

2024:PHHC:165343-DB



IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRA-D-673-DB-2007 (O & M)
Date of decision: 11.12.2024

Iqbal Mohd.

..... Appellant

V/s

State of Punjab

...Respondent

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

Present: Mr. Satnam Singh Gill, Advocate,
for the appellant.

Mr. P.S. Sekhon, Advocate, as Amicus Curiae.

Mr. Kuljeet Singh, Addl.A.G., Punjab.

JASJIT SINGH BEDI, J.

The present appeal has been filed against the judgment of conviction and order of sentence dated 26.07.2007 passed by the Judge Special Court, Sangrur.

2. The FIR was registered on 05.09.2005, the judgment of conviction and order of sentence passed by the Judge, Special Court, Sangrur is dated 26.07.2007, the appeal was filed on 03.08.2007 and the

matter is being taken up for hearing now i.e. after 19 years of the registration of the FIR.

3. As per the case of the prosecution, on the intervening night 4/5.9.2005, a police party headed by SI Pushpinder Singh (PW-2), in which HC Sewa Singh (PW-6) and other officials were present, in the connection with special Nakabandi and checking of vehicles, an official Jeep No PB-13M-2033 was present near the bridge of the drain on the metalled road of Adamwal-Malerkotla, when from the side of village Adamwal, one Car was seen coming, it was signalled to stop in the light of a Torch and in the meanwhile Abdul Haq, resident of Malerkotla, came on a bi-cycle from the Malerkotla side and he was also joined in the police party. Then the I.O. stopped the Car, which was having a right light stop and the registration number of the Indica Car was PB-28B-4671, it was being driven by a clean shaven person. On enquiry, the said person disclosed his name as Iqbal Mohd. (appellant) son of Sharif Mohd alias Sharif, Caste Ghumiar Muslim, resident of near Manna Phattak, Malerkotla, District Sangrur. When the I.O. checked the Car in the light of a Torch, two heavy gunny-bags were seen lying on the rear seat of the Car. The I.O. got suspicious and told the appellant that he suspected some intoxicant substance in the gunny-bags lying in his Car. His search and that of the gunny-bags lying in his Car was to take place. However, he had a right to get the search conducted in the presence of any Gazetted Officer or a Magistrate and they could be called at the spot. However, the appellant expressed faith in the I.O. and for that his consent statement was recorded as Ex. P-3. The same was signed by the

appellant and attested by the witnesses. Then the I.O. checked the bags after opening their mouths and the same were found to contain poppy-husk and out of the recovered poppy husk, from each bag two samples of 250 Gms were taken out separately and were made into parcels and the remaining poppy husk, on weighment, came to be 30 Kgs each. These were also made into parcels separately and then all the parcels were sealed by the I.O. with his own seal bearing impression 'PS' Sample seal was prepared separately and the seal after use was handed over to Abdul Haq. Then all the parcels along with the Indica Car bearing registration number PB-28B-4671 were taken into police possession vide memo Ex. P-4 attested by the witnesses. The IO sent ruqa Ex. P-5 to the Police Station, resulting into registration of FIR Ex. P-6. The I.O. also prepared a rough site plan Ex. P-7 of the place of recovery with correct marginal notes.

4. It is further the case of the prosecution that during the course of interrogation, the appellant suffered a disclosure statement Ex. P-7 to the effect that he had kept concealed Eight gunny-bags containing poppy- husk in his cattle shed near his Kothi and about which only he knew and could get them recovered on Nishandehi. The said statement was signed by the appellant and attested by the witnesses. Then in pursuance to his disclosure statement, the appellant got recovered eight gunny-bags and on checking, the same were found to containing poppy-husk and then out of each gunny-bag, two samples of 250 Gms. of poppy husk each were taken out separately and were made into parcels and on weighment, the remaining poppy husk in each bag came out to be 35 Kgs. The sample parcels and the parcels

