a Constable was fully competent to conduct the search and investigate the matter as per sub-section 3 of Section 41 of the NDPS Act. In support of his arguments, he relied upon the judgment rendered by the Hon'ble Supreme Court in *M. Prabhulal Vs. Assistant Director, Directorate of Revenue Intelligence 2004 (1) RCR (Criminal) 160*.

9. It is also argued that after registration of the FIR, regular ASI Sharanjeet Singh was called to the spot, who carried out further investigation as per the provisions of the NDPS Act and therefore, there was no lacuna in the investigation, which vitiated the trial. Thus, the impugned judgment, which is under challenge in the present appeal, is liable to be set aside.

ANALYSIS AND OBSERVATION

10. Learned counsel for the appellant has vehemently argued that the learned trial Court did not appreciate the fact that ASI Mahinder Singh was duly authorized by the DSP (HQ) to conduct search on the accused and the said

vehicle as per the provisions of Section 41 (2) of the NDPS Act and as per sub-section 3 of Section 41 of the NDPS Act, he had all powers of an officer acting under Section 42 of the *ibid*. Before adverting to the argument raised by the counsel for the appellant, it is apt to reproduce Section 41 of the NDPS Act:-

“41. Power to issue warrant and authorisation. (1) A Metropolitan Magistrate or a Magistrate of the First Class or any Magistrate of the Second Class specially empowered by the State Government in this behalf, may issue a warrant for the arrest of any person whom he has reason to believe to have committed any offence punishable under this Act, or for the search, whether by day or by night, of any building, conveyance or place in which he has reason to believe any narcotic drug or psychotropic substance or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of this Act is kept or concealed.

(2) Any such officer of gazetted rank of the department of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including the para-military forces or the armed forces to be empowered in this behalf by general or special order by the Central Government, or any such officer of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government if he has reason to believe from personal knowledge or information given by any person and taken in writing that any person has committed an offence punishable under this Act or that any narcotic drug or psychotropic substance or controlled substance in respect of which any offence under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for

seizure or freezing or forfeiture under Chapter V-A of this Act is kept or concealed in any building, conveyance or place, may authorise any officer subordinate to him but superior in rank to a peon, sepoy or a constable to arrest such a person or search a building, conveyance or place whether by day or by night or himself arrest such a person or search a building, conveyance or place.

(3) The officer to whom a warrant under sub-section (1) is addressed and the officer who authorised the arrest or search or the officer who is so authorised under sub-section (2) shall have all the powers of an officer acting under Section 42.”

11. From a bare perusal of Section 41 of the NDPS Act, it is crystal clear that as per sub-section 1 of Section 41, the Magistrate is vested with the power to issue warrant, to conduct a search and Section 41(2) enshrines similar power in a Gazetted Officer of the departments mentioned therein to conduct a search or authorize any other official, who is superior in rank to a Peon, Sepoy or a Constable, to do the same. However, prior to taking any such action, they must have a reason to believe from personal knowledge or information given by any person, which is taken in writing that an offence under this Act has been committed. The argument raised by the counsel for the appellant that ASI Mahinder Singh, who was actually holding the rank of regular Head Constable and acting as *ad hoc* ASI, was authorized by the DSP (HQ) to conduct the search and therefore, provisions of Section 41 (2) of the NDPS Act come to the rescue of the prosecution to annul the rigors of Section 42 of the NDPS Act *sans* merit.

12. At the very first instance, no material was brought on record to vindicate that the DSP (HQ), who was a Gazetted Officer in the present case, had reason to believe from personal knowledge or information was given to him by any person which was taken in writing that person had committed an offence punishable under this Act. On the other hand, the version of the prosecution is that secret

