

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

CRM-A-2933-2019 (O&M)

Reserved on: 28.03.2023.

Date of Pronouncement: 19.04.2023.

State of Punjab

...Appellant.

Versus

Jatinder Singh @ Jinda

...Respondent.

**CORAM: HON'BLE MR. JUSTICE M.S. RAMACHANDRA RAO
HON'BLE MRS. JUSTICE SUKHVINDER KAUR**

.....

Argued by: Mr. Sandeep Vermani, Addl. A.G., Punjab.

Mr. S.S. Swaich, Advocate for the respondent.

Sukhvinder Kaur, J.
CRM-40850-2019

Prayer made in the application is for condonation of delay of
175 days in filing the appeal.

For the reasons mentioned in the application, delay of 175 days
in filing the appeal is condoned.

Application is allowed.

CRM-A-2933-2019

Appellant-State of Punjab has preferred the instant application
under Section 378(3) Cr.P.C. seeking leave to appeal against judgment
dated 24.01.2019, pertaining to FIR No.119 dated 25.09.2013, under
Section 21/61/85 NDPS Act, registered at Police Station Khamanon, passed
by learned Judge, Special Court, Fatehgarh Sahib, vide which
respondent/accused-Jatinder Singh @ Jinda has been acquitted.

The factual scenario, as per the prosecution, is that on 25.09.2013 at about 8.00 P.M., when ASI Baljinder Singh alongwith police party was present at water tank, Sanghol Road, Village Kalewal, in connection with routine patrolling and checking of bad elements, then the police party noticed that accused was coming from the side of Village Sanghol, on a motorcycle Hero Honda Splendor Plus bearing registration No.PB-23-G(T)-0638. On seeing the police party, he got perplexed and tried to turn towards the backside, but the Investigating Officer apprehended him with the help of the police party on the basis of suspicion. Upon asking, he disclosed his name as Jatinder Singh @ Jinda son of Avtar Singh besides other particulars. Then Investigating Officer after disclosing his identity to the accused, told him that he had the suspicion that accused was having some contraband and shown his intention to conduct the search of the accused. The Investigating Officer apprised him regarding his legal right to get his search conducted in the presence of Gazetted Officer or Magistrate. However, accused reposed confidence in the Investigating Officer and the consent memo was prepared. The Investigating Officer also tried to join some independent witness but none obliged by showing their inability. Thereafter, Investigating Officer conducted the search of the accused which led to recovery of 8 pouches i.e. 4 pouches from one pocket of his trousers and 4 pouches from the other pocket of his trousers; total 8 pouches each containing 100 tablets Phenotil. Accused failed to produce any permit or license for keeping the said Phenotil tablets. Investigating Officer separated two samples of 1/1 pouches of phenotil tablets and converted the same into sample parcel and remaining 6 pouches of phenotil tablets were converted into separate bulk parcel. Then Investigating Officer put his seal bearing

impression 'BS' on all the parcels and sample seal chit and Form No.29 was partly prepared. Seal after use was handed over to HC Gurmeet Singh. All the recovered phenotil tablets and seal chit were taken into police possession vide separate recovery and same was witnessed by official witnesses and attested by Investigating Officer. Ruqa was sent through C. Lakhvir Singh. FIR was registered by SI Darshan Singh against accused. Rough site-plan was prepared. Accused was interrogated and arrested vide ground of arrest cum intimation memo and personal search memo of the accused was prepared and Rs.100/- were recovered from his personal search. The above said Hero Honda motorcycle was taken into police possession without its documents. Form No.29 was prepared. Statements of witnesses were recorded. Upon reaching the police station, accused along with witnesses, Form No.29, motorcycle, personal search articles and case property were produced before the officiating SHO SI Darshan Singh. After the verification, SI Darshan Singh affixed his seal bearing impression 'DS' on the case property and sample chit and thereafter, the case property was deposited with the MHC. On next day, Investigating Officer ASI Baljinder Singh took accused and case property from MHC and produced them before the concerned Magistrate who remanded the accused to judicial custody. Thereafter, case property was deposited in the Judicial Malkhana. After receiving report of Chemical Examiner and completion of investigation, Challan was presented in the Court.

Copies of the report under Section 173 Cr.P.C. along with relevant documents were supplied to the accused free of cost. Charge under Section 22 of the Act was framed against accused to which accused pleaded not guilty and claimed trial.

In order to prove its case, the prosecution has examined Sub Inspector Darshan Singh as PW1, Amarjit Singh (Proprietor of M/s Kamal Motors, Khamanon) as PW2, ASI Shashwat Kumar as PW3, HC Gurmeet Singh as PW4 and Investigating Officer ASI Baljinder Singh as PW5 and thereafter, prosecution evidence was closed by court order.

Thereafter, statement of the accused under Section 313 Cr.P.C. was recorded in which the incriminating circumstances appearing against him in the prosecution evidence were put to him, to which he denied and pleaded innocence and closed his defence evidence.

