

2024:PHHC:136154



IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH

CRM-A-276-2020(O&M)
Date of Decision:-15.10.2024

State of Punjab

.....Appellant

VERSUS

Ajay Kumar & another

.....Respondents

**CORAM:- HON'BLE MR. JUSTICE SUDHIR SINGH
HON'BLE MR. JUSTICE JASJIT SINGH BEDI**

Present:- Mr. Kuljit Singh, Addl. A.G., Punjab
for the appellant.

Mr. A.S. Manaise, Amicus Curiae
for respondent Nos.1 and 2.

JASJIT SINGH BEDI, J.

The present application under Section 378(3) of Cr.PC has been filed for grant of leave to appeal against the judgment of acquittal dated 31.08.2019 passed by Judge, Special Court, Rupnagar.

2. The FIR was registered on 14.07.2016, the judgment of acquittal passed by the Judge, Special Court, Rupnagar is dated 31.08.2019, the appeal was filed on 28.01.2020 and the matter is being taken up for hearing now after 08 years of the registration of the FIR.

3. In brief, the case of the prosecution is that on 14.7.2016 ASI Tarlochan Singh, Investigating Officer (hereinafter to be referred as the IO) along with HC Sohan Singh, HC Prem Nath, ASI Makhan Singh were on patrolling and Nakabandi. The police party had laid a Nakka near the

cremation ground Gaushala Road Rupnagar. At about 8:45 PM, a motor-cycle was seen, coming from Railon side, on which two persons were sitting. The police party signalled the motor-cyclists to stop. However, they tried to flee away from the spot. The person who was sitting at the back jumped from the motor-cycle with the intention of running from the spot but he fell into a pit. He was having a small bag of black colour on his shoulder. He was apprehended by ASI Makhan Singh. The other person who was driving the motor-cycle was also apprehended. The IO asked the name of the person who was sitting at the back seat. He disclosed his name as Ajay Kumar @ Aju, son of Kuldeep Singh resident of House No. 17A/1, Green Avenue Rupnagar and the motor-cyclist disclosed his name as Manoj Kumar @ Lucky son Bhupinder Kumar, resident of House No. 2525, Mohalla Phool Chakker Rupnagar. The number of the motor-cycle was PB12AA-1686 make Hero Splendor. The motor-cyclist namely Manoj Kumar had tied a Parna of a Kesari colour around his waist having some article tied in the same.

4. The I.O. disclosed his name, rank, posting and identity to the accused. He told them that he suspected some contraband in the bag being carried by Manoj Kumar and in the cloth which tied to the waist of Manoj Kumar. He told them about their legal right to get their search conducted from a Gazetted Officer or a Magistrate and they could be called to the spot. Both the persons reposed their confidence in the I.O. on which the consent memo was prepared.

5. On search of the cloth (Parna) which accused Manoj Kumar had tied there was a green colour polythene having white colour intoxicant powder. The same was weighed and was found to be 560 Grams. Samples of

10/10 Grams each were separated and were put in two small polythene parcels and the parcels were then put into plastic cases. The parcel of the same was prepared and the remaining 540 Grams of intoxicant powder was again put into a visible polythene packet and the parcel of the same was prepared. All the three parcels were duly sealed by the I.O. with his seal bearing impression TS. Sample seal was prepared separately. The seal was handed over to HC Sohan Singh after use by the I.O.

6. On the search of the bag which accused Ajay Kumar was carrying, a laptop of black colour of HP Company having serial No. CND43540MP Model No. 1512078TU was recovered. The accused was not able to prove the ownership of the laptop. As the accused was not able to produce any license or permit to keep the intoxicant powder and further was not able to prove the ownership of laptop a Ruqa was sent for registration of the FIR to the Police Station. Recovery memo regarding 560 Grams of intoxicant powder was prepared. The motorcycle bearing No. PB12AA-1686 was taken into police possession. The recovery memo of laptop recovered from accused Ajay Kumar was also prepared. Rough site plan was prepared by the I.O. The accused were arrested. Their personal search was conducted. Statements of witnesses were recorded.

