

Reportable

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS.1565-66 OF 2019
(@ out of SLP (CrI.) Nos. 5659-5660/2019)

STATE OF PUNJAB

Appellant(s)

VERSUS

BALJINDER SINGH & ANR.

Respondent(s)

J U D G M E N T

Uday Umesh Lalit, J.

1. Leave granted.
2. These appeals arise out of the judgment¹ of the High Court² setting aside the order of conviction and sentence recorded by the Trial Court against the present respondents, namely, Baljinder Singh and Khushi Khan.
3. The case of the prosecution as set out in the judgment of the High Court was as under:

“3. The case of the prosecution in a nutshell is ;that on 19.8.2009 ASI Rakesh Kumar along with other police officials in connection with patrolling duty were present at Sirhind bye-pass, Rajpura. Lachhman Singh son of Sarwan Singh came on the spot. When Rakesh Kumar was talking with Lachhman Singh, a Qualis bearing registration no. PB-13-D-7000 was seen coming from Ambala side. On seeing the police party, the driver of the vehicle tried to reverse the

¹ Judgment and order dt.22.1.19 in CRA-D-917-DB/2011 & CRA-D-923-DB/2011

² The High Court of Punjab and Haryana at Chandigarh

vehicle. On suspicion, the vehicle was stopped. One lady was sitting with the driver. On enquiry, the driver and passenger disclosed their identities. ASI Rakesh Kumar suspected them to be carrying some contraband in the bags lying in the vehicle. He wanted to search them. He apprised the accused of their right to get the search conducted in the presence of Magistrate or gazetted Police Officer. However, accused reposed confidence in him. Joint consent statement of accused was reduced into writing. On search, 7 bags containing poppy husk were recovered. Two samples of 250 grams each from each bag were separated and the residual poppy husk of each bag weighed 34 kgs. All the sample parcels and bulk parcels were sealed with the seals bearing impression 'RK' Specimen seal was prepared and the seal after use was handed over to HC Malwinder Singh. The case property was taken into possession. Ruqa was sent to the police station, on the basis of which FIR was registered. The case property was deposited in the Malkhana. On receipt of chemical report and after completing all the codal formalities, challan was put up in Court against the accused.”

4. Thus, according to the prosecution, accused Baljinder Singh, driver of the vehicle and Khushi Khan who was accompanying the driver, were guilty of offences punishable under Section 15 of the Narcotic and Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as “the Act”). As indicated in the above paragraph, the contraband material found in seven bags contained poppy husk. It is also a matter of record that the personal search of both the accused was undertaken after their arrest, which did not lead to any recovery of contraband.

5. The case of the prosecution was accepted by the Judge, Special Court, Patiala in Sessions Case No.IIT/17.11.2009/11. By its judgment

dated 8.9.2011, the Trial Court concluded that the aforesaid two accused were guilty of the offence punishable under Section 15 of the Act and sentenced them to suffer 12 years' rigorous imprisonment with fine in the sum of Rs.2 lakhs each, in default whereof, they were further directed to undergo further rigorous imprisonment for two years.

6. In the appeals preferred by the accused, the High Court observed that the personal search of the accused was not conducted before the Magistrate or a Gazetted Officer and as such there was complete infraction of Section 50 of the Act. Granting benefit on that count, the High Court set aside the order of conviction and sentence recorded by the Trial Court and acquitted both the accused of the charge levelled against them.

7. Ms. Jaspreet Gogia, learned advocate appearing for the State submitted that the High Court fell in error in not considering the fact that the search of the vehicle had resulted in recovery of seven bags of poppy husk containing 34 kgs in each bag. In her submission, though there may be infraction of the requirement of Section 50 as regards personal search of the accused, the fact of recovery of material from the vehicle was an independent factor which ought to be taken into account.

8. Mr. Naresh Dilawari and Ms. Pallavi Singh, learned advocates appearing for the accused however, submitted that non-compliance of

Section 50 ought to result in acquittal of the accused and as such the view taken by the High Court was correct.

9. Ms. Pallavi Singh, learned Advocate also relied upon the decision of this Court in *Dilip & Anr vs State of M.P.*³ to submit that once there was non-compliance of the requirements of Section 50, the benefit ought to be extended in favour of the accused.

10. The question that arises in the matter is:-

If a person found to be in possession of a vehicle containing contraband is subjected to personal search, which may not be in conformity with the requirements under Section 50 of the Act; but

the search of the vehicle results in recovery of contraband material, which stands proved independently;

would the accused be entitled to benefit of acquittal on the ground of non-compliance of Section 50 of the Act even in respect of material found in the search of the vehicle.

