

2024:PHHC:019675-DB

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**
CRM-A-359-2020 (O&M)
Reserved on: 18.01.2024
Pronounced on: 09.02.2024

State of Punjab

....Applicant

Versus

Vijay Kumar

....Respondent

**CORAM: HON'BLE MR. JUSTICE SUDHIR SINGH
HON'BLE MR. JUSTICE HARSH BUNGER**

Present :- Mr. Dhruv Dayal, Additional AG, Punjab,
for the applicant.

SUDHIR SINGH, J.

The present application seeking leave to appeal has been filed by the State of Punjab against the judgment dated 11.09.2019, passed by Special Court, Shaheed Bhagat Singh Nagar in FIR No. 59 dated 09.07.2018 at P.S. Banga, whereby and whereunder the learned Trial Court has acquitted the respondent of the charges under Section 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (referred to 'NDPS').

2. Vide order dated 28.04.2022, the Lower Court Record was called for. The same has been received.

3. The prosecution's case as per the report of the informant (PW-4), in brief, is that he along with his fellow police officials, was on patrol duty on 09.07.2018. At around 1.30 pm, they saw a haircut (mona) person carrying a polythene bag in his hand, coming from the front. On seeing the police vehicle, he

immediately hid himself in the bushes towards the canal. On suspicion, the said person was apprehended. He disclosed his name as Vijay Kumar; gave his consent for being searched and had reposed confidence in the Investigating Officer. Thereafter, he was searched and 16 injections of Buprenorphine IP of 2 ml each and 16 injections of Avil of 10 ml each, were recovered from said polythene bag. However, he could not produce any licence or permit for carrying the said injections. The parcel of the contraband was prepared and sealed by Investigating Officer and the entire case property was taken into possession.

4. On the basis of written report of the informant (P.W.4), FIR No. 59 of 2018 dated 09.07.2018 was registered under Section 22 of NDPS, Act and investigation was taken up. On completion of investigation, a charge-sheet was submitted under Section 22 of the Act and accordingly, cognizance was taken. Thereupon charges were framed against the appellant to which the appellant pleaded not guilty and claimed to be tried.

5. During trial, the prosecution examined five witnesses, namely, PW1 HC Satvir Singh (MHC); PW2 HC Ashok Kumar; PW3 Inspector Gopal Krishan (SHO); PW4 ASI Nand Lal (I.O.) and PW5 ASI Balbir Singh. All these witnesses had been members of the police patrol party. The prosecution also produced documentary evidence in the form of Ex. P1-sample seal 'GK'; Ex. P2-Entrustment Memo dated 09.07.2018; Ex. P3-Inventory Report dated 09.07.2018; Ex. P4-Application for Judicial Remand; Ex. P5-Application to get case property seen for depositing the same in judicial malkhana and Ex. P6, P7 –

remand order dated 09.07.2018; Ex. P8-Form No. 29; Ex. P9-Sample Seal 'NKG'; Ex. P10-F.S.L. Report received from F.S.L., Ludhiana; Ex.-P11 consent memo of accused; Ex. P12-Sample seal 'NL'; Ex. P13-Recovery Memo; Ex. P14-Ruqa; Ex. P15-F.I.R., Ex. P16-Endorsement; Ex. P17 Site plan; Ex. P18 Arrest Memo and Ex. P19-Personal Search Memo. The defence did not produce any oral or documentary evidence in support of its case. Thereafter, the statement of the accused was recorded under section 313 of the Cr.P.C. After conclusion of the trial, the learned Trial Court acquitted the accused, as noticed above.

6. The grounds considered by the learned Trial Court for acquittal of the respondent, are as follows:

1. The accused was not produced before any Gazetted Officer or a Magistrate for conducting his personal search, which amounted to violation of the mandatory provision of Section 50 of N.D.P.S. Act.
2. No details of the batch number, date of manufacturing and expiry date of the recovered injections of Buprenorphine had been mentioned in the recovery memo and ruqa. In absence thereof, the case of prosecution got weakened as regards the identity of the contraband recovered.
3. During the investigation, no independent witness had been joined despite the recovery being made in a public area. Furthermore, there were discrepancies and contradictions in the testimony of the police witnesses.
4. The Investigating Officer in this case did not raid the house of the accused-respondent to trace any other part of the contraband allegedly recovered from him. The police neither tried to trace the origin of the contraband nor verified from where the accused was coming and where he was heading for.

7. Being aggrieved by the impugned judgment of

acquittal, the instant application for leave to appeal has been filed by the State.

