



124

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH****CRA-S-2933-SB-2016 (O&M)****Date of decision: 29th May, 2024**

Salwinder Singh @ Shinda

...Appellant

Versus

State of Punjab

...Respondent

CORAM: HON'BLE MR. JUSTICE MAHABIR SINGH SINDHU

Present: Mr. Joginder Pal Ratra, Advocate (*Amicus Curiae*)
for the appellant.

Ms. Manjot Kaur, AAG, Punjab.

MAHABIR SINGH SINDHU, J.

Present appeal has been filed against the judgment of conviction and order of sentence dated 09.08.2016 passed by learned Judge, Special Court, Tarn Taran, whereby appellant was convicted under Section 22 of Narcotic Drugs & Psychotropic Substances Act, 1985 (for short "Act") and sentenced to undergo RI for a period of 10 years and to pay fine of Rs.1 lakh with default stipulation.

2. Case of the prosecution, as noticed in paras 2 & 3 of the impugned judgement passed by learned Special Court, are reproduced as under:-

"2. In brief story of the prosecution is that on 8.6.2014, when police party headed by ASI Tarlochan Singh along with his fellow officials were going from Chowk Bahmaniwala, Patti towards village Bahmaniwala and had reached the bridge of drain, they saw a person coming on foot from the left side of



pear orchard, who on seeing the police party turned back and tried to take out plastic packet from his pocket so as to throw it away, but before he could do any such thing, Incharge Police Party ASI Tarlochan Singh with the help of his fellow officials intercepted him and enquired about his antecedents, who disclosed himself to be Salwinder Singh alias Shinda son of Pargat Singh, caste Jatt, resident of Wara Teliyan. However, when this Incharge Police Party collected the plastic packet, which said Salwinder Singh was holding in his right hand and the same was checked and recovered intoxicant powder in it. Thereafter, said Incharge Police Party separated 10 Gms of intoxicant powder from the contents of this plastic packet and remaining contents of the same when weighed separately came out to be 310 Gms. Thereafter, said Incharge Police Party converted both these separated contents of intoxicant powder into parcels and put into small plastic boxes and sealed the same using his seal bearing letters TS. A separate sample seal chit and FSL form were also prepared and original seal after its use was handed over to HC Jatinder Singh 1152. Since all this happened to be a chance recovery, therefore, no independent person from the public was joined and even no Gazetted Officer could be called at the spot. However, when this Salwinder Singh alias Shinda could not furnish any such reasonable explanation as to how he has kept 320 Gms of Intoxicant powder in his possession, he rendered himself liable u/s 22/61/85 of NDPS Act on account of his keeping 320 Gms of intoxicant powder in his custody, so ruqa was sent to Police Station through PHG Kishan Singh 3988, on the basis of which, formal FIR was registered against the accused. Thereafter, rough site plan of the place of recovery was prepared. Statements of the witnesses of this recovery were recorded. Thereafter, both these sealed parcels were taken into custody and accused was also formally arrested. After completing remaining investigation at the spot, police party came back to police station, where said Incharge produced accused, both the sealed parcels bearing seals TS and other connected documents



before SI/SHO Gurwinder Singh, who after ascertaining about factum of this recovery and intactness of the seals also appended his own seals on both the sealed parcels along with connected documents and accused was put into lockup after initial investigation and said SI/SHO kept the case property in police Malkhana under double lock system.

