



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

CRA-S-1107-2021 (O&M)

Reserved on: 03.05.2024

Pronounced on: 14.05.2024

SUZIE ACHAYO @ SHIVONJE

.... APPELLANT

Vs.

STATE OF PUNJAB

.... RESPONDENT

CORAM: HON'BLE MR JUSTICE DEEPAK GUPTA

Present: - Mr. Vedit Bansal, Advocate, for the appellant.

Mr. Ramandeep Singh, Sr. DAG, Haryana.

DEEPAK GUPTA, J.

This appeal is directed against judgment dated 30.07.2021 in NDPS Case No.1602-2017 (CNR-PBJL01-016288-2017) passed by the Court of learned Special Judge, Jalandhar, in a case arising out of FIR No.181 dated 31.05.2017 registered at Phillaur, District Jalandhar under Section 21 of Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, 'the NDPS Act'), whereby the accused Suzie Achayo @ Shivonje (now appellant) has been convicted under Section 21 (c) of the NDPS Act; and vide a separate order of even date, has been sentenced to undergo rigorous imprisonment for a period of 10 years and to pay a fine of ₹1 lakh with default sentence of six months.

2. The trial Court record was called and the main appeal itself has been heard.

3.1 As per the prosecution case, on 31.05.2017, Inspector Onkar Singh Brar (PW2), SHO, P.S. Phillaur alongwith other police officials,

was present at G.T.Road under bridge, Bus Stand Phillaur in connection with checking bad elements. They were conducting search of vehicles, when they spotted a lady, carrying a bag, crossing the road and coming towards the bridge. At sight of the police party, she became perplexed, started walking briskly and turned towards railway line. Due to suspicion, she was apprehended by Lady SI Rajvir Kaur on instructions of Inspector Onkar Singh. On asking, the foreigner (Korean lady), disclosed her identity. Inspector Onkar Singh revealed his identity to her and told that she was suspected of carrying some intoxicating substance. She was apprised of her legal right to be searched in presence of some Gazetted officer or Magistrate. Accused opted to be searched before a Gazetted officer. Non consent memo Ex.P1 was prepared, upon which accused put her signatures in English.

3.2 On request of Inspector Onkar Singh, DSP Gurmeet Singh Cheema (PW6), a Gazetted police officer reached the spot, who also gave option of search to the accused, as per section 50 of NDPS Act. She reposed faith in him and opted to be searched from him. Her consent memo (Ex.P2) was prepared, upon which she put her signatures in English. Thereafter, on instructions of DSP Gurmeet Singh Cheema (PW6), search of the bag carried by the accused was conducted by SI Rajvir Kaur (PW3), leading to recovery of 800 gms of heroin, from a polythene envelope found inside the bag. Said heroin was converted into a parcel and sealed by Inspector Onkar Singh Brar and DSP Gurmeet Singh Cheema with their seals 'OSB' and 'GS' respectively. Necessary seizure memo was prepared. Case property was deposited by Inspector Onkar Singh Brar with MHC Satnam Singh (PW2), on reaching the police

station.

3.3 Next day, Inspector Onkar Singh produced the case property (after taking from MHC) and the accused before the Ld. Magistrate, who after breaking seals had drawn two samples of 5 gms each and sealed the same and the remaining bulk parcel containing 790 gms heroin with her seal 'AK'. IO took the case property and deposited the same with MHC on reaching police station. MHC produced one of the sample parcel on 01.06.2017 before Inspector Onkar Singh Brar and thereafter, on 21.07.2017 before DSP Surinder Mohan (PW5), who put their respective unique codes thereon and thereafter, MHC through C. Samuel (PW4) deposited the said parcel with FSL Mohali on 24.07.2017.

3.4 As per report (Ex.PY) of FSL Mohali, Diacetylmorphine salt was found in the recovered contraband. After conclusion of the investigation, final report under Section 173 Cr.P.C was filed in the court so as to prosecute the accused.

4. After hearing both the sides and perusing the documents attached with the report under Section 173 Cr.P.C, a prima facie case for commission of offence punishable Under Section 21 of the Narcotic Drugs & Psychotropic Substances Act, having been made out against the accused, she was charge- sheeted accordingly, to which she pleaded not guilty and claimed trial.

