

**CRA-S-834-SB-2009****1****210 IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH****CRA-S-834-SB-2009
Reserved on:01.04.2025
Pronounced on:08.04.2025****Ajay Kumar****.....Appellant****Versus****STATE OF PUNJAB****.....Respondent****CORAM: HON'BLE MR. JUSTICE HARPREET SINGH BRAR**

Present: None for the appellant

Mr. Sandeep Kumar, DAG Punjab

HARPREET SINGH BRAR, J. (ORAL)

1. This appeal is preferred against the judgment of conviction and order of sentence dated 04.03.2009 passed by learned Judge, Special Court, Barnala in FIR No.83 dated 15.05.2007 registered at Police Station City Barnala, under Section 15 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as 'the NDPS Act ' for short), whereby the appellant has been convicted and sentenced to undergo rigorous imprisonment for a period of six months with a fine of Rs. Five Hundred and in default of payment of fine, to further undergo rigorous imprisonment for a period of one month.

FACTUAL BACKGROUND

2. Succinctly, the facts of the prosecution case are that on 15.05.2007, a police party headed by ASI Bharat Singh, was on patrolling duty.



One person, namely Kirpal Singh was associated as independent witness. When they reached in the area of Barnala, the appellant-accused was found sitting with a jhola. The appellant on seeing the police party became hesitant. Noticing his dubious movements, said ASI along with his team nabbed the appellant. During enquiry he disclosed his name as Ajay Kumar and also disclosed other particulars. From the jhola, a total of 7 kgs of poppy husk was recovered from which two samples of 250 grams each were separated. On personal search of the appellant, currency notes amounting to Rs. 50/- were recovered, which were taken into possession vide separate memo. After completion of necessary formalities of investigation, Ruqa (written information) was sent to the police station on the basis of which formal FIR was registered against the appellant-accused.

3. On completing the investigation, report under Section 173 Cr.P.C was presented against the accused. On finding a prima facie case against the appellant, charge under Section 15 of the NDPS Act was framed against the accused/appellant to which he pleaded not guilty and claimed trial.

4. In order to prove its case, prosecution examined as many as five witnesses. Statement of the appellant under Section 313 Cr.P.C. was recorded whereby all the incriminating evidence was put before him, but he pleaded false implication.

5. Learned trial Court, on minutely scrutinising the evidence led by the prosecution and going through the record of the case, held the appellant guilty and convicted and sentenced him as discussed herein above.



CONTENTIONS

6. No representation on the behalf of the appellant.
7. *Per contra*, learned State counsel contends that the link evidence is complete and the learned trial Court has arrived at a guilty verdict on correct appreciation of material on record.

OBSERVATIONS AND ANALYSIS

8. I have heard the learned state counsel and scrupulously perused the paper-book with able assistance.
9. The appellant has been convicted in the present case for possessing 7 kgs of poppy husk. A perusal of the impugned judgement indicates that although an independent witness was joined in the investigation when the recovery was effected from the accused but he was not examined during trial. It appears that Kirpal Singh, was merely joined to comply with the procedure that requires an independent witness to be joined in the investigation. The Hon'ble Supreme Court in **Krishan Chand v. State of H.P. AIR 2017 (SC) 3751** has laid down the ratio that the failure of the investigating officer to associate an independent witness at the time of recovery creates a dent in the case of the prosecution. A two Judge Bench of the Hon'ble Supreme Court in **Gorakh Nath Prasad v. State of Bihar, 2018(1) RCR (Criminal) 108** had acquitted the accused and held that the case of the prosecution cannot be entirely based upon the statements of the official witnesses when no independent witness has been joined in the investigation.



