

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

**Reserved on 28th October, 2022
Pronounced on 3rd February, 2023**

CRA-S No.496-SB of 2005

Parkash SinghAppellant

Versus

State of PunjabRespondent

CORAM: HON'BLE MR. JUSTICE PANKAJ JAIN

Present : Mr. Bhrigu Dutt Sharma, Advocate
for the appellant.

Mr. Sarabjit S. Cheema, Dy. Advocate General, Punjab
for the respondent-State.

PANKAJ JAIN, J. (ORAL)

The appellant has been convicted for offence punishable under Section 15 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (for short, 'the NDPS Act') in case FIR No.124 dated 20th of June, 2003, registered at Police Station Sadar, Pathankot. He has been sentenced to undergo Rigorous Imprisonment for 2 years and to pay fine of Rs.2500/-. In default of payment of fine he is to undergo further Rigorous Imprisonment for 2 months.

2. As per the prosecution, truck bearing registration No.PB-04-B-9884 driven by the appellant was intercepted at *Naka*. On checking of the truck it was found that one bag of white colour was lying behind the driver's seat. In terms of Section 50 of the NDPS Act,

appellant was offered to exercise his option to get the search conducted in presence of Investigating Officer or the Gazetted Officer or the Magistrate. Appellant opted to get the search conducted in the presence of Gazetted Officer. Memo Exhibit PC was prepared. Deputy Superintendent of Police, a Gazetted Officer was called. Gazetted Officer disclosed his identity to the accused and again gave accused offer to get the search conducted in his presence or in the presence of some other Gazetted Officer, or Magistrate. It is claimed that the accused reposed faith in the Deputy Superintendent of Police and signed memo Exhibit P-D. Truck was searched. From the plastic bag poppy-husk weighing 12 kgs. 200 grams was recovered. Sample and bulk parcels were drawn. From the personal search of the accused currency notes amounting to Rs.11080/- were recovered. Regarding this separate recovery memo was drawn. Sealed parcels of the contraband recovered were produced before the Illaqa Magistrate in compliance of Section 52-A of the NDPS Act. After completion of investigation, Report under Section 173 Cr.P.C. was filed. The appellant was charged for offence punishable under Section 15 of the NDPS Act. Trial Court after considering the evidence on record held the appellant guilty of being in conscious possession of a narcotic substance i.e. poppy-husk weighing 12 kgs. 200 grams and, thus, held

him guilty of offence punishable under Section 15 of the NDPS Act and awarded him sentence as mentioned hereinabove.

3. Mr. B.D. Sharma, Advocate appearing for the appellant has taken this Court through the testimony of PW-3 SI Joga Singh, PW-6 DSP (HQ.) Hatinder Singh and that of PW-7 Inspector Chhaju Ram- the Investigating Officer to submit that there are major discrepancies w.r.t. the time of accused being intercepted at the *Naka*, mode by way of which Gazetted Officer was called and w.r.t. source of weights and measures. He further submits that apart from major discrepancies in the oral testimonies of the material witnesses there are material discrepancies even in the written documents. He claims that when a consent memo Exhibit PC is compared with the *Ruqa* Exhibit P-J both authored by IO Chhaju Ram, it is a clear case of false implication. While recording consent memo Exhibit PC, it is recorded that an offer was given to the accused to get him himself searched by Investigating Officer or by the Gazetted Officer or by the Magistrate whereas in the *Ruqa* recorded on the same day and probably at the same time it has been stated that the IO offered the appellant to get himself searched by the IO or by some Gazetted Officer. Apart from this he also submits that bare perusal of the consent memos recorded at the time of search and seizure would indicate that the same bear FIR number. The