information was received by ASI Mahinder Singh and acting on the said information, he stopped the vehicle in question. The Gazetted Officer in the present case i.e. DSP (HQ) was called in compliance of provisions of Section 50 of the NDPS Act, as the accused wanted his search to be conducted in the presence of a Gazetted Officer. The purpose of search being conducted under Section 50 of the NDPS Act in the presence of a Magistrate or a Gazetted Officer after ensuring their presence at the place of recovery is to safeguard the rights of the accused so that he is not implicated in a false case. The safeguards mentioned in Section 50 are intended to serve a dual purpose viz; (i) to protect the person against false accusation and frivolous charges and (ii) to lend credibility to the search and seizure conducted by the empowered officer. If the empowered officer fails to comply with the requirements of the Section 50, the prosecution is to suffer for the consequences. Therefore, this Court has no hesitation in concluding that a Magistrate or a Gazetted Officer under Section 50 of the NDPS Act acts as an independent officer and cannot be a part of the investigation. A Gazetted Officer, who forms a part of the raiding team, cannot be said to be a competent officer in the presence of whom search could be conducted since he cannot be regarded as an independent officer to ensure search without false implication. Thus, the argument raised by the counsel for the appellant is self-contradictory, as a Gazetted Officer under Section 41 (2) for all intents and purposes forms a part of the investigating team and therefore, the said officer cannot be held competent to act in terms of provisions enshrined under Section 50 of the NDPS Act. In the present case, the Gazetted Officer i.e. DSP (HQ) was called to the spot in compliance of provisions of Section 50 of the NDPS Act, hence, being an independent officer, he cannot step into the shoe of an investigating officer or authorize any person to investigate the matter.

13. Section 42 of the NDPS Act talks about the officers, who are empowered to enter, search, seize and arrest without warrant if they have reason to believe from personal knowledge or information given by any person and taken down in writing that an offence punishable under the NDPS Act has been committed but the said officers ought to have been empowered to do so by a general or special order passed by the State Government in this behalf. In order to comply with the mandate of Section 42 of the NDPS Act, the Government of Haryana has issued notification dated 29.12.1986, which is reproduced as under:-

“No.S.O.103/C.A.61/85/S.42 dated 67/86:- In exercise of the powers conferred by sub-section (1) of Section 42 and Section 67 of Narcotic Drugs and Psychotropic Substance Act 1985 (61 of 1985), the Governor of Haryana hereby empowers the officers, of and above the rank of Excise Inspector in the Excise and Taxation Department; of and above the rank of Naib Tehsildar in the Revenue Department and of and above the rank of Assistant Sub Inspector in the Police Department to exercise the powers and perform the duties specified in Section 42 within the area of their respective jurisdiction and also authorize the said officers to exercise the powers specified in Section 67.”

14. A perusal of the notification reproduced above indicates that officers/officials of and above the rank of ASI are empowered to enter, search, seize and arrest without warrant or authorization within the area of their respective jurisdiction. DW1 HC Vikram Singh in his cross-examination stated that Mahender Singh was promoted as Own Rank Pay (ORP) ASI vide order dated 23.12.2009 and thereafter, promoted as EASI vide order dated 02.11.2013. The FIR in question was registered on 16.05.2019 and therefore, on the date of registration of the FIR, Mahinder Singh was not a regular ASI. As such, he was not a competent person to investigate the present case under Section 42 of the NDPS Act.

15. Section 156 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the Code of 1973) envisages power of a police officer to investigate cognizable case. As per Section 156 Cr.P.C., any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable offence and no proceeding of a police officer in such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this Section to investigate. However, as per Section 42 of the NDPS Act, only those officers, who are empowered by a general or special order of the State Government are entitled to enter, search, seize and arrest without warrant or authorization in case they have reason to believe that an offence punishable under the NDPS Act has been committed.

16. Though there is no bar under the NDPS Act qua applicability of the procedure laid down under the Code of 1973 as Section 51 of the NDPS Act in specific and categorical terms provides that the provisions of the Code of Criminal Procedure, 1973 shall apply, in so far as they are not inconsistent with the provisions of this Act, to all warrants issued and arrests, searches and seizures under this Act. Still, the Legislature felt a need to add provisions in the NDPS Act whereby the Central Government and the State Governments have been empowered under Sections 41 and 42 of the NDPS Act to authorize officers of different categories and departments including that of the Police, who would issue warrants, effect search of the premises or person in connection with the recovery of incriminating articles as covered by the NDPS Act. The Legislature in its wisdom had understood that the powers conferred under the NDPS Act has far-reaching consequences and a potential for misuse and hence, provided inbuilt safeguards under the NDPS Act itself. One of the illustrations of such safeguards is Section 50 of the NDPS Act, according to which, at the time of conducting