3. Thereafter, on the following day i.e. 9.6.2014 as the above said SI/SHO Gurwinder Singh was supposed to go to Hon'ble Punjab & Haryana High Court at Chandigarh, therefore, he took this case property from police Malkhana and handed over the same to SI Karanjit Singh with direction to further handover the same to IO of this case ASI Tarlochan Singh for producing it before the court of Illaqa Magistrate. This is how, said IO after taking charge of this case property again produced accused in the said court of Illaqa Magistrate along with two sealed parcels bearing seals letters TS and GS along with FSL form and sample seal and moved a written request in this regard for carrying out inventory proceedings. Learned Illaqa Magistrate broke the seals of bulk parcel and drew representative sample weighing 10 Gms of intoxicant powder and thereafter converted the same into parcel and sealed it using his seal bearing letters PS and even IO of this case also appended his own seal bearing letters TS on this representative sample as well as remaining bulk parcel and other connected documents comprising of FSL form and sample seal chit were also seen by learned Judicial Magistrate and accused was remanded to judicial custody till 19.6.2014. After accomplishing this task said IO again handed over all the three sealed parcels already bearing seals TS and GS, which were drawn at the place of recovery and another representative sample again weighing 10 Gms bearing seals PS and TS and one bulk parcel weighing 300 Gms again bearing seals PS and TS along with FSL form and re-deposited the same with SI/SHO Police Station Patti. Thereafter, on 17.6.2014 SI/SHO again took out sealed sample parcel from police Malkhana and got the docket prepared from the office of SSP, Tarn Taran and



then he again kept this sealed parcel in police Malkhana. Thereafter, on 9.7.2014, he again took out this parcel from police Malkhana and handed over the same to HC Sukhraj Singh 1241 vide road no. 186/21 with a direction to take the same to the office of FSL Mohali and receipt produced by the above said official was retained on the police record. Thereafter, remaining investigation in this case was also completed and finally after receiving report of Chemical Examiner, which disclosed the contents of sealed parcel to be that of narcotic material of Diphenoxylate Hydrochloride, accused was challaned and was sent to the Court to stand this trial.

3. On presentation of challan, copies of documents relied upon by the prosecution along with report under Section 173 Cr.P.C were supplied to the accused in compliance of Section 207 Cr.P.C.

4. Finding *prima facie* case, accused was charge-sheeted under Section 22 of the Act to which he did not plead guilty and claimed trial.

5. In order to prove its case, prosecution examined as many as 06 prosecution witnesses, namely, PW-1 ASI Kulwant Singh, PW-2 ASI Tarlochan Singh, PW-3 HC Jatinder Singh, PW-4 SI Karanjit Singh, PW-4 Sukhraj Singh (repeated), PW-5 Inspector Gurwinder Singh.

6. Statement of accused was recorded under Section 313 Cr.P.C in which all the incriminating material evidence was put to him, but he denied the same and pleaded false implication.

7. In defence evidence, HC Balbir Singh was examined as DW-1.

8. After hearing both sides and evaluating the evidence brought on record, learned Special Court convicted and sentenced the appellant as noticed above.

9. Feeling dis-satisfied with the impugned judgment and order, present appeal has been filed.



10. It is apposite to mention here that during the pendency of the present appeal, appellant had moved an application (CRM-13024 of 2017) for suspension of his remaining sentence, which was eventually allowed along with a bunch of other applications by a Coordinate Bench, vide order dated 29.01.2018. The said order was challenged before Hon'ble the Supreme Court in Crl. Appeal No. 1512 of 2018 (Arising out of SLP (Crl.) No. 4762 of 2018), which was allowed in the following terms:-

“18. Accordingly the impugned order passed by the High Court is hereby set aside and the concerned authorities are directed to take the accused-respondents herein into custody forthwith.

19. Lastly, the counsels for respondents in Appeals arising out of SLP (Crl.) No.4816/2018 and SLP (Crl.) No. 4817/2018 have specifically pleaded that the respondents have already undergone a considerable period under incarceration. In light of the same, we request the High Court to expedite the hearings and dispose of the appeals accordingly. It is needless to observe that the observations made during the course of this order are only for deciding these appeals.”

11. Vide order dated 07.05.2019, the Coordinate Bench segregated all the appeals by observing that all the cases have to be heard individually and separately, the order is extracted herein below:-

“Learned counsel(s) for the appellant in the instant case as well as in the connected cases are ad idem that the facts of every case are distinct from other. Therefore, all the cases have to be heard individually and separately.

In view of the above, the instant appeal is ordered to be segregated and listed on different dates for arguments.

Adjourned to 27.09.2019.”

12. None appeared on behalf of the appellant on three consecutive



dates and this Court requested Mr. Joginder Pal Ratra, Advocate (Enrl. No. P/1596/2005) to assist the Court on behalf of the sole appellant.

