

Before Arvind Singh Sangwan, J.

NEK SINGH—Appellant

versus

STATE OF HARYANA—Respondent

CRA-S No.1968-SB of 2002

March 13, 2018

Narcotic Drugs And Psychotropic Substances Act, 1985—Ss. 15, 50, 52-A & 52-A (3)—Appellant tried and convicted under Section 15 of NDPS Act for possession of 19 Kgs poppy husk—Appeal filed—Allowed—Held—Under Section 50 of the Act offer given to a person should be clear that he has legal right to be searched either before Magistrate or Gazetted Officer—Inventory not prepared—Clear violation of Section 52-A of the Act—Provisions of Section 52-A (3) of the Act not followed—No evidence that after arrest of appellant and seizure of contraband they were produced before Magistrate.

Held that, it is a clear case of violation of mandatory provisions of Section 50 of the Act. It is provided under Section 50 of the Act that the offer given to a person, should be clear that he has a legal right to be searched either before a Magistrate or before a Gazetted Officer.

(Para 17(a))

Further held that, as per record that there is a clear violation of Section 52- A of the Act. A careful perusal of statement of PW ASI Atma Ram, shows that he has not prepared any inventory and even SI/SHO Shamsher Singh has deposed that when the accused was presented before him, he had not prepared any inventory.

(Para 17(b))

Further held that, as per on record, even the provisions of Section 52-A (3) are not followed in the present case. It is not the case of the prosecution that after arrest of the appellant and on seizure of the contraband, they were produced before the Magistrate for the purpose of verification and obtaining any such order from the Magistrate regarding deposit of the recovered contraband in police or judicial malkhana and to be sent to the FSL, rather a perusal of statements of PW ASI Atma Ram and PW SI/SHO Shemsher Singh show that after the accused was produced before the SHO, he i.e. SHO directed contraband to be kept in police Malkhana and the same was never produced before the Magistrate for verification.

(Para 17(c))

Further held that, it is well settled principle of law that it is mandatory to prepare CFSL form No. 29 at the spot or even later on, at the time when the case property is produced before the SHO in-charge of police station and to prepare a sample seal chit to be sent alongwith the sample parcel before CFSL so as to verify that it is the same sample parcel which was recovered and sealed by the Investigating Officer. In the absence of any form No. 29 and sending the sample seal (s) chit to FSL, the recovery effected from the appellant is highly doubtful.

(Para 17(d))

Further held that, the entire investigation is conducted by ASI Atma Ram w.e.f the time when the accused was apprehended on suspicion till preparation and submission of the report under Section 173 Cr.P.C. Therefore, at no point of time, the investigation conducted by him was verified by any other independent officer.

(Para 17(g))

Swati Batra, Advocate as amicus curiae,
for the appellant.

Harpreet Kaur, AAG, Haryana.

ARVIND SINGH SANGWAN,J.(ORAL)

(1) Prayer in this appeal is for setting aside the judgment dated 21.11.2002, vide which the appellant was convicted under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'the Act') as well as the order of sentence dated 26.11.2002 vide which he was ordered to undergo rigorous imprisonment for a period of 2 years and 6 months and to pay a fine of Rs.10,000/-. In default of payment of fine, to further undergo rigorous imprisonment for a period of 6 months.

(2) Brief facts of the case are that on 18.11.1997, ASI Atma Ram alongwith police officials was present at Sanjay Chowk on G.T.Road, Panipat on patrol duty, when the appellant-accused was seen coming from Sanoli Road side, carrying a bag of green colour and on seeing the police party, he became perplexed and tried to run away. On suspicion, he was apprehended by the police party. Thereafter, on suspicion, he was served with a notice (Ex.PA) under Section 50 of the Act giving him an offer as to whether he wanted to be searched either by ASI Atma Ram or by some higher officer. The accused gave his consent vide memo Ex.PA/1 for his search before a senior Officer. The notice as well as the reply were duly signed by the accused-appellant