argument raised is that the mentioning of FIR number even prior to registration of FIR itself would be a circumstance to raise doubt w.r.t. the investigation carried out by the agencies. He submits that it shows that even prior to search, the Investigating Authorities were sure that the contraband will be recovered leading to registration of FIR which clearly points towards false implication of the appellant at the hands of the agencies. In support of his contention, counsel for the appellant relies upon the Division Bench's judgment of this Court in **Didar Singh @ Dara vs. State of Punjab, 2010(3) RCR (Criminal) 337** wherein it has been observed that if the documents prepared on the spot contain number and FIR at a time when FIR was not even registered, it casts serious doubt on the prosecution story. Similar is the view taken by this Court in the case of **Ajay Malik vs. State of U.T., Chandigarh, 2009(3) RCR (Criminal) 649**. He further contends that admittedly the petitioner was intercepted and the recovery was made from a public place yet no effort was made to join any independent witness which itself casts cloud on the story being projected by the prosecution. Mr. Sharma has strenuously argued that it is a case wherein there is patent violation of the mandatory provisions contained in Section 50 of the NDPS Act. The offer made to the petitioner being in teeth of the mandate of the mandatory

provision, whole of the trial gets vitiated. In order to hammer-forth his contention, he relies upon law laid down by Apex Court in the case of **Myla Venkateswarlu vs. State of A.P. (2012) 5 SCC 226**, **State of Rajasthan vs. Parmanand and another, (2014) 5 SCC 345** and **S.K. Raju @ Abdul Haque @ Jagga vs. State of West Bengal, (2018) 9 SCC 708**.

4. Ld. Counsel for the appellant submits that it has come on record during investigation that the vehicle from which recovery has been made is owned by one Jarnail Singh. Surprisingly, for the reasons best known to the Investigating Agency the said Jarnail Singh has not been associated with the investigation. He, thus, submits that in the absence of there being any evidence to relate the appellant to the vehicle in question, contraband recovered from the vehicle cannot be said to be in conscious possession of the appellant.

5. Lastly, Mr. Bhriugu Dutt Sharma while referring to Section 15 of the NDPS Act submits that the provision contained in Section 15 (b) provides for maximum punishment but does not prescribe minimum punishment. Appellant was implicated in the present case in the year 2003 and has no criminal antecedents prior thereto or after the present case. The quantity alleged to have been recovered from him is much less than the commercial quantity notified. Thus, the legislature

having left it to judicious discretion of the Court to award minimum sentence, the sentence awarded to the appellant should be reduced to already undergone. The appellant has already faced protracted prosecution for about 20 years and has also undergone actual custody of 2 months and 13 days.

6. Per contra, Ld. Counsel for the respondent/State submits that it is too late in the day for the appellant to dispute his link with the truck being its driver. He submits that the appellant can't deny that he was driving the truck in question on the day it was intercepted and recovery was effected from the truck. He, thus, claims in view of Section 34 the onus shifts upon the appellant to prove it otherwise. W.r.t. the plea raised by the appellant *qua* false implication, Mr. Cheema submits that there is no reason brought on record to suggest false implication of the appellant. He submits that it is not the defence which was pleaded or put forth by the accused during the course of the trial and, thus, merely oral assertions would not cut any ice. It is a plea of fact which was required to be proved. He asserts that as per settled law non-association of an independent witness cannot be held fatal to the case of the prosecution. He further submits that the alleged discrepancies pointed out by the counsel for the appellant w.r.t. an illegal offer being made by invoking Section 50 of the NDPS Act is

inconsequential. He submits that since in the present case recovery has not been made from the person of the accused, Section 50 will not be applicable and, thus, reliance thereupon is misplaced. He submits that a strong reliance is being placed upon mentioning of FIR number in the consent memos is also without any basis. He submits that from bare perusal of the consent memos, it is evident that at the time of preparing the consent memos blank space was left which was later-on filled after FIR number was assigned on *Ruqa*. Mr. Cheema further relies upon judgment rendered by a Co-ordinate Bench of this Court in **CRM-M No.22127 of 2011** titled as '**Balwinder Singh @ Binder vs. State of Punjab**' wherein it has been held that mentioning of FIR on the space left blank in the consent memos is not unusual.