search by any officer duly authorized under Sections 41, 42 or Section of the NDPS Act on any suspect, he shall, if such person so requires, take such persons without unnecessary delay to the nearest Gazetted Officer or to the nearest Magistrate. It is also made imperative on the part of the empowered officer to apprise the person of his legal right to be searched before a Gazetted Officer or a Magistrate. The Legislature through Section 50 of the NDPS Act intended to confer a safeguard on the suspect in order to check the misuse of power and to avoid harm to innocent persons, much less, to minimize the cases of false planting or foisting false cases by the law enforcement agencies. Similarly Section 52(3) of the NDPS Act provides that every person arrested and article seized under sub-section (2) of Sections 41, 42, 43 or 44 shall be forwarded without unnecessary delay to; (a) the officer-in-charge of the nearest police station; or (ii) the officer empowered under Section 53. Again, the object is to safeguard the interest of the accused and to rule out the possibility of any kind of tampering with the seized articles. Furthermore, Section 58 provides for punishment for vexatious entry, search, seizure or arrest to check a balance and control over the misuse of power at the hands of officers empowered to investigate under the NDPS Act. The Hon'ble Supreme Court in the ***State of Punjab v Baldev Singh (1999) 6 SCC 172*** has held that it cannot overlook the context in which the NDPS Act operates and particularly the factor of widespread illiteracy among persons subject to investigation for drug offences. 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.

17. The NDPS Act came into force w.e.f. 14.11.1985 whereas the State of Haryana issued the notifications under Sections 41, 42 of the NDPS Act on

29.12.1986 and it is in this backdrop, following question was referred to the Division Bench of this Court for determination:

“Is the power of the Executive Police as envisaged by Section 156 of the Code to investigate cognizable offences, in any way ousted, curtailed or controlled by the provisions of the Act?”

Answering the aforesaid question, the Division Bench of this Court in ***Murli Dhar Vs. State of Haryana (1989) 2 ILR (P&H)*** speaking through Justice A.L. Bahri, has held as under:-

“(7). That Act of 1985 is a code in itself. In view of Section 51 of the Act, the provisions of the Code of Criminal Procedure shall apply in so far as they are not inconsistent with the provisions of this Act, to all warrants issued and arrests, searches and seizures, made under this Act. Under the Act, the authorized officers under Sections 41 and 42 of the Act, or the officer deemed to be so authorized in view of Section 74 of the Act, are required to follow special procedure laid down under Sections 50, 52, 53, 57 of the Act. The Act now provides minimum sentence of 10 years imprisonment and minimum fine of rupees one lac. Special procedure under Sections 50, 52, 55 and 57 has been provided to be strictly followed. These provisions are mandatory. The officer acting under Sections 41 and 42 of the Act is required to maintain record of following the provisions aforesaid. Non observance of these provisions would vitiate the trial. In case the State Government decide to authorize officers of departments other than police to exercise powers under Section 41 and 42 of the Act, the provisions of Section 156 of Criminal Procedure Code will not at all be attracted. Police officers authorized to act under the Act either in view of Section 74 of the Act as they would be deemed to have been appointed under the Act and appointed under the Act are required to follow the procedure as provided under Sections 50, 52, 55 and 57 of the Act as observed above. If these provisions are not followed, the action would not be saved in view of Section 156 of the Code of Criminal Procedure. The powers of the Executive Police as envisaged by Section 156 of the Code of Criminal Procedure to investigate offences (committed under the Act,

1985) is thus ousted, curtailed and controlled by the provisions of Act, 1985. The question referred is answered in the affirmative as above....”