and the notice was attested by the Investigating Officer. It is also stated in the FIR that by-chance DSP Partap Singh reached there alongwith his staff in a Govt. vehicle and then ASI disclosed the facts of case to DSP and on his written direction, he conducted the search of the bag of the accused and found that it was containing poppy husk which, on weighment, was found to be 19 kgs. approx. Out of which a sample of 250 grams was separated and sealed separately with the seal of 'AR' and was taken into police possession vide memo. Ex. PC which was attested by DSP by affixing his seal 'PS'. After sealing the sample, the seal was handed over to one Constable Mahabir. The accused could not produce any permit or license, then ASI sent *ruqa* (Ex.PF) to the police station, on the basis of which formal FIR (Ex.PF/1) was recorded. He also prepared the rough site plan (Ex.PG) with correct marginal notes and thereafter, recorded the statements of witnesses and arrested the accused. On completion of the investigation, the accused, witnesses and case property were produced before SI/SHO Shamsher Singh who verified the same and affixed his seal as 'SS' on both parcels and then on his direction, ASI deposited the case property with the MHC with seals intact.

(3) On 24.11.1997, MHC Sat Pal Singh, handed over the sample parcel with seal intact to Constable Baljit Singh Jaglan, for depositing the same with the Director, FSL, Madhuban and the same was deposited on the same day and on receiving the report (Ex. PH) dated 24.03.1998 from the FSL, the challan was presented before the trial Court and, thereafter, vide order dated 25.08.1998, the accused was charge-sheeted under Section 15 of the Act.

(4) The prosecution examined PW1-Mahabir Singh, a witness of the recovery, who deposed on the line of the version given in the FIR. PW2-SI/SHO Shamsher Singh, proved that the accused alongwith the case property was produced before him and on his direction, ASI deposited the case property with MHC. PW3-Baljit Singh Jaglan Constable stated that he delivered the special report to the higher officers. PW4- DSP Partap Singh, also stated on the line of the recovery effected from the appellant that when he reached near Sanjay Chowk, on G.T.Road, Panipat, on patrol duty, he met and directed ASI Atma Ram to check the bag carried by accused from which approximately 19 kgs of poppy husk was recovered. The same was taken in possession by the police vide memo Ex.PC and he attested the same vide his seal 'PS'. This witness further identified the case property as Ex.P1. PW-5 H.C. Satyapal, tendered his affidavit Ex.PD with

regard to handing over the case property to PW Trilok for depositing the same with FSL. PW-6 Constable Trilok Kumar also tendered his affidavit Ex.PE that he has taken the sample parcel from Satyapal and deposited the same in FSL Madhuban. PW-7 Atma Ram, Investigating Officer also deposed in the line of the investigation conducted by him and proved the notice (Ex. PA) and reply (Ex.PA/1) which were signed by the accused and further stated that DSP Partap Singh reached at the spot and he informed him about the suspicion and apprehension of the accused and in his presence, on a written direction Ex.PB, he conducted the search. This witness further stated that after completing the formalities, he prepared the sample parcel and a separate parcel of the residue, recovered from the appellant, which were sealed with his seal 'AR' and handed over the same to Constable Bhupinder whereas the DSP handed over his seal 'PS' to his Reader Sukhbir. After the sample parcel and remainder parcel were taken into possession, vide recovery memo Ex.PC. He sent a *ruqa* (Ex.PF), on the basis of which, formal FIR (Ex.PF/1) was registered by MHC Stapal Singh. Thereafter, he produced the accused alongwith case property before the SI/SHO Shamsher Singh, who verified the investigation and affixed his two seals i.e. 'SS' on the sample parcel and one seal on the remainder parcel. In cross-examination, this witness stated that though he tried to join some independent witness in the investigation but no-body joined and the seals were returned to him after one week. Thereafter, the prosecution closed its evidence.