5.1 In order to prove its case, prosecution examined as many as 7 witnesses.

5.2 PW2 Inspector Onkar Singh Brar, posted as SHO Police Station, Phillaur at the relevant time on 31.05.2017, testified as to how the police party headed by him along with ASI Paramjit Singh, SI Rajvir Kaur

and others confronted the accused due to suspicious circumstances and that after disclosing his identity, he apprised her of the legal right to opt for search to be conducted from a Magistrate or a Gazetted Officer and as accused reposed faith in Gazetted Officer, he prepared non-consent memo (Ex.P1). PW2 deposed that on his information, DSP Gurmeet Singh Cheema reached the spot, who also apprised the accused about her legal right to be searched before Gazetted Officer or in the presence of the Magistrate and that accused reposed faith in DSP Gurmeet Singh Cheema and that consent was reduced into writing vide Ex.P2. He also testified that on instructions of DSP Gurmeet Singh Cheema, SI Rajvir Kaur conducted search of the bag of the accused in the presence of other officials, which resulted in recovery of contraband and that on weighing, the same came to be 800 gm of heroin, which was converted into a parcel. He proved affixation of his seal 'OSB' and the seal of 'GS' by DSP Gurmeet Singh Cheema on the parcel. He also proved Form 29 (Ex.PX) prepared at the spot and that the seizure memo of the parcel containing the contraband as E.P3 was prepared. He further proved rukka (Ex.P4), FIR (Ex.P5), arrest memo (Ex.P6), personal search memo (Ex.P7) and rough site plan (Ex.P8). As per him, the entire writing work was done at the spot and then they left the place of recovery along with the accused and the case property, whereas DSP Gurmeet Singh Cheema left for his office. He also deposed that on reaching Police Station, he deposited the case property with MHC Satnam Singh and lodged the accused in lockup. He also deposed that on next day, he interrogated the accused in the presence of SI Rajvir Kaur and other officials and that accused suffered her disclosure statement (Ex.P9). He then took the case property from MHC Satnam Singh and produced the same

along with the accused before Id. Area Magistrate. He proved applications P10 to P13 in this regard and the order (Ex.P14) as passed by the Magistrate. He testified that Area Magistrate broke the seal of the parcel, took out two representative parcels of 5 gm each and affixed her seal impression 'AK' on the sample parcels as well as the residue parcel. The Magistrate also put his seal impression 'AK' on Form M29 (Ex.PX) and thereafter, he redeposited the case property along with the sample parcels with MHC Satnam Singh. He further deposed about receipt of the FSL report (Ex.PY) and that after completion of investigation, challan was presented in the Court.

5.3 PW3 Inspector Rajvir Kaur, who was posted as Additional SHO PS Phillaur at the relevant time, corroborated the version of PW2 in all material particulars. She also proved documents Ex.P1 to P8, prepared in her presence.

5.4 PW6 Gurmeet Singh Cheema (SP Head Quarter Ferozepur), who was posted as DSP Sub Division, Phillaur, on the relevant date of 31.05.2017 is the next material witness of the prosecution, who also corroborated the version of PW2 Inspector Onkar Singh Brar. He testified about his reaching the spot after getting information from Inspector Onkar Singh Brar, informing the accused about her legal right to be searched, preparing of consent memo Ex.P2 and that on his instructions, SI Rajvir Kaur conducted the search of the bag carried by the accused, resulting into recovery of contraband. He also proved all the subsequent proceedings by corroborating the version of the PW2, including putting his seal 'GS' on the parcel of contraband and also affixing his seal on form M29 as Ex.PX.

5.5 PW7 ASI Paramjit Singh is the recovery witness, who also

corroborated the version of PW2 in material particulars.

