

(2005) 05 P&amp;H CK 0136

**High Court Of Punjab And Haryana At Chandigarh****Case No:** Criminal Appeal No. 66-SB of 2003

Narinder Singh alias Nindi

APPELLANT

Vs

State of Punjab

RESPONDENT

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**Date of Decision:** May 12, 2005**Acts Referred:**

- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 18

**Citation:** (2005) 14 CriminalCC 161**Hon'ble Judges:** Virender Singh, J**Bench:** Single Bench**Advocate:** G.K. Mann, for the Appellant; S.C. Bhardwaj, D.A.G. Punjab, for the Respondent**Final Decision:** Dismissed

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**Judgement**

Virender Singh, J.

Narinder Singh alias Nindi stands convicted u/s 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "the act") for allegedly carrying in his conscious possession 4 kgs of opium. He has been sentenced to undergo RJ for ten years and to pay a fine of Rs.one lac, in default thereof to further undergo RJ for six months by the learned Additional Sessions Judge, Amritsar vide impugned judgment dated 7.11.2003.

2. The appellant on the basis of his long custody (five years) moved an application for suspension of bail. Vide order dated 7.3.2005, while dismissing the application of suspension of sentence, this Court directed the appeal to be listed for final hearing.

3. In brief the prosecution case is that on 4.3.2000, Inspector Swaran Singh PW4 while posted as SHO, Police Station Patti was present in the area of Baba Peer Shah in connection with patrolling. The other police officials were also present with him. At that time the appellant was seen coming from the opposite direction having wrapped himself in a Khes. After seeing the police party, he at once turned towards one side. On suspicion he was apprehended. Inspector Swaran Singh offered him

the option of being searched by him or in the presence of a Gazetted Officer or a Magistrate. The appellant opted to be searched in the presence of a Gazetted Officer. Thereafter, a request was sent to DSP Ashutosh Kaushal PW2 to reach the place of recovery. On his arrival, DSP also introduced himself to the accused as a Gazetted Officer and asked him as to whether he wanted to be searched in his presence or in the presence of a Magistrate or a Gazetted Officer. The appellant reposed confidence in him. In this regard a consent memo Ex. PC was prepared which was attested by DSP and other PWs. One Mohan Singh independent witness was also joined in the police party. In the presence of DSP and other witnesses, search of the appellant was conducted by Inspector Swaran Singh. On search, opium wrapped in a glazed paper from a poly bag which was being carried by the appellant on his shoulder was recovered. 10 grams was separated as sample and the remaining opium on weighment came to be 3.990 kgs. The sample and the remaining opium were converted into two separate sealed parcels bearing seal impressions "SS" and "AT". Specimen of the seals used was also prepared and the sample and the remaining opium was taken into possession vide recovery memo Ex. PC. Rough site plan Ex. PD was also prepared at the spot. The grounds of arrest were conveyed to the appellant vide Memo Ex. PE. On return, the sample and the bulk opium were kept in safe custody by Inspector Swaran Singh in the Malkhana. On 5.3.2000, the case property and sample were produced before the Ilaka Magistrate alongwith the appellant. On return to the Police Station, again the case property was kept in safe custody. Ruqa Ex. PF was sent to the Police Station on the basis of which formal FIR Ex. PG was recorded. The sample and the seals were then sent to the Chemical Examiner Amritsar through Constable Davinder Singh (PW3). After the receipt of the report of Chemical Examiner Ex. PX, the appellant was challaned. He was charged u/s 18 of the Act for which he now stands convicted, as stated above. Hence, this appeal.

4. The prosecution in order to prove the link evidence has examined Constable Chaman Singh PW1 who has tendered his affidavit Ex. PA and Constable Davinder Singh PW3 who had taken the sample parcel alongwith seal of sample to the Chemical Examiner.

5. The witnesses to the recovery are PW2 DSP Ashutosh Kaushal, PW4 Inspector Swaran Singh. The investigation conducted by Inspector Swaran Singh is detailed in the preceding paras. DSP Ashutosh Kaushal also corroborates the statement of Inspector Swaran Singh. He also talks about recording of consent memo Ex. PB. Mohan Singh independent witness has been given up as unnecessary. MHC Harjinder Singh has also been given up as unnecessary.

6. The stand taken by the appellant is of false implication. It is pleaded that earlier also in March, 2000, one Puran Singh who was posted as SHO, Police Station Bhikhiwind had implicated the appellant in a case in which he earned acquittal. Before lodging this case, the said Puran Singh had lifted the appellant from his

residence and subsequently planted the recovery on him.

