

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-11767-2022 in/and
CRM-A-100-2022 (O&M)
Date of Decision: 25.01.2023

State of Punjab

.....Appellant

Vs.

Atinder Pal Singh @ Raju

.....Respondent

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

Present: Mr. Navneet Singh, Sr. D.A.G., Punjab.

HARPREET KAUR JEEWAN, J.

CRM-11767-2022

By this application, the applicant-appellant seeks condonation of delay of 90 days in filing the appeal.

In view of the averments made in the application, which is duly supported by an affidavit of Sh. Davinder Singh, PPS, Deputy Superintendent of Police, Sub-Division Nawanshahr, District Shaheed Bhagat Singh Nagar, the application is allowed and the delay of 90 days in filing the appeal is hereby condoned.

CRM-A-100-2022 (O&M)

1. State has filed an application under Section 378 (3) for grant of Leave to Appeal to challenge the findings of acquittal recorded by the Judge, Special Court, Shaheed Bhagat Singh Nagar, whereby the respondent Atinder Pal Singh @ Raju was acquitted of the charge framed against him in FIR No. 62, dated 08.05.2017, registered under Sections 21

& 22 of Narcotic Drugs & Psychotropic Substances Act, 1985 (herein after referred to as “NDPS Act”) at Police Station Citi Nawanshahr on 01.11.2019.

2. As per the prosecution story, on 08.05.2017 at about 05:50 p.m., ASI Balbeg Singh along with other police officials were present near a water channel situated in Village Saloh in connection to a patrol duty. The respondent-accused who was coming from the side of Village Saloh got perplexed on seeing the police party and tried to change his way. However, he was apprehended by the police party on the basis of suspicion as he was carrying a polythene bag in his right hand. On enquiry regarding his identity, he revealed his name as Atinder Pal Singh @ Raju, son of Tarlochan Singh, resident of Village Karayam, Police Station Sadar Nawanshahr. Having suspicion that he was carrying some intoxicating substance, SI Balbeg Singh apprised him of his right to be searched in the presence of some gazetted officer or a Magistrate and further informed him that such an officer can be arranged at the spot. The accused reposed his faith in SI Balbeg Singh. Therefore, search was conducted which led to the recovery of 10 injections of “Avil”, each measuring 10 ml and 10 injections of “Buprenorphine”, each containing 02 ml. The same were taken into possession after converting the same into sealed parcels. Formal FIR was registered against the accused and investigation was carried out by SI Balbeg Singh and after completion of the investigation '*challan*' was presented in the Court.

2.2. After presentation of the '*challan*', copies of the documents under Section 207 Cr.P.C were supplied to the accused and charge under

Section 22 of the NDPS Act was framed against him, to which he pleaded not guilty and claimed trial.

2.3 In order to prove the case, prosecution examined Head Constable Nirmal Kumar PW-1, SI-Balbeg Singh PW-2, DSP Raj Kumar, PW-3, ASI Nirmal Singh, PW-4 and ASI Balvir Singh, PW-5. The accused alleged false implication in his statement under Section 313 of the Cr.P.C. However, he did not lead any evidence in defence of the same.

3. After hearing the Public Prosecutor, and the learned defence counsel and on perusal of the record, the trial Court acquitted the accused-respondent on the ground that the investigating officer ASI Balbeg Singh has admitted in his cross-examination that no offer was made by him to the accused that he can be taken to a Magistrate or a gazetted officer for search. He has also admitted that he did not inform the accused as to who would be searching him in the presence of the Magistrate or the gazetted officer. Even PW-4, ASI Nirmal Singh has admitted this fact that no such offer was given to the accused by the investigating officer. Hence, there is non-compliance of the provisions of Section 50 of the Act. Reliance was placed upon the decision of the Hon'ble Apex Court in Arif Khan @ Agha Khan vs. State of Uttarkhand 2018 (2) RCR (Criminal) 931. The learned trial Court observed that there is non-compliance of the mandatory procedure prescribed under Section 50 of the Act, which is fatal to the prosecution case. Hence, the accused-respondent was acquitted.

4. Learned counsel appearing for the appellant-State submitted that the trial court has erroneously, while ordering the acquittal of the accused *inter alia* observed that the mandatory provisions of Section 50 of

the Act were violated. As per Section 50 of the NDPS Act, the accused is required to be produced before the Gazetted officer or the Magistrate only in case he so requires. In the present case, the accused was appraised of his said right but he did not desire his production before such officer and reposed confidence in the investigating officer. As such there is compliance of the said provision. It was submitted that the recovery has been proved from the accused. As per the report of the Forensic Science Laboratory, the contents of the samples were found to be “Alprazolam” and “Pheniramine Maleate Buprenorphine Hydrochloride”. Hence, the respondent is liable to be convicted.