7. After completing the investigation at the spot, the accused along with the case property were produced before SHO namely SI Pawan Kumar. He verified the facts from the accused and checked the case property. After finding the same to be correct, the SHO affixed his seal PK on the case property i.e. three parcels. The accused were put in the police lock-up and the case property deposited with MHC. Form No.29 M was filled by the SHO. Sample seal was also seen by him and both Form No. 29 M, sample

seal along with case property were deposited with MHC.

8. On 15.7.2016, the accused along with the case property were produced before the Illaqa Magistrate. Application was moved under section 52 A NDPS Act. Inventory report was prepared. The order of the Magistrate was obtained. Report of the Forensic Science Laboratory was received. On completion of entire investigation the Challan was presented against the accused.

9. The copies of the report under Section 173 Cr.P.C along with the documents attached thereto were supplied to the accused as required under Section 207 Cr.P.C.

10. After hearing the Additional Public Prosecutor for the State and the defence counsel, a prima facie case was made out against the accused for the offence punishable under Sections 22, 25 and 29 of the NDPS Act, Section 411 of IPC and Sections 192 and 181 of Motor Vehicles Act. Accordingly, the accused were charge sheeted on 08.05.2018, to which they pleaded not guilty and claimed trial.

11. In order to prove its case, the prosecution examined PW1 Manoj Kumar son of Ishar Dass resident of H. No.2706 Mata Rani Mohalla who deposed as under :-

“Stated that I am doing private job in Mohali. On 17.2.2016, I went to duty as routine. My brother Sandeep Verma whose working in Swaraj Majda also on duty on that day. My wife Leisha Verma went to Karnal to his parents house. On 17.2.2016 nobody in our house. The house was locked from outside gate and also to the rooms. At about 4.00 my brother came back home. He called me that the lock of the room was broken. The grill of the kitchen also broken. The lock of the almira brief case were also broken. My laptop make HP, cash and one mobile phone kept in the almira were stolen by the unknown person. On 20.2.2016, case was registered against

unknown person. My laptop was recovered in this case same was identified by me vide identification memo Ex.PW1/A. I brought the laptop from Bangalore. Copy of the bill is Mark A. My statement was recorded by the police”.

12. PW2 MHC Narinder Singh tendered into evidence his duly sworn affidavit as Ex.PW2/A. PW2(renumbered) ASI Rajinder Singh also tendered into evidence his duly sworn affidavit Ex.PW2/A.

13. PW3 Manpreet Kaur Clerk from SDM Office Rupnagar deposited as under:-

“Stated that I have brought the summoned record regarding motor-cycle bearing no. PB12AA-1686. The same is on the name of Manoj Kumar S/o Bhupinder Kumar, R/o house no. 2589, Phool Chakkar Mohalla, Rupnagar. The screen report of the vehicle is Ex. PW3/A”.

14. PW4 ASI Tarlochan Singh, Investigating Officer deposited as under :-

“Stated that on 14.7.2016, I was posted at PS City Rupnagar. On that day, I along with HC Sohan Singh, HC Prem Nath, ASI Makhan Singh were on patrolling and Nakabandi. The police party has placed Nakka near cremation ground Gaushala Road Rupnagar. At about 8:45 PM, a motor-cycle was seen coming from Railon side, on which two persons were sitting. The police party made a signal to the motor-cycle borne persons to stop. They tried to flee away from the spot. The persons who was sitting at the back jumped from the motor-cycle with the intention of running from the spot. He was having a small bag of black colour on his shoulder. He was apprehended by ASI Makhan Singh. The other person ie. who was driving the motor-cycle was also apprehended. I asked the name of the person who was sitting at the back seat. He disclosed his name as Ajay Kumar @ Aju, S/o Kuldeep Singh R/o 17A/1, Green Avenue Rupnagar and the motor-cyclist disclosed his name as Manoj Kumar @ Lucky S/o Bhupinder Kumar R/o house no. 2525, Mohalla Phool Chakker Rupnagar. The number of the motorcycle was PB12AA-1686 mark Hero Splender. The

motor-cyclist namely Manoj Kumar was tying a cloth against his waist of Kesari Colour having some article tied in the same.

I disclosed about my name, rank, posting and identity. I further disclosed that I suspect some contraband in the bag being carried by Ajay Kumar and in the cloth which is tied to the waist of Ajay Kumar. I further disclosed about legal right to the accused that they had got legal right to get their search conducted from a Gazetted Officer or a Magistrate and they can be called on the spot. Both the persons reposed confidence with me on which consent memo Ex. PW4/A was got recorded by me duly signed by both accused and attested by HC Sohan Singh as attesting witness.