The Hon’ble Supreme Court in ***Gurjant Singh alias Janta Vs. State of Punjab (2014) 13 SCC 603*** speaking through Justice F.M. Ibrahim Kalifulla has held as under:-

“26. One of the grounds raised on behalf of the appellant was that PW 3 was not holding the post of DSP in a substantive manner in order to hold that he was a gazetted officer on the date of search. According to the appellant, PW 3 was not a regularly promoted DSP but was only an Inspector functioning as a DSP in a category called "Own Rank Pay" DSP. According to the appellant, PW 3 was drawing the pay of an Inspector from IRD and was not holding the post of DSP on a regular basis. It was, therefore, contended that such a person who was not duly promoted as DSP, cannot be equated to the status of a gazetted officer in order to hold that a search was conducted in his presence was a valid search as contemplated under Section 50 of the NDPS Act. As far as the said point raised on behalf of the appellant, we do not find any material or a counter-stand taken to the effect that PW 3 was a regularly promoted DSP or that as per the rules even as an 'Own Rank Pay' DSP, he would be equated to any other DSP, holding a substantive post. Unfortunately, as stated by us earlier, the trial Court having taken a view that Sections 42 and 50 were not applicable, completely omitted to examine the said defence raised on behalf of the appellant. We also do not find any contra evidence laid on behalf of the prosecution to counter the said ground raised on behalf of the appellant.”

Further, a Coordinate Bench of this Court in ***Bikkar Singh Vs. State of Punjab, 2006 (3) R.C.R. (Criminal) 16***, has held as under:-

"12. Secondly, it is evident from the cross-examination of PW-1 SI Gurmail Singh, who is the Investigating Officer in this case, that he was ad hoc ASI and had not passed the departmental course for

promotion as A.S.I. Further, it is also admitted by him that he was receiving pay of Constable Grade II at the time of occurrence of this case. Not only that DW-1 Constable Preet Inder Singh also proved from the summoned record that the substantive rank of SI Gurmail Singh was Constable Grade II and that his SI rank is only O.R.P. (own rank promotion). He also proved that SI Gurmail Singh had never passed any course for promotion as Head Constable or that of Assistant Sub Inspector. In his further cross-examination he admitted it to be correct that before promotion to the rank of SI, one has to pass the course of Head Constable and also that of ASI. In this view of the matter, it can be safely inferred that he was not competent to exercise the powers and perform the duties specified in Sections 42 and 67 of the Act within the area of his jurisdiction"

18. The learned trial Court while rendering a finding that the first Investigating Officer Mahinder Singh was not competent to investigate the matter under Section 42 of the NDPS Act had relied upon the judgments rendered by this Court in ***Jarnail Singh @ Jaila Vs. State of Punjab 2002 (1) RCR (Criminal) 302, Joginder Singh Vs. State, CRM-M No.5074 of 2019 decided on 28.05.2019 and State of Punjab Vs. Mohinder Pal 2020 (1) RCR (Criminal) 300*** wherein it has been held that search of the accused should be conducted by the officer authorized under Section 42 of the NDPS Act i.e. the officer of and above the rank of Assistant Sub Inspector (Regular) and an *ad hoc* ASI is not competent to exercise the power and perform duties as specified in Section 42 and 67 of the NDPS Act. The ratio of law formulated in the aforesaid judgments is not being elaborated for the sake of brevity.

19. The judgment in ***M. Prabhulal's case*** (supra) relied upon by the counsel appearing for the appellant is not applicable to the facts of the present case, as in the said case, the investigation was done by the Gazetted Officer whereas in the present case, there is not an iota of evidence that the investigation was done by

the Gazetted Officer rather the Gazetted Officer was present on the spot of recovery as an independent officer in terms of Section 50 of the NDPS Act.

20. The argument raised by the counsel for the appellant that in the present case, provisions of Section 43 of the NDPS Act would apply as the contraband was recovered at a public place and from a vehicle, which was in transit, also has no force and the same is not sustainable. A bare perusal of Section 43 of the NDPS Act reveals that any officer of any of the departments mentioned in Section 42 is empowered to seize in any public place or in transit, any narcotic drug or psychotropic substance or controlled substance in respect of which he has reason to believe an offence punishable under this Act has been committed. Explanation attached to Section 43 of the NDPS Act further clarifies that the expression “public place” includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public. In the present case, there is no permit brought on record to show that the vehicle in which the contraband was being transported was being plied as a public conveyance and therefore, the provisions of Section 43 of the NDPS are not at all attracted. The Hon’ble Supreme Court in ***State of Rajasthan Vs. Jagraj Singh (2010) 11 SCC 687*** speaking through Justice Ashok Bhushan, has held as under:-

“18. The Explanation to Section 43 defines the expression “public place” which includes any public conveyance. The word “public conveyance” as used in the Act has to be understood as a conveyance which can be used by the public in general. The Motor Vehicles Act, 1939 and thereafter the Motor Vehicles Act, 1988 were enacted to regulate the law relating to motor vehicles. The vehicles which can be used for public are public motor vehicles for which necessary permits have to be obtained. Without obtaining a permit in accordance with the Motor Vehicles Act, 1988, no vehicle can be used for transporting passengers.