5. We have considered the aforesaid submissions and perused the paper-book. As per the prosecution case, 10 injections of “Buprenorphine”, (each of 02 ml) and 10 injections of “Avil” (10 ml each) were recovered from the accused. The recovery was effected from a bag carried by the accused. As per the testimony of SI-Balbeg Singh, PW-2, who was the investigating officer, the search of the accused was conducted on the basis of suspicion as he was apprehended when he tried to change his way on seeing the police party. With regard to the compliance of Section 50 of the Act, the investigating officer made the following statement in his examination-in-chief.

“.....Then I further told him that I had suspicion that he had something incriminating in his possession and I wanted to conduct his search. I also apprised him of his legal right of getting himself searched in presence of Gazetted Officer or Magistrate and arrangement can be made in that regard. But accused reposed his confidence in me, accordingly a consent memo Ex. PW-2/A was

prepared....”

(Emphasis applied by this Court)

6. In the cross-examination, he has admitted this fact that no offer was made by him that accused can be taken before a Magistrate/Gazetted officer for such. He has also admitted that he did not inform the accused as to who would be searching him in the presence of the Magistrate or the Gazetted officer. As per the admission made by the investigating officer, the accused was not specifically informed that any gazetted officer or Magistrate can be arranged at the spot before whom the search can be conducted. Even in the consent memo Ex. PW-2/A, this fact is not recorded. A plain reading of Section 50 of the NDPS Act suggests that during the search of the accused, if such person so requires, shall be taken to the nearest gazetted officer or Magistrate but in the present case, no such offer was made by the investigating officer that the accused can be taken to nearest gazetted officer or Magistrate. If the complete offer was not given, as per the mandate of Section 50 of the Act, the question of giving consent by way of signing the consent memo by the accused merely becomes paper work. The relevant portion of Section 50 reads as under:-

“50. Conditions under which search of persons shall be conducted

“(I) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

xxxx xxxx xxxx xxx

(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be

searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.]”

7. In Arif Khan's case (*supra*), the accused was apprehended and he was informed that he has a right to be searched in the presence of a gazetted officer or a Magistrate, to which he replied that he has a faith on the raiding party and consented to be searched by them. While considering the question as to whether the search made by the police officer from the accused of the alleged contraband ('Charas'), can be held to be in accordance with the procedure prescribed under Section 50 of the NDPS Act was considered by Hon'ble Supreme Court in the said case and the following observations were made:-

“21. What is the true scope and object of [Section 50](#) of the NDPS Act, what are the duties, obligation and the powers conferred on the authorities under [Section 50](#) and whether the compliance of requirements of [Section 50](#) are mandatory or directory, remains no more res integra and are now settled by the two decisions of the Constitution Bench of this Court in [State of Punjab vs. BaldevSingh](#) (1999) 6 SCC 172 and [Vijaysinh ChandubhaJadeja](#) (*supra*).

22. Indeed, the latter Constitution Bench decision rendered in the case of *Vijaysinh Chandubha Jadeja* (supra) has settled the aforementioned questions after taking into considerations all previous case law on the subject.

23. Their Lordships have held in *Vijaysinh Chandubha Jadeja* (supra) that the requirements of [Section 50](#) of the NDPS Act are mandatory and, therefore, the provisions of [Section 50](#) must be strictly complied with. It is held that it is imperative on the part of the Police Officer to apprise the person intended to be searched of his right under [Section 50](#) to be searched only before a Gazetted officer or a Magistrate. It is held that it is equally mandatory on the part of the authorized officer to make the suspect aware of the existence of his right to be searched before a Gazetted Officer or a Magistrate, if so required by him and this requires a strict compliance. It is ruled that the suspect person may or may not choose to exercise the right provided to him under [Section 50](#) of the NDPS Act but so far as the officer is concerned, an obligation is cast upon him under [Section 50](#) of the NDPS Act to apprise the suspect of his right to be searched before a Gazetted Officer or a Magistrate. (See also [Ashok Kumar Sharma vs. State of Rajasthan](#), 2013 (2) SCC 67 and [Narcotics Control Bureau vs. SukhDev Raj Sodhi](#), 2011 (6) SCC 392)

24. Keeping in view the aforementioned principle of law laid down by this Court, we have to examine the question arising in this case as to whether the prosecution followed the mandatory procedure prescribed under [Section 50](#) of the NDPS Act while making search and recovery of the contraband “Charas” from the appellant and, if so, whether it was done in the presence of a Magistrate or a Gazetted Officer so as to make the search and recovery of contraband “Charas” from the appellant in conformity with the requirements of [Section 50](#).

25. In our considered view, the evidence adduced by the

prosecution neither suggested and nor proved that the search and the recovery was made from the appellant in the presence of either a Magistrate or a Gazetted Officer.