5.6 Amongst other witnesses, PW1 HC Satnam Singh was MHC PS Phillaur at the relevant time on 31.5.2017, who proved deposition of sealed parcel containing heroin of 800 gms sealed with impression 'GS' and 'OSB' along with Form M29 in the Malkhana by Inspector Onkar Singh Brar and that on next date, the same was taken by Inspector Onkar Singh Brar for producing it in Court and that on that day, after producing the same, Inspector Onkar Singh Brar deposited two representative samples of 5 gms each and the residue samples of 790 grams all sealed with 'AK'. He further deposed that on the same day, he produced one representative sample of 5 gm heroin sealed with the seal impression 'AK' before Inspector Onkar Singh Brar, who was SHO of PS Phillaur, who put the said sample parcel into another parcel and sealed the same with the impression 'OSB' and also put his unique code thereon. He then deposited the same in Malkhana and then on 21.07.2017, he again took out the sample and sent it to the office of DSP (D), Surender Mohan, who converted it into another parcel and sealed the same with his seal impression SM and put his unique code thereon and thereafter, the sample parcel carrying the seal impression SM was sent to FSL on 24.07.2017 through Constable Samuel and that after depositing the same at FSL Mohali, Constable Samuel deposited the receipt in this regard with him.

5.7 PW4 Constable Samuel in his affidavit Ex.PW4/A corroborated the version of PW1.

5.8 PW5 DSP Surinder Mohan also corroborated the version of PW1 by deposing that on 21.07.2017, Constable Samuel had produced a parcel containing 5 gm heroin sealed with seal 'OSB' with unique code

before him and that he had converted the same in another parcel, sealed it with his seal SM and put his unique code number thereon and then returned the parcel to Constable Samuel.

6. All the incriminating circumstances appearing in the evidence produced by prosecution were confronted to the accused in her statement recorded under Section 313 Cr.P.C, in which she pleaded innocence and controverted the incriminating evidence appearing against her. However, she did not adduce any evidence in her defence.

7. After hearing both the sides, judgment of conviction and order of sentence were passed, as per the details given earlier.

8.1 Assailing the aforesaid conviction as recorded by the trial Court, ld. counsel for the appellant-accused has drawn attention towards the fact that accused is a permanent resident of Kenya and as per the deposition of SI Rajvir Kaur, the accused did not know Punjabi, Hindi or English languages and knew only Kenyan language. Even Inspector Onkar Singh Brar, the IO of the case, during his deposition pleaded ignorance about the language known to the accused and thus, fair trial has not been ensured in this case.

8.2 Ld. counsel for the appellant-accused has then drawn attention towards numerous material contradictions appearing in the statements of PW2 Inspector Onkar Singh Brar, PW3 SI Rajvir Kaur, PW6 DSP Gurmeet Singh Cheema and PW7 ASI Paramjit Singh, so as to contend that in the name of compliance of Section 50 of the NDPS Act, a mockery has been committed, inasmuch as the non-consent memo (Ex.P1) and consent memo (Ex.P2) were prepared after the recovery had already been effected, clearly defeating the objective of Section 50 of the NDPS Act.

8.3 Ld. counsel contends further that even the presence of SI Rajvir Kaur at the spot in the beginning is doubtful in view of the contradictions. No compliance of Section 57 of the NDPS was made; that no independent witness from the public was called so as to join the recovery proceedings and that in all these circumstances, the conviction cannot be sustained.

9. On the other hand, ld. State counsel defended the impugned judgment of conviction passed by the trial Court and contended that conviction has been rightly recorded.

10. I have considered submissions of both the sides and have appraised the record carefully.

11. The principle contention raised by learned counsel for the appellant is regarding the non-compliance of Section 50 of the NDPS Act. The provision reads as under:-

“Section 50 – Conditions under which search of persons shall be conducted:

(1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the

nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.”

12. In *State of Punjab Vs. Baldev Singh, (1999) 6 SCC 172*, Constitutional Bench of Hon'ble Supreme Court considered the question as to whether the compliance of Section 50 of the NDPS Act is mandatory or not and if it is so, what is the effect in case of breach thereof. After considering the relevant judgments on the point, following conclusions were drawn: -

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

(1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the person concerned of his right under sub-section (1) of Section 50 of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.

(2) That failure to inform the person concerned about the existence of his right to be searched before a gazetted officer or a Magistrate would cause prejudice to an accused.

(3) That a search made by an empowered officer, on prior information, without informing the person of his right that if he so requires, he shall be taken before a gazetted officer or a Magistrate for search 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 his person, during a search conducted in violation of the provisions of Section 50 of the Act.