containing remaining poppy-husk were sealed by the I.O. with his own seal bearing letters 'PS' after taking back from Abdul Haq and the seal was again returned to witness Abdul Haq. Then these parcels were also taken into police possession vide memo Ex. P-8 attested by the witnesses. The I.O. also prepared a rough site plan of the second place of recovery as Ex. P-9 with correct marginal notes. The reason for his arrest were intimated to the appellant vide memo Ex. P-10 and his personal search memo was also prepared as Ex. P-11. Both the memos were signed by the appellant and attested by the witnesses. The I.O. moved application Ex. P-12 regarding Inventory of the case property and moved another application Ex. P-13 for police remand of the appellant and the order of the Court regarding production of the case property before it is Ex. P-14. Sample seal is Ex. P-15. The Registration Certificate Ex. P-16 of Car No. PB-28B-4671 was taken into police possession vide memo Ex. P-41 and it was found in the name of appellant Iqbal Mohd. On receipt of the report of the Chemical Examiner Ex. P-17 and after completion of investigation and other formalities, the challan against the appellant was presented in the Court.

5. On presentation of challan in the Court, after supplying him the copies of documents, relied upon by the prosecution, charge under Section 15 of the Act was framed against the appellant, to which he pleaded not guilty and claimed trial.

6. To prove its case against the appellant the prosecution examined PW-1 MHC Gurmail Singh and PW-4 HC Jagat Ram, who

tendered into evidence their affidavits Exs. P-1 and P-38, respectively, for safe custody of the case property in their possession.

PW-2 SI Pushpinder Singh is the I.O. of the case. He made a statement in support of the case of the prosecution and in his statement he also brought on record second sample parcels Exs. P-18 to P-27 and gunny bags Exs. P-28 to P-37. PW-7 ASI Sewa Singh, Head Constable, is the recovery witness and he has also made a statement regarding recovery of contraband, as per the case of the prosecution.

PW-3 Amrit Pal Singh, Clerk, office of S.D.M., Malerkotla, proved on record the RC of Car No. PB-28B-4671 as Ex. P-16 in the name of appellant Iqbal Mohd.

PW-5 Inspector Harjinder Singh deposed that on 5.9.2005 he was posted as SHO in Police Station, Malerkotla and on that day SI Pushpinder Singh had produced before him the appellant, the entire case property and PWs along with the sample seal, Car and the personal search recovery of the appellant. He also deposed that he interrogated the appellant and verified the facts of the case and then after his satisfaction, he affixed his own seal bearing impression 'HS' on the parcels and he also prepared the sample seal and further stated that prior to the production of the case property before him, the appellant had produced the same along with the appellant before the Magistrate at Malerkotla and the Magistrate had attested the case property. This witness also deposed that he questioned the appellant, who had confessed that poppy-straw was recovered from him. He further stated that on his directions, SI Pushpinder Singh deposited the case property

before MHC Gurmail Singh with seals intact and so long as the case property remained in his custody, nobody tampered with it nor anybody was allowed to tamper with the same. He stated that on receipt of the report of the Chemical Examiner Ex. P-17, the challan was presented in the Court by SHO Sukhdev Singh, whose signatures he identified.

PW-7 ASI Gurnam Singh made a statement regarding the production of the case property by him before the Ilaqa Magistrate and then to deposit the same with the Malkhana Nazir of the Court of CJM Sangrur after getting permission from the CJM Sangrur. He further stated that so long as the case property remained with him, he did not tamper with the same nor he allowed anybody else to tamper with the same and he handed over the receipt to the MHC. He also stated that he had taken into possession the RC of the Car vide memo Ex. P-41.

PW-8 Suresh Kumar, Malkhana Nazir of the Court of CJM Sangrur stated that on 07.9.2005, ASI Gurnam Singh had produced before him 20 samples parcels of poppy husk weighing 250 gms each and two bags parcels of poppy-husk weighing 30 Kgs. The seals on all the parcels were in-tact. He stated that the case property was deposited with him as per the orders of Sh. Barjinderpal Singh, JMIC Malerkotla, which was further allowed by the CJM, Sangrur. This, witness also stated that on 19.9.2005, he handed over ten sample parcels of 250 gms each duly sealed to Cst. Jagat Ram for depositing the same with the Chemical Examiner and also deposed that he neither tampered with the same nor allowed anybody to tamper with the same during the period it remained in his custody.