7. In defence, the appellant has produced his wife Kulwinder Kaur (DW1) who talks about sending of the telegrams with regard to the involvement of the appellant. One such telegram is exhibited as Ex. DX.

8. DW2 Constable Paramjit Singh of Police Station Patti has proved an entry in the Register No. 13 dated 5.3.2000 with regard to the deposit of the case property to FIR No. 33 dated 4.3.2000 registered u/s 18 of the Act. He states that on 28.3.2000 vide road certificate No. 92/21, the sample parcel of the case was sent to Chemical Examiner through Constable Davinder Singh. He however has stated that there is no other entry in register No. 19 regarding the deposit or withdrawal of the property of this case from the Malkhana.

9. DW3 Mohinder Singh is retired S.I. He states that on 4.3.2000, the appellant was apprehended in case FIR No. 33 on 5.3.2000 he along with the case property was produced before the Ilaqa Magistrate. The sample and the case property was sealed by the Illaqa Magistrate and the appellant was then remanded to police custody till 8.3.2000. He further states that the case property was with Inspector Swaran Singh when it was produced before the Ilaqa Magistrate alongwith the accused. He proved photostat copy of the relevant entry (Ex. DW2/A) of the Malkhana register.

10. I have heard Ms. G.K. Mann, learned counsel for the appellant and Ms. Sonia Virk, learned Assistant Advocate General, Punjab. With their assistance, I have also gone through the entire record.

11. The first limb of argument advanced by learned counsel for the appellant is that there is non-compliance of Section 50 of the Act as the offer given to the appellant is incomplete inasmuch as the Investigating Officer has not prepared any consent memo after he offered the option of being searched. Even otherwise Inspector Swaran Singh could not give his own option alongwith the option of Magistrate or Gazetted Officer. The learned counsel then contends that the offer in writing is given only by DSP Ashutosh Kaushal who arrived at the spot after 15/20 minutes. This offer cannot be said to be an offer u/s 50 of the Act. The learned counsel relies upon the latest judgment of Full Bench rendered by this Court in Mohan Singh v. State of Punjab, 2005(2) CCC 623 (P&H); 2004(4) RCR(Cri.) 260, in which the accused was carrying contraband in a bag on his head and the Bench held that it was a search of person and the accused was to be informed of his right of being searched before the Gazetted Officer or the Magistrate. In support of her contention, the learned counsel refers to para Nos. 34 and 35 of the aforesaid judgment. The appellant deserves acquittal on this basic infirmity only, the learned counsel so contends.

12. The other argument advanced by the learned counsel for the appellant is that the link evidence is missing in this case as the prosecution has not proved affirmatively that from the stage of seizure of the sample parcel till it reached the hands of the Chemical Examiner for analysis, there was no possibility of tampering

with it. Dwelling upon her arguments, the learned counsel has drawn my attention to the statement of Constable Davinder Singh PW3 who has stated that on 28.3.2000, he had taken over the sample parcel of this case from MHC Harjinder Singh alongwith seal sample for taking it to the Chemical Examiner's office at Amritsar. According to the learned counsel MHC Harjinder Singh was the most important witness in this case and he has been given up as unnecessary by the Public Prosecutor. The sample which was sent to the Chemical Examiner remained with him after it was deposited by the Investigating Officer in the Malkhana and in the absence of his substantive statement or the affidavit to that effect on the file, the main link is missing. In support of her contentions, the learned counsel has relied upon the judgments of this Court rendered in Padam Singh v. State of Haryana, 1997(4) RCR(Cri.) 172, Jagjit Singh v. State of Punjab, 1998(3) RCR (Cri.) 561 and Jeeto v. State of Haryana, 1998(1) RCR (Cri.) 764. The appellant deserves acquittal on this counts as well, the learned counsel so contends.

13. The other submission made by the learned counsel for the appellant is that the defence of the appellant is most probable on the face of it and the same has not been taken into consideration by the trial court. My attention has been drawn to the statement of Kulwinder Kaur DW1, the wife of the appellant who has stated that in the year 1996, Puran Singh of Police Station Sadar Taran Tarn had registered a case under the Act against her husband in which he was acquitted in the year 1998. However, Puran Singh was after her husband and thereafter on 1.3.2000, the appellant was again taken in illegal custody at the instance of Puran Singh who was posted as SHO Police Station Bhikhiwind and when the appellant was not traceable, she on 2.3.2002 sent telegrams to Governor Punjab and other high ups. The statement of Constable Parmjit Singh DW2 has also been read over before me in which he states that on 5.3.2000, the case property of this case was deposited in the Malkhana of Police Station Patti. He made that statement on the basis of entries made in Register No. 19. Statement of DW3 Mohinder Singh, retired S.I. was also read out before me who states that on 5.3.2000 the appellant alongwith case property was produced before the Illaqa Magistrate and the same were sealed by the Illaqa Magistrate. From the aforesaid evidence, the learned counsel for the appellant wants to develop that the appellant has been falsely implicated in this case.