(4) That there is indeed need to protect society from criminals. The societal intent in safety will suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it does not exist. The answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher

authorities seriously inviting action against the official concerned so that the laxity on the part of the investigating authority is curbed. In every case the end result is important but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of the judicial process may come under a cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for the law and may have the effect of unconscionably compromising the administration of justice. That cannot be permitted. An accused is entitled to a fair trial. A conviction resulting from an unfair trial is contrary to our concept of justice. The use of evidence collected in breach of the safeguards provided by [Section 50](#) at the trial, would render the trial unfair.

(5) That whether or not the safeguards provided in [Section 50](#) have been duly observed would have to be determined by the court on the basis of the evidence led at the trial. Finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of [Section 50](#) and, particularly, the safeguards provided therein were duly complied with, it would not be permissible to cut short a criminal trial.

(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.

(7) That an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in [Section 50](#) of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search.

(8) A presumption under [Section 54](#) of the Act can only be raised after the prosecution has established that the accused was found to be in possession of the contraband in a search conducted in accordance with the mandate of [Section 50](#)."

13. In *Vijaysinh Chandubha Jadeja v. State of Gujarat: (2011) 1 SCC 609*, another Constitution Bench of Hon'ble Supreme Court considered the question whether compliance of [Section 50](#) of the NDPS Act

would be sufficient. The Court answered in the negative and held that the obligations of the authorized officer under [Section 50 \(1\)](#) of the NDPS Act is mandatory and requires strict compliance. The relevant extract of the said decision is set out below:-

"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 subsection (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.

31. We are of the opinion that the concept of "substantial compliance" with the requirement of [Section 50](#) of the NDPS Act introduced and read into the mandate of the said section in Joseph Fernandez [(2000) 1 SCC 707 : 2000 SCC (Cri) 300] and Prabha Shankar Dubey [(2004) 2 SCC 56 : 2004 SCC (Cri) 420] is neither borne out from the language of subsection (1) of [Section 50](#) nor it is in consonance with the dictum laid down in Baldev Singh case [(1999) 6 SCC 172 : 1999 SCC (Cri) 1080] . Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of [Section 50](#) had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf.

32. We also feel that though [Section 50](#) gives an option to the empowered officer to take such person (suspect) either before the nearest gazette officer or the Magistrate but in order to impart authenticity, transparency and creditworthiness to the entire proceedings, in the first instance, an endeavour should be to produce the suspect before the nearest Magistrate, who enjoys more confidence of the common man compared to any other officer. It would not only add legitimacy to the search proceedings, it may verily strengthen the prosecution as well."

14. Thus, though in *Baldev Singh's case (supra)*, it was held that it is difficult to interpret [Section 50\(1\)](#) of the NDPS Act to read that it is mandatory that in all cases, search must be conducted before a Gazetted Officer or a Magistrate. Clearly, if [Section 50\(1\)](#) of NDPS Act is read to mean that it is necessary in all cases that a search be conducted before a Magistrate or a Gazetted Officer, there would be no purpose in informing the suspect of his right to be searched before such officers. The entire object of informing the suspect, who is proposed to be searched, about his/her right is to enable him to exercise this right - the right to be searched before a Magistrate or a Gazette Officer. However, in *Vijaysinh Chandubha Jadeja (supra)*, Hon'ble Supreme Court had also observed that the obligations of the authorized officer under [Section 50\(1\)](#) of the NDPS Act is mandatory and requires strict compliance. Failure to comply with the said provision would render the recovery of the illicit article suspect and vitiate the conviction. Though at the same time, the Court also observed that "Thereafter, the suspect may or may not choose to exercise the right provided to him under the said proviso".

15. In *Ashok Kumar Sharma v. State of Rajasthan: (2013) 2 SCC 67*, Hon'ble Supreme Court considered a case where the authorized officer had merely informed the accused (appellant therein) that he can be searched before any Magistrate or Gazetted Officer, if he so wished. The Supreme Court held that the same did not comply with the mandatory procedure of [Section 50](#) of the NDPS Act and, thus, vitiated the entire proceedings. The Court reasoned that the accused was only informed that he could be searched before a Magistrate or a Gazetted Officer if he so wished, however, the fact that the accused had a right under [Section 50](#) of the NDPS

Act to be searched before the Gazetted Officer or a Magistrate was not made known to him.