11. Before we deal with the question, we may extract Section 50 of the Act:

“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 the 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. Section 50 of the Act affords protection to a person in matters concerning “personal search” and stipulates various safeguards. It is only upon fulfilment of and strict adherence to said requirements that the contraband recovered pursuant to “personal search” of a person can be relied upon as a circumstance against the person.

13. The law which has developed on the point in some of the judgments

of this Court may now be considered.

In *State of Punjab vs. Baldev Singh*⁴ a Constitution Bench of this Court considered, *inter alia*, questions as to what would be the resultant effect, in case the requirements of Section 50 were not complied with. The conclusions arrived at in para 57 of the decision were as under:

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. (Underlying by us)

(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

4 [(1999) 6 SCC 172]

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. An illegal search cannot entitle the prosecution to raise a presumption under Section 54 of the Act.

(9) That the judgment in Pooran Mal case [(1974) 1 SCC 345] cannot be understood to have laid down that an illicit article seized during a search of a person, on prior information, conducted in violation of the provisions of Section 50 of the Act, can by itself be used as evidence of unlawful possession of the illicit article on the person from whom the contraband has been seized during the illegal search.

(10) That the judgment in Ali Mustaffa case [(1994) 6 SCC 569] correctly interprets and distinguishes the judgment in Pooran Mal case [(1974) 1 SCC 345] and the broad observations made in Pirthi Chand case [(1996) 2 SCC 37] and Jasbir Singh case [(1996) 1 SCC 288] are not in tune with the correct exposition of law as laid down in Pooran Mal case [(1974) 1 SCC 345].”

Subsequently, another Constitution Bench of this Court in *Vijaysinh Chandubha Jadeja vs. State of Gujarat*⁵ had an occasion to consider the case from the stand-point whether the person who is about to be searched ought to be informed of his right that he could be searched in

⁵ [(2011) 1 SCC 609]

the presence of a Gazetted Officer or a Magistrate. While considering said question, this Court also dealt with the judgment rendered in Baldev Singh's case and the discussion in paragraphs 24 and 29 was as under:

24. Although the Constitution Bench in *Baldev Singh case* [(1999) 6 SCC 172] did not decide in absolute terms the question whether or not Section 50 of the NDPS Act was directory or mandatory yet it was held that provisions of sub-section (1) of Section 50 make it imperative for the empowered officer to "inform" the person concerned (suspect) about the existence of his right that if he so requires, he shall be searched before a gazetted officer or a Magistrate; failure to "inform" the suspect about the existence of his said right would cause prejudice to him, 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 the person during a search conducted in violation of the provisions of Section 50 of the NDPS Act. The Court also noted that it was not necessary that the information required to be given under Section 50 should be in a prescribed form or in writing but it was mandatory that the suspect was made aware of the existence of his right to be searched before a gazetted officer or a Magistrate, if so required by him. We respectfully concur with these conclusions. Any other interpretation of the provision would make the valuable right conferred on the suspect illusory and a farce.

... ..

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.”
(Underlying by us)

14. The law is thus well settled that an illicit article seized from the person during personal search conducted in violation of the safe-guards provided in Section 50 of the Act cannot by itself be used as admissible evidence of proof of unlawful possession of contra-band.

But the question is, if there be any other material or article recovered during the investigation, would the infraction with respect to personal search also affect the qualitative value of the other material circumstance.

15. At this stage we may also consider following observations from the decision of this Court in *Ajmer Singh vs. State of Haryana*⁶:-

“15. The learned counsel for the appellant contended that the provision of Section 50 of the Act would also apply, while searching the bag, briefcase, etc. carried by the person and its non-compliance would be fatal to the proceedings initiated under the Act. We find no merit in the contention of

6 [(2010) 3 SCC 746]

the learned counsel. It requires to be noticed that the question of compliance or non-compliance with Section 50 of the NDPS Act is relevant only where search of a person is involved and the said section is not applicable nor attracted where no search of a person is involved. Search and recovery from a bag, briefcase, container, etc. does not come within the ambit of Section 50 of the NDPS Act, because firstly, Section 50 expressly speaks of search of person only. Secondly, the section speaks of taking of the person to be searched by the gazetted officer or a Magistrate for the purpose of search. Thirdly, this issue in our considered opinion is no more *res integra* in view of the observations made by this Court in *Madan Lal v. State of H.P.* [(2003) 7 SCC 465]. The Court has observed: (SCC p. 471, para 16)

“16. A bare reading of Section 50 shows that it only applies in case of personal search of a person. It does not extend to search of a vehicle or a container or a bag or premises (see *Kalema Tumba v. State of Maharashtra* [(1999) 8 SCC 257], *State of Punjab v. Baldev Singh* [(1999) 6 SCC 172] and *Gurbax Singh v. State of Haryana* [(2001) 3 SCC 28]). The language of Section 50 is implicitly clear that the search has to be in relation to a person as contrasted to search of premises, vehicles or articles. This position was settled beyond doubt by the Constitution Bench in *Baldev Singh case*¹. Above being the position, the contention regarding non-compliance with Section 50 of the Act is also without any substance.”