26. It is the case of the prosecution and which found acceptance by the two Courts below that since the appellant (accused) was apprised of his right to be searched in the presence of either a Magistrate or a Gazetted Officer but despite telling him about his legal right available to him under [Section 50](#) in relation to the search, the appellant (accused) gave his consent in writing to be searched by the police officials (raiding party), the two Courts below came to a conclusion that the requirements of [Section 50](#) stood fully complied with and hence the appellant was liable to be convicted for the offence punishable under NDPS Act.

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).....”

8. Applying the ratio of the aforesaid decisions to the facts of the present case, we are of the considered opinion that the compliance of the provisions of Section 50 of the NDPS Act were not made into spirit and it was only on papers. The consent memo is a typed document and the investigating officer has admitted this fact that the consent memo in question is a computerized document. We have also observed that in the cross-examination the investigating officer ASI Balbeg Singh PW-2 has stated that no chemical test was done by him to ascertain whether the contraband is a narcotic substance and he voluntarily stated that he checked the contraband by sniffing and looking at the same and therefore concluded that the powder is a narcotic substance. It is also observed that PW-4, ASI

Nirmal Singh, who was allegedly present at the time of recovery has stated in the cross-examination that the colour of the intoxicating powder was pink, whereas it is not the case of the prosecution that any intoxicating material powder was recovered. It is specifically the prosecution story that injections were recovered and this fact is also mentioned in the report of the Forensic Science Laboratory that the samples which were sent for examination were 10 ml colourless liquid in a glass vial labelled as 'Avil' and 02 ml of colourless liquid in a glass ampoule labeled as 'Leegestic'. Further, we have observed that ASI Nirmal Singh (PW-4), recovery witness had stated in the cross-examination that no injection of LEEGESIC was recovered from the accused and he categorically stated that he is sure about this fact as he was present at the spot. Whereas the report of the chemical examiner, Ex.PW-2/B reveals that one of the sample was a glass ampule labelled as LEEGESIC. This totally smashed the prosecution case as the recovery is not of the powder as recovery made by the police was not of any intoxicating powder as injections thereof and it is highly improbable that the investigating officer would have the capability as of sniffing the injections which are usually contained in glass ampule.

9. Thus, apparently once the personal search as such had been carried out as per the admission of the police official, the Gazetted Officer or the Magistrate was not accompanying him and thus, there is violation of Section 50 of the Act in view of the law laid down by the Apex Court in **State of Rajasthan vs. Parmanand and others**, 2014 (2) RCR (CrI.) 40.

Relevant portion of the judgment reads thus:-

“12. 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 No.1 Parmanand's bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of respondent No.2 Surajmal was also conducted. Therefore, in light of judgments of this Court mentioned in the preceding paragraphs, Section 50 of the NDPS Act will have application."

10. In view of the aforesaid discussion and in order to ascertain as to whether the judgment and order of the learned Court below needs any interference, it would be appropriate to refer to the principles laid down by the Hon'ble Supreme Court of India while dealing with the appeals, particularly against the order of acquittal in **Sidhartha Vashisht @ Manu vs. State (NCT of Delhi)** 2010 AIR (SC) 2352. The said principles are reproduced as under:-

"13) The following principles have to be kept in mind by the Appellate Court while dealing with appeals, particularly, against the order of acquittal:

(i) There is no limitation on the part of the Appellate Court to review the evidence upon which the order of acquittal is found.

(ii) The Appellate Court in an appeal against acquittal can review the entire evidence and come to its own conclusions.

(iii) The Appellate Court can also review the Trial Court's conclusion with respect to both facts and law.

(iv) While dealing with the appeal preferred by the State,

it is the duty of the Appellate Court to marshal the entire evidence on record and by giving cogent and adequate reasons set aside the judgment of acquittal.

(v) An order of acquittal is to be interfered only when there are "compelling and substantial reasons" for doing so. If the order is "clearly unreasonable", it is a compelling reason for interference.

(vi) While sitting in judgment over an acquittal the Appellate Court is first required to seek an answer to the question whether finding of the Trial Court are palpably wrong, manifestly, erroneous or demonstrably unsustainable. If the Appellate Court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the Appellate Court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities, it can reappraise the evidence to arrive at its own conclusion.

(vii) When the Trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of Ballistic Experts etc., the Appellate Court is competent to reverse the decision of the Trial Court depending on the materials placed.

11. We are of the considered opinion that there are material contradictions in the testimony of prosecution witnesses and the documents prepared during the investigation. The compliance of Section 50 of the NDPS Act was merely on papers, as such, the respondent has been rightly given the benefit of doubt by the trial Court. Keeping in view the totality of these circumstances, no interference is called for in the findings of the acquittal by the trial Court.

12. Accordingly, the application for grant of leave to appeal is dismissed.

Pending miscellaneous applications, if any, also stand disposed of.

(G.S. SANDHAWALIA)
JUDGE

(HARPREET KAUR JEEWAN)
JUDGE

January 25, 2023
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Whether Speaking	Yes
Whether Reportable	No