On the search of the cloth (Parna) which accused Manoj Kumar had tied, a green colour polythene in which there was a visible polythene which was having white colour intoxicant powder. The same was weighed and was found to be 560 Gms. 10/10 gms were drawn as sample and was put in two small polythene and the polythene were put into plastic cases. The parcel of the same was prepared and the remaining 540 gms of intoxicant powder was again put into the visible polythene and the parcel of the same was prepared. All the three parcels were duly sealed by me with my seal TS. Sample seal was prepared separately. The seal was handed over to HC Sohan Singh after use by me. Form no. 29 M was filled up partially.

On the search of the bag which accused Ajay Kumar was holding, a laptop of black colour of HP Company having serial no. CND43540MP Model no.1512078TU was recovered. The accused was not able to prove the ownership of laptop. As the accused was not able to produce any license or permit to keep the intoxicant powder and further was not able to prove the ownership of laptop. Ruqa Ex. PW4/B was sent for registration of FIR being Ex.PW4/C, noting of the same is Ex.PW4/D. Recovery memo regarding 560 gms of intoxicant powder is Ex. PW4/E. The motor-cycle bearing no. PB12AA-1686 was taken into police possession vide memo Ex. PW4/F. The recovery memo regarding laptop from accused Ajay Kumar is Ex. PW4/G. Rough site plan was prepared by me

being Ex. PW4/H. The accused were arrested vide memo Ex. PW4/J. The personal search memo of accused Ajay Kumar is Ex. PW4/K and personal search memo of accused Manoj Kumar is Ex. PW4/L. Statement of witnesses were recorded under section 161 Cr.PC by me. All the memos were attested by HC Sohan Singh as attesting witness.

After completing the investigation on the spot, the accused along with the case property were produced before SHO namely SI Pawan Kumar. He verified the facts from the accused and checked the case property. After finding the same, to be correct, SHO affixed his seal PK on the case property i.e. three parcel. The accused were put in police lock-up and the case property deposited with MHC. Form no.29 M was filled up by SHO. Sample seal was also seeing by him and both i.e. form no. 29 M, sample seal along with case property were deposited with MHC.

On 15.7.2016, the accused along with case property were produced before Illaqa Magistrate (Duty Magistrate). Application Ex. PW4/M was moved under section 52 A NDPS Act. Inventory report being Ex. PW4/N. The orders of Ld. Magistrate is Ex. PW4/O. Police remand of the accused was taken. The accused made confessional statement and the same being Ex. PW4/P. The owner of the laptop namely Manoj Kumar S/o Late Isher Dass identified the laptop and the memo of the same is Ex. PW1/A. Sample seals being Ex. PW4/Q, form no. 29 M is Ex. PW4/R and the chemical examiner report is Ex. PW4/S. All the investigation was done by me being true and correct. I have seen the case property today and the same being Ex. MO1 i.e. sample of 10 gm of intoxicant powder, Ex. MO2 i.e. laptop of HP Company, Ex. MO3 i.e. Motorcycle bearing no. PB12AA-1686 and Ex. MO4 i.e. Kesari Colour cloth (parna). I identify the accused Manoj Kumar @ Lucky from whom 560 gms of intoxicant powder was recovered and accused Ajay kumar is not present today.

I identify accused Ajay Kumar as shown to me through Video conference”.

15. PW-5 HC Sohan Singh No. 540/R deposited as under :-

“Stated that on 14.7.2016, I was posted at PS City Rupnagar. On that day, I along with ASI Tarlochan Singh , HC Prem Nath, ASI Makhan Singh were on patrolling and nakkabandi. The police party has placed Nakka near cremation ground Gauoshala Road Rupnagar. At about 8:45 PM, a motor-cycle was seen coming from Railon side, on which two persons were sitting. The police party made a signal to the motor-cycle borne persons to stop. They tried to fled away from the spot. The persons who was sitting at the back jumped from the motor-cycle with the intention of running from the spot. He was having a small bag of black colour on his shoulder. He was apprehended by ASI Makhan Singh. The other person i.e. who was driving the motor-cycle was also apprehended. IO asked the name of the person who was sitting at the back seat. He disclosed his name as Ajay Kumar @ Aju, S/o Kuldeep Singh R/o 17A/1, Green Avenue Rupnagar and the motor-cyclist disclosed his name as Manoj Kumar @ Lucky S/o Bhupinder Kumar R/o house No. 2525, Mohalla Phool Chakker Rupnagar. The number of the motorcycle was PB12AA-1686 mark Hero Splender. The motor-cyclist namely Manoj Kumar was tying a cloth against his waist of Kesari Colour having some article tied in the same.

