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IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH

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CRA-S-1685-SB-2008 (O&M)
Date of Decision: 08.05.2025

PAWAN KUMAR

...APPELLANT

Versus

UT OF CHANDIGARH

...RESPONDENT

CORAM: HON'BLE MR. JUSTICE HARPREET SINGH BRAR

Present: Mr. Imran, Advocate as *Amicus Curiae*
for the appellant.

Mr. Manish Bansal, PP U.T. Chandigarh and
Ms. Diksha Sharma, Advocate for UT Chandigarh.

Harpreet Singh Brar, J. (Oral)

1. Present appeal has been preferred by the appellant against the judgment of conviction and order on quantum of sentence dated 06.08.2008 passed by learned Judge, Special Court, Chandigarh vide which the appellant has been convicted and sentenced as mentioned below:

Offence under Section	Sentence	Fine	Sentence in default of payment of fine
21 of NDPS Act	Rigorous imprisonment for three months	Rs. 1,000/-	Rigorous imprisonment for 07 days

2. Brief facts of the case are that on 23.02.2003, SI Harinder Singh Sekhon and other police officials had apprehended the accused-appellant on the basis of suspicion in the area of Rajiv Colony, Sector 38-A, Chandigarh and his name and address was verified. On the basis of suspicion, personal search of the appellant was conducted and 9 grams of smack was recovered, out of which, two samples of 2 grams each were separated. All the parcels were sealed. FIR no. 96 dated 23.02.2003 was registered under Section 21 of the Narcotic Drugs

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and Psychotropic Substances Act, 1985 (hereinafter to be referred as 'NDPS Act').

CONTENTIONS

3. Learned *Amicus Curiae* for the appellant *inter alia* contends that the whole case of prosecution hinges upon the testimonies of official witnesses and no independent witness was joined at the time of recovery of alleged contraband, however, the place of recovery is a thoroughfare. Further, there is non-compliance of mandatory provisions of Section 50 of NDPS Act, as the appellant was apprehended on the basis of suspicion and on being searched the alleged contraband was found by the police. The Police was under legal obligation to serve notice under Section 50 of NDPS Act before carrying out the personal search of the appellant. As per NDPS Act no relaxation is provided regarding issuance of notice under section 50 of the Act in the case of chance recovery. That another flaw in the prosecution case, as per the standing instruction of NCB it is required that the CFSL form be prepared at the spot, which was not ever prepared at the spot or was deposited with MHC or sent to FSL along with the sample. Hence, there is non-compliance of Section 52-A of NDPS Act also. Learned *Amicus Curiae* further submits that although the petitioner is involved in other cases but none of the cases falls within the ambit of NDPS Act.

4. Per contra, learned State counsel argues that learned trial Court has passed a well-reasoned judgment based on correct appreciation of evidence available on record and as such, no interference by this Court is warranted. Additionally, there is nothing on record to suggest that the appellant may have been falsely implicated.



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OBSERVATIONS AND ANALYSIS

5. Having heard learned counsel for the parties and after perusing the record with their able assistance, it transpires that no independent witness was joined in the investigation and the entire prosecution case is totally based upon the testimony of official witnesses. Infact, neither any effort was made to associate any independent witness nor any explanation is forthcoming for not doing so. A two Judge Bench of the Hon'ble Supreme Court in ***Krishan Chand Vs. State of H.P., AIR 2017 SC 3751*** has laid down the ratio that the failure of the Investigating Officer to associate an independent witness at the time of recovery creates a dent in the case of the prosecution. The Hon'ble Supreme Court in ***Gorakh Nath Prasad Vs. State of Bihar, 2018(1) R.C.R. (Criminal) 108*** has acquitted the accused while holding that the case of the prosecution cannot be said to be proved when it is entirely based upon the statements of the official witness when no independent witness has been joined in the investigation.

6. Learned amicus curie has forcefully argued that provisions of the Section 50 of NDPS Act were not complied with, as the appellant was not made aware of his legal right to be searched before a Gazetted Officer or a Magistrate. The above contention of the learned counsel for the appellant, when tested on the anvil of the facts and circumstances of the present case, finds merit. Undisputedly, the alleged contraband was recovered from accused while having a polythene envelop in his right side pocket of pant and on the basis of suspicion the envelop was searched which led to recovery of Heroin(smack). Therefore, the rigor of Section 50 of the NDPS Act would be made applicable.

7. A two Judge Bench of the Hon'ble Supreme Court in ***State of Rajasthan v. Parmanand and another (2014) 5 SCC 345*** speaking through Justice Ranjana P. Desai has held as under:-

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"15. Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application. In this case, Respondent 1 Parmanand's bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of Respondent 2 Surajmal was also conducted. Therefore, in the light of the judgements of this Court mentioned in the preceding paragraphs Section 50 of the NDPS Act will have application."

A three Judge Bench of the Hon'ble Supreme Court in ***S.K. Raju alias Abdul Haque alias Jagga v. State of W.B. (2018) 9 SCC 708*** speaking through Justice Dr. D.Y. Chandrachud has held as under:-

"20. The question which arises before us is whether Section 50 (1) was required to be complied with when charas was recovered only from the bag of the appellant and no charas was found on his person. Further, if the first question is answered in the affirmative, whether the requirements of Section 50 were strictly complied with by PW 2 and PW 4.