10. As per procedure prescribed in Standing Order No. 1 of 1988 dated 15.03.1988, representative sample of any contraband after seizure and deposit in the Malkhana or with the concerned SHO is required to be sent to the FSL within 72 hours. The sanctity of the instructions contained in Standing Order No.1 of 1988 came up for consideration before the Hon'ble Supreme Court in **Noor Aga v. State of Punjab and another, 2008 (16) SCC 417** and it was held that these statutory instructions are mandatory in nature and the following was observed:

*"32. Recently, this Court in **State of Kerala & Ors. v. Kurian Abraham (P) Ltd. & Anr. [(2008) 3 SCC 582]**, following the earlier decision of this Court in **Union of India v. Azadi Bachao Andolan [(2004) 10 SCC 1]** held that statutory instructions are mandatory in nature.*

Logical corollary of these discussions is that the guidelines such as those present in the Standing Order cannot be blatantly outed and substantial compliance therewith must be insisted upon for so that sanctity of physical evidence in such cases remains intact. Clearly, there has been no substantial compliance of these guidelines by the investigating authority which leads to drawing of an adverse inference against them to the effect that had such evidence been produced, the same would have gone against the prosecution. "

A perusal of the record indicates that the alleged recovery was effected on 15.05.2007 but deposited with the FSL on 29.05.2007. As such, there is an unexplained delay of 13 days in sending the sample to the Chemical



Examiner, which further weakens the prosecution case. The case of the appellant is also covered by the ratio of law laid down in **Union of India v. Bal Mukund and others, 2009(2) RCR (Criminal) 574** and **State of Rajasthan v. Gurmail Singh, 2005 (2) RCR (Criminal) 58** on account of the sample being sent after the stipulated period of 72 hours.

11. Further, it is discernible from the record that provisions of Section 50 of the NDPS Act were not complied with, as on personal search, Rs.50/- were recovered from the accused-appellant, whereas it is nowhere mentioned that he was made aware of his legal right, to be searched before a Gazetted Officer or a Magistrate. This stands fatal for the case of prosecution. Therefore, the case in hand is a case of composite search, meaning thereby, when along with the bag/vehicle/receptacle of the accused, his body is also searched, the rigor of Section 50 of the NDPS Act would be made applicable.

12. A two Judge Bench of the Hon'ble Supreme Court in **State of Rajasthan v. Parmanand and another (2014) 5 SCC 345** speaking through Justice Ranjana P. Desai has held as under: -

"15. Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application. In this case, Respondent 1 Parmanand's bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of Respondent 2 Surajmal was also conducted. Therefore, in the light of the judgements of this



Court mentioned in the preceding paragraphs, Section 50 of the NDPS Act will have application."

13. A three Judge bench of the Hon'ble Supreme Court of India in **Mohan Lal v. State of Punjab AIR 2018 SC 3853**, speaking through Justice Navin Sinha, made the following observations in this regard:

"25. In view of the conflicting opinions expressed by different two Judge Benches of this Court, the importance of a fair investigation from the point of view of an accused as a guaranteed constitutional right under Article 21 of the Constitution of India, it is considered necessary that the law in this regard be laid down with certainty. To leave the matter for being determined on the individual facts of a case, may not only lead to a possible abuse of powers, but more importantly will leave the police, the accused, the lawyer and the courts in a state of uncertainty and confusion which has to be avoided. It is therefore held that a fair investigation, which is but the very foundation of fair trial, necessarily postulates that the informant and the investigator must not be the same person. Justice must not only be done, but must appear to be done also. Any possibility of bias or a predetermined conclusion has to be excluded. This requirement is all the more imperative in laws carrying a reverse burden of proof. "

14. In view of the above discussion, it is held that the prosecution has miserably failed to prove its case beyond reasonable doubt, and as such, the present appeal is allowed. The judgment of conviction and order of sentence

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dated 04.03.2009 passed by learned Judge, Special Court, Barnala is set aside. The appellant, namely Ajay Kumar, is acquitted of the charges framed against him. His bail bonds and surety bonds stand discharged.

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

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

08.04.2025
Ajay Goswami

(HARPREET SINGH BRAR)
JUDGE

<i>Whether speaking/reasoned</i>	<i>Yes/No</i>
<i>Whether Reportable</i>	<i>Yes/No</i>