(5) The accused, in his statement under Section 313 Cr.P.C, was put all the incriminating evidence which has come against him but he denied the same and pleaded his false implication in the case. However, no defence evidence was led by the accused and the trial Court, vide impugned judgment of conviction dated 21.11.2002 held the appellant guilty for offence under Section 15 of the Act and vide order of sentence dated 26.11.2002, awarded sentence of two years and six months and to pay a fine of Rs.10,000/-.

(6) Counsel for the appellant has argued that the notice (Ex. PA) and the consent memo (Ex. PA/1) are defective and are not in consonance with the provisions of Section 15 of the Act. The offer/notice (Ex.PA) reads as under:-

P.S.Chandni Bagh

District Panipat

Notice

husk alongwith the sample sealed parcel and there is no reference in this affidavit that Form No. 29 was either prepared or deposited with this witness, who was MHC of the police station. It is also clear from the affidavit Ex.PE submitted by PW-6 Trilok Kumar that he has received only one parcel from MHC Satyapal on 24.11.1997 and deposited the same in the Office of Director, FSL, Madhuban on 24.11.1997 and there is no mention in his affidavit that any form No. 29 was handed over to him by MHC Satyapal or he further handed over same to FSL, Madhuban alongwith the sealed sample parcel. It is further submitted by counsel for the appellant that there is clear violation of Section 52-A of the Act as after arrest of the appellant, the SHO of the police Station, neither prepared any inventory of the items, recovered from the appellant, nor produced the same alongwith accused and case property before the Illaqa Magistrate for verification. Counsel for the appellant further submits that it is mandatory under Section 52-A of the Act to prepare an inventory of the recovered items so as to identify the same subsequently and produce the same before the Area Magistrate for verification and in the absence of the same, the entire investigation undertaken by the Investigating Officer is defective. It is further submitted that the directions given by the Investigating Officer for keeping the case property with MHC Satyapal, is also defective as this can be done by order of Judicial Magistrate for depositing the same either with the police Malkhana or with the Judicial Malkhana and in the instant case, there is no such order as the appellant was never produced before the Illaqa Magistrate.

(9) Counsel for the appellant, in support of her arguments, has relied upon a judgment in *Union of India* versus *Mohanlal and another*¹ wherein the Hon'ble Supreme Court with reference to the procedure regarding seizure and sampling of a contraband under Section 52-A of the NDPS Act, has observed as under: -

“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

¹ 2016 (2) RCR (CrL.) 858

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.”

(10) Counsel for the appellant has, thus submitted that it is not proved from the statement of any of the prosecution witness that the accused, alongwith case property, was either produced before the Illqa Magistrate or any order was passed after verifying the case property or

inventory was prepared and no such direction was issued that the sealed property be deposited either in Judicial Malkhana or Police Malkhana. Counsel for the appellant has further submitted that in the affidavits i.e. Ex. PD, submitted by PW-5 HC Satyapal, and Ex. PE, submitted by PW-6 Trilok Kumar, it is nowhere stated that the seal(s) of the parcels was intact at the time of depositing the same with the Malkhana or during transit to hand over the same with FSL, Madhuban, the same was not tampered with.

(11) Counsel for the appellant, in support of her arguments, has further relied upon a judgment in *Harjinder Singh* versus *State of Punjab*² wherein this Court has held that if there is delay of 10 days in sending the sample to FSL, without there being any proper explanation, the accused is entitled to acquittal. It is submitted on behalf of the appellant that the samples in this case were sent after a gap of 7 days, without there being any such explanation.

(12) Counsel for the appellant has further submitted that since the arrest of the appellant; recovery of contraband and completion of investigation as well as submission of report under Section 173 Cr.P.C., the entire investigation was conducted by ASI Atma Ram and he has not adopted the proper procedure.