13. Learned *Amicus Curiae* contends that before effecting recovery of alleged contraband, no offer in terms of Section 50 of the Act was given to the appellant; thus the alleged recovery becomes inadmissible in law.

13.1 Also contends that alleged recovery was effected on 08.06.2014 at 11.05 a.m, but the sample was sent to FSL on 09.07.2014 and no plausible explanation has been given by the prosecution for keeping the contraband with them for such a long period and possibility of tampering with the sample also cannot be ruled out.

13.2 Further contends that admittedly, the parcel was deposited with the office of Chemical Examiner, Kharar by Constable Sukhraj Singh vide report dated 03.11.2014, but while appearing as PW-4, Constable Sukhraj and PW-5 Inspector Gurwinder Singh deposed that parcel had been deposited with FSL, Mohali and due to this reason both the above witnesses were declared hostile on asking of the Public Prosecutor, but FSL report (Ex.PW2/11) speaks otherwise. Even DW-1 HC Balbir Singh, P.S. City Patti has testified that parcel had been deposited with the FSL, Mohali and brought on record documents (Ex.D-1 to D-6) and these documents also indicate that the sample had been sent to FSL, Mohali and not to FSL, Kharar; hence this major discrepancy is fatal to the prosecution case.

13.3 Still further contended that recovery was effected in the broad day light and many people were present at the place of recovery as admitted by PW-3 HC Jatinder (one of the recovery witness), still the prosecution failed to join any independent witness during the alleged recovery proceedings and non-joining of independent witness creates a doubt in the prosecution story.



13.4 In support of the contentions, reliance has been placed upon (i) *Vijaysingh Chandubha Jadeja Vs. State of Gujarat 2011 AIR (SC) 77 SC*; (ii) *Sanjeev @ another Vs. State of Himachal Pradesh 2022(2) SCC (Criminal) 522 SC*; (iii) *Mina Pun Vs. State of Uttar Pradesh 2023(3) Law Herald (SC) 2033*; (iv) *Harjeet Singh Vs. State of UT 2023(3) RCR (Criminal) 555*; (v) *Mohammed Khalid and another Vs. State of Telangana 2024 (20 RCR (Criminal) 102*; (vi) *Simarjit Singh Vs. State of Punjab 2023 CrL. L.R (SC) 1502*; (vii) *Sunil Basant Malvi Vs. State of Maharashtra (Criminal Appeal No. 270 of 2023) Bom. (viii) Bothilal vs. The Intelligence Officer Narcotics Control Bureau 2023(2) RCR (Criminal) 823*; (ix) *Yusuf @ Asif Vs. State 2023 CrL. LR (SC) 1483 SC* and; (x) *Balwinder Singh @ Billa Sarpanch @ Chairman and ors. Vs. State of Punjab CRA-D-100-2020 (DB) (Pb. &Hr).*

14. *Per contra*, learned State counsel has vehemently opposed the contention of the appellant and submitted that recovery effected in the present case is a chance recovery, therefore, non-compliance of Section 50 of the Act is not fatal to the case of prosecution. To buttress her argument, learned State counsel has placed reliance on a judgment rendered by Hon'ble the Supreme Court in *State of Himachal Pradesh Versus Sunil Kumar (2014) 4 SCC 780*.

14.1 Also submitted that PW-2 ASI Tarlochan Singh has testified that sealed parcels of the case property during the period when the same was in custody had not been tampered with; hence delay in sending the samples is immaterial.

14.2 Further submitted that non-joining of independent witness shall not make the prosecution case doubtful in any manner because now-a-days, nobody wants to become a witness to the police proceedings in order to



avoid future complication.

14.3 Lastly submitted that investigating officer had tried his level best to join an independent witness, but none came forward to join the recovery proceedings.