IO disclosed about his name, rank, posting and identity. IO further disclosed that his suspect some contraband in the bag being carried by Ajay Kumar and in the cloth which is tied to the waist of Ajay Kumar. IO further disclosed about legal right to the accused that they had got legal right to get their search conducted from a Gazetted Officer or a Magistrate and they can be called on the spot. Both the persons reposed confidence with IO on which consent memo Ex. PW4/A was got recorded by IO duly signed by both accused and attested by me as attesting witness.

On the search of the cloth (Parna) which accused Manoj Kumar had tied, a green colour polythene in which there was a visible polythene which was having white colour intoxicant powder. The same was weighed and was found to be 560 Gms. 10/10 gms were drawn as sample and was put in two small polythene and the polythene were put into plastic cases.

The parcel of the same was prepared and the remaining 540 gms of intoxicant powder was again put into the visible polythene and the parcel of the same was prepared. All the three parcels were duly sealed by IO with his seal TS. Sample seal was prepared separately. The seal was handed over to me after use by me. Form no. 29 M was filled up partially.

On the search of the bag which accused Ajay Kumar was holding, a laptop of black colour of HP Company having serial no. CND43540MP Model no. 1512078TU was recovered. The accused was not able to prove the ownership of laptop. As the accused was not able to produce any license or permit to keep the intoxicant powder and further was not able to prove the ownership of laptop. Ruqa Ex. PW4/B was sent for registration of FIR being Ex. PW4/C, noting of the same is Ex. PW4/D. Recovery memo regarding 560 gms of intoxicant powder is Ex. PW4/E. The motor-cycle bearing no. PB12AA-1686 was taken into police possession vide memo Ex. PW4/F. The recovery memo regarding laptop from accused Ajay Kumar is Ex. PW4/G. Rough site plan was prepared by IO being Ex. PW4/H. The accused were arrested vide memo Ex. PW4/J. The personal search memo of accused Ajay Kumar is Ex. PW4/K and personal search memo of accused Manoj Kumar is Ex. PW4/L. Statement of witnesses were recorded under section 161Cr.PC by IO. All the memos were attested by me as attesting witness.

After completing the investigation on the spot, the accused along with the case property were produced before SHO namely SI Pawan Kumar. He verified the facts from the accused and checked the case property. After finding the same, to be correct, Sho affixed his seal PK on the case property i.e. three parcel. The accused were put in police lock-up and the case property deposited with MHC. Form no.29 M was filled up by SHO. Sample seal was also seeing by him and both ie. form no. 29 M, sample seal along with case property were deposited with MHC. My statement was recorded by the IO. I identified the accused”.

16. PW-6 SI Pawan Kumar deposed as under:-

“Stated that on 14.07.2016, I was posted at PS City Rupnagar. On the said date, ASI Tarlochan Singh, produced before me accused Manoj Kumar, Ajay Kumar along-with two samples each containing 10 gm of intoxicating powder and one parcel containing remaining contraband weighing 540 gm sealed with the seal bearing impression TS. After verifying the antecedents of the accused and the case property, I affixed my seal bearing impression PK on the two samples and the bulk case property and sample seal already Ex.PW4/Q and form no. 29M already Ex.PW4/R were completed and affixed my seal on the said exhibits at point-A. I identify my signatures on the above said exhibits at point-A. I affixed my seal bearing impression PK on the representative samples and the remaining bulk contraband. I identify my signature on the Ex.MO1 at point-A which I have seen in the court today. Thereafter, I directed the ASI Tarlochan Singh to deposit the case property with MHC and the accused were put up in the lock-up. IO recorded my statement. I identify accused Manoj Kumar present in the court and accused Ajay Kumar present through VC”.