19. In the present case, it is not the case of the prosecution that the jeep HR 24 4057 had any permit for transporting the passengers. The High

Court has looked into the evidence and come to the conclusion that there was no material to indicate that there was any permit for running the jeep as public transport vehicle. The High Court has further held that even Kartara Ram who as per the owner of the vehicle, Vira Ram, was using the vehicle, does not support that the jeep was used as public transport vehicle. The High Court held that personal jeep could not be treated as public transport vehicle.

20. *The following observations were made by the High Court:*

“Kartara Ram is produced as PD 5, who has deposed the statement that Vira Ram is his brother-in-law (saala), on whose name jeep bearing No. HR 24 4057 is lying registered. He had employed Inderjit Singh as driver for that jeep. Person, namely, Krishan has never been employed as driver. This witness has been declared hostile and he has been examined too, who does not support the prosecution case. In this manner, Vira Ram is the owner of the jeep. According to him he had given the jeep to Kartara Ram, but Kartara Ram has not stated anywhere in his statement that this jeep was given to him and he used the same as public transport vehicle. Since powder of opium was caught in this jeep and even notice Ext. P-6 was also served upon him by the police, he with a view to save himself, can also depose such statement that Kartara used to use the jeep as public transport vehicle, whereas Kartara Ram PD 5 does not affirm this fact. Jeep was personal, it is clear on the record. In this manner, just on this ground that he has given the jeep to his brother-in-law and he used it to carry the passengers, the personal jeep could not be treated as public transport vehicle. However, the fact that jeep is used to carry the passengers has not been affirmed from the statements of Kartara Ram. There is no evidence on record on the basis of which it could be stated that jeep was public transport vehicle and they have the permit for it, rather it was the private vehicle and it is stated that Vira Ram himself is the owner of that vehicle.”

21. *There is nothing to impeach the aforesaid findings. We have also perused the statement of Vira Ram in which statement he has never even stated that he has any permit for running the vehicle as transport vehicle. He has stated that “... I had given this jeep to Kartara Ram, resident of ... who is my relative to run it for transporting passengers”. Admittedly the jeep was intercepted and was seized by the police. In view of the above, the jeep cannot be said to be a public conveyance within the meaning of the Explanation to Section 43. Hence, Section 43 was clearly not attracted and the provisions of Section 42 (1) proviso were required to be complied with and the aforesaid statutory mandatory provisions having not been*

complied with, the High Court did not commit any error in setting aside the conviction.

22. *There is one more aspect which needs to be noted. The present is a case where the prosecution itself has come with case that secret information was received from the informer which information was recorded in Ext. P-14 and Ext. P-21 roznamcha and thereafter the Station House Officer along with the police party proceeded towards the scene. The present is not a case where the Station House Officer suddenly carried out search at a public place. The Station House Officer in his statement has also come up with the facts and case to prove compliance with Section 42. When search is conducted after recording information under Section 42(1), the provisions of Section 42 have to be complied with. This Court in Directorate of Revenue v. Mohd. Nisar Holia [Directorate of Revenue v. Mohd. Nisar Holia, (2008) 2 SCC 370 : (2008) 1 SCC (Cri) 415] had occasion to consider Sections 41, 42 and 43 Explanation. The following was stated in para 14: (SCC pp. 377-78)*

“14. Section 43, on plain reading of the Act, may not attract the rigours of Section 42 thereof. That means that even subjective satisfaction on the part of the authority, as is required under sub-section (1) of Section 42, need not be complied with, only because the place whereat search is to be made is a public place. If Section 43 is to be treated as an exception to Section 42, it is required to be strictly complied with. An interpretation which strikes a balance between the enforcement of law and protection of the valuable human right of an accused must be resorted to. A declaration to the effect that the minimum requirement, namely, compliance with Section 165 of the Code of Criminal Procedure would serve the purpose may not suffice as non-compliance with the said provision would not render the search a nullity. A distinction therefore must be borne in mind between a search conducted on the basis of a prior information and a case where the authority comes across a case of commission of an offence under the Act accidentally or per chance.”

