

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

(217)

CRM-A-1591-2019 (O&M)

Decided on: 14.02.2023

State of Punjab

....Applicant (s)

Versus

Manpreet Singh @ Ram

.... Respondent(s)

**CORAM : HON'BLE MR.JUSTICE G.S. SANDHAWALIA
HON'BLE MS.JUSTICE HARPREET KAUR JEEWAN**

Present: Mr. Navneet Singh, Sr. DAG, Punjab.

Mr. B.S. Baath, Advocate for the respondent.

G.S. Sandhawalia, J.

The present application has been filed under Section 378 (3) Cr.P.C. for grant of leave to appeal against the judgment dated 25.01.2019 passed by Special Court, Fatehgarh Sahib, whereby acquittal has been recorded in FIR No.148 dated 07.11.2013 under Sections 22/61/85 of N.D.P.S.Act registered at Police Station, Khamanon and the recovery of 150 gram intoxicant/psychotropic powder (Diphenoxylate-hydrochloride) from the respondent-accused was not accepted.

2. The acquittal was recorded by the Trial Court on the ground that there was lack of proper compliance under Section 50 of NDPS Act, which has left the case of the prosecution under a very strong shadow of doubt. Reliance had been placed upon the judgment of the Apex Court passed in **Vijaysinh Chandubha Jadeja Vs. State of Gujarat, 2010 (4) RCR (Criminal) 911**, apart from the fact the Investigating Officer and the complainant was the same. It was also noticed that no independent witness was associated and neither the Sarpanch of the village had been called to attest and witness the recovery. Nothing had been brought on record that

any other person was sought to be associated for the search and the

recovery and neither the names and addresses of the persons who refused to join as independent witnesses had come forth. Therefore, for lack of independent corroboration it was held that the inevitable conclusion was that the prosecution witnesses were not present and the recovery did not take place in the mode and manner alleged. The prosecution not having inspired confidence in the mind of the Trial Court, the acquittal was recorded by noting that the case of the prosecution was highly doubtful and prosecution had miserably failed to prove its case beyond reasonable doubt or suspicion.

3. Counsel for the State has submitted that the judgment as such is not sustainable and merely because the Gazetted Officer or the Magistrate was not present, would not mean that the conviction cannot be recorded. It was further submitted that reliance wrongly has been placed upon **Mohan Lal Vs State of Punjab AIR 2018, Supreme Court 385** that the Investigating Officer and the informant could not be the same person. It was, accordingly, contended that the Apex Court in **Varinder Kumar Vs. State of Himachal Pardesh, 2019 (1) RCR (Criminal) 1003** and **Mukesh Singh Vs. State (Narcotic Branch of Delhi, (2020) 10 SCC 120** has held to the contrary. Therefore, the matter should be remanded for fresh decision. Counsel for the accused on the other hand argued that the benefit of acquittal recorded was not to be rightly interfered with.

4. A perusal of the paper-book and the record would go on to show that the police party headed by ASI Sajjan Singh was stated to be out for patrolling for checking bad elements. At about 6:35 PM they had accosted the accused-respondent who was going on foot. On having suspicion that the accused-respondent was carrying contraband, he was apprised of his legal right to get his search conducted in the presence of

the Gazetted Officer or Magistrate and having reposed confidence with the Investigating Officer, he had got recorded his consent memo and resultantly, recovery of the incriminating material in the form of intoxicant power was effected. Two samples of 5gms each were separated and sealed by the said Investigating Officer bearing seal 'SS' and, thereafter, the seal was handed over to HC Ram Singh. The ruqa was sent through Constable Rohit Kumar and the FIR was registered by PW-1 Darshan Singh at the police station and the accused was thereafter produced before the said officer, who affixed his seal upon the case property bearing 'DS'. The accused was, thereafter, produced before the Magistrate and the bulk case property except the samples was deposited in the Judicial Malkhana. Upon the receipt of the report from FSL on 01.07.2014, the challan was presented and eventually charge was framed on 24.09.2014.