21. As evidenced by Ext. 3, a first option was given to the appellant. PW 2 informed him that it was his legal right to be searched either in the presence of a Magistrate or in the presence of a gazetted officer. The appellant was then asked to give his option by indicating whether he wanted to be searched by a Magistrate or a gazetted officer. The appellant indicated that he wanted the search to be carried out in the presence of a gazetted officer. When PW 4 arrived, he was introduced to the detainee as a gazetted officer. As evidenced by Ext. 4, PW 4 then gave the appellant a second option. He inquired of him again, whether he wanted to be searched in the presence of a gazetted officer or in the presence of a Magistrate. The appellant reiterated his desire to be searched in the presence of a gazetted officer. Before the search of the appellant commenced, the gazetted officer asked the appellant whether he wanted to



search PW 2 before his own search was carried out by PW 2. The appellant agreed to search PW 2 before the latter carried out his search. On conducting the search, only personal belongings of PW 2 were found by the appellant. On the search of the appellant in the presence of the gazetted officer, a biscuit-coloured jute bag was recovered from the appellant, and Rs 2400 cash in the denomination of 24 notes of Rs 100 each was found in the left pocket of the appellant's trouser. When the bag was opened, a black polythene cover containing nineteen rectangular broken sheets of a blackish/deep brown colour weighing 1.5 kg was recovered. The sheets were tested and were found to be charas.

22. PW 2 conducted search of the bag of the appellant as well as of the appellant's trousers. Therefore, the search conducted by PW 2 was not only of the bag which the appellant was carrying, but also of the appellant's person. Since the search of the person of the appellant was also involved, Section 50 would be attracted in this case. Accordingly, PW 2 was required to comply with the requirements of Section 50 (1). As soon as the search of a person takes place, the requirement of mandatory compliance with Section 50 is attracted, irrespective of whether contraband is recovered from the person of the detainee or not. It was, therefore, imperative for PW 2 to inform the appellant of his legal right to be searched in the presence of either a gazetted officer or a Magistrate. From Ext. 3, it can be discerned that the appellant was informed of his legal right to be searched in the presence of a Magistrate or a gazetted officer. The appellant opted for the latter alternative. Ext. 4 is a record of the events after the arrival of PW 4 on the scene. After the arrival of PW 4, the appellant was once again asked by him, whether he wished to be searched in the presence of a gazetted officer or a Magistrate. This was the second option which was presented to him. When he reiterated his desire to be searched before a gazetted officer, PW 4 inquired of the appellant whether he wished to search PW 2 before his own search was conducted by PW 2. The appellant agreed to search PW 2. Only the personal belongings of PW 2 were



found by the appellant. It was only after this that a search of the appellant was conducted and charas recovered. Before the appellant's search was conducted, both PW 2 and PW 4 on different occasions apprised the appellant of his legal right to be searched either in the presence of a gazetted officer or a Magistrate. The options given by both PW 2 and PW 4 were unambiguous. Merely because the appellant was given an option of searching PW 2 before the latter conducted his search, would not vitiate the search. In Parmanand, in addition to the option of being searched by the gazetted officer or the Magistrate, the detainee was given a "third" alternative by the empowered officer which was to be searched by an officer who was a part of the raiding team. This was found to be contrary to the intent of Section 50 (1). The option given to the appellant of searching PW 2 in the case at hand, before the latter searched the appellant, did not vitiate the process in which a search of the appellant was conducted. The search of the appellant was as a matter of fact conducted in the presence of PW 4, a gazetted officer, in consonance with the voluntary communication made by the appellant to both PW 2 and PW 4. There was strict compliance with the requirements of Section 50 (1) as stipulated by this Court in Vijaysinh ."

In the present case, despite being it was a case of chance recovery, 'it is correct that no notice under Section 50 of the NDPS Act was served upon the accused and there is not an iota of evidence produced on record by the prosecution to prove that the accused-appellant was made aware of his right to be searched by a Gazetted Officer or a Magistrate at the time of his personal search and that an offer of search was given to him as enshrined under *Section 50* of the NDPS Act.

8. Another glaring omission in the investigation of the case is the non-compliance of Section 52-A of the NDPS Act. The safeguard provided under Section 52-A of the NDPS Act is in furtherance of Article 21 of the Constitution of



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India, which guarantees a fair and impartial investigation. Although samples were taken at spot and sent for chemical examination within 72 hours, on 25.02.2003 by PW-3 ASI Amanjot Singh, the mandatory Form 29 was not filled at the spot which was required to be verified by the Magistrate along with inventory and the representative samples were also required to be drawn in the presence of the concerned Magistrate as mandated under Section 52-A of the Act. The case of the appellant is fully covered by the ratio of law laid down in ***Union of India vs. Bal Mukund and others, 2009(2) RCR (Criminal) 574***. As such, there is a clear non-compliance of Section 52-A of the Act as also the guidelines issued by a two Judge Bench of the Hon'ble Supreme Court in ***Union of India vs. Mohan Lal, 2016 (1) R.C.R. (Criminal) 858***, speaking through Justice T.S.Thakur, which are reproduced here as under:-

“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.”

