

Gurjant Singh @ Janta vs State Of Punjab on 28 October, 2013

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Author: Fakkir Mohamed Ibrahim Kalifulla

Bench: Fakkir Mohamed Ibrahim Kalifulla

Reportable

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1868 OF 2013
(@ SLP (CRL.) No.3407 of 2012)

Gurjant Singh @ Janta

... Appellant

VERSUS

State of Punjab

... Respondent

J U D G M E N T

Fakkir Mohamed Ibrahim Kalifulla, J.

1. Delay condoned.

2. Leave granted.

3. This appeal is directed against the judgment of the High Court of Punjab and Haryana at Chandigarh dated 12.08.2010 in Criminal Appeal No.5-SB of 2000. The appellant was proceeded against for an offence under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter called "the NDPS Act"). The trial Court by its judgment dated 30.07.1999, in Sessions

Case No.39 of 31.05.1996, found the appellant guilty of the offence alleged against him and while convicting him imposed a sentence of 10 years rigorous imprisonment apart from a fine of Rs.1,00,000/- (Rupees One Lac only) and in default of payment of fine to undergo rigorous imprisonment for one more year.

4. The case of the prosecution as projected before the trial Court was that on 04.04.1996, S.I. Darbara Singh, who was examined as P.W.6, was posted as S.H.O, Police Station, Sunam. According to him he along with A.S.I. Balbir Singh, A.S.I. Massa Singh, H.C. Bhim Sain and other police officers were present at "T" point in an area of village Ugrahan in connection with Nakabandi. At about 00.15 AM, one tractor trolley was seen coming from the side of village Ugrahan. The head lights of the tractor trolley were on and P.W.6 gave a signal from his torch light and the tractor trolley was stopped by the driver. According to P.W.6, as soon as the tractor trolley was stopped, the driver who tried to slip away was overpowered by P.W.6 and other police officials. The driver stated to have revealed his name as Gurjant Singh @ Janta, the appellant herein. Thereafter, when P.W.6 checked the trolley of the tractor he found three gunny bags lying inside the trolley. P.W.6 informed the appellant that he intended to search the gunny bags as he suspected some incriminating article in the gunny bags. P.W.6 further informed the appellant that, if he so desired, the search could be conducted in the presence of a Gazetted officer or a Magistrate. The appellant stated to have expressed his consent that the search may be conducted in the presence of some Gazetted officer or a Magistrate.

5. After recording the statement of the appellant and after getting his signature attested by A.S.I Balbir Singh and A.S.I Massa Singh, P.W.6 claimed to have flashed a wireless message whereupon Baldev Singh, DSP, Sunam, who was examined as P.W.3, reached the spot. P.W.6 stated to have searched the gunny bags lying in the tractor trolley in which poppy husk was recovered. P.W.6 claimed to have drawn two samples of 250 gms from each of the gunny bag. The remaining poppy husk, which weighed to the extent of 34 kg in each of the gunny bag, was stated to have been separately sealed, while the six sample parcels were also sealed separately with the impression 'DS'. P.W.6 also claimed to have prepared a sample seal chit separately. Tractor trolley and the case properties were taken into possession by P.W.6 through a recovery memo attested by P.W.3 as well as by A.S.I Balbir Singh and A.S.I. Massa Singh. The appellant was stated to have been arrested, and the arrest memo along with Rukka, was sent to the police station through C. Harjinder Singh, based on which an FIR was recorded by A.S.I Sukhdev Singh. After preparing the rough site plan of the place of recovery with correct marginal notes and after recording the statement of the witnesses on the same day, P.W.6 stated to have deposited the case property with the MHC with seals intact along with the sample seal.