(13) Counsel for the appellant has further relied upon the judgment in *State by Inspector of Police, Narcotic Intelligency Bureau, Madurai, Tamil Nadu* versus *Rajangam*³ wherein the Hon'ble Supreme Court has held as under: -

“The learned counsel appearing for the accused submitted that the controversy involved in this case is no longer res integra. In *Megna Singh* versus *State of Haryana (1996) 11 SCC 709*, this Court has taken a categorical view that the officer who arrested the accused should not have proceeded with the investigation of the case. The relevant paragraph reads as under:

"4. We have also noted another disturbing feature in this case. P.W.3, Sri Chand, Head Constable arrested the accused and on search being conducted by him a pistol and the cartridges were recovered from the accused. It was on his complaint a formal first information report was

² 2016 (1) RCR (Criminal) 197

³ 2010 (15) SCC 369

lodged and the case was initiated. He being complainant should not have proceeded with the investigation of the case. But it appears to us that he was not only the complainant in the case but he carried on with the investigation and examined witnesses under Section 161 Cr.P.C. Such practice, to say the least, should not be resorted to so that there may not be any occasion to suspect fair and impartial investigation."

The ratio of Megna's case has been followed by other cases. In another case in *Balasundaran v. State* 1999 (113) ELT 785 (Mad), in para 16, the Madras High Court took the same view. The relevant portion reads as under:

"16. Learned Counsel for the appellants also stated that P.W. 5 being the Inspector of Police who was present at the time of search and he was the investigating officer and as such it is fatal to the case of the prosecution. P.W. 5, according to the prosecution, was present with PWs 3 and 4 at the time of search. In fact, P.W. 5 alone took up investigation in the case and he had examined the witnesses. No doubt the successor to P.W. 5 alone had filed the charge sheet. But there is no material to show that he had examined any other witness. It therefore follows that P.W. 5 was the person who really investigated the case. P.W. 5 was the person who had searched the appellants in question and he being the investigation officer, certainly it is not proper and correct. The investigation ought to have been done by any other investigating agency. On this score also, the investigation is bound to suffer and as such the entire proceedings will be vitiated."

(14) It is, thus, argued by learned counsel for the appellant that the police officer, who had arrested the appellant, should not have conducted the investigation of the case.

(15) In reply, learned State counsel has argued that a notice under Section 50 of the Act was given to the appellant and after recording his consent, the recovery was effected in the presence of DSP and, thereafter, there is proper compliance of Section 50 of the Act. It is further submitted that from the statements of prosecution witnesses, it is proved that the recovery of the narcotics was effected from the conscious possession of the appellant for which he could not produce

any licence and as per the report of FSL, it is proved to be poppy husk falling in the category of non-commercial quantity and, thereafter, the trial Court has rightly convicted the appellant.

(16) Learned State counsel has filed custody certificate of the appellant and as per the same, he has undergone a period of 05 months and 07 days of actual sentence out of total sentence of 02 years and 06 months RI and he is not involved in any other case since 2003 onwards.

(17) After hearing counsel for the parties, I find merit in the present appeal and the same deserves to be allowed on the following grounds:-

(a) It is a clear case of violation of mandatory provisions of Section 50 of the Act. It is provided under Section 50 of the Act that the offer given to a person, should be clear that he has a legal right to be searched either before a Magistrate or before a Gazetted Officer. The Hon'ble Supreme Court of India in *State of Rajasthan versus Parmanand and another, 2014 (2) RCR (Crl.) 40*, has held that in view of the stringent provisions of the Act, certain safeguards are also provided to the accused person which enables the Court to come to a correct decision. In the instant case, notice under Section 50 of the Act, given by PW ASI Atma Ram, only makes an offer that the accused has a right to be searched before him (ASI) or some senior officers and, thereafter, neither it is mentioned in the notice that the accused has a right to be searched before a Magistrate nor it is mentioned that he has a right to be searched before Gazetted Officer.

(b) As per record that there is a clear violation of Section 52-A of the Act. A careful perusal of statement of PW ASI Atma Ram, shows that he has not prepared any inventory and even SI/SHO Shamsher Singh has deposed that when the accused was presented before him, he had **not** prepared any inventory. It is well settled principle of law as held by Hon'ble Supreme Court in India in *Union of India versus Mohanla and another, 2016 (2) RCR (Criminal), 858*, 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 to prepare an inventory as per Section 52-A (2) (c) and for preparing such inventory, he shall make an application to the Magistrate for the purpose

of certifying the correctness of the inventory, photographs of such substances and to draw representative samples in the presence of a Magistrate.