5. A perusal of the statements of the police officials would go on to show that firstly Constable Rohit Kumar had come about at 8:30 PM with the Ruqa to the police station and the accused-respondent had been accosted in the first week of November at about 6:35 PM. It was admitted even by the SHO that there was darkness at about 8:40PM when the constable had arrived. Rather the said Constable is stated to have left the police station at 9:40 PM after taking the FIR number.

6. Similarly, PW-3 HC Ram Singh had also deposed regarding this fact the sampling was done and out of 150gms two samples of each 5gms were taken, after the recovery had been effected from the personal search of the accused-respondent. It has also been admitted in his cross-examination that there was darkness at 7:00 PM when they reached at the spot. Constable Rohit Kumar is also alleged to have brought the scale and weights. In his cross-examination he showed ignorance regarding the

calling of any Panch, Sarpanch and Numberdar of village Mansoorpur and admitted that the road was leading to village Khamanon Kamli and was a single road. He also admitted that Ruqa and consent memo (Ex.P5) were in different handwriting and Constable Rohit Kumar had come back after getting the weighing scale after 10/15 minutes and they had reached the police station at about 10:30 PM. It is, thus, apparent that all the paper work is stated to have been done in the darkness in a winter evening on a village road as per the stand of the official witnesses.

7. Similar is the stand of PW-4 ASI Sajjan Singh, the investigator and the complainant. He had submitted in his statement that he had tried to join independent witnesses, but nobody was ready to join the investigation, which is in contradiction to the statement of PW-3 HC Ram Singh. He also admitted that it grows dark in the month of November at 6:30 PM and it took 3 to 3½ hours for the writing work to be completed. He also admitted that police party was standing on a thorough fare and a large number of persons had passed but not associated and they had not included any respectable person. It is also a matter of fact that Constable Rohit Kumar was sent to bring the weighing scales, but no effort was made to call any Gazetted Officer or Magistrate at the time of recovery.

8. It is further to be noticed that sampling was done and contraband was put in a small plastic box inside the cloth parcel and there is nothing to show that from where small plastic box came from on the village road. It was not the case of the prosecution that plastic box and cloth parcel were being carried by the police party. Suggestion, thus, was rightly put that the parcels were prepared while sitting in the police station and accused had been picked up in the morning on 07.11.2013 at 9:00 AM and had been falsely implicated, which was also the defence version by

examining DW-1 Bhinderjit Singh, though the time of picking up is stated to be 7:00 AM. Said witness is stated to be President of Kisan Cell (Congress) of Block Khamanon.

9. PW-5 HC Jagtar Singh has also stated that Investigating Officer had tried to join the independent witnesses, but nobody was ready to join the investigation and in cross-examination he admitted that there was darkness when the accused had come across the police party.

10. The above sequence of events as such would go on to show that samples were also produced before the Magistrate on the next day i.e. 08.11.2013, who only noticed that the seals of the Investigating Officer and SI Darshan Singh had been affixed on the two samples of 5gms each. She had directed that the case property consisting of one sample and bulk parcel be deposited in the Judicial Malkhana. Apparently, no effort was made to open the bulk parcel of 140 gms and then taking the sample in the presence of the officials, which we feel also caused prejudice to the accused. The sample was received by the FSL, SAS Nagar (Mohali) only on 12.11.2013 after four days and which also only contained the seals of 'DS' and 'SS', on account of which the charge-sheet was filed and eventually the accused was charge-sheeted for the said offence.