6. The final report was thereafter stated to have been filed in the Court. Before the trial Court P.W.1 Kulwant Singh, Registration Clerk, P.W.2 A.S.I Balbir Singh, P.W.3 D.S.P. Baldev Singh, P.W.4 Harbans Singh C.No.365, P.W.5 Jaswinder Singh and P.W.6 S.I. Darbara Singh were examined and the report of the Chemical Examiner Ex.PK was also filed. When the incriminating circumstances were put to the appellant under Section 313 Cr.P.C, appellant pleaded false implication alleging that he was taken away from his house in the presence of his wife and a false case was planted on him. In defence, the appellant examined H.C. Paramjit Singh as D.W.1 Gurmail Kaur, his wife as D.W.2 and

one other witness C. Avtar Singh as D.W.3.

7. Before the trial Court it was contended on behalf of the appellant that there was clear violation of Sections 42 and 50 of the NDPS Act, in as much as, the search was not conducted in the presence of a Gazetted officer or a Magistrate. According to the appellant, he was forcibly taken away from his house and a false case was planted and the claim that search was made in the presence of P.W.3 was not true. It was also contended that P.W.3 was not a regularly promoted D.S.P. but was only an Inspector in the category of Own Rank Pay (ORP). It was contended that since he was only an Inspector and was drawing the pay of an Inspector, while acting as D.S.P, he cannot be held to be a Gazetted Officer.

8. The trial Court, however, took the view that there was no necessity to comply with Section 50 of the NDPS Act and on that basis did not go into the question whether P.W.3 was a competent Gazetted Officer, in order to validate the search stated to have been held in his presence. The trial Court in support of its conclusion relied upon the judgment in the case of State of Punjab vs. Balbir Singh reported in (1994) 3 SCC 299 and found the appellant guilty of the offence alleged against him and convicted him by imposing a sentence of 10 years rigorous imprisonment along with the fine of Rs.1 lac with the default clause to undergo imprisonment for one more year. In the appeal preferred by the appellant before the High Court, unfortunately, the High Court by simply extracting the concluding part of the judgment of the trial Court chose to confirm the conviction and sentence. The appellant has, therefore, come forward with this appeal.

9. We heard Mr. S.S. Ray, learned counsel for the appellant as well as Mr. Sanchar Anand, learned Additional Advocate General for the respondent. The learned counsel for the appellant mainly contended that there was non-compliance of Section 50 in the matter of search alleged to have been made on the appellant and the tractor; that the contention of the appellant about the status of P.W.3 that he was not a Gazetted officer on the date of the alleged search was not considered by the Courts below and that none of the defence witnesses were properly appreciated by the trial Court as well as by the High Court. The learned counsel, therefore, contended that the conviction and sentence imposed on the appellant cannot be sustained.

10. Reliance was placed upon the decisions in State of Punjab vs. Baldev Singh reported in (1999) 6 SCC 172, State of H.P. vs. Pawan Kumar reported in (2005) 4 SCC 350 in support of his submissions.

11. Learned Additional Advocate General in his submissions contended that there was no illegality in the judgment of the trial Court in convicting the appellant and the imposition of sentence and, therefore, the High Court was justified in confirming the same. Learned Additional Advocate General contended that the reliance placed upon the decision of this Court by the trial Court, namely, the one in Balbir Singh (supra) was well justified. The learned Additional Advocate General, therefore, contended that the judgment impugned does not call for interference.

12. Having considered the respective submissions and also having bestowed our serious consideration to the judgment of the trial Court, as well as that of the High Court, at the very outset

we wish to state that the reliance placed upon by the trial Court in Balbir Singh (supra) was totally inappropriate to the facts of this case and consequently the ratiocination of the trial Court in having held that Sections 42 and 50 were not attracted to the case on hand was not correct.

13. When we refer to the decision of this Court in Balbir Singh (supra), what has been held therein as a broad principle in paragraph 25(1), is as under:

“25. The questions considered above arise frequently before the trial courts. Therefore we find it necessary to set out our conclusions which are as follows:

(1) If a police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offences as provided under the provisions of CrPC and when such search is completed at that stage Section 50 of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act.”