14. On the basis of the aforesaid submissions, the learned counsel prays for acquittal of the appellant.

15. The learned State counsel has, however, controverted the submissions contending that a very heavy recovery has been effected from the appellant and the same cannot be planted. He then contends that there is no reason with the police official to falsely implicate the appellant in this case. The recovery is otherwise effected in the presence of a senior police official (DSP) after complying with all the statutory provisions of the Act. The appellant, thus, has no escape.

16. After giving my thoughtful consideration to the rival contentions made by learned counsel for either side, in my view, the prosecution has been able to prove its case against the appellant beyond any shadow of reasonable doubt.

17. The main thrust of the submissions advanced by the learned counsel for the appellant is with regard to Section 50 of the Act. In support of her arguments, the learned counsel has relied upon a judgment of Full Bench of this Court rendered in Mohan Singh's (supra). In the aforesaid judgment, the question of law posed was with regard to the provisions of Section 50 of the Act. In the said case, the accused was carrying a gunny bag containing 13 kgs of opium on his head at the relevant point of time. The argument advanced was that there was apparent violation of provisions of Section 50 of the Act as the appellant was carrying the bag on his person and this being a personal search, strict compliance of the provisions of Section 50 of the Act including giving complete offer in terms thereof was mandatory. The infirmity highlighted was that the offer was not complete and composite as contemplated u/s 50 of the Act and as such the appellant deserves acquittal. However, other infirmities were also projected. May be the Full Bench on merits did not find any infirmity in the aforesaid case with regard to non-compliance of Section 50 of the Act and acquitted the accused on other weaknesses in the prosecution case, but while relying upon judgments of the Apex Court including the judgment of Constitutional Bench rendered in State of Punjab v. Baldev Singh, 1999 ACJ 261 (S.C.): 1999 SCC(Cri.) 1080 and other judgment of three Judges Bench, rendered in Namdi Francis Nwazor v. Union of India, 1998 SCC(Crl.) 1516, has ultimately observed as under:-

The result of the above discussion is that it is obligatory upon the investigating officer to give complete offer to the suspect upon whom he proposes to conduct personal search and where the suspect exercises (sic) conduct the search in presence of the Gazetted Officer or the Magistrate, as the case may be. The offer must be complete, but essentially need not be in writing.

18. In Baldev Singh's case (supra) the Hon"ble Supreme Court while considering the matter at great length with regard to Section 50 of the Act held that it was obligatory upon the investigating Officer to inform the suspect of his right to be searched before a Gazetted Officer or a Magistrate. It is then said that the provisions of Section 50 of the Act implicitly make it imperative and obligatory and cast a duty upon the investigating officer to ensure compliance of the provisions of Section 50, failure to conduct his search before a Gazetted Officer or a Magistrate would cause prejudice to the accused, render the recovery of illicit article suspect and vitiate the conviction and the sentence of the accused, where the conviction has been recorded on the basis of possession of the illicit article. It was, however, held in the aforesaid judgment that such offer may not necessarily be in writing.

19. In Namdi Francis's case (supra), the three Judges Bench has held that on a plain reading of sub-section (1) of Section 50 of the Act, it is obvious that it applies to

cases of search of any person and not search of any article in the sense that the article is at a distant place from where the offender is actually searched. It was also clarified by the Hon"ble Apex Court that if the person is carrying a hand bag or the like and the incriminating article is found therefrom, it would still be a search of the person of the accused requiring compliance of Section 50 of the Act. In para 3 of the aforesaid judgment, their Lordships have observed as under:-

We must hasten to clarify that if that person is carrying a hand bag or the like and the incriminating article is found therefrom, it would still be a search of the person of the accused requiring compliance with Section 50 of the Act. However, when an article is lying elsewhere and is not on the person of the accused and is brought to a place where the accused is found, and on search, incriminating articles are found therefrom it cannot attract the requirements of Section 50 of the Act for the simple reason that it was not found on the accused person.