9. It is a well settled proposition that the representative samples must be drawn before the Magistrate as per the ratio laid down in ***UOI vs. Mohan Lal*** (*supra*). Recently, a two Judge Bench of the Hon'ble Supreme Court in ***Mangilal vs. The State of M.P., 2023 SCC OnLine SC 862***, speaking through Justice M. M. Sundresh, while acquitting the accused, has observed that the

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mandate of Section 52-A of the Act has to be duly complied with. The following was observed:

“8. Before any proposed disposal/destruction mandate of Section 52A of the NPDS Act requires to be duly complied with starting with an application to that effect. A Court should be satisfied with such compliance while deciding the case. The onus is entirely on the prosecution in a given case to satisfy the Court when such an issue arises for consideration. Production and other connected matter of seized material is a factor to establish seizure followed by recovery. One has to remember that the provisions of the NDPS Act are both stringent and rigorous and therefore the burden heavily lies on the prosecution. Non-production of a physical evidence would lead to a negative inference within the meaning of Section 114(g) of the Indian Evidence Act, 1872 (hereinafter referred to as the Evidence Act). The procedure contemplated through the notification has an element of fair play such as the deposit of the seal, numbering the containers in seriatim wise and keeping them in lots preceded by compliance of the procedure for drawing samples.”

10. Admittedly, Section 52-A of the Act was inserted by Act 2 of 1989 which came into force w.e.f. 29.05.1989. Section 52-A (2) (c) of the Act provides for drawing a representative sample of the seized contraband in the presence of a Magistrate. On the other hand, para 1.5 of the Standing Order No. 1 of 1988 requires that the samples of the seized contraband must be drawn on the spot of recovery in duplicate. Similar provision is provided in Standing Order No.1 of 1989 dated 13.06.1989. As such, *the Standing Orders cannot supersede the implication of Section 52-A of the Act*. Further, the law is well settled that whenever there is a conflict between the Act and the instructions relating to the same subject matter, the Act would prevail but where the instructions supplement the Act, the former would have a binding force.

11. The sanctity of the statutory instructions contained in the Standing Orders issued by the Narcotics Control Bureau came up for consideration before the Hon’ble Supreme Court in *Noor Aga vs. State of Punjab, 2008 (16) SCC*



417, where a two Judge Bench, speaking through Justice S.B.Sinha, held as under:-

*“32. Recently, this Court in **State of Kerala & Ors. v. Kurian Abraham (P) Ltd. & Anr. [(2008) 3 SCC 582]**, following the earlier decision of this Court in **Union of India v. Azadi Bachao Andolan [(2004) 10 SCC 1]** held that statutory instructions are mandatory in nature.*

Logical corollary of these discussions is that the guidelines such as those present in the Standing Order cannot be blatantly flouted and substantial compliance therewith must be insisted upon for so that sanctity of physical evidence in such cases remains intact. Clearly, there has been no substantial compliance of these guidelines by the investigating authority which leads to drawing of an adverse inference against them to the effect that had such evidence been produced, the same would have gone against the prosecution.”

A comparison of the Standing Order No.1 of 1988 with Section 52-A (2)

(c) of the Act shows that there is a divergence with regard to drawing of the representative samples. Standing Order No.1 of 1988 provides for drawing of sample at the spot, whereas Section 52-A of the Act provides for drawing of sample in the presence of a Magistrate. Therefore, in the light of Act 2 of 1989, inserting Section 52-A in the Act as well as the ratio of law laid down in **UOI vs. Mohan Lal** (supra), it is clear that as far as the manner in which representative samples are required to be drawn, the investigating agency is bound to follow the drill of Section 52-A of the Act. As far as the mode and time limit for dispatch of samples is concerned, para 1.13 of the Standing Order No. 1 of 1988 provides that samples must be dispatched to the laboratory within 72 hours of seizure to avoid any legal objection and this time limit. Thus, the above omission on the part of the investigating officer with regard to total non-compliance of section 52-A of NDPS Act and non-filling of Form 29 at the spot would tantamount to a serious flaw in the investigation and it suffocates the prosecution case completely.

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12. In view of the above discussion, this Court is of the considered opinion that the prosecution has failed to prove its case beyond reasonable doubt. Accordingly, the present appeal is allowed and the judgment of conviction and order of sentence dated 06.08.2008 passed by learned Judge, Special Court, Chandigarh are hereby set aside. The appellant, namely Pawan Kumar is acquitted of the charges framed against him. His bail bonds and surety bonds stand discharged.

13. All the pending miscellaneous application(s), if any, shall also stand disposed of.

14. The case property, if any, may be dealt with as per rules, after the expiry of period of limitation for filing the appeal(s). Record of the case be sent back to the Court below.

(HARPREET SINGH BRAR)
JUDGE

08.05.2025*Ajay Goswami**Whether speaking/reasoned**Whether reportable**Yes/No**Yes/No*