14. The said principle clearly postulates a situation where a police officer in the normal course of investigation of an offence or suspected offences as provided under the provisions of Cr.P.C. and in the course of such investigation when a search is completed and in that process happens to stumble upon possession of a narcotic drug or psychotropic substance, the question of invoking Section 50 would not arise. When that principle is examined carefully one can easily understand that without any prior information as to possession of any narcotic drug and psychotropic substance, a police officer might have held a search in the course of discharge of his duties as contemplated under the provisions of Cr.P.C and, therefore, it would well neigh impossible to state that even under such a situation, the application of Section 50 would get attracted. In fact, if we examine the facts involved in Balbir Singh (supra), as per the contention of learned counsel for the State, in that decision the police officer effected the arrest, search and seizure on reasonable suspicion that a cognizable offence was committed and not based on any prior information that any offence punishable under NDPS Act was committed and, therefore, it was argued that complying with the provisions of the NDPS Act at the time of the said arrest, search and seizure did not arise in as much as such arrest, search and seizure was substantially in accordance with the provisions of the Cr.P.C. It was, therefore, contended that such arrest, search and seizure cannot be declared as illegal. While examining the contention in the said background, principle no.1 in paragraph 25 came to be rendered.

15. However, while analyzing the importance of Section 50 of the NDPS Act in that very decision, this Court has held as under in paragraph 20:

“20. In *Miranda v. Arizona* the Court, considering the question whether the accused be apprised of his right not to answer and keep silent while being interrogated by the police, observed thus:

“At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent. For those unaware of the privilege, the warning is needed simply to make them aware of it — the threshold requirement for an intelligent decision as to its exercise. More important, such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere.” It was further observed thus:

“The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of foregoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system — that he is not in the presence of persons acting solely in his interest.” When such is the importance of a right given to an accused person in custody in general, the right by way of safeguard conferred under Section 50 in the context is all the more important and valuable. Therefore it is to be taken as an imperative requirement on the part of the officer intending to search to inform the person to be searched of his right that if he so chooses, he will be searched in the presence of a Gazetted Officer or a Magistrate. Thus the provisions of Section 50 are mandatory.”

16. If the ratio of the said decision had been properly understood, the flaw committed by the trial Court and as confirmed by the High Court in our considered opinion would not have arisen. The distinct feature in the case on hand was that on the date of occurrence i.e. on 04.04.1996 at 00.15 AM, the police party headed by P.W.6, accosted a tractor trolley coming from the side of village Ugrahan, which was stopped by him and that when the driver after stopping the tractor tried to escape was apprehended by the police team. The most crucial aspect of the case was that P.W.6 noticed three gunny bags lying in the tractor of the appellant and felt that some incriminating substance was kept in those gunny bags. P.W.6, therefore, took the view that before effecting search of the gunny bags, the necessity of affording an opportunity to the appellant to conduct the search in the presence of a Gazetted officer or a Magistrate was imperative. In other words, after noticing three gunny bags, P.W.6, as an investigating officer, felt the need to invoke the provisions of Section 50 and thereby provide an opportunity to the appellant for holding any search in the presence of a Gazetted officer or a Magistrate. When once P.W.6 could assimilate the said legal requirement as stipulated under Section 50 of the NDPS Act, we fail to understand as to how principle No.1 in paragraph 25 of the decision reported in *Balbir Singh* (supra) could be applied. Unfortunately, the trial Court failed to understand the said principle set out in *Balbir Singh* (supra) in the proper perspective while holding that neither Section 42 nor Section 50 was attracted to the facts of this case.

17. On the other hand even according to the prosecution, namely, the investigating officer himself, i.e. P.W.6, a search was required after apprehending the appellant along with the tractor and the gunny bags and such search had to be necessarily conducted in accordance with Section 50 of the NDPS Act. It was further the case of the prosecution that such a step was pursued by calling upon the appellant to exercise his opinion and after affirmatively ascertaining whether he wanted any search to be conducted in the presence of the Gazetted officer, only then P.W.3 was summoned, in whose presence the search operation was held. Therefore, the conclusion of the trial Court in having held that Sections 42 and 50 were not applicable to the case on hand was a total misunderstanding of the legal provisions in the light of the facts placed before it and consequently the conclusion arrived at for convicting the appellant was wholly unjustified.