8. While assailing the impugned judgment, the learned State counsel has submitted that the Trial Court did not appreciate the evidence on record in correct perspective. It is further submitted that in the instant case, the contraband had been recovered from a polythene bag carried by the accused-respondent and not from his body and therefore, there was no requirement for giving him any option of being searched in the presence of a Gazetted Officer. It is yet further submitted that the accused-respondent had been made aware of his right of being searched by the Investigating Officer and he had reposed faith in the later. It is further submitted that merely because all the witnesses were the personnel of police patrol party, cannot be a ground to disbelieve the prosecution version. The learned State counsel has further submitted that once the recovery had been effected from a public place and no evidence was led by the accused-respondent regarding his false implication or him validly carrying the contraband, the factum of non-joining of an independent witness would lose its significance. In support of his arguments, he has relied upon the judgments of the Hon'ble Apex Court in Akmal Ahmad Vs. State of Delhi, (1999)3 SCC 337; State of Punjab Vs. Baldev Singh, (1999)6 SCC 172; Dayalu Kashyap Vs. State of Chhatisgarh, Manu/SC/1039/2022 and a Division Bench judgment of this Court in Harpreet Singh alias Gahgu Vs. State of Punjab, Law Finder Doc Id# 1430458.

9. After hearing the arguments advanced by the learned

State Counsel and upon thorough examination of the entire material available on the record, the following issue arises for determination in the present application seeking leave to appeal:-

“Whether in the facts and circumstances of the case, where the intoxicant injections, were recovered upon the personal search of the accused, there was non-compliance of the mandatory provisions of Section 50 of the NDPS Act?

10. Upon careful perusal of the available records, it becomes evident that the Investigation Officer, himself is a complainant in this case. He had expressed his intention to search the accused on the ‘basis of suspicion’ and had himself conducted the personal search of the accused in absence of any Gazetted Officer or Magistrate. In the instant case, it has been proved on record that the personal search of the accused had been done and in that process the alleged contraband was recovered. Therefore, it is not the case where only the search of the polythene bag was conducted and rather it was a case of personal search of the accused. Therefore, in view of the plethora of judgments of the Hon’ble Apex Court as also this Court, we are of the opinion that the trial Court was perfectly justified in holding that there was violation of the mandatory provisions of Section 50 of the NDPS Act.

11. In Rajan Kumar Chadha Vs. State of Himachal Pradesh, 2023 SCC OnLine SC 1262, the Hon’ble Apex Court, while examining the issue of applicability of the provisions of Section 50 of the NDPS Act, in case of personal search and/or search of a bag held by the accused, held as under:-

“83. However, it is important to note that the law down in *Yasihey* (supra) is no longer a good law. A three-Judge Bench in *State of H.P. v. Pawan Kumar*, (2005) 4 SCC 350, distinguished *Namdi* (supra) and held that the observations relied upon in it were obiter on this point. It was held as under:—

“16. ... The Bench then finally concluded that on the facts of the case Section 50 was not attracted. The facts of the case clearly show that the bag from which incriminating article was recovered had already been checked in and was loaded in the aircraft. Therefore, it was not at all a search of a person to which Section 50 may be attracted. The observations, which was made in the later part of the judgment (reproduced above), are more in the nature of obiter as such a situation was not required to be considered for the decision of the case. No reasons have been given for arriving at the conclusion that search of a hand-bag being carried by a person would amount to search of a person. It may be noted that this case was decided prior to the Constitution Bench decision in State of Punjab v. Baldev Singh. After the decision in Baldev Singh, this Court has consistently held that Section 50 would only apply to search of a person and not to any bag, article or container, etc. being carried by him.”

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“121. The only idea with which we have referred to the various decisions of this Court starting with *Balbir Singh* (supra) till *Dayalu Kashyap* (supra) is to highlight that Section 50 of the NDPS Act has been tried to be interpreted and understood in many ways. As noted earlier, in some of the decisions of this Court, the concept of “inextricably linked to person” was applied. In other words, if the bag, etc. is in immediate possession of the accused and the search is undertaken of such bag, etc., even then, according to those decisions, Section 50 would be applicable. It could legitimately be argued that the interpretation of Section 50 restricting its scope only to the search of a person of the accused would frustrate the object as the apprehension of the person concerned may continue to subsist that he may still be implicated by the police or any other person for more stringent punishment of carrying commercial quantity by getting rid of the rigor of the mandatory provision of Section 50 by implanting the contraband in a vehicle, bag, etc. accompanying the person.

What we are trying to convey has been explained in the case of *State v. Klein* [See : John C. Derrnbachet.al., *A Practical Guide to Legal Writing and Legal Method* (1994)]. In the said case, the issue before the U.S. Court was that whether a person can be held guilty for the offence of burglary more particularly when such person did not enter the house *per se* but tried to steal the object with the help of tree snips. The statute clearly declared that for burglary to happen, the defendant should be physically present. In this case, although the defendant never entered the house, yet he did extend his tree snips through the window. The Court held that, “*there is no meaningful difference between the snips and his arm because the penetration by the snips was merely an extension of Klein's person.*” Therefore, in the said case, the object which a person was carrying was held to be part of his body. A similar view could also have been adopted while interpreting the term “personal search”. However, in view of plain and unambiguous statutory provision, there is no scope of interpreting Section 50 in any other manner than the interpretation explained in *Baldev Singh* (supra) and *Pawan Kumar* (supra).