7. After closing of the prosecution evidence, the statement of the appellant was recorded under Section 313 Cr.P.C. He denied the prosecution allegations against him and pleaded innocence. He took-up the plea that the alleged place of recovery i.e. the house of Liakat Ali belonged to other persons and that he had no concern with the said house nor did he ever reside in that house. He stated that he was residing in Ward No 17 which was purchased on 02.3.1987 by his father Pille Khan alias Sharif Khan. He stated that SI Pushpinder Singh had planted a false case upon him for certain reasons. On 04.9.2005, he was arrested from his house at 8.00 PM though, nothing was recovered from him and his Car which was standing in the house of his brother Ali Sher was also taken from there and his wife had moved complaints to the higher authorities and the Human Rights Commission.

8. In defence, the appellant examined Seven witnesses.

DW-1 Ali Ahmed stated that the house shown in Ex. P-9 did not belong to the appellant as the house of the appellant was situated in another street. He also stated that on 04.9.2005, the Car belonging to the appellant was taken away by the police from his (DW1) house but no incriminating article was recovered from the said Car as the driver of the Car usually parks the car in his house. He also stated that on 05.09.2005 no recovery was effected from the house shown in the site plan Ex. P-9.

DW-2 Ajay Kumar, Patwari, stated that as per summoned record, the house shown in the site plan Ex.P-9 did not belong to the appellant.

DW-3 Balwinder Singh, Municipal Commissioner, Municipal Council, Malerkotla, stated that the appellant belonged to his Ward and he had never been involved in any criminal activity.

DW-4 Yasmin wife of Abdul Satar stated that the house shown in the site plan Ex P-9 did not belong to the appellant and that the appellant with his family was residing in his ancestral house for the last about six years. She also stated that the appellant was arrested by the police in her presence on 04.9.2005 and at that time Balwinder Singh, Municipal Commissioner, was also present but no incriminating article was recovered from the appellant.

DW-5 Wahida Begum wife of the appellant made a statement in support of the plea of the appellant taken by him in his statement recorded under Section 313 Cr.P.C. and she also brought on record documents Exs. D-2 and D-3 and DW-6 Mohd. Hanif also made a statement in support of plea of the appellant in his statement under Section 313 Cr.P.C.

DW-7 Ishrat Ali stated that he was working as Octroi Clerk with Contractor Iqbal Mohd. and was present on the Octroi Post on the intervening night of 04/05.9.2005 at the Adamwal-Malerkotla road and stated that on that night no Naka was held by the police nor any recovery was effected from the Car near the Octroi Post and he also stated that in the site plan Ex. P-7, an abandoned Paper Mill is shown and there was Khokha of Octroi post but now there is no Khokha and he has also brought on record copy of duty roster as Ex. DW7/A.

9. Based on the evidence led, the appellant came to be convicted and sentenced as under:-

Convict	Offence under Sections	Sentence	Fine	In default of fine
Iqbal Mohd.	15 NDPS Act	RI 12 years	Rs.1,00,000/-	RI for 02 years

10. It is the aforementioned judgment, which is under challenge, in the present appeals.

11. The learned counsel for the appellant contends that the testimony of the prosecution witnesses was thoroughly discrepant in material particulars. The mandatory provision of Sections 42 and 52-A of the NDPS Act have not complied with in this case. The prosecution case is highly doubtful as the recovery was effected between sunset and sunrise and there was no compliance of provision of Section 42 of the Act. At the time of the alleged house search of the appellant, the provisions of Section 100(4) Cr.P.C. were not complied with. No CFSL form was filled in at the spot by the I.O. and the S.H.O. himself didn't deposit the case property with MHC. There is a contradiction regarding the use of seal by the I.O. A bare perusal of the FIR and the records show that nothing was done at the spot and that a false and fictitious case has been planted on the appellant. All the documents were prepared by the police at the police station. The provision of Sections 55 and 57 of the NDPS Act have not been complied with. It is highly doubtful that if any report regarding the search and seizure of the contraband was sent to the superior officers. He, therefore, contends that the

impugned judgment was liable to be set aside and the appellant be acquitted of the charges framed against him.