18. In fact, after reaching the said conclusion, all that the trial Court did was to hold that the version of the prosecution witnesses cannot be discarded merely because they were police officers and that the evidence of P.W.3 was sufficient to support the search and recovery of the narcotic substance from the appellant. The trial Court also held that the version of the defence witnesses was not worth mentioning.

19. Unfortunately, the High Court has committed the same errors whilst considering the correctness of the judgment of the trial Court. The High Court being the first appellate Court was required to independently reappraise the entire material, record the conclusions supported by cogent reasons. In our opinion, the High Court failed to exercise its jurisdiction in dismissing the appeal.

20. Before concluding, we wish to refer to the decisions placed before us to state the importance of applying the stipulations contained in Section 50, before holding the search, in order to ensure fair consideration of the offence alleged against an accused under the NDPS Act, before reaching any conclusion about the commission of the alleged offence.

21. In the Constitution Bench decision of this Court in Baldev Singh (supra), the importance of due compliance of Section 50 has been mainly set out in paragraphs 28, 32 and 33 which are as under:

“28.....The argument that keeping in view the growing drug menace, an insistence on compliance with all the safeguards contained in Section 50 may result in more acquittals does not appeal to us. If the empowered officer fails to comply with the requirements of Section 50 and an order or acquittal is recorded on that ground, the prosecution must thank itself for its lapses. Indeed 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.”

32. However, the question whether the provisions of Section 50 are mandatory or directory and, if mandatory, to what extent and the consequences of non-compliance

with it does not strictly speaking arise in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched.

Therefore, without expressing any opinion as to whether the provisions of Section 50 are mandatory or not, but bearing in mind the purpose for which the safeguard has been made, we hold that the provisions of Section 50 of the Act implicitly make it imperative and obligatory and cast a duty of the investigating officer (empowered officer) to ensure that search of the person (suspect) concerned is conducted in the manner prescribed by Section 50, by intimating to the person concerned about the existence of his right, that if he so requires, he shall be searched before a gazetted officer or a Magistrate and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate would cause prejudice to the accused and render the recovery of the illicit article suspect and vitiate the conviction and sentence of the accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered during a search conducted in violation of the provisions of Section 50 of the Act. The omission may not vitiate the trial as such, but because of the inherent prejudice which would be caused to an accused by the omission to be informed of the existence of his right, it would render his conviction and sentence unsustainable. The protection provided in the section to an accused to be intimated that he has the right to have his personal search conducted before a gazetted officer or a Magistrate, if he so requires, is sacrosanct and indefeasible — it cannot be disregarded by the prosecution except at its own peril.

33. The question whether or not the safeguards provided in Section 50 were observed would have, however, to be determined by the court on the basis of the evidence led at the trial and the 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 in that section were complied with, it would not be advisable to cut short a criminal trial.”

22. In Pawan Kumar (supra) wherein the Constitution Bench decision was referred to and was reiterated as under in paragraph 26:

“26.....Otherwise, there would be no distinction between recovery of illicit drugs, etc. seized during a search conducted after following the provisions of Section 50 of the Act and a seizure made during a search conducted in breach of the provisions of Section 50. Having regard to the scheme and the language used a very strict view of Section 50 of the Act was taken and it was held 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 sentence of an accused bad and unsustainable in law. As a corollary, there is no warrant or justification for giving an extended meaning to the word “person” occurring in the same provision so as to include even some bag, article or container or some other baggage being carried by him.”