12. When the instant case is seen in the light of the aforesaid legal position, it is observed that the trial Court upon perusal of the record has returned a finding that the accused was not taken before any Gazetted Officer or a Magistrate in order to effect his personal search and, thus, the mandatory provisions of Section 50 of the NDPS Act, were not complied with. Learned State counsel has failed to controvert the aforesaid finding returned by the trial Court by indicating any material to justify that the provisions of Section 50 of the Act, had been complied with.

13. In view of the above, we find that the finding of the trial Court that the mandatory provisions of Section 50 of the NDPS Act, were not complied with in the instant case, does not

call for any interference.

14. PW3 is Inspector Gopal Krishan. On the date of occurrence, he had been posted as SHO, Police Station City Banga. The Investigating Officer, had produced the respondent-accused along with the alleged recovered intoxicant injections, before the said witness. Said witness in his cross examination deposed that he did not know the batch number, manufacturing date and expiry date of the recovered injections of Buprenorphine nor did he remember whether the same were mentioned in the recovery memo or not. He specifically stated that the details of the same were also not mentioned in the F.S.L. Report or the ruqa or the production memo, readjustment memo, inventory report placed in the judicial file. Therefore, we also do not find any illegality or perversity in the finding recorded by the trial Court that the prosecution had failed to connect the alleged recovered contraband with the respondent-accused. The issue framed above, is answered accordingly.

15. While deciding an appeal against acquittal in a criminal case, the primary task with which the appellate Court is entrusted is to find out whether the findings in the impugned judgment are perverse, illegal, irrational and against the principles of natural justice. Once the appellate Court comes to the conclusion that the grounds on which the judgment is based are not perverse, the scope of appeal against acquittal is limited, considering the fact that the presumption of innocence which is available with an accused, gets further strengthened by the finding of a Court. The Hon'ble Apex Court in Mrinal Das Vs.

State of Tripura, (2011) 9 SCC 479, has held as under:-

“13. It is clear that in an appeal against acquittal in the absence of perversity in the judgment and order, interference by this Court exercising its extraordinary jurisdiction, is not warranted. However, if the appeal is heard by an appellate court, it being the final court of fact, is fully competent to reappraise, reconsider and review the evidence and take its own decision. In other words, the law does not prescribe any limitation, restriction or condition on exercise of such power and the appellate court is free to arrive at its own conclusion keeping in mind that acquittal provides for presumption in favour of the accused. The presumption of innocence is available to the person and in criminal jurisprudence every person is presumed to be innocent unless he is proved guilty by the competent court. If two reasonable views are possible on the basis of the evidence on record, the appellate court should not disturb the findings of acquittal.

14. There is no limitation on the part of the appellate court to review the evidence upon which the order of acquittal is found and to come to its own conclusion. The appellate court can also review the conclusion arrived at by the trial court with respect to both facts and law. While dealing with the appeal against acquittal preferred by the State, it is the duty of the appellate court to marshal the entire evidence on record and only by giving cogent and adequate reasons set aside the judgment of acquittal. An order of acquittal is to be interfered with only when there are “compelling and substantial reasons” for doing so. If the order is “clearly unreasonable”, it is a compelling reason for interference. ...

16. In the case of Ghurey Lal Vs. State of Uttar Pradesh, (2008) 10 SCC 450, the Hon’ble Apex Court held as under:-

“The trial court has the advantage of watching the demeanour of the witnesses who have given evidence, therefore, the appellate court should be slow to interfere

with the decisions of the trial court. An acquittal by the trial court should not be interfered with unless it is totally perverse or wholly unsustainable.”

17. Thus, an order of acquittal is to be interfered with only for compelling and substantial reasons. In case if the order is clearly unreasonable, it is a compelling reason for interference. But where there is no perversity in the finding of the impugned judgment of acquittal, the appellate Court must not take a different view only because another view is possible. It is because the trial Court has the privilege of seeing the demeanour of witnesses and, therefore, its decision must not be upset in absence of strong and compelling grounds.

18. In view of the above, we do not find any merit in the present application seeking leave to appeal. Accordingly, the present application is dismissed and leave to appeal is declined.

(Sudhir Singh)
Judge

(Harsh Bunger)
Judge

09.02.2024
Mahavir/ds

-	<i>Whether speaking/reasoned:</i>	<i>Yes/No</i>
-	<i>Whether reportable:</i>	<i>Yes/No</i>