12. The learned Amicus Curiae while very ably assisting this Court contends that Section 52-A of the NDPS Act has not been complied with. The samples of the recovered contraband were taken at the spot and not before the Magistrate as has been held in ***“Union of India versus Mohanlal & Anr., 2016(1) RCR (Criminal) 858, Bothilal versus The Intelligence Officer Narcotics Control Bureau 2023(2) RCR (Criminal) 828, Simranjit Singh versus State of Punjab 2023 Cri LR (SC) 1502, Mangilal versus The State of Madhya Pradesh 2023(3) RCR (Criminal) 703 and Yusuf @ Asif versus State , Criminal Appeal No.3191 of 2023 (arising out of SLP (Crl.) No.3010 of 2023 decided on 13.10.2023”*** . In furtherance of the judgments of the Hon’ble Supreme Court, the Ministry of Finance in its Notification No.G.S.R. 899(E) dated 23.12.2022 has also stated that the IO would ensure that samples of the seized material are drawn in the presence of the Magistrate in terms of Section 52-A of the Act. The same not having been done and the samples having been taken at the spot, completely vitiate the Trial and therefore, the appellant was liable to be acquitted.

13. The learned counsel for the State, on the other hand, contends that all the arguments raised by the appellant and the Amicus Curiae have been dealt with by the Trial Court and therefore, the present appeal was liable to be dismissed.

14. We have heard the learned counsel for the parties.

15. Section 52-A of the NDPS Act is reproduced as under:-

52A. Disposal of seized narcotic drugs and psychotropic substances.—

(1) The Central Government may, having regard to the hazardous nature, vulnerability to theft, substitution, constraint of proper storage space or any other relevant consideration, in respect of any narcotic drugs, psychotropic substances, controlled substances or conveyances, by notification in the Official Gazette, specify such narcotic drugs, psychotropic substances, controlled substances or conveyance or class of narcotic drugs, class of psychotropic substances, class of controlled substances or conveyances, which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time, determine after following the procedure hereinafter specified.

(2) Where any narcotic drugs, psychotropic substances, controlled substances or conveyances has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings under this Act and make an application, to any Magistrate for the purpose of—

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such Magistrate, photographs of such drugs, substances or conveyances and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

(3) Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs, psychotropic substances, controlled substances or conveyances and any list of samples drawn under subsection (2) and certified by the Magistrate, as primary evidence in respect of such offence.

16. The Hon'ble Supreme Court in ***Union of India versus Mohanlal & Anr., 2016(1) RCR (Criminal) 858***, held as under:-

13. It is manifest from Section 52A (2)(c) (supra) that upon seizure of the contraband the same has to be forwarded either to the officer in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory (b) certifying photographs of such drugs or substances taken before the Magistrate as true and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn. Sub-section (3) of Section 52- A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the

contraband forwarded to the officer in charge of the Police Station or the officer empowered, the officer concerned is in law duty bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-section (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure. Be that as it may, a conflict between the statutory provision governing taking of samples and the standing order issued by the Central Government is evident when the two are placed in juxtaposition. There is no gainsaid that such a conflict shall have to be resolved in favour of the statute on first principles of interpretation but the continuance of the statutory notification in its present form is bound to create confusion in the minds of the authorities concerned instead of helping them in the discharge of their duties. The Central Government would, therefore, do well, to re-examine the matter and take suitable steps in the above direction.

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20. To sum up we direct as under :

(1) No sooner the seizure of any Narcotic Drugs and Psychotropic and controlled Substances and Conveyances is effected, the same shall be forwarded to the officer in-charge of the nearest police station or to the officer empowered under Section 53 of the Act. The officer concerned shall then approach the Magistrate with an application under Section 52A(ii) of the Act, which shall be allowed by the Magistrate as soon as may be required under Sub-Section 3 of Section 52A, as discussed by us in the body of this judgment under the heading 'seizure and sampling'. The sampling shall be done under the supervision of the magistrate as discussed in paras 13 and 14 of this order.