7. I have heard Ld. Counsel for the parties and have gone through the records of the case.

8. Plea raised by counsel for the appellant regarding violation of Section 50 of the NDPS Act is misconceived and deserves to be rejected. Admittedly, appellant was searched in presence of Gazetted Officer after he exercised his right. Thus no fault can be found with compliance of Section 50 of the NDPS Act. Likewise the plea w.r.t. absence of an independent witness also does not cut any ice. It is a matter of common knowledge that independent witness seldom join

such proceedings and the plea that the whole of the prosecution needs to be vitiated for want of independent witness can't be accepted.

9. The contention raised by counsel for the appellant w.r.t. mentioning of details of FIR on the consent memo and non-consent memo prepared on the spot also sans merit. Hatinder Singh, DSP appeared as PW-6 and I.O. Chhaju Ram appeared as PW-7. A bare perusal of the testimony would reveal that no question w.r.t. mentioning of FIR number on the documents Exhibit P-C and Exhibit P-D was put to any of the witnesses. So much so not even a suggestion was put that the documents were not prepared at the spot. Having considered the contention of counsel for the appellant in the light of the evidence, this Court finds that mere mentioning of the FIR number in the documents *ipso facto* cannot lead to the conclusion that the same have been prepared at a later stage. In the absence of any question put to the Investigating Officer or the Gazetted Officer that the documents were not prepared by them at the spot, mere mentioning of FIR number in the documents cannot be held to be fatal to the prosecution. The defence having failed to confront the witnesses cannot be permitted to raise this plea in appeal. Reliance can be placed upon Division Bench's judgment of Himachal Pradesh High Court in **Jauni Ram vs. State of H.P. 2005(3) AIC 412.**

10. At this stage this Court feels it necessary to put on record that the question w.r.t. non-mentioning of FIR number on the consent memos has been subject matter of continuous debate in series of the precedents. By now it stands settled that Section 50 of the NDPS Act as contemplated under the 1985 Act is mandatory and non-compliance thereof can lead to acquittal of an accused. Wherever personal search is to be made consent/non-consent memos under Section 50 are prepared prior to the registration of FIR. In some cases the plea of consent memos having been prepared after registration of FIR for carrying details of FIR leads to acquittal and in some as in the present case it is held to be inconsequential. Thus, in order to remove the uncertainty w.r.t. this important aspect of investigation, Investigating Agencies need to be more proactive. This may not be left to probability. The investigation needs to be more robust. The Act was enacted in the year 1985. More than 37 years have gone by. Today, when majority of the Investigating Officers are equipped with smart-phones it is desirable that the State Governments should come up with some web-portal on which the consent memo/non-consent memo *qua* compliance of Section 50 can be uploaded at the time the same is executed and such uploading of the memo generates some unique ID number which can be utilized as a reference at the time of registration

of FIR to be related later on. It will be a cogent evidence at least to prove the place, date and time where and when such memo was uploaded. This is one of the ways in which the uncertainty involving this important aspect of the investigation can be weeded out. This is only an illustrative measure. Prosecution Agency may evolve any such measure with an objective to weed out the chance of false implications/undeserved acquittal so that the real culprit gets conviction and the innocent is not falsely implicated. This Court is sanguine that the concerned agencies shall make an endeavour to make investigation more full-proof.

11. So far as the argument raised by counsel for the appellant w.r.t. leniency in conviction is concerned, keeping in view the menace of drugs gripping the State of Punjab and the deleterious effect the same has on the society, it deserves to be rejected.

12. Resultantly, the present appeal is dismissed. Impugned judgment and order of conviction passed by the Special Judge, Gurdaspur, dated 9th of February, 2005/10th of February, 2005 are upheld.

February 03, 2023

Dpr

(PANKAJ JAIN)

JUDGE

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No