16. The above decision also makes it clear that the mandate of [Section 50\(1\)](#) of the NDPS Act is to ensure that the authorized officer informs the person proposed to be searched about his right to be searched before a Magistrate or a Gazetted Officer. The authorized officer is also obliged to take the concerned person (the suspect) to the nearest Gazetted Officer of any departments mentioned in [Section 42](#) of the NDPS Act or to the nearest Magistrate, if such person so requires. In *Vijaysinh Chandubha Jadeja (supra)*, the Supreme Court had also observed that though [Section 50](#) of the NDPS Act gives the option to the empowered officer to take the person suspect either before the nearest Gazetted Officer or to a Magistrate; and in the first instance, an endeavor should be made to produce the suspect before the nearest Magistrate. This, obviously, would follow only 'if the person so requires'.

17. In view of the decisions as mentioned above, it is no longer res integra that it is mandatory to comply with [Section 50](#) of the NDPS Act. There is also no ambiguity as to the manner in which Section 50 of the NDPS Act is required to be complied with. Plainly, there is no requirement to conduct the search in the presence of a Magistrate or Gazetted Officer, if the person proposed to be searched did not so desire, after being informed of his right in this regard. The words "if such person so requires" as used in [Section 50\(1\)](#) of the NDPS Act make it amply clear that the person to be searched would be taken before a Magistrate or a Gazetted Officer, only if he so requires.

18. In the present case, it is no doubt true that in order to prove

the compliance of Section 50 of the NDPS Act and the consequent recovery of contraband from the possession of the appellant-accused, prosecution relied on the statements of PW2 Inspector Onkar Singh Brar, PW3 SI Rajvir Kaur, PW6 DSP Gurmeet Singh Cheema and PW7 ASI Paramjit Singh but, there are numerous material contradictions in their statements creating doubt about the truthfulness of the entire prosecution case. The Court would have ignored the minor contradictions, which are normally the result of long lapse of time from the date of recovery and the date of deposition of witnesses on account of loss of memory, but the material contradictions going to the root of the matter, cannot be ignored.

19. As has come in the testimony of PW3 SI Rajvir Kaur and that of PW7 ASI Paramjit Singh, the police party had reached at the spot of recovery at about 5:40 PM, after they had started from police station at 5:30 PM. As per the statement of PW6 DSP Gurmeet Singh Cheema, he received the call from SHO Onkar Singh Brar at 5:55 PM and that after preparing the consent memo (Ex.P2), the recovery was effected at 6:10 PM. However, this statement of PW6 DSP Gurmeet Singh Cheema regarding effecting of the recovery from the accused at 06:10 PM after preparing of the consent memo is totally contradicted by other three witnesses. PW2 Inspector Onkar Singh Brar, PW3 SI Rajvir Kaur as well as PW7 ASI Paramjit Singh stated that recovery was effected at about 5:40-5:45 PM. According to PW2 Inspector Onkar Singh Brar, consent memo was prepared at 6:15 PM. PW3 SI Rajvir Kaur states that consent memo was prepared at 7:00 PM i.e. after 1½ hours from the time of recovery. PW6 DSP Gurmeet Singh Cheema also stated during cross-examination that consent memo was prepared after about 1 ½ hour i.e. at

7:30 PM from the time of recovery. PW7 ASI Paramjit Singh stated that non-consent and consent memo were prepared at 6:30 PM.

20. It, thus, becomes evident that time of recovery by all these four material witnesses has been stated to be during 5:40 PM to 6:10 PM, but all of them have clearly stated that consent memo Ex.P2 has been prepared after the recovery had already been effected. The time for preparing of the consent memo given by these four witnesses is during 6:15 PM to 7:30 PM. PW3 and PW6 are quite specific that the consent memos were prepared after the recovery had already been effected. The said circumstance in itself entirely demolishes the prosecution case, as by taking the consent of the accused for being searched before a Gazetted Officer or a Magistrate, after recovery had already been effected, is just making mockery of Section 50 of the NDPS Act, because said consent is required to be taken before effecting the search.