(2) The Central Government and its agencies and so also the State Governments shall within six months from today take appropriate steps to set up storage facilities for the exclusive storage of seized Narcotic Drugs and Psychotropic and controlled Substances and Conveyances duly equipped with vaults and double locking system to prevent theft, pilferage or replacement of the seized drugs. The Central Government and the State Governments shall also designate an officer each for their respective storage facility and provide for other steps, measures as stipulated in Standing Order No. 1/89 to ensure proper security against theft, pilferage or replacement of the seized drugs.

(3) The Central Government and the State Governments shall be free to set up a storage facility for each district in the States and depending upon the extent of seizure

and store required, one storage facility for more than one districts.

(4) Disposal of the seized drugs currently lying in the police maalkhans and other places used for storage shall be carried out by the DDCs concerned in terms of the directions issued by us in the body of this judgment under the heading 'disposal of drugs'.

The Hon'ble Supreme Court in ***Bothilal versus The Intelligence Officer Narcotics Control Bureau 2023(2) RCR (Criminal)***

828, held as under:-

15. Admittedly, PW-2 drew two samples from each of the packets of the contraband found in the hotel room and kept them in two separate plastic covers. These covers were sealed and the remaining contraband was also sealed. Thus, the prosecution claims that the samples were prepared even before the packets were sent to the Station House Officer. The submission of the learned senior counsel appearing for the appellant in Criminal Appeal 451 of 2011 was that a grave suspicion is created about the prosecution's case as this action by the PW-2, was contrary to Section 52A of NDPS Act.

16. In paragraphs 15 to 17 of the Mohanlal's case, it was held thus:

"15. It is manifest from Section 52A(2)include (supra) that upon seizure of the contraband the same has to be forwarded either to the officer-in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory, (h) certifying photographs of such drugs or substances taken before the Magistrate as true, and (c) to

draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.

16. Sub-section (3) of Section 52A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer-in-charge of the police station or the officer empowered, the officer concerned is in law duty-bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct.

17. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52A(4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-sections (2) and (3) of Section 52A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure."

(emphasis added)

Thus, the act of PW-2 of drawing samples from all the packets at the time of seizure is not in conformity with what is held by this Court in the case of Mohanlal². This creates a serious doubt about the prosecution's case that the substance recovered was contraband.

17. Even according to the prosecution's case, as can be seen from the version of PW-2, accused no.1 (appellant in Criminal Appeal No.1185 of 2011) was staying in room no.213 of Himalaya Lodge, Triplicane, Chennai. He was to receive 5 kilograms of heroin from accused no.2 and accused no.3 (appellant in Criminal Appeal no.451 of 2011). Accused nos.2

and 3, according to the case of the prosecution, were staying in room no.211 of Hotel Blue Star International, Chennai. It was accused no.4 who was staying in room no.303 of Hotel Suriya, Periamet, Chennai where PW-2 and other members of her party entered. The case of the prosecution is that after PW-2 and others entered the room, they called upon all the four accused who were present there to disclose whether they were in possession of the contraband. The prosecution's case is that accused no.1 showed a blue coloured bag from which the recovery of about 5 kilograms of heroin was made. It is not the case of the prosecution that accused no.1 was carrying that bag with him or that it was in his custody. The bag was in the room occupied by accused no.4. Thus, it cannot be said that the contraband was found in the custody of accused no.1. At the highest, it was found in the room occupied by accused no.4. We may note here that accused no.4 has been convicted by the High Court only for the offence punishable under Section 30 of the NDPS Act which is for the offence of making preparation to do or omitting to do anything which constitutes an offence punishable under the provisions of Sections 19, 24 and 27A. The prosecution has not produced any evidence to show that the contraband was brought to the room of the accused no.4 by the other three accused persons or anyone of them. It is not the case that the room of accused no.4 was in possession of accused nos.1 to 3 who were staying in different hotels.