After concluding the trial, the trial Court acquitted the accused Jatinder Singh @ Jinda and aggrieved by the said decision, the appellant-State has filed the present application for leave to appeal against acquittal of accused Jatinder Singh @ Jinda.

We have heard Mr. Sandeep Vermani, Additional Advocate General, Punjab, and Mr. S.S. Swaich, Advocate for the respondent and have also perused the record.

Learned State counsel for the appellant has vehemently contended that the trial Court has wrongly relied upon the law laid down in case **Mohan Lal Vs. State of Punjab, AIR 2018, SC 3853** in holding that the complainant as well as Investigating Officer cannot be the same person and as in the present case the complainant as well as the Investigating Officer is the same person i.e. ASI Baljinder Singh, so in view of the law laid down in Mohan Lal's case (supra), he could not have conducted the investigation. He has contended that Hon'ble Apex Court in **Criminal Appeal No.2450-2451 of 2010** titled as **Varinder Kumar Vs. State of Himachal Pradesh** has held that all the pending criminal prosecution trials

and appeals prior to the law laid down in Mohan Lal's case shall continue to be governed by the individual facts of the case. So the relief of Mohan Lal's case is not applicable to the case in hand as the law laid down in the Mohan Lal's case is much later than the FIR in the present case. He has further contended that mere absence of the independent witness at the time of search and seizure will not render the case of the prosecution unreliable and in this context, he has relied upon the judgment of **Dharampal Singh Vs. State of Punjab, 2010(4) RCR (Criminal) 504**. He has further argued that the trial Court has also erred in holding that provisions of Section 50 of NDPS Act have not been complied with. In fact, in the present case, the offer was given by the Investigating Officer to the accused before conducting his search. He has also contended that the provisions of Section 50 of NDPS Act were not to be attracted it being chance recovery of narcotics tablets. He has contended that the positive suspicion entertained by the police officers cannot be equated with prior information and has prayed that the present appeal may be allowed and the judgment of acquittal dated 24.01.2019 passed by the trial Court may be set aside and accused may be convicted as per law.

On the other hand, it has been contended by counsel for the respondent that there was no proper compliance of Section 50 of the NDPS Act. The Investigating Officer did not bother to requisition the services of any Magistrate or any Gazetted Officer from any other department, who could also have been joined as the independent witness at the time of the alleged recovery. He has contended that the Investigating Officer had not taken sample from all the 8 pouches of the phenotil tablets allegedly recovered from the possession of the accused, as such the proper samples

had not been prepared. He has vehemently contended that no independent witness was joined by the Investigating Officer during the police proceedings which the Investigating Officer could have easily joined from that place, which shows that it is a clear cut case of false implication. He has contended that the Investigating Officer did not inquire from the manufacturing company or wholesaler as to who had purchased huge quantity of narcotic tablets. In this context, he has relied upon the judgment of this Court in case **Kamaljit Singh Vs. State of Punjab**, CRA-S-4002-SB-2016, wherein it was held that :-

“Narcotics-Defective Investigation-Recovery of huge quantity of contraband/medicines-Investigating Officer ought to have inquired from the manufacturing company or its wholesaler as to who had purchased this huge quantity of medicines-Not done-Accused acquitted”.

He has also contended that complainant and the Investigating Officer in this case was one and the same person which is in violation of law laid down in Mohan Lal's case (supra). He has contended that as such the accused has been rightly acquitted by the trial Court and the impugned judgment does not call for any interference.

It is well settled proposition of law that the Appellate Court is to interfere with the order of acquittal only when there is perversity of facts and law. The NDPS Act provides for very stringent punishment in case the accused is found to have committed an offence under the same and, therefore, it is all the more important and imperative for the prosecution to prove its case beyond the reasonable doubt. It is for this reason that several safeguards have been provided under the Act and it is obligatory upon the

investigating agency and then the prosecution to comply with these provisions.

Now adverting to the present case, after having heard learned counsel for the appellant and learned counsel for the respondent and having perused the judgment as well as the other relevant record, we are of the considered opinion that the prosecution was not able to prove its case against the accused beyond the shadow of the reasonable doubt.

As per provisions of Section 50 of the Act, before conducting the personal search of the accused, it was incumbent upon the Investigating Officer to have apprised the accused of his legal right of his search being conducted in the presence of a Gazetted Officer or a Magistrate.

The perusal of the statement of the Investigating Officer, PW5 ASI Baljinder Singh reveals that he has stated that after inquiring the name and whereabouts of the accused, he disclosed his name, identity and designation to the accused and expressed his suspicion regarding possession of some contraband, thereafter, he apprised the accused regarding his right of being searched in the presence of Magistrate or Gazetted Officer who could be called at the spot but the accused reposed confidence in him. His consent memo was prepared which was signed by the accused and attested by the Investigating Officer and the recovery witnesses, thereafter, the accused was searched. It has been held by the Hon'ble Apex Court in **Vijaysinh Chandubha Jadega Vs. State of Gujarat, 2010(4) R.C.R. (Criminal) 911** that :-

“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.