20. The matter with regard to the provisions of Section 50 of the Act once again came up before the Hon"ble Supreme Court in *State of H.P. v. Pawan Kumar*, 2005(1) CCC 362 (S.C.): 2004(4) RCR 543 (SC). Since there was difference of opinion between two Hon"ble Judges of the Apex Court the matter was placed before the Larger Bench of the Supreme Court. The Larger Bench while considering the scope and ambit of Section 50 of the Act as examined by the Constitutional Bench in *Baldev Singh's* case (supra), the Larger Bench in *Namdi Francis's* case (supra) and the other judgments of the Hon"ble Supreme Court on the subject observed in [State of Himachal Pradesh Vs. Pawan Kumar](#), as under:-

The Constitution Bench decision in [Pooran Mal Vs. The Director of Inspection \(Investigation\), New Delhi and Others](#), was considered in [State of Punjab Vs. Baldev Singh, etc. etc.](#), and having regard to the scheme of the Act and especially the provisions of Section 50 thereof, it was held that it was not possible to hold that the judgment in the said case can be said to have laid down that the "recovered illicit article can be used as "proof of unlawful possession" of the contraband seized from the suspect as a result of illegal search and seizure. 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.

21. While allowing the appeal of the State, the Hon"ble Bench further observed as under:-

In view of the discussion made earlier, Section 50 of the Act can have no application on the facts and circumstances of the present case as opium was allegedly recovered from the bag, which was being carried by the accused.

22. While dealing with the view taken by the Larger Bench in *Namdi Francis's* case (*supra*) it was observed as under:-

"Learned counsel for the respondent has placed strong reliance on [Namdi Francis Nwazor Vs. Union of India \(UOI\) and Another](#), which is a decision by a Bench of three learned Judges. In this case, the accused had checked in at the Indira Gandhi International Airport for taking the flight from Delhi to Lagos. A team of the Narcotics Control Bureau, on suspicion, decided to check his baggage. At the point of time when the actual search took place, he was carrying two handbags but nothing incriminating was found therefrom. He had booked one bag which had already been checked in and was loaded in the aircraft by which he was supposed to travel. The bag was brought to the customs counter and on checking 180 gms of heroin was found therein. The Bench held that on a plain heading of sub-section (1) Section 50, it applies to cases of search of a person and not search of any article in the sense that the article is at a distant place from where the offender is actually searched. After arriving at the above finding, the Bench also observed, "we must hasten to clarify that if that person is carrying a handbag or the like and the incriminating article is found therefrom, it would still be a search of the person of the accused requiring compliance with Section 50 of the Act. However, when an article is lying elsewhere and is not on the person of the accused and is brought to a place where the accused is found, and on search, incriminating articles are found therefrom it cannot attract the requirements of Section 50 of the Act for the simple reason that it was not found on the accused person. "The bench then finally concluded that on the facts of the case Section 50 was not attracted. The facts of the case clearly show that the bag from which incriminating articles was recovered had already been checked in and was loaded in the aircraft. Therefore, it was not at all a search of a person to which Section 50 may be attracted. The observations, which were made in the later part of the judgment (reproduced above), are more in the nature of *biter* as such a situation was not required to be considered for the decision of the case. No reasons have been given for arriving at the conclusion that search of a hand bag being carried by a person would amount to search of a person. It may be noted that this case was decided prior to the Constitution Bench decision in *State of Punjab v. Baldev Singh*. After the decision in *Baldev Singh*, this Court has consistently held that Section 50 would only apply to search of a person and not to any bag, article or container, etc. being carried by him. Another judgment relied upon by the learned counsel for the accused is *Beckodan Abdul Rahiman v. State of Kerala*, JT 2002(3) 2529 (SC). Here 11 gms of opium was found in a polythene bag which had been concealed in the fold of dhoti which the accused was wearing. This was clearly a case of search of a person, as explained

above, and Section 50 was rightly held applicable."

23. In view of the latest judgment rendered by Larger Bench in Pawan Kumar's case (supra), the plea of the appellant that there is non-compliance of Section 50 of the Act in this case is not acceptable for the reason that provisions of Section 50 of the Act are not at all attracted in the present case as the contraband allegedly recovered was being carried by the appellant on his shoulder.

