

HIGH COURT OF PUNJAB AND HARYANA**Bench: Hon'ble Ms. Justice Kirti Singh****Date of Decision: 24th May 2024**

CRIMINAL APPELLATE JURISDICTION

CRA-S-412-SB-2006 (O&M)

JANKI DASS ...APPELLANT**VERSUS****STATE OF HARYANA ...RESPONDENT****Legislation:**

Section 20, 52A of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act)

Subject: Criminal appeal challenging the conviction and sentence under Section 20 of the NDPS Act for possession of ganja, focusing on the non-compliance with the mandatory provisions of Section 52A regarding the preparation and certification of inventory, and the drawing of samples in the presence of a Magistrate.

Headnotes:

Narcotic Drugs and Psychotropic Substances Act, 1985 – Conviction and Sentence – Appeal – Non-compliance with Section 52A – Conviction and sentence of the appellant set aside due to non-compliance with mandatory provisions of Section 52A of the NDPS Act, which requires the preparation of an inventory, and drawing of samples in the presence of a Magistrate – Held that the failure to comply with this mandatory provision vitiates the prosecution's case – Appeal allowed, appellant acquitted. [Paras 1-15]

Compliance with Section 52A of NDPS Act – Requirement – Analysis – Held – Section 52A of the NDPS Act mandates that an inventory of the seized narcotic substance must be prepared and certified by a Magistrate, and samples must be drawn in the presence and under the supervision of the Magistrate – Non-compliance results in the samples not being treated as primary evidence – Reference made to Union of India v. Mohanlal and Mohammed Khalid v. State of Telangana. [Paras 8-13]

Decision – Conviction Set Aside – Court found significant procedural lapses in the investigation, particularly the non-compliance with Section 52A, resulting in the acquittal of the appellant – Judgment of conviction and order of sentence by the Trial Court set aside. [Para 15]

Referred Cases:

- Union of India v. Mohanlal (2016) 3 SCC 379
- Mohammed Khalid and another v. State of Telangana, 2024 SCC OnLine SC 213
- Yusuf @ Asif v. State, 2023 SCC OnLine SC 1328
- Mangilal v. State of Madhya Pradesh, 2023 SCC OnLine SC 862
- Simranjit Singh v. State of Punjab, 2023 SCC OnLine SC 906

Representing Advocates:

Mr. Sukhcharan Singh Gill, Advocate (Amicus Curiae) for the appellant

Mr. Rahul Dev Singh, Addl. A.G. Haryana

KIRTI SINGH J.

The present appeal has been preferred against the judgment of conviction and order of sentence dated 28.01.2006/30.01.2006 passed by the learned Special Court, Faridabad, in case bearing FIR No.250 dated 28.04.2003, Police Station Sarai Khawaja, whereby the appellant has been convicted under Section 20 of the Narcotic Drugs and Psychotropic

Substance Act, 1985 (in short 'the NDPS Act') and was sentenced to undergo rigorous imprisonment for period of 05 years and to pay a fine of Rs.25,000/- and in default of payment of fine to further undergo rigorous imprisonment for a period of one year.

FACTUAL BACKGROUND

2. In brief, the version put forth by the prosecution is that on 28.04.2003, SI Pritpal Singh, along with other police officials were on patrolling duty on the bypass road near the cremation ground, Sector 37, Faridabad. They received secret information against the appellant accused Janki Dass and it was reported that he was going to Sehatpur Bistar to sell ganja and that he was in possession of a large quantity of ganja and if a nakabandi was set up at Palla Bridge, he could be apprehended. Accordingly, a nakabandi was established at Palla Bridge bypass road. After 20-25 minutes, the secret informant gave a signal that the person carrying a white plastic bag on his shoulder was Janki Dass, who was accordingly apprehended by SI Pritpal Singh along with other police officials. Upon inquiry, he disclosed his name as Janki Dass son of Bhagwan Dass. Suspecting that he was in possession of some narcotic substance, the accused/appellant was given an option to be searched by a Magistrate or a Gazetted Officer. The notice (Ex.PB) under Section 50 of the NDPS Act was given to the accused in this regard. To this notice, the accused/appellant exercised his option to be searched by a Gazetted Officer of the police. This option was recorded as Ex.PB/1, Shibhash Kaviraj, Addl. S.P., conducted a search of the plastic bag of the accused/appellant. On search, ganja weighing 4 kg was recovered, out of which two samples of 100 grams each were separated from the recovered contraband. Both these samples were separated and sealed with the seal of 'SK' and were taken into police possession vide memo Ex.PA. ASI Abhey Singh and UGC Ved Singh signed this memo as witnesses and the Additional SP attested it. Ruqqa Ex.PC was sent to the Police Station through Constable Ranbir Singh on the basis of which formal FIR Ex.PC/1 was registered. Upon completing the investigation, a challan was presented against the accused/appellant and charges under Section 20 of the NDPS Act were framed, to which he pleaded not guilty and claimed

trial.