16. As regards applicability of the requirements under Section 50 of the Act are concerned, it is well settled that the mandate of Section 50 of the Act is confined to “personal search” and not to search of a vehicle or a container or premises.

17. The conclusion (3) as recorded by the Constitution Bench in Para

57 of its judgment in *Baldev Singh* clearly states that the conviction may not be based “only” on the basis of possession of an illicit article recovered from personal search in violation of the requirements under Section 50 of the Act but if there be other evidence on record, such material can certainly be looked into.

In the instant case, the personal search of the accused did not result in recovery of any contraband. Even if there was any such recovery, the same could not be relied upon for want of compliance of the requirements of Section 50 of the Act. But the search of the vehicle and recovery of contraband pursuant thereto having stood proved, merely because there was non-compliance of Section 50 of the Act as far as “personal search” was concerned, no benefit can be extended so as to invalidate the effect of recovery from the search of the vehicle. Any such idea would be directly in the teeth of conclusion (3) as aforesaid.

18. The decision of this Court in *Dilip’s* case, however, has not adverted to the distinction as discussed hereinabove and proceeded to confer advantage upon the accused even in respect of recovery from the vehicle, on the ground that the requirements of Section 50 relating to personal search were not complied with. In our view, the decision of this Court in said judgment in *Dilip’s* case is not correct and is opposed to the law laid down by this Court in *Baldev Singh* and other judgments.

19. Since in the present matter, seven bags of poppy husk each weighing 34 kgs. were found from the vehicle which was being driven by accused- Baljinder Singh with the other accused accompanying him, their presence and possession of the contraband material stood completely established.

20. In the circumstances, the acquittal recorded by the High Court, in our considered view, was not correct. We, therefore, set aside the view taken by the High Court.

While allowing this appeal, we restore the order of conviction recorded by the Trial Court and hold accused Baljinder Singh and Khushi Khan to be guilty of the offence punishable under Section 50 of the Act. We, however, reduce their substantive sentence from 12 years to 10 years while maintaining other incidents of sentence namely, the payment of fine and the default sentence unaltered.

The appeals stand allowed in aforesaid terms.

21. Both the accused are given time till 15th November, 2019 to surrender before the concerned police station to undergo remaining sentence. In case, the accused fail to surrender within said period, they shall immediately be taken into custody by the concerned Police Station. A copy of this judgment shall be communicated to the concerned Chief Judicial Magistrate and Police Station for compliance. The compliance in

that behalf shall be reported to this Court on or before 01.12.2019.

.....J.
(UDAY UMESH LALIT)

.....J.
(INDU MALHOTRA)

.....J.
(KRISHNA MURARI)

New Delhi
October 15, 2019.

ITEM NO.7

COURT NO.7

SECTION II-B

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

Petition(s) for Special Leave to Appeal (Cr1.) No(s). 5659-

5660/2019

(Arising out of impugned final judgment and order dated 22-01-2019 in CRAD No. 923/2011 22-01-2019 in CRAD No. 917/2011 passed by the High Court Of Punjab & Haryana At Chandigarh)

THE STATE OF PUNJAB

Petitioner(s)

VERSUS

BALJINDER SINGH & ANR.

Respondent(s)

Date : 15-10-2019 These petitions were called on for hearing today.
CORAM :

HON'BLE MR. JUSTICE UDAY UMESH LALIT
HON'BLE MS. JUSTICE INDU MALHOTRA
HON'BLE MR. JUSTICE KRISHNA MURARI

For Petitioner(s) Ms. Jaspreet Gogia, AOR
Ms. Tanupriya, Adv.

For Respondent(s) Mr. Naresh Dilawari, Adv,
Mr. Mahesh Thakur, AOR
Ms. Sheffali Chaudhary, Adv.
Ms. Vipasha Singh, Adv.

Ms. Pallavi Singh, Adv.
Ms. Vriti Gujral, Adv.
Mr. G. Balaji, AOR

UPON hearing the counsel the Court made the following
O R D E R

Leave granted.

The appeals are allowed in terms of the signed Judgment.

(INDU MARWAH)
COURT MASTER

(SUMAN JAIN)
BRANCH OFFICER

(Signed reportable-judgment is placed on the file)