In the instant case, the perusal of the statement of PW5, the Investigating Officer reveals that the proper compliance of the provisions of Section 50 of the Act was not made in the present case. PW5 has very categorically stated in his cross-examination that he did not give any offer to the accused that he can be taken to Gazetted Officer or Magistrate for his search in case he so desires. He has also very candidly admitted that he knew about the provisions of Section 50 of the NDPS Act.

Though, it has been deposed by PW5 that the accused had reposed the confidence in him, but a person who has already been apprehended by the police officer does not have much of a choice to actually refuse to sign such consent memo. Reliance in this respect can be placed upon **Kulwinder Kumar @ Bona Vs. State of Punjab, 2018(3) Law Herald (P& H) 1938**, wherein it was held that :-

“Narcotic Drugs and Psychotropic Substances Act, 1985, S.50-Personal Search-Acquittal-Contention that accused was given offer but he gave written consent for not being searched before Magistrate or Gazetted Officer-Held, a person who has

already been apprehended by police officials, does not have much of a choice to actually refuse to sign such consent memo, if pressurized to do so-No attempt has been made to carry out the search in presence of Magistrate or a Gazetted Officer-Thus, there was non-compliance of Section 50-Accused acquitted.”

The trial Court has thus rightly observed that when there was not proper compliance of the provisions of Section 50 of the Act, it may not vitiate the trial, but it certainly leaves the prosecution case under a strong shadow of doubt, when the Investigating Officer did not bother to requisition the services of any Magistrate or any Gazetted Officer from any other department, who could also have been an independent witness to the alleged recovery. Admittedly, when the alleged recovery in the present case was effected from personal search of the accused and the contraband was recovered from the pockets of the trousers of the accused which he was wearing, then provisions of Section 50 of the NDPS Act were attracted in the present case and this contention of learned State counsel does not have any merit that since it was a chance recovery, so no compliance of Section 50 of the NDPS Act was required to be made.

From the testimony of the above said prosecution witnesses, it is further apparent that no independent witness was joined by the police at the time of the alleged recovery. It has been stated by PW5 the Investigating Officer during in his examination-in-chief that the alleged place of recovery was near water tank, Sanghol Road, Village Kalewal. He has not denied the fact that recovery was effected near Village Kalewal, which was situated near to the alleged place of recovery. So the Investigating Officer could have very easily called the Sarpanch or some Panch or some other prominent person or villager to attest and witness the recovery. As per PW5,

no member of the public agreed to join the police party. But had he called the Sarpanch or Panch or other prominent person from the village, then, such a person would not have refused to join the police party like any ordinary person from the public. However nothing has come on record that any action was taken by the Investigating Officer against the persons who refused to join as the independent witness with the police party. He did not bother even to record the particulars of such persons who had refused to join the police party, so it appears that the sincere and genuine effort was not made by the Investigating Officer to join some independent person to witness the alleged recovery. So when no independent witness was joined despite ample opportunity for the same, then much authenticity and creditworthiness cannot be attached to these recovery proceedings conducted by the Investigating Officer in the present case. It is true that prosecution case is not to be thrown out only for want of independent corroboration, but in the instant case it has assumed more significance, as there are some glaring infirmities in the prosecution evidence which have not been reconciled. PW5, the Investigating Officer has stated in his cross-examination that at the time of apprehending the accused on 25.09.2013, he already knew his name and address. He had met the accused on 04.03.2013, 05.03.2013 when the case FIR No.28 dated 04.03.2013, under Section 21/61/85 of the NDPS Act was registered against the accused by him. But he could not explain as to why it has been mentioned in the ruqa Ex.P3 that he came to know about the name and address of accused by asking him, when as per his testimony he already knew his name and address. It had not been mentioned in ruqa Ex.P3 that he already knew the accused person and he had already registered another case under the NDPS Act against him.

No effort was made by the Investigating Officer to inquire from the manufacturing company or wholesaler as to who had purchased the huge quantity of narcotic tablets. Furthermore, he has also admitted that he had not taken the samples from each of these 8 pouches of the phenotil tablets allegedly recovered from the possession of the accused and all these 8 pouches were not attached with one another. So when all these 8 pouches were not attached with one another, then the sample was required to be taken from the each pouch.

Criminal cases have to be decided on their own facts without universal generalization. So the judgments relied upon by the learned State counsel are of no avail in facts and circumstances of the present case.

So keeping in view of all these discrepancies and snags the trial Court rightly has reached at the conclusion that the prosecution witnesses were not successful in bringing home guilt to the accused and the recovery did not take place in the mode and manner as alleged by the prosecution. The accused has been rightly acquitted by giving him the benefit of doubt.

In view of the above, no case is made out for grant of leave to appeal against acquittal of Jatinder Singh @ Jinda. The application without having any merits stands dismissed and the leave to appeal is declined.

(M.S. RAMACHANDRA RAO)
JUDGE

(SUKHVINDER KAUR)
JUDGE

19.04.2023

Komal

Whether speaking/reasoned? : Yes/ No
Whether reportable? : Yes/ No