11. The Apex Court has time and again held that it is imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a Gazetted Officer or Magistrate. The said protection is in order to impart authenticity, transparency and creditworthiness to the entire proceedings in the first instance and that an endeavour should be made to produce the suspect before the nearest Magistrate in view of the stringent punishment provided

under the Act. Relevant observations made in the judgment of **Vijaysinh Chandubha Jadeja (supra)** reads as under:-

“22.In view of the foregoing discussion, we are of the firm opinion that the object with which right under [Section 50\(1\)](#) of the NDPS Act, by way of a safeguard, has been conferred on the suspect, viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that in so far as the obligation of the authorised officer under sub-section (1) of [Section 50](#) of the NDPS Act is concerned, it is mandatory and requires a strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision. As observed in *Re Presidential Poll*¹⁴, it is the duty of the courts to get at the real intention of the Legislature by carefully attending to the whole scope of the provision to be construed. "The key to the opening of every law is the reason and spirit of the law, it is the animus imponentis, the intention of the law maker expressed in the law itself, taken as a whole." We are of the opinion that the concept of "substantial compliance" with the requirement of [Section 50](#) of the NDPS Act introduced and read into the mandate of the said Section in *Joseph Fernandez (supra)* and *Prabha Shankar Dubey (supra)* is neither borne out from the language of sub-section (1) of [Section 50](#) nor it is in consonance with the dictum laid down in *Baldev Singh's case (supra)*. Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of [Section 50](#) had been met, is a matter of trial. It would neither be possible nor feasible to lay down any

absolute formula in that behalf. We also feel that though [Section 50](#) gives an option to the empowered officer to take such person (suspect) either before the nearest gazetted officer or the Magistrate but in order to impart authenticity, transparency and creditworthiness to the entire proceedings, in the first instance, an endeavour should be to produce the suspect before the nearest Magistrate, who enjoys more confidence of (1974) 2 SCC 33 the common man compared to any other officer. It would not only add legitimacy to the search proceedings, it may verily strengthen the prosecution as well.”

12. Reliance can also be placed upon the judgment of the Apex Court passed in **Arif Khan @ Agha Khan vs. State of Uttrakhand 2018 (2) RCR Criminal 931**, wherein it was held that it is a mandatory provision and in the absence of the Magistrate or the Gazetted Officer, the empowerment to make search and recovery could not be there of the police officials. The Apex Court, thus, had allowed the appeal, whereby the conviction had been recorded and upheld by the High Court. In the present case, as noticed the manner in which the proceedings have been conducted do not inspire any confidence that the police had prepared the proceedings on a village road in the pitch darkness and done the paper work and then produced the accused before the Station House Officer at that point of time without associating any independent person also.

13. In such circumstances, we are of the considered opinion that the reasoning which has been arrived at by the Trial Court is well justified and even if we ignore the fact that one of the reasons as such by the Trial Court is of reliance upon the judgment passed in **Mohan Lal (supra)** which was thereafter discussed on 11.02.2019 in **Varinder Kumar (supra)** and reversed in **Mukesh Singh (supra)** on 31.08.2020, whereas the judgment under challenge is dated 25.01.2019. In such circumstances,

we are of the considered opinion that the matter is not liable to be remanded, as even if the said aspect is ignored, prosecution story has not inspired any confidence in us.

14. The cumulative discussion of these factors would go on to show that justifiable reasons were given by the Trial Court and the evidence was discussed in detail and are in consonance with the record as noticed by this Court. In the case of **State of Punjab Vs. Bhag Singh, AIR 2004 SC 1203**, it was held that this Court had to detail out the reasons where prayer for grant of leave was not made out being the first Appellate Court and whether the witnesses were reliable, cogent or trustworthy, were to be examined before coming to any conclusion whether the acquittal was justified. In the case of **Gamini Bala Koteswara Rao & others vs State of Andhra Pradesh, AIR 2010 SC 589**, it was observed by the Apex Court that the High Court has to appreciate the judgment of the Trial Court against the weight of the evidence and interference should be rare and in exceptional cases.

15. Accordingly, keeping in view the above, the present application for grant of leave to appeal is dismissed.

(G.S. SANDHAWALIA)
JUDGE

(HARPREET KAUR JEEWAN)
JUDGE

14.02.2023
Naveen

Whether speaking/reasoned :	✓Yes	No
Whether Reportable :	Yes	✓No