3. In order to substantiate its case, the prosecution examined 06 witnesses. After closure of evidence of the prosecution, statement of the accused/appellant under Section 313 Cr.P.C. was recorded and all the incriminating circumstances appearing in evidence were put to the him to which he pleaded false implication. In support of his case he examined DW1 Sailesh Kumar, DW2 Brij Bhan and DW3 Bhagwan Dass.

4. After hearing arguments of both the sides and perusing the evidence on record, the Trial Court held the accused/appellant guilty of the offence vide judgment dated 28.01.2006 and he was sentenced to undergone imprisonment along with fine as under:-

Sentence under Section	Sentenced to RI	Fine	In default of payment of fine
20 of NDPS Act	RI for 05 years	Rs.25,000/-	RI for 01 year

5. Feeling aggrieved with the said judgment of conviction and order of sentence, the accused/appellant has approached this Court by way of filing of the present appeal, which came up for hearing on 02.03.2006 which was admitted and on the same date the sentence of the accused/appellant was suspended during the pendency of the present appeal.

Arguments by learned counsel for the appellant.

6. Learned counsel for the appellant has limited his prayer to the extent that the appellant deserves to be acquitted on the ground of non-compliance of Section 52A of the NDPS Act. He further contended that as per the prosecution story the samples were drawn from the recovered contraband and the same were sent to the FSL without taking the recourse to Section 52(A) of the NDPS Act. Reliance is placed upon the judgment of the Hon 'ble Supreme Court in Yusuf@ Asifvs. State, 2023 SCC OnLine SC 1328, Mangilal vs. The State ofMadhya Pradesh, 2023 SCC OnLine SC 862 and Simranjit Singh vs. State of Punjab, 2023 SCC OnLine SC 906.

7. Per contra learned State counsel submits that there has been due compliance of the necessary provisions of the NDPS Act and there is no

infirmity in the judgment passed by the learned Trial Court and the appeal should accordingly be dismissed.

Analysis of the Arguments

8. This Court has heard the learned counsel for the parties and has gone through the entire record with their able assistance.

For the sake of convenience Section 52A of the NDPS Act is reproduced hereunder:-

"52A. Disposal of seized narcotic drugs and psychotropic substances.— (1)

The Central Government may, having regard to the hazardous nature, vulnerability to theft, substitution, constraint of proper storage space or any other relevant consideration, in respect of any narcotic drugs, psychotropic substances, controlled substances or conveyances, by notification in the Official Gazette, specify such narcotic drugs, psychotropic substances, controlled substances or conveyance or class of narcotic drugs, class of psychotropic substances, class of controlled PHHC 074584. substances or conveyances, which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time, determine after following the procedure hereinafter specified.

(2) Where any narcotic drugs, psychotropic substances, controlled substances or conveyances has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under Section 53, the officer referred to in subsection (1) shall prepare an inventory of such narcotic drugs, psychotropic substances, controlled substances or conveyances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs, psychotropic substances, controlled substances or conveyances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs, psychotropic substances, controlled substances or conveyances in any proceedings under this Act and make an application, to any Magistrate for the purpose of-

(a) certifying the correctness of the inventory so prepared; or

- (b) taking, in the presence of such Magistrate, photographs of such drugs, substances or conveyances and certifying such photographs as true; or
 - (c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.
- (3) Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.
- (4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs, psychotropic substances, controlled substances or conveyances and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence."

4. Sub-section (1) of Section 52A of the NDPS Act facilitates the Central Government a mode to be prescribed to dispose of the seized narcotic substance. The idea is to create a clear mechanism for such disposal both for the purpose of dealing with the particular case and to safeguard the contraband being used for any illegal purpose thereafter.

5. Sub-section (2) of Section 52A of the NDPS Act mandates a competent officer to prepare an inventory of such narcotic drugs with adequate particulars. This has to be followed through an appropriate application to the Magistrate concerned for the purpose of certifying the correctness of inventory, taking relevant photographs in his presence and certifying them as true or taking drawal of samples in his presence with due certification. Such an application can be filed for anyone of the aforesaid three purposes. The objective behind this provision is to have an element of supervision by the magistrate over the disposal of seized contraband. Such inventories, photographs and list of samples drawn with certification by Magistrates would constitute as a primary evidence. Therefore, when there is non-compliance of Section 52A of the NDPS Act, where a certification of a magistrate is lacking any inventory, photograph or list of samples would not constitute primary evidence.

6. The obvious reason behind this provision is to inject fair play in the process of investigation. Section 52A of the NDPS Act is a mandatory rule of evidence which requires the physical presence of a Magistrate followed by an order facilitating his approval either for certifying an inventory or for a photograph KAPIL taken apart from list of samples drawn. In due compliance of Section 52A(1) of the NDPS Act the Ministry of Finance (Department of Revenue) issued a Notification No. G.S.R. 339(E) dated 10.05.2007 which furnishes an exhaustive manner and mode of disposal of drugs ending with a certificate of destruction:

"4. Manner of disposal

1) Where any narcotic drug or psychotropic substances has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, of the Act, or if it is seized by such an officer himself, he shall prepare an inventory of such narcotic drugs or psychotropic substances as per Annexure 1 to this notification and apply to any Magistrate under sub-section

(2) of section 52A as per Annexure 2 to this notification.