17. PW-7 Jitender Pal Singh, Assistant Dept. Manager, Croma Store, Mohali deposed as under:-

“Stated that I am working as Assistant Dept. Manager at Infiniti Retail Limited Trading as Croma. Today, I have brought summoned record i.e. invoice no. SLF02A045010096793 of laptop of make HP. The laptop was sold to Manoj Kumar. The item code of the same is 173154. The computer generated invoice is Ex.PW7/A. The performa bill invoice is Ex.PW7/C. The certificate under Section 65-B is Ex.PW7/B”.

18. On closure of the prosecution evidence, the accused were examined under Section 313 Cr.P.C in which all the incriminating evidence appearing against the accused was put to them. They denied the same and pleaded their false implication.

19. In his defence accused Manoj Kumar tendered into evidence attested copies of judgments of case titled as “State Vs. Manoj Kumar” FIR

No.28 dated 20.02.2016 under Sections 454, 380, 411 of IPC, Police Station City Rupnagar Ex.D1, another case titled as “State Vs. Manoj Kumar” FIR No.242 dated 01.12.2015 under Sections 457, 380, 411, Police Station City Rupnagar Ex.D2, copy of FIR Ex.D3 of the same case, another case titled as “State Vs. Manoj Kumar” FIR No.117 dated 13.07.2016 under Section 457, 380, 411, Police Station City Rupnagar as Ex.D4, copy of FIR of the same case Ex. D5, another case titled as “State Vs. Manoj Kumar” FIR No.114 dated 11.07.2016 under Sections 380, 436, 457, 427, Police Station City Rupnagar as Ex.D6 and copy of its FIR No.D7.

20. Based on the evidence led by the accused/respondent Nos.1 and 2 were acquitted by the Court of Judge, Special Court, Rupnagar vide judgment dated 31.08.2019.

21. It is the aforementioned judgment which is under challenge in the present case.

22. The learned counsel for the appellant/State contends that the Trial Court has passed the judgment of acquittal on the basis of conjectures and surmises and wrongly acquitted the accused. The facts and circumstances of the present case were not properly appreciated by the Court. Minor discrepancies had been given undue importance. There was substantial compliance of Sections 42 and 50 of the NDPS Act. The non-joining of independent witnesses was not fatal to the prosecution case. He, therefore, contends that leave be granted to file an appeal against the acquittal of the respondent/accused.

23. The learned Amicus Curiae, on the other hand, contends that there was apparent non-compliance of Sections 42 and 50 of the NDPS Act.

The documents prepared at the time of search and seizure had the FIR

number mentioned despite the fact that the formal FIR came to be recorded later. No offence under Section 411 IPC was made out and there was no evidence that the laptop purportedly recovered from the accused belonged to PW1-Manoj Kumar. He, therefore contends that the judgment of acquittal was passed on a proper appreciation of the evidence and the application seeking grant of leave to appeal was liable to be dismissed.

24. We have heard counsel for the parties and have gone through the lower Court record.

25. The primary question which requires to be answered is whether there has been compliance of Section 50 of the NDPS Act.

26. In the present case the prosecution has examined PW4 ASI Tarlochan Singh, I.O. of the present case, who in his testimony has deposed that the accused were apprehended on the suspicion that they were in possession of some contraband and at that time, he made aware the accused of their legal right that they may get conducted their search from any Gazetted Officer or Magistrate. However, in the ruqa Ex.PW4/B the offer which was given to the accused by the I.O. was that they had a legal right to get their search conducted from him or from any Gazetted Officer or Magistrate. The consent memo Ex.PW4/A is to the similar effect. Therefore, firstly, the offer which has been given to the accused by the I.O. is misleading. As per provisions of the NDPS Act in the present case the search of the accused could only be made by a Gazetted Officer or Magistrate. The I.O., who is not a Gazetted Officer could not have made the offer to the accused that they had a legal right to get searched from him. The prosecution has proved the consent memo on record as Ex.PW4/A.

Therefore, there is an inconsistency in the consent memo with regard to the

offer made to the accused and in the testimony of the I.O. ASI Tarlochan Singh (PW4).