23. The aforesaid observations of the above Constitution Bench decision in Baldev Singh (supra) and the three Judge Bench decision in Pawan Kumar (supra), clearly highlight the legal requirement of

compliance of Section 50 in its true spirit. It will have to be stated that such compliance of the requirement under Section 50 of holding of a search and seizure in the presence of Gazetted officer or a Magistrate, cannot be an empty formality. In other words, the offer to the person to be searched in the presence of a Gazetted officer or a Magistrate, should really serve the purpose of ensuring that there was every bona fide effort taken by the prosecution to bring forth the grave offence of possession of narcotic substance and proceed against the person by way of prosecution and thereby establish the truth before the appropriate judicial forum. In the same breath such a course of compliance of Section 50 would also enable the person accused of such a grave offence to be convinced that the presence of such an independent Gazetted officer or a Magistrate would also enable the person proceeded against to demonstrate that there was no necessity for holding any search on him and thereby persuade the concerned Gazetted officer or Magistrate to protect his fundamental right of freedom, from being unlawfully proceeded against. In other words, the purpose of Section 50 was to ensure that on the one hand, the holding of a search and seizure was not a farce of an exercise in order to falsely implicate a person by unscrupulous police authorities, while on the other hand to prevent an accused from committing an offence of a serious nature against the society, warranting appropriate criminal proceedings to be launched and in the event of establishing such offence, conviction and sentence to be imposed in accordance with law. Therefore, such a dual requirement of law prescribed under Section 50 cannot be dealt with lightly by the Courts dealing with the trial of such offences brought before it.

24. Keeping the above principles in mind, when we examine the manner in which the trial Court dealt with the case of the prosecution as well as the defence pleaded, we find that the trial Court committed a serious flaw in holding that Sections 42 and 50 were not attracted to the case on hand, which we have found in the earlier paragraph was a total misreading of the provision as well as the decision relied upon by it. That apart, when admittedly Section 50 was invoked by offering the presence of a Gazetted officer or a Magistrate to the appellant and at the request of P.W.6, P.W.3, who was stated to be the D.S.P. at that point of time, was summoned and in whose presence the search and seizure was stated to have been made, the trial Court failed to appreciate whether such a search or seizure was really held in accordance with Sections 42 and 50 of the NDPS Act.

25. One of the grounds raised on behalf of the appellant was that P.W.3 was not holding the post of D.S.P. in a substantive manner in order to hold that he was a Gazetted officer on the date of search. According to the appellant, P.W.3 was not a regularly promoted D.S.P. but was only an Inspector functioning as a D.S.P. in a category called 'Own Rank Pay' D.S.P. According to the appellant, P.W.3 was drawing the pay of an Inspector from I.R.D. and was not holding the post of D.S.P. on a regular basis. It was, therefore, contended that such a person who was not duly promoted as D.S.P., cannot be equated to the status of a Gazetted officer in order to hold that a search conducted in his presence was a valid search as contemplated under Section 50 of the NDPS Act. As far as the said point raised on behalf of the appellant, we do not find any material or a counter-stand taken to the effect that P.W.3 was a regularly promoted D.S.P. or that as per the rules even as an 'Own Rank Pay' D.S.P., he could be equated to any other D.S.P., holding a substantive post. Unfortunately, as stated by us earlier, the trial Court having taken a view that Sections 42 and 50 were not applicable, completely omitted to examine the said defence raised on behalf of the appellant. We also do not find any contra evidence laid on behalf of the prosecution to counter the said ground raised on behalf of the

appellant.

26. In such circumstances it will be highly dangerous to simply affirm the ultimate conclusion of the trial Court in having convicted the appellant and the sentence imposed based on such conviction, as the same was without any ratiocination. It was most unfortunate that the High Court failed to independently examine the correctness of the findings recorded by the trial Court by simply extracting a portion of the judgment of the trial Court, while affirming the conviction.

27. For all the above stated reasons, the judgment of the trial Court and the confirmation of the same by the High Court cannot be sustained. The appeal stands allowed. The conviction and sentence imposed on the appellant is set aside and the appellant shall be set at liberty forthwith, if not required in any other case.

.....J. [Surinder Singh Nijjar]J.
[Fakkir Mohamed Ibrahim Kalifulla] New Delhi;

October 28, 2013.