18. Therefore, in our view, the case of the prosecution is not free from suspicion. The prosecution has not proved beyond a reasonable doubt that the appellants in these two appeals were in possession of the contraband or that they brought the contraband to the hotel room of the accused no.4.

The Hon'ble Supreme Court in *Simranjit Singh versus State of Punjab 2023 Cri LR (SC) 1502*, held as under:-

7. *We have perused the evidence of PW-7 Hardeep Singh in which he has stated that from the eight bags of poppy husk, two samples of 250 gms each were drawn and converted into 16 parcels. This has been done immediately after the seizure.*

8. *In paragraphs 15 to 17 of the decision of this Court in Mohanlal's case, it was held thus:*

"15. It is manifest from Section 52-A(2) include (supra) that upon seizure of the contraband the same has to be forwarded either to the officer in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory, (b) certifying photographs of such drugs or substances taken before the Magistrate as true, and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.

16. Sub-section (3) of Section 52-A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer-in-charge of the police station or the officer empowered, the officer concerned is in law duty-bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct.

17. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with subsections (2) and

(3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure."

9. Hence, the act of PW-7 of drawing samples from all the packets at the time seizure is not in conformity with the law laid down by this Court in the case of Mohanlal. This creates a serious doubt about the prosecution's case that substance recovered was a contraband.

The Hon'ble Supreme Court in ***Mangilal versus The State of Madhya Pradesh 2023(3) RCR (Criminal) 703***, held as under:-

6. The obvious reason behind this provision is to inject fair play in the process of investigation. Section 52A of the NDPS Act is a mandatory rule of evidence which requires the physical presence of a Magistrate followed by an order facilitating his approval either for certifying an inventory or for a photograph taken apart from list of samples drawn. In due compliance of Section 52A(1) of the NDPS Act the Ministry of Finance (Department of Revenue) issued a Notification No. G.S.R. 339(E) dated 10.05.2007 which furnishes an exhaustive manner and mode of disposal of drugs ending with a certificate of destruction:

"4. Manner of disposal

1) Where any narcotic drug or psychotropic substances has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, of the Act, or if it is seized by such an officer himself, he shall prepare an inventory of such

narcotic drugs or psychotropic substances as per Annexure 1 to this notification and apply to any Magistrate under sub-section (2) of section 52A as per Annexure 2 to this notification.

2) After the Magistrate allows the application under sub-section (3) of section 52A, the officer mentioned in clause (1) above shall preserve the certified inventory, photographs and samples drawn in the presence of the Magistrate as primary evidence for the case and submit details of the drug consignments to the Chairman of the Drug Disposal Committee for a decision by the committee on the disposal. The officer shall send a copy of the details along with the drug consignments to the officer-in-charge of the godown.

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7. To be noted, the aforesaid notification was in existence at the time of the commission of the offence alleged in the case on hand, stood repealed with effect from 23.12.2022 vide Notification No. G.S.R.899(E). In any case a notification issued in derogation of the powers conferred under sub-section (1) of Section 52A of the NDPS Act can never contradict the main provision, particularly sub-Section (2). However, any guideline issued by way of a notification in consonance with Section 52A of the NDPS Act has to be followed mandatorily.

The Hon'ble Supreme Court in ***Yusuf @ Asif versus State*** ,
Criminal Appeal No.3191 of 2023 (arising out of SLP (Crl.) No.3010 of 2023 decided on 13.10.2023, held as under:-

12. A simple reading of the aforesaid provisions, as also stated earlier, reveals that when any contraband/narcotic substance is seized and forwarded to the police or to the officer so mentioned under Section 53, the officer so referred to in sub section (1) shall prepare its inventory with details and the description of the seized substance like quality, quantity, mode of packing, numbering and identifying marks and then make an application to any Magistrate for the purposes of certifying its correctness and for allowing to draw representative samples of such substances in the presence of the Magistrate and to certify the correctness of the list of samples so drawn.