(c) As per on record, even the provisions of Section 52-A (3) are not followed in the present case. It is not the case of the prosecution that after arrest of the appellant and on seizure of the contraband, they were produced before the Magistrate for the purpose of verification and obtaining any such order from the Magistrate regarding deposit of the recovered contraband in police or judicial malkhana and to be sent to the FSL, rather a perusal of statements of PW ASI Atma Ram and PW SI/SHO Shemsher Singh show that after the accused was produced before the SHO, he i.e. SHO directed contraband to be kept in police Malkhana and the same was never produced before the Magistrate for verification.

(d) It is also apparent on record that while effecting the recovery and sealing the sample parcel as well as the remainder parcel, no form No. 29 was prepared by the Investigating Officer. It is well settled principle of law that it is mandatory to prepare CFSL form No. 29 at the spot or even later on, at the time when the case property is produced before the SHO in-charge of police station and to prepare a sample seal chit to be sent alongwith the sample parcel before CFSL so as to verify that it is the same sample parcel which was recovered and sealed by the Investigating Officer. In the absence of any form No. 29 and sending the sample seal (s) chit to FSL, the recovery effected from the appellant is highly doubtful.

(e) Even the investigation conducted at the spot raises a doubt about the presence of PW DSP Partap Singh because it has come in the FIR itself that he came at the spot by-chance. Therefore, he was never given an information in this regard. The direction given by DSP also appeared to be vague as also it only reads that "*you are directed to search the bag of the accused in my presence*". This order no where specified as to whom he had directed to conduct the search. Even the consent memo of the appellant bears his signatures and it is neither attested by the Investigating Officer nor witnessed by any person and, therefore, it makes the prosecution version highly doubtful.

(f) The prosecution case is also doubtful for the reason that as per the ruqa (Ex.PF) sent to police station by ASI Atma Ram, it is clearly mentioned that the recovery of contraband is effected from the appellant as per the recovery memo Ex.PC. This ruqa was written at 12:00 P.M. and there is an endorsement by the MHC of police station that vide “DDR No. 23 at 1:00 P.M. Case No/FIR No. 762 dated 18.11.1997 under Section 15 of the Act, P.S.Chandni Bagh, Panipat is registered”.

However, a perusal of the recovery memo Ex.PC which is recorded prior to registration of FIR find mention FIR No. 762 dated 18.11.1997 under Section 15 of the Act, P.S.Chandni Bagh. This make the investigation highly doubtful.

(g) The entire investigation is conducted by ASI Atma Ram w.e.f the time when the accused was apprehended on suspicion till preparation and submission of the report under Section 173 Cr.P.C. Therefore, at no point of time, the investigation conducted by him was verified by any other independent officer. Therefore, in view of the judgment of Hon'ble Supreme Court in *Rajangam's case* (supra), the entire investigation conducted by ASI Atma Ram stands vitiated.

(h) There is an unexplained delay of 7 days in sending the sample parcel to FSL, Madhuban. In the affidavits i.e. Ex. PD of PW-5 HC Satyapal and Ex.PE of PW-Trilok Kumar, who has taken the same from PW MHC Satyapal and deposited the same in the Office of Director, FSL, Madhuban, it is neither mentioned that any form No. 29 was handed over to FSL nor give any explanation about the delay.

(18) In view of the same, this appeal is allowed and the impugned judgment of conviction dated 21.11.2002 convicting the appellant under Section 15 of the Act and order of sentence dated 26.11.2002 sentencing him to undergo RI for two years and six months alongwith fine of Rs.10,000/-are set aside. The appellant-convict is acquitted of the charges framed against him. His bail/surety bonds stand released.