2) After the Magistrate allows the application under subsection (3) of section 52A, the officer mentioned in clause

(1) above shall preserve the certified inventory, photographs and samples drawn in the presence of the Magistrate as primary evidence for the case and submit details of the drug consignments to the Chairman of the Drug Disposal Committee for a decision by the committee on the disposal. The officer shall send a copy of the details along with the drug consignments to the officer-in-charge of the godown.

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9. A simple reading of the above said provision clearly reveals that Section 52A(2)(c) upon seizure of the contraband, the same has to be forwarded either to the officer incharge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provisions and make an application to the Magistrate for purpose of (a) certifying the correctness of the inventory (b) certifying photographs of such drugs and substances taken before the Magistrate as KAPILtrue (c) to

draw representatives samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn. 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.

10. Reverting to the present case on 28.04.2003, the investigating officer received a secret information and on the basis of which 4 kgs ganja was recovered from the appellant. Two samples of 100 grams were separated from the recovered ganja. The case property and appellant was produced before the SHO Police Station who also verified the facts and put his seal on the recovered case property. On 01.05.2003 SI Samunder Singh PW3 handed over the sample to Constable Anil Kumar PW4 for depositing the same with the Forensic Science Laboratory Madhuban from where a report dated 26.06.2003 (Ex.PG) was received concluding that the sample was of ganja. No inventory was prepared by the Investigation Officer in regard to the contraband so recovered containing said details relating to its description, quality, quantity, mode of packing, marks, number or other such identifying particulars of the contraband so recovered. The samples were not drawn in the presence and under the supervision of the Magistrate which is a complete violation of mandatory provisions of Section 52A of the Act. The samples so recovered from the appellant were directly sent to the FSL and the report Ex.PG identifying the sample as ganja was received.

11. No evidence has been brought on record to the effect that procedure prescribed under sub Section (2) (3) and (4) of Section 52A of KAPIL PHHC 074584.

the NDPS Act was followed while making the seizure and drawing sample, such as preparing the inventory and getting it certified by the Magistrate. No evidence has also been brought on record that the samples were drawn in the presence of the Magistrate and the list of samples so drawn was certified by the Magistrate. The mere fact that the samples were drawn in the presence of the Gazetted Officer is not sufficient compliance of the mandate of sub Section (2) of Section 52A of the NDPS Act.

12. On the issue of seizure in the presence of the Magistrate, reliance is placed upon the decision rendered by the Supreme Court in Union of India Vs. Mohanlal, (2016) 3 SCC 379, the relevant part of the said judgment is reproduced as under:-

"16. 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.

17. 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 KAPIL the Magistrate in compliance with sub-sections (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.

18. 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."

13. The Hon'ble Supreme Court in Mohammed Khalid and another vs. The State of Telangana, 2024 SCC OnLine SC 213 held that the FSL report cannot be read in evidence when there is non-compliance of Section 52A of the NDPS Act. The relevant extract of the said judgment reads as under:-
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"22. Admittedly, no proceedings under Section 52A of the NDPS Act were undertaken by the investigating Officer PW-5 for preparing an inventory and obtaining samples in presence of the jurisdictional Magistrate. In this view of

the matter, the FSL report (Exhibit P-11) is nothing but a waste paper and cannot be read in evidence.

The accused A-3 and A-4 were not arrested at the spot. The offence under Section 20(b)(ii)(c) deals with production, manufacture, possession, sale, purchase, transport, import or export of cannabis. It is not the case of the prosecution that the accused A-3 and A-4 were found in possession of ganja. The highest case of the prosecution which too is not substantiated by any admissible or tangible evidence is that these two accused had conspired sale/purchase of ganja with A-1 and A-2. The entire cause of the prosecution as against these two accused is based on the interrogation notes of A-1 and A-2."

14. In essence it is a case where no inventory was prepared and the sample was not drawn in the presence of the Magistrate in compliance to the mandatory provisions of Section 52A of the NDPS Act which was sent for analysis. The learned Trial Court failed to notice this material infirmity in the case of the prosecution and fell into grave error in recording conviction to the appellant. Rather the benefit of the same should have been granted to the appellant.

15. As an upshot of the aforesaid discussion, the appeal is allowed and the appellant-Janki Dass is acquitted of the charge. The judgment of conviction and order of sentence dated 28.01.2006/30.01.2006 rendered by Special Court, Faridabad is hereby set aside. His bail bonds and surety bonds stand discharged.

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

17. The case property, if any, may be dealt with as per rules after expiry of period of limitation for filing the appeal(s). Record of the case be sent back to the Court below.