24. I, at the same time, do not find any substance in the other argument advanced by the learned counsel for the appellant with regard to link evidence. In this regard, I have once again re-scanned the entire evidence minutely. Inspector Swaran Singh PW4 who is also the Investigating Officer when stepped into witness box has categorically stated that after completing all the statutory formalities at the spot, the accused and the contraband recovered from him were brought to Police Station Patti. The accused was locked up in lock up and sample and bulk opium were kept under his double lock in the Police Malkhana. He then states that on 5.3.2000, he took the case property and sample and produced them before the Illaqa Magistrate alongwith the accused. The sample and the case property were also initialed by the Illaqa Magistrate and were returned to him for keeping it in safe custody. He further states that on return, he had kept them under this double lock. He then states in his substantive statement that on 28.3.2000, he again took out the sample from Malkhana and handed it over to Constable Davinder Singh alongwith specimen seal directing him to deposit it with Chemical Examiner, Amritsar.

25. Constable Davinder Singh PW3 when stepped into witness box has no doubt stated that on 28.3.2000, MHC Harjinder Singh had handed over to him the sample parcel "of this case along with seal sample bearing impressions "SS" and "AT" for taking it to Chemical Examiner Officer, Amritsar. In my view, the statement of Constable Davinder Singh is a stray statement which carries no weight and has to be rejected in the light of the other evidence on the file. According to the substantive statement of Swaran Singh, no doubt the sample parcel of this case alongwith seal sample had been kept in Malkhana but the same was directly under his custody as he has categorically stated that he had kept them under his double lock in the Malkhana. He has nowhere stated that the case property was kept somewhere else. Inspector Swaran at the relevant time was the SHO as is clear from his examination-in-chief. While following the provisions of Section 55 of the Act, he had taken the charge of the case property on the date of recovery i.e. 4.3.2000, took it out of Malkhana on 5.3.2000 and thereafter deposited it on the same day after getting it cross-checked by the Illaqa Magistrate. In my considered view, this amounts to complete compliance of the provisions of the Act. MHC Harjinder Singh had no role to play in this case as the above said article (case property) was never kept in his custody by the Investigating Officer and for this reason he was given up as being unnecessary. In my considered view, the SHO being Incharge of the Police Station is also considered to be the Incharge of the Malkhana and that is the reason



that in this case also the seal impression and sample were kept by him in the Malkhana only but under the lock and key.

26. I have perused the statement of Constable Paramjit Singh DW2 also who states that in Register No. 19, at Entry No. 49 and Entry No. 13, the case property of this case is shown as deposited in the Police Station. Even if the said entries are there, it would not be presumed that the case property was not in the custody of Inspector Swaran Singh. I have also perused the statement of Mohinder Singh retired S.1. (DW3) and the same does not come at the rescue of the appellant. Rather this witness has stated that the sample along with the accused was produced before the Illaqa Magistrate and the same was sealed by the Judge. He has further stated that case property was with Inspector Swaran Singh when it was produced before the Illaqa Magistrate. This is exactly the case of the prosecution also.

Section 55 of the Act reads as under:-

55. Police to take charge of articles seized and delivered - An officer incharge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that police station and which may be delivered to him, and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples or and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station.

27. From the evidence adduced by the prosecution, it is amply clear that pending the orders of the Magistrate which were obtained on 5.3.2000, the case property was kept in the custody of Inspector Swaran Singh who was also incharge of the Police Station being SHO and thereafter the case property was also got initialed by the Magistrate. All these safeguards are provided by the statute so that at no stage the case property is tampered with. In the case in hand till the case property reached the Chemical Examiner all the seals were found intact. Once the case property was initialed by the concerned Magistrate within 24 hours there is no possibility to change or tamper with the material or the sample. The judgments relied upon by learned counsel for the appellant rendered in Padam Singh's case (supra), Jagjit Singh's case (supra) and Jeeto's case (supra) are not applicable to the facts of the case in hand as the facts in the aforesaid cases are absolutely distinguishable.

28. I have also considered the case of the appellant with regard to the telegram Ex. DX sent by his wife who has otherwise stepped into witness box as one of the defence witnesses. In my considered view, the defence led by the appellant is hanging on a very tenuous thread and is of no help to him. No official from the Telecommunication Department has been produced to prove the telegram. Even no complaint has been made before any higher authority by the wife of the appellant.

The appellant has not made any attempt to produce any witness to strengthen his evidence. For this reason, he cannot derive any benefit out of this.

29. No other point has been urged before me.

30. The net outcome of the aforesaid discussion is that the prosecution has been able to establish the conscious possession of the appellant qua contraband 4 kgs of the opium allegedly recovered from him on 4.3.2000. Resultantly, the conviction as recorded by the trial Court is hereby affirmed.

The present appeal is, thus, dismissed.