15. Heard learned counsel for the parties and perused paper-book.

16. It is the case of prosecution that on 08.06.2014 at 11.00 a.m., Police party headed by ASI Tarlochan Singh was going from Bahmaniwala Chowk to Patti and appellant was seen coming on foot from the side of Pear Orchard. On seeing the Police party, he turned back and tried to take out plastic packet from his pocket, but was apprehended by the Police party. A plastic packet from his right hand was taken into possession by the seizing officer. Upon opening the same, it was found to be intoxicant powder. A sample of 10 gm was drawn and on weighment, the remaining quantity came out to be 310 gms. Both the parcels were put in separate small boxes and sealed with the seal bearing letters 'TS'. A separate sample seal chit and FSL form were also prepared on the spot. Original seal after use was handed over to HC Jatinder Singh. In this regard, relevant part of the examination-in-chief of PW-2 ASI Tarlochan Singh (I.O.) recorded before learned Special Court is reproduced as under:-

“My Police party apprehended said person and on my asking, he disclosed his name as Salwinder Singh, accused present in the court today. Polythene bag carried by accused in his right hand was checked by me and intoxicant powder was recovered from it. From the recovered contraband, 10 Gm was taken as sample and it was put in a polythene bag and further put in the plastic container. On weighing the remaining intoxicant powder, it came to 310 Gm intoxicant powder. It was put in a different plastic container and total two parcels were prepared on the spot.”



From the above extract, it is apparently clear that alleged recovery was effected by ASI Tarlochan Singh, but no offer, much less a valid offer was given to the appellant of being searched in the presence of a Gazetted Officer; or a Magistrate.

17. Section 50 of the Act casts a duty on the empowered officer to inform the accused of his right of search in terms of Section 50 of the Act. The failure to inform an accused of his valuable right would render the search illegal because the suspect would not be able to avail the protection which is inbuilt mechanism under Section 50 of the Act. Otherwise also, the safeguard envisaged by Section 50 of the Act is not a mere formality; rather incorporated with an object to avoid false implication in such cases. The Act provides stringent punishments for the offences contained therein; thus, to save the innocent, certain safeguards have been bestowed upon the accused by the legislature under Section 50 and this provision is mandatory in nature.

18. Here, it would be profitable to make reference to the Constitution Bench Judgment of Hon'ble the Supreme Court in ***State of Punjab Versus Baldev Singh (1999) 6 SCC 172***. Paras 32 and 57(6) of the same being relevant are reproduced as under:-

“32. However, the question whether the provisions of Section 50 are mandatory or directory and, if mandatory, to what extent and the consequences of non-compliance with it does not strictly speaking arise in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched. Therefore, without expressing any opinion as to whether the provisions of Section 50 are mandatory or not, but bearing in mind the purpose for which the safeguard has been made, we hold that the provisions of Section 50 of



the Act implicitly make it imperative and obligatory and cast a duty of the investigating officer (empowered officer) to ensure that search of the person (suspect) concerned is conducted in the manner prescribed by Section 50, by intimating to the person concerned about the existence of his right, that if he so requires, he shall be searched before a gazetted officer or a Magistrate and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate would cause prejudice to the accused and render the recovery of the illicit article suspect and vitiate the conviction and sentence of the accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered during a search conducted in violation of the provisions of Section 50 of the Act. The omission may not vitiate the trial as such, but because of the inherent prejudice which would be caused to an accused by the omission to be informed of the existence of his right, it would render his conviction and sentence unsustainable. The protection provided in the section to an accused to be intimated that he has the right to have his personal search conducted before a gazetted officer or a Magistrate, if he so requires, is sacrosanct and indefeasible — it cannot be disregarded by the prosecution except at its own peril.”

“57. On the basis of the reasoning and discussion above, the following conclusions arise:

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(6) That in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Section 50 are mandatory or directory, but hold that failure to inform the person concerned of his right as emanating from sub-section (1) of Section



50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law.”