23. *Thus the present is not a case where Section 43 can be said to have been attracted, hence, non-compliance with Section 42(1) proviso and Section 42(2) had seriously prejudiced the accused. This Court had occasion in a large number of cases to consider the consequence of non-compliance with the provisions of Sections 42(1) and 42(2), whether the entire trial stands vitiated due to above non-compliance or conviction can be set aside. In this context reference is made to the judgment of this Court*

in State of Punjab v. Balbir Singh [State of Punjab v. Balbir Singh, (1994) 3 SCC 299 : 1994 SCC (Cri) 634] . In the above batch of cases, the High Court has acquitted the accused on the ground that search was conducted without conforming to the provisions of the NDPS Act. Sections 41, 42, 43 and other relevant provisions came up for consideration before this Court, referring to the provisions of Chapter IV the following was stated in para 8: (SCC pp. 311-12)

“8. But if on a prior information leading to a reasonable belief that an offence under Chapter IV of the Act has been committed, then in such a case, the Magistrate or the officer empowered have to proceed and act under the provisions of Sections 41 and 42. Under Section 42, the empowered officer even without a warrant issued as provided under Section 41 will have the power to enter, search, seize and arrest between sunrise and sunset if he has reason to believe from personal knowledge or information given by any other person and taken down in writing that an offence under Chapter IV has been committed or any document or other article which may furnish the evidence of the commission of such offence is kept or concealed in any building or in any place. Under the proviso if such officer has reason to believe that search warrant or authorisation cannot be obtained without affording opportunity for the concealment of the evidence or facility for the escape of the offender, he can carry out the arrest or search between sunset and sunrise also after recording the grounds of his belief. Sub-section (2) of Section 42 further lays down that when such officer takes down any information in writing or records grounds for this belief under the proviso, he shall forthwith send a copy thereof to his immediate official superior.”

21. Furthermore, the argument of the counsel for the appellant that regular ASI Sharanjeet was called to the spot, who carried out further investigation, in the opinion of this Court, also pales into insignificance for, it is the initial stage of investigation i.e. search, seizure and arrest, which plays a pivotal role in success or failure of prosecution case. Chapter V of the NDPS Act, containing Sections 42 to 67, talks about the procedure to be followed by the officers, who are empowered to enter, search, seize and arrest with or without warrant/authorization. The procedure as prescribed under Sections 41, 42, 43, 44, 50 and 52 of the NDPS Act is to be followed by the empowered officer mandatorily and non-compliance of the same crumbles the whole edifice of the

prosecution case, resulting into acquittal of the accused. The NDPS Act is a complete Code in itself and it has been enacted by the Legislature with an aim to prohibit consumption of drugs and its trafficking including cultivation, manufacturing, distribution, sale and purchase. Therefore, it is a special Act enacted with a view to make stringent provisions for the control and regulation of operation relating to narcotic drugs and psychotropic substances.

22. Keeping in view the aforesaid, this Court holds that ASI Mahinder Singh (*ad hoc*) was not an officer empowered to search and seize in view of the notification dated 29.12.1986 issued by the State of Haryana and therefore, the exercise of search and seizure conducted by him was vitiated and so was the trial, which led to acquittal of the respondents.