27. In Arif Khan @ Agha Khan Versus State of Uttarakhand, 2018(2) RCR (Criminal) 931, the Hon'ble Supreme Court held as under:-

“7. Thereafter, the accused was asked by the police personnel of raiding party as to whether he is in possession of contraband "Charas". The accused admitted that he is in possession of "Charas". On apprehending the accused, he was informed by the police personnel that he has a legal right to be searched in the presence of a Gazetted Officer or a Magistrate to which the accused replied that he has a faith on the raiding police party and consented to be searched by them.

8. The raiding police party accordingly obtained his consent in writing to be searched by the raiding police party. The raiding police party then searched the accused which resulted in seizure of "Charas" weighing around 2.5 K.G. in quantity from his body.

*** *** ***

19. The short question which arises for consideration in the appeal is whether the search/recovery made by the police officials from the appellant (accused) of the alleged contraband (charas) can be held to be in accordance with the procedure prescribed under Section 50 of the NDPS Act.

20. In other words, the question that arises for consideration in this appeal is whether the prosecution was able to prove that the procedure prescribed under Section 50 of the NDPS Act was followed by the Police Officials in letter and spirit while making the search and recovery of the contraband "Charas" from the appellant (accused).

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 v. Baldev Singh 1999(3) RCR (Criminal) 533:

(1999) 6 SCC 172 and Vijaysinh Chandubha Jadeja (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 v. State of Rajasthan, 2013(2) RCR (Criminal) 1: 2013 (2) SCC 67 and Narcotics Control Bureau v. Sukh Dev Raj Sodhi, 2011(3) RCR (Criminal) 370 : 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 the 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)*. This we say for the following reasons.

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

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

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

(emphasis supplied)

28. Quite apparently, there is non-compliance of Section 50 of the NDPS Act which is fatal to the prosecution case.

29. It is significant to point out that the prosecution has proved recovery memo Ex.PW4/E and PW4/G and has also further proved the site plan Ex.PW4/H and on all the memos the FIR number has been mentioned. As per the cross-examination of the I.O. the Ruqa was sent at about 9-45 P.M. and the site plan was prepared at 9-00 P.M. The prosecution has failed to explain as to how the number of the FIR is mentioned in the recovery memo and on the site plan when till that time no FIR was registered.

30. Further, the compliance of Section 42 of NDPS Act has not been made which is also a mandatory provision. It has come during the cross-examination of the I.O. that no information was sent to the Senior Officers, which is fatal to the case of the prosecution.

31. As per the case of the prosecution white intoxicant powder was recovered from accused Manoj Kumar, whereas in the FSL report Ex.PW4/S

in the column of articles received, it has been mentioned that on opening the parcel it was found to contain white colour powdery material mixed with peach and yellow coloured particles. Apparently, the intoxicant which was recovered from the accused is different from the one sent for forensic analysis. This also creates a doubt in the case of the prosecution.

32. Another discrepancy in the case of the prosecution is that it has come during the cross-examination of S.I. Pawan Kumar, (PW6), who was then SHO of Police Station City Rupnagar that after affixing his seal on the case property, he kept his seal with him. Therefore, the tampering of the case property till the same was produced before the Magistrate cannot be ruled out.

33. In the present case the accused have also been charge sheeted under Section 411 of IPC. As per the story of the prosecution, from the black bag which was carried by accused Ajay Kumar when search was conducted a laptop of black colour of HP Company having serial No. CND43540MP Model no. 1512078TU was recovered and accused was unable to produce any document of the ownership of the laptop. Recovery memo in this regard has been prepared which is Ex.PW4G which has been proved by the I.O.

34. The perusal of the said recovery memo reveals that the same has not been signed by the accused. Moreover, it has been mentioned in the recovery memo that the said laptop was recovered from accused Ajay Kumar and he failed to produce any document with regard to the ownership of the said laptop. The prosecution in this regard examined PW1 Manoj Kumar stated to have been the owner of the said laptop. He, in his testimony before the Court deposed that he was doing a private job at Mohali and on 17.02.2016 he was on his routine duty and his brother and mother were also

