

2023 SCC OnLine P&H 616

In the High Court of Punjab and Haryana at Chandigarh
(BEFORE HARKESH MANUJA, J.)

Nand Kishore ... Appellant;

Versus

State of Punjab ... Respondent.

CRA-S-4625-SB-2015(O&M)

Decided on May 30, 2023, [Reserved on : May 22, 2023]

Advocates who appeared in this case :

Mr. Arnav Sood, Advocate for the appellant.

Mr. Amit Shukla, AAG, Punjab.

The Judgment of the Court was delivered by

HARKESH MANUJA, J.:— By way of present appeal, challenge has been made to the judgment of conviction dated 20.07.2015 as well as the order of sentence dated 21.07.2015 passed by the court of learned Judge Special Court, Pathankot, whereby, appellant was convicted under Section 20 of the NDPS Act, 1985 and sentenced to undergo rigorous imprisonment for a period of five years and to pay fine of Rs. 10,000/- or in default to further undergo rigorous imprisonment for a period of six months.

2. Facts of the case as projected by the prosecution are that the appellant Nand Kishore was nabbed by the police party headed by SI Kuldeep Kumar on suspicion in the area of Turi Wala Chowk, Police Station Division No. 2, Pathankot while he was coming on foot carrying a plastic bag in his right hand and after seeing the police party he tried to turn back but got caught; SHO Kuldeep Kumar told the accused that he suspected some intoxicant material with him and thus his search was to be conducted and he could opt his search from him, some Magistrate or gazetted officer. The accused opted his search from SHO Kuldeep Kumar by executing consent memo Ex.PW2/A. Subsequently after the consent memo, his search was conducted by SI Kuldeep Kumar (PW-2) and 1 Kg Charas was found from him. Consequently, FIR No. 141 dated 28.09.2013, under Section 20/61/85 of the NDPS Act, 1985 was registered against him at Police Station Division no. 2, Pathankot. On the basis of the evidence recorded, learned Trial Court convicted and sentenced the appellant as mentioned in para 1 of this judgment, vide judgment and order dated 20.07.2015/21.07.2015.

3. Learned counsel for the appellant submits that in the present case, there was non-compliance of section 50 of the act by the officer

Incharge of the search as he included himself (SI-Kuldeep kumar PW-2) while asking to conduct the search of the appellant and to support his contention he refers to a judgment given by this court in "*State of Rajasthan v. Parmanand*" reported as (2014) 2 RCR (Cri) 40, the relevant para of the same is reproduced hereunder:—

"15. We also notice that PW-10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate or before a nearest gazetted officer or before PW-5 J.S. Negi, the Superintendent, who was a part of the raiding party. It is the prosecution case that the respondents informed the officers that they would like to be searched before PW-5 J.S. Negi by PW-10 SI Qureshi. This, in our opinion, is again a breach of section 50(1) of the NDPS Act. The idea behind taking an accused to a nearest Magistrate or a nearest gazetted officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer. Therefore, it was improper for PW- 10 SI Qureshi to tell the respondents that a third alternative was available and that they could be searched before PW-5 J.S. Negi, the Superintendent, who was part of the raiding party. PW-5 J.S. Negi cannot be called an independent officer We are not expressing any opinion on the question whether if the respondents had voluntarily expressed that they wanted to be searched before PW-5 J.S. Negi, the search would have been vitiated or not But PW-10 SI Qureshi could not have given a third option to the respondents when section 50(1) of the NDPS Act does not provide for it and when such option would frustrate the provisions of section 50(1) of the NDPS Act. On this ground also, in our opinion, the search conducted by PW-10 SI Qureshi is vitiated. We have, therefore, no hesitation in concluding that breach of section 50(1) of the NDPS Act has vitiated the search. The conviction of the respondents was, therefore, illegal. The respondents have rightly been acquitted by the High Court. It is not possible to hold that the High Court's view is perverse. The appeal is, therefore, dismissed."

4. On the other hand, learned State counsel opposes the submissions made on behalf of the appellant while submitting that in the facts of the present case, substantial compliance of section 50 of NDPS Act was duly made.

5. I have heard learned counsel for the parties and perused the paper book, I find substance in the submissions made on behalf of the appellant regarding non-compliance of section 50 of the act.

6. Upon a perusal of judgment passed by the court below, it is apparent that the Trial Court failed to examine the "memo of consent"(Ex.PW2/A) in appropriate context, a handwritten true translation of which has been submitted in the Court by Learned

counsel, relevant part of the same is reproduced below:—

"I SI had disclosed my name, rank and place of posting to the accused Nand Kishore@ rinku according to the directions issued by Hon'ble Supreme Court. I told him that I have suspicion that you are carrying some intoxicant substance and you have to be searched. You have a legal right that you can get your search conducted from me or any magistrate or any gazetted officer. He replied that he has faith in me and I can take his search on this memo of search was prepared".

7. A careful perusal of the consent memo recorded by SI-Kuldeep kumar PW-2 shows that he included himself while giving the option for the search under section 50 of the NDPS Act and recorded the consent memo accordingly. In view of *Parmanand's case* (supra), In which it has been specifically mentioned that providing third option to the accused for the purpose of search is non-compliance of section 50 of the NDPS act and therefore search done by SI-Kuldeep Kumar being defective, vitiates the entire trial.

8. Additionally, apart from the merits of the case, the case of appellant also requires sympathetic consideration as he has already undergone actual sentence for a period of 10 months and 7 days, besides he being, first offender and sole bread earner of the family, living a peaceful life for the last almost ten years, having joined the main stream of society being not even involved in any other case since the date of registration of present FIR as informed by learned State counsel. It has further been informed that he has not even misused the concession of suspension of sentence.

9. Accordingly, the appeal is allowed. The judgment of conviction dated 20.07.2015 and the order of sentence passed on 21.07.2015 against the appellant by the Courts below are hereby set aside.

10. Pending application(s), if any, shall also stand disposed of.