13. Notwithstanding the defence set up from the side of the respondent in the instant case, no evidence has been brought on record to the effect that the procedure prescribed under subsections (2), (3) and (4) of Section 52A of the NDPS Act was followed while making the seizure and drawing sample such as preparing the inventory and getting it certified by the Magistrate. No evidence has also been brought on record that the samples were drawn in the presence of the Magistrate and the list of the samples so drawn were certified by the Magistrate. The mere fact that the samples were drawn in the presence of a gazetted officer is not sufficient compliance of the mandate of subsection (2) of Section 52A of the NDPS Act.

14. It is an admitted position on record that the samples from the seized substance were drawn by the police in the presence of the gazetted officer and not in the presence of the Magistrate. There is no material on record to prove that the Magistrate had certified the inventory of the substance seized or of the list of samples so drawn.

17. It may also be relevant to mention here that in terms of Section 52-A of the NDPS Act, a Notification No.G.S.R. 899(E) dated 23.12.2022 has been issued by the Ministry of Finance and the relevant extract thereof is reproduced as under:-

CHAPTER III

SAMPLING

8. Application to Magistrate. – *After the seized material under the Act is forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53 of the Act or if it is seized by such an officer himself, he shall prepare an inventory of such material in Form-4 and apply to the Magistrate, at the earliest, under sub-section (2) of section 52A of the Act in Form-5.*

9. Samples to be drawn in the presence of Magistrate. – *After application to the Magistrate under sub-section (2) of section 52A of the Act is made, the Investigating Officer shall ensure that samples of the seized material are drawn in the presence of the Magistrate and the same is certified by the magistrate in accordance with the provisions of the said-sub-section.*

10. Drawing the samples. – *(1) One sample, in duplicate, shall be drawn from each package and container seized.*

(2) When the packages and containers seized together are of identical size and weight bearing identical marking and the contents of each package give identical results on colour test by the drugs identification kit, conclusively indicating that the packages are identical in all respects, the packages and containers may carefully be bunched in lots of not more than ten packages or containers, and for each such lot of packages and containers, one sample, in duplicate, shall be drawn:

Provided that in the case of ganja, poppy straw and hashish (charas) it may be bunched in lots of not more than forty packages or containers.

(3) In case of drawing sample from a particular lot, it shall be ensured that representative sample in equal quantity is taken from each package or container of that

lot and mixed together to make a composite whole from which the samples are drawn for that lot.

18. A perusal of the aforementioned judgments as well as the Notification dated 23.12.2022 issued in consonance with the said judgments, it is apparent that when the contraband is seized, it is to be sealed and forwarded to the officer-in-charge of the nearest police station or to an officer empowered under Section 53 of the Act, who shall prepare an inventory of such material and forward the same to the Magistrate concerned in whose presence samples of the seized material are to be drawn and thereafter, certified by the Magistrate. The samples are, thereafter, to be despatched to the Chemical Examiner.

19. Coming back to the facts of the instant case, it is apparent from the deposition of PW-2 SI Pushpinder Singh, SHO, P.S. Lehra and others that the samples were drawn at the spot and only then all the parcels were taken into police possession and later, produced before the Magistrate. The order of Barjinderpal Singh, JMIC, Malerkotla, dated 05.09.2005 (Ex.P-14) only reveals that the contraband was produced before the JMIC and no samples were drawn in his presence. Ten out of the twenty samples drawn at the spot were then despatched to the Chemical Examiner. Quite apparently, the procedure of drawing samples at the spot of recovery itself, is in derogation of the law laid down (supra) and is sufficient to cast a doubt on the entire prosecution case. Once the procedure of drawing sample at the spot of recovery is vitiated for non-compliance of the statutory provisions,

the other grounds raised by the appellant need not be gone into.

20. In view of the aforementioned discussion, we find considerable merit in the present appeal and therefore, the same stands allowed. The judgment of conviction and order of sentence dated 26.07.2007 passed by the Judge, Special Court, Sangrur, is set aside and the appellant is acquitted of the charges framed against him.

(JASJIT SINGH BEDI)
JUDGE

(SUDHIR SINGH)
JUDGE

December 11, 2024
sukhpreet

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