19. Still further, Constitution Bench of Hon’ble the Supreme Court while dealing with the provisions of Section 50 of the Act in ***Vijaysinh Chandubha Jadeja Versus State of Gujarat, (2011) 1 SCC 609***, held that “it is mandatory and requires strict compliance”. For reference, paragraph Nos. 24 & 29 of the judgment are extracted as under:-

“24. Although the Constitution Bench in Baldev Singh case did not decide in absolute terms the question whether or not Section 50 of the NDPS Act was directory or mandatory yet it was held that provisions of sub-section (1) of Section 50 make it imperative for the empowered officer to “inform” the person concerned (suspect) about the existence of his right that if he so requires, he shall be searched before a gazetted officer or a Magistrate; failure to “inform” the suspect about the existence of his said right would cause prejudice to him, and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from the person during a search conducted in violation of the provisions of Section 50 of the NDPS Act. The Court also noted that it was not necessary that the information required to be given under Section 50 should be in a prescribed form or in writing but it was mandatory that the suspect was made aware of the existence of his right to be searched before a gazetted officer or a Magistrate, if so required by him. We respectfully concur with these conclusions. Any other



interpretation of the provision would make the valuable right conferred on the suspect illusory and a farce.”

“29. In view of the foregoing discussion, we are of the firm opinion that the object with which the 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 insofar 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 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.”

Perusal of above extract clearly reveals that it is imperative on the part of the empowered officer to apprise the person of his right to be searched before a gazetted officer; or a Magistrate and this provision is mandatory which requires strict compliance.

20. Moreover, it is the case of prosecution that alleged contraband was weighed on the spot and put in two separate small boxes i.e. 10 gm in one parcel and the remaining 310 gm. in another, without giving any offer to the appellant for his search being conducted before any gazetted officer or



any magistrate. It is worthwhile to observe here that during the course of hearing, this Court was apprised by learned *Amicus Curiae* that distance between the alleged place of recovery i.e. village Bahmaniwala and the office of Deputy Superintendent of Police, Patti as well as Sub-Divisional Magistrate, Patti is less than 02 km and there is no denial by learned State counsel to that effect. In such a scenario, this Court will not hesitate to take judicial notice of this aspect of the matter when distance between above places is acknowledged by both sides.

21. As already noticed, the recovery of alleged contraband was effected during broad day light at 11.00 am in the month of June, 2014; therefore, denying the opportunity to appellant for his search before a gazetted officer or magistrate shall amount to complete negation of the mandatory provisions of Section 50 of the Act.

22. *A fortiori*, there is no exception carved out under Section 50 of the Act to the effect that seizing officer could deny this valuable right of search before a gazetted officer or magistrate merely by reciting in the *ruqa* that “*it is a chance recovery*”, when the police party was well prepared in this regard, carrying weighing machine along with empty containers.

23. Although, learned State counsel tried to rely upon the judgment in case of ***State of Himachal Pradesh (supra)***, but that is not helpful for the following reasons:-

(i) In ***State of Himachal Pradesh's (supra)***, the Constitution Bench judgment rendered in ***Vijaysinh Chandubha Jadedda's case(supra)*** was not brought to the notice of Bench consisting of two Hon'ble Judges.

(ii) In that case, recovery was effected during checking of passengers who were traveling ticketless, but in the case in



hand, Police party was well prepared for searching the bad elements along with necessary apparatus.

(iii) In *Vijaysinh Chandubha Jadedda's case(supra)*, there is no exception carved that if a police party apprehends any suspect carrying contraband like the present case one, then it is not obligatory for the seizing officer to comply with the provisions of Section 50 of the Act.

24. In view of the above discussion, this Court is of the considered opinion that PW-2 ASI Tarlochan Singh, while effecting the alleged recovery of contraband, did not make offer to the appellant for his search before any gazetted officer or a magistrate; thus, there is complete negation of the mandatory provisions of Section 50 of the Act; hence rendering the alleged recovery inadmissible in law.

25. As a result of the above conclusion, there is no option, except allow the appeal.

26. Consequently, appeal is allowed; judgment of conviction and order of sentence dated 09.08.2016, passed by learned Judge, Special Court, Tarn Taran are hereby set aside. Appellant is acquitted of the charges framed against him i.e. Section 22 of the Act. His bail/surety bonds stand discharged.

27. Case property be disposed off in accordance with law after the expiry of period of limitation.

28. Pending application(s), if any, shall also stand disposed off.

29th May, 2024
SN

(MAHABIR SINGH SINDHU)
JUDGE

Whether speaking/reasoned:
Whether Reportable:

Yes/No
Yes/No