21. More doubt is created in the prosecution case by the fact that though PW2 Inspector Onkar Singh Brar states that search of the bag of the accused as well as personal search of the accused was conducted by a lady i.e., SI Rajvir Kaur [as per the requirement of Section 50 (4) NDPS Act], but he is contradicted in this regard by PW3 SI Rajvir Kaur, who says that personal search of the accused as well as the search of bag of the accused was conducted by IO Inspector Onkar Singh Brar in her presence. Similarly, PW6 DSP Gurmeet Singh Cheema as well as PW7 ASI Paramjit Singh also stated that the recovery of contraband from the bag was effected by the IO in their presence and that even the personal search of the accused was taken by the IO i.e., Inspector Onkar Singh Brar.

22. Apart from above, there are also contradictions in the

statements of the material witnesses, as to duration of time for their stay at the spot so as to complete the formalities. Though PW2 Inspector Onkar Singh Brar and PW7 ASI Paramjit Singh state that they remained at the spot for about 6 hours i.e. till 11:30 PM but both of them are contradicted by PW3 SI Rajvir Kaur, who states that they stayed at the spot for about 1½ hour i.e. till 7:00 PM.

23. It is also interesting to note that PW3 SI Rajvir Kaur further disclosed that she was present at Woman Cell Phillaur at the relevant time, when she was called at the spot by SHO Onkar Singh Brar. This statement is quite contrary to the statement made by Inspector Onkar Singh Brar, as per which SI Rajvir Kaur, the only lady official associating the police party, was with the said police party since beginning. PW3 SI Rajvir Kaur further demolished the prosecution case, when she disclosed during her cross-examination that entire writing work was done in the Police Station. Even her statement was recovered in the Police Station. When she had reached at the spot, the police party and the accused were already present. She had not read any memo at the time of signing of the same and she simply signed the same at the instance of the IO. As per her, even DSP Gurmeet Singh Cheema had come to the Police Station for completing the formalities of putting seal on the parcel.

24. Thus, the prosecution story to the effect that contraband was recovered at the spot; that it was weighed at the spot; that it was found to be 800 gm; that it was converted into parcel, which was sealed with seal of 'OSB' by Inspector Onkar Singh Brar and 'GS' by DSP Gurmeet Singh Cheema, are all doubtful having regard to the testimony of PW3 SI Rajvir Kaur, who did not even conduct the search of the accused and rather, the

search was effected by Inspector Onkar Singh Brar himself. It has already been noticed that consent memo Ex.P2 was prepared after the recovery had already been effected.

25. Apart from above, it is not disputed that accused-appellant is from Kenya. The record does not reveal that she was aware of Hindi, Punjabi or English language. All the material documents have been prepared either in Punjabi or in English. PW2 Inspector Onkar Singh Brar admitted that he did not know as to in what language the accused signed the non-consent and consent memo. He admitted that he has not mentioned in these documents that the same were explained to the accused in her language. He also admitted that none of the memos mentioned the fact that accused knew English or Punjabi, though he voluntarily stated that accused had told him orally, but these facts do not find mention in any of the zimini or any statement. He admitted that he is not aware about the language known to the accused. PW3 SI Rajvir Kaur categorically stated that accused did not know Hindi, Punjabi or English language and that she only knew the Kenyan language and was speaking only the said Kenyan language. She also disclosed that police party did not know the Kenyan language, which was being spoken by the accused-appellant.

26. In view of the aforesaid facts and circumstances, it cannot be stated that fair trial has been conducted. The entire investigation is held to be vitiated on account of the accused not understanding any communication made to her by the police party.

27. Consequent to above discussion, when there is complete non-compliance of Section 50 of the NDPS Act and numerous material contradictions have surfaced in the statements of material witnesses of the

prosecution creating doubt about the truthfulness of the prosecution case, the conviction of the appellant-accused as recorded by the trial court, cannot be sustained in the eyes of law.

28. Consequently, the appeal is allowed and the impugned judgment of conviction and order of sentence are hereby set aside. The appellant-accused is directed to be released immediately, if not required in any other case.

14.05.2024

Vivek

(DEEPAK GUPTA)

JUDGE

1. Whether speaking/reasoned?

Yes

2. Whether reportable?

Yes