23. Furthermore, it is an accepted proposition of criminal jurisprudence that this Court has the power to unsettle the order of acquittal on the basis of re-appreciation of the evidence but the power is subject to the settled law that where two views are possible and out of the two, one points towards the innocence of the accused, the view which favours the accused should prevail over the other pointing towards his guilt. The Hon'ble Supreme Court in ***H.D. Sundara and others Vs. State of Karnataka, Criminal Appeal No.247 of 2011 decided on 26.09.2023*** speaking through Justice Abhay S. Oka, has summarized the principles which govern the exercise of appellate jurisdiction while dealing with an appeal against acquittal under Section 378 of Cr.P.C. as follows: -

“7.....(a) The acquittal of the accused further strengthens the presumption of innocence;

(b) The Appellate Court, while hearing an appeal against acquittal, is entitled to re-appreciate the oral and documentary evidence;

(c) The Appellate Court, while deciding an appeal against acquittal, after re-appreciating the evidence, is required to consider whether the view

taken by the Trial Court is a possible view which could have been taken on the basis of the evidence on record;

(d) If the view taken is a possible view, the Appellate Court cannot overturn the order of acquittal on the ground that another view was also possible; and

(e) The Appellate Court can interfere with the order of acquittal only if it comes to a finding that the only conclusion which can be recorded on the basis of the evidence on record was that the guilt of the accused was proved beyond a reasonable doubt and no other conclusion was possible.

8. *Normally, when an Appellate Court exercises appellate jurisdiction, the duty of the Appellate Court is to find out whether the verdict which is under challenge is correct or incorrect in law and on facts. The Appellate Court normally ascertains whether the decision under challenge is legal or illegal. But while dealing with an appeal against acquittal, the Appellate Court cannot examine the impugned judgment only to find out whether the view taken was correct or incorrect. After re-appreciating the oral and documentary evidence, the Appellate Court must first decide whether the Trial Court's view was a possible view. The Appellate Court cannot overturn acquittal only on the ground that after re-appreciating evidence, it is of the view that the guilt of the accused was established beyond a reasonable doubt. Only by recording such a conclusion an order of acquittal cannot be reversed unless the Appellate Court also concludes that it was the only possible conclusion. Thus, the Appellate Court must see whether the view taken by the Trial Court while acquitting an accused can be reasonably taken on the basis of the evidence on record. If the view taken by the Trial Court is a possible view, the Appellate Court cannot interfere with the order of acquittal on the ground that another view could have been taken.*

9. *There is one more aspect of the matter. In many cases, the learned Trial Judge who eventually passes the order of acquittal has an occasion to record the oral testimony of all material witnesses. Thus, in such cases, the Trial Court has the additional advantage of closely observing the prosecution witnesses and their demeanour. While deciding about the reliability of the version of prosecution witnesses, their demeanour remains in the back of the mind of the learned Trial Judge. As observed in the*

commentary by Sarkar on the Law of Evidence, the demeanour of a witness frequently furnishes a clue to the weight of his testimony. This aspect has to be borne in mind while dealing with an appeal against acquittal.”

24. The Hon’ble Supreme Court has also articulated the above principle in the following decisions:

a) A three Judge Bench of Hon’ble Supreme Court in **Kali Ram v. State of H.P., 1973 (2) SCC 808**, speaking through Justice H.R. Khanna, held as under:

“25. Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted...”

b) A two Judge Bench of Hon’ble Supreme Court in **Chandrappa and others v. State of Karnataka, (2007) 4 SCC 415** has laid down the parameters with regard to the power of appellate Court while dealing with an appeal against an order of acquittal. Speaking through Justice C.K. Thakker, the following was held:

“35. From the above decisions, in our considered view, the following general principles regarding powers of appellate Court while dealing with an appeal against an order of acquittal emerge;

(1) An appellate Court has full power to review, reappraise and reconsider the evidence upon which the order of acquittal is founded;

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law;

(3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to

curtail extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasise the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

(4) An appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.”

CONCLUSION

25. In view of the facts and circumstances of the case, we find that the defence has been successful in making serious dent in the prosecution case and that the prosecution miserably failed to establish its version beyond reasonable doubt. Therefore, we find the view taken by the learned trial Court to be reasonable and logical. Learned counsel for the appellant has failed to point out any perversity or illegality in the findings recorded by the learned trial Court, which warrants interference by this Court. As such, there is no merit in the present application and the leave to appeal is declined. Resultantly, the main appeal is also dismissed.

(RAJ MOHAN SINGH)
JUDGE

(HARPREET SINGH BRAR)
JUDGE

October 05, 2023

Pankaj*

Whether speaking/reasoned
Whether reportable

Yes/No
Yes/No