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**(1997) 12 P&H CK 0027**

**High Court Of Punjab And Haryana At Chandigarh**

**Case No:** Criminal Appeal No. 554 of 1996

Kulwant Singh

APPELLANT

Vs

State of Punjab

RESPONDENT

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**Date of Decision:** Dec. 8, 1997

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 18, 41(2), 42, 50

**Citation:** (1998) 3 CivCC 65 : (1998) CriLJ 4117

**Hon'ble Judges:** P.K. Jain, J

**Bench:** Single Bench

**Advocate:** Navkiran Singh and Sarbjit Singh, for the Appellant; I.P.S. Sidhu, A.A.G., for the Respondent

**Final Decision:** Allowed

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### **Judgement**

P.K. Jain, J.

This appeal is directed against the judgment/order dated May 17, 1995, passed by Additional Sessions Judge, Amritsar, whereby the appellant has been convicted u/s 18 of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as "the Act") and sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs. 1,00,000/- or in default of payment of fine to undergo further rigorous imprisonment for one year.

2. The facts necessary for the disposal of this appeal are that S.I. Satnam Singh, Officer-In-Charge of Police Station, Jhabal, along with other companions was on patrolling duty. He received a secret information that the appellant was indulging in illicit trafficking of narcotics and he could be apprehended in the area of village Mirpur. This information was sent to the police station in the form of a ruqa Exhibit PD, on the basis of which formal First Information Report exhibit PD/1 was recorded. On the receipt of a message, DSP Jaspal Singh also reached the place of nakabandi on the bridge of canal

minor in the area of Mirpur. At about 10.00 a.m. the appellant was sighted while coming and having a bag in his hand. DSP Jaspal Singh (P.W. 1) conducted the search of the said bag which was found to contain one kilogram of opium. 10 grams of the contents were separated by way of sample. The sample and the remaining opium were converted into two separate parcels with the seal of "JS" and were taken into possession vide memo Exhibit PA. The seal after use was handed over to ASI Amrjit Singh. Sealed sample parcel was sent to the office of Chemical Examiner and the report Exhibit PE was received. After completing the investigation, a charge-sheet was filed in the Court.

3. A charge u/s 18 of the Act was framed against the appellant, who pleaded not guilty and claimed to be tried.

4. In support of its case, the prosecution examined three witnesses, i.e. DSP Jaspal Singh (P.W. 1), SI Satnam Singh (P.W. 2) and ASI Raghbir Singh (P.W. 3). The report of the Chemical Examiner (Exhibit PE) was also tendered in evidence.

5. In his examination u/s 313 of the Code of Criminal Procedure, the appellant denied the allegations of the prosecution and pleaded false implication. He did not produce any defence.

6. On an appraisal of the evidence produced before him, the trial Court convicted and sentenced the appellant as stated above. Hence this appeal.

7. I have heard the learned Counsel for the parties and have also gone through the record of the trial Court with their active help.

8. Shri Navkiran Singh, Advocate, learned Counsel for the appellant, has assailed the conviction of the appellant on several grounds, of which one is fatal to the prosecution. It has been argued by the learned Counsel that there is a total non-compliance of Section 50 of the Act. While elaborating his argument, the learned Counsel has argued that the appellant was never apprised of his right enshrined in this provision of law and this non-compliance is fatal to the prosecution case.

9. On the other hand Shri IPS Sidhu, learned Assistant Advocate-General, Punjab, has argued that DSP Jaspal Singh (P.W. 1) was present at the spot and he had disclosed his identity as such to the appellant and after obtaining the consent of the appellant, his search was conducted. It is, thus, argued that the provision of Section 50 of the Act were substantially complied with and no prejudice has been caused to the appellant.

10. The nature and scope of Section 50 of the Act has been examined by the Apex Court in [State of Punjab Vs. Balbir Singh](#), [Saiyad Mohd. Saiyad Umar Saiyad and Others Vs. State of Gujarat](#), and State of Punjab v. Jasbir Singh 1996 SCC 1. In Balbir Singh's case (supra), the following law was laid down (at page 3719 of Cri LJ) :-

On prior information, the empowered officer or authorised officer while acting u/s 41(2) or 42 should comply with the provisions of Section 50 before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a Gazetted Officer or a Magistrate as provided thereunder. It is obligatory on the part of such officer to inform the person to be searched. Failure to inform the person to be searched and if such person so requires failure to take him to the Gazetted Officer or the Magistrate would amount to non-compliance of Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial.

11. This view was reiterated by the Apex Court in Saiyad Mohd. Saiyad Umar's case (supra) and Jasbir Singh's case (supra).

12. The learned Assistant Advocate-General has relied upon the judgment of the Apex Court rendered in [Manohar Lal Vs. State of Rajasthan](#). This judgment does not help the learned State counsel on this aspect of the provision of Section 50 of the Act. Their Lordships of the Apex Court made "the following observations (at page 1367 of Cri LJ) :-

...The provision only requires the option to be given to the accused to say whether he would like to be searched in the presence of a Gazetted Officer or a Magistrate; and on exercise of that option by the accused, it is for the officer concerned to have the search made in the presence of the nearest Gazetted Officer or the nearest Magistrate whosoever is conveniently available for purpose in order to avoid undue delay in completion of that exercise. It is clear from Section 50 of the N.D.P.S. Act that the option given thereby to the accused is only to choose whether he would like to be searched by the officer taking the search or in the presence of the nearest available Magistrate, The choice of the nearest Gazetted Officer or the nearest Magistrate has to be exercised by the officer making the search and not by the accused.

13. This judgment has been subsequently approved by the Apex Court in Raghbir Singh v. State of Haryana 1996 SCC 266.

14. A careful perusal of the above cases does not reveal any inconsistency among them. On the other hand, all these decisions do recognise a valuable right of an accused enshrined in Section 50 of the Act to the effect that if an authorised officer has a suspicion that a particular person is in possession of some prohibited drug or substance in contravention of the Act, he would inform the person to be searched regarding his suspicion and further that if he so desired, he could be searched either before a Gazetted Officer or a Magistrate. This provision has been held to be sacrosanct and mandatory in nature and violation thereof strikes at the core of the prosecution case.

15. Turning to the case in hand, ASI Raghbir Singh (P. W. 3) although stated to be present at the time of search and recovery has not stated anywhere in his deposition before the Court that the appellant was apprised of his right enshrined in Section 50 of the Act. Similarly, SI Santam Singh (P.W, 2), Officer In-charge of Police Station, Jhabal,

has nowhere stated that either he or DSP Jaspal Singh had informed the appellant of his said right to be searched either before a Magistrate or a Gazetted Officer. The mere fact that DSP Jaspal Singh had disclosed his identity to the appellant is not enough to say that the provisions of Section 50 of the Act have been complied with.

16. It requires mention that in Writ Petition (Crl). No. 497/95, Paramjit Kaur v. State of Punjab, C.B.I, had filed a report that DSP Jaspal Singh, SI Satnam Singh and ASI Amarjit Singh were involved in kidnapping of Shri Jaswant Singh Khalra and that on a thorough enquiry it was revealed that a falsa case had been fabricated against Kulwant Singh, the appellant herein. In view of this enquiry, made by the C.B.I., it is hard to believe that DSP Jaspal Singh or Satnam Singh had apprehended the appellant as alleged or had apprised him of his right as envisaged in Section 50 of the Act. Non-compliance with the provisions strikes at the core of the prosecution case.

17. As a result of the above discussion, this appeal is allowed. The conviction of the appellant is set aside and he is acquitted of the charge u/s 18 of the Act. He shall be released forthwith, if not wanted in any other case.