not at home. At about 4.00 P.M. his brother returned back home and found that the lock of the room was broken and he intimated the same to him. His laptop make HP, cash and one mobile phone kept in the almirah were stolen by some unknown persons and on 20.02.2016 one case was registered against unknown persons and he deposed that his laptop was recovered in this case and same was identified by him vide identification memo Ex.PW1/A. He had purchased the said laptop from Bangalore and proved the bill of the said laptop as mark 'A'. However, during his cross-examination the said witness deposed that he never met the police regarding this case and his statement was not recorded by the police in the present case. He had not identified his laptop and had not taken the laptop on Sapurdari and on that day he had not seen the said laptop in the court. He did not have the original bill of the said laptop. In this regard the prosecution also examined PW7 Jitender Pal Singh, Assistant Department Manager, Croma Store, Mohali, who deposed that he had brought the summoned record of invoice No.SLF02A045010096793 of laptop make HP and the said laptop was sold to Manoj Kumar, the item code was 173154 and computer generated invoice was Ex.PW7/A and proforma bill invoice was Ex.PW7/C. From the perusal of the recovery memo of the laptop, it reveals that it has been mentioned that one laptop of HP company black colour having series No.CND43540MP Model no.1512078TU had been recovered. In the bill which has been produced by Manoj Kumar mark 'A' neither the series number nor the model number of the laptop has been mentioned. Similarly, in the proforma bill invoice Ex.PW7/C which has been produced by PW7 Jitender Pal Singh on the same also neither the series number nor the model number of the said laptop has been mentioned. The second document which has been proved by

PW7 Jitender Pal Singh is the computer generated invoice Ex.PW7/A. From the perusal of the same, it reveals that neither the invoice number nor the date is similar with the bill which has been produced by PW1 Manoj Kumar mark 'A'. On mark 'A' i.e. bill produced by PW1 Manoj Kumar of his laptop invoice number is mentioned as PIF02A045010002250 dated 03.10.2014, whereas in Ex.PW7/A which is the computer generated invoice, the invoice number is SLF02A045010096793 dated 05.10.2014. In the recovery memo Ex.PW4/G, series number CND43540MP Model no.1512078TU has been mentioned, but on the invoice Ex.PW7/A no model number of the laptop has been mentioned. Therefore, the prosecution has failed to prove on record that the laptop which has been allegedly recovered from accused Ajay Kumar is the laptop of PW1 Manoj Kumar. Therefore, the ownership of the laptop has not been proved on record. In order to prove the offence under Section 411 of IPC against accused the prosecution had to establish its case by leading cogent and convincing evidence that the said laptop was a stolen property. However, the prosecution failed to prove that accused Ajay Kumar was found in possession of stolen property. Therefore, accused Ajay Kumar and Manoj Kumar were acquitted of the charge framed against them under Section 411 of IPC.

35. The accused Ajay Kumar and Manoj Kumar have also been charge-sheeted under Sections 192 and 181 of Motor Vehicles Act, but neither any averment has been made nor any evidence has been led by the prosecution in this regard. There is no evidence on the record to prove such offences. Accordingly, accused Ajay Kumar and Manoj Kumar were also rightly acquitted of the charge framed against them under Sections 192 and 181 of Motor Vehicles Act.

36. As to how an appeal against a judgment of acquittal is to be dealt with, the Hon’ble Supreme Court in ***Kallu @ Masih & Ors. Vs. State of Madhya Pradesh 2006(1) RCR (Criminal) 427*** has held as under:-

“ 8.While deciding an appeal against acquittal, the power of the Appellate Court is no less than the power exercised while hearing appeals against conviction. In both types of appeals, the power exists to review the entire evidence. However, one significant difference is that an order of acquittal will not be interfered with, by an appellate court, where the judgment of the trial court is based on evidence and the view taken is reasonable and plausible. It will not reverse the decision of the trial court merely because a different view is possible. The appellate court will also bear in mind that there is a presumption of innocence in favour of the accused and the accused is entitled to get the benefit of any doubt. Further if it decides to interfere, it should assign reasons for differing with the decision of the trial court.”

37. In view of the aforementioned discussion and keeping in view the law laid down in ***Kallu @ Masih & Ors. Case (supra)***, we find no reason to interfere with the well-reasoned judgment of acquittal passed by the Judge, Special Court, Rupnagar. Therefore, the application seeking grant of leave to appeal stands dismissed.

(JASJIT SINGH BEDI)
JUDGE

(SUDHIR SINGH)
JUDGE

October 15, 2024
Jitesh

Whether speaking/reasoned	Yes/No
Whether reportable	Yes/No