

STATE OF H.P.

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v.

SUNIL KUMAR

(Criminal Appeal No. 1101 of 2005)

MARCH 5, 2014

B

**[RANJANA PRAKASH DESAI AND  
MADAN B. LOKUR, JJ.]**

**NARCOTIC DRUGS AND PSYCHOTROPIC  
SUBSTANCES ACT, 1985.**

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*s. 50 and s.20 - 'Chance recovery' - Compliance of s.50 - Police in routine traffic check for without ticket passengers, detected accused-appellant in possession of charas - Held: It was plainly a chance recovery of charas - It was not necessary for police officers to comply with provisions of s. 50 -- Mere suspicion, even if it is 'positive suspicion' or grave suspicion cannot be equated with 'reason to believe' -- Decision of trial court convicting the accused of an offence u/ s 20 of the Act, upheld.*

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**WORDS AND PHRASES:**

*Expressions 'chance recovery', 'reason to believe' - Connotation of in the context of Narcotic Drugs and Psychotropic Substances Act.*

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**The respondent was prosecuted for an offense punishable u/s 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985. The prosecution case was that, while checking a bus, in usual 'traffic check' for ticket less passengers etc., the respondent was found concealing something under his clothes which turned to be 2.300 Kg of charas. The trial court held that in the circumstances provisions of s. 42 of the Act relating to search and**

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A seizure were not applicable and convicted and sentenced the respondent to imprisonment for 10 years and to pay a fine of Rs. 1 Lakh. However, the High Court held that the recovery of charas was not a chance recovery and it attracted the provisions of s. 50 of the act and because of non-compliance thereof the conviction and the sentence were not justified.

C In the instant appeal filed by the state, the question for consideration before the Court was: whether the accidental or chance recovery of narcotic drugs during a personal or body search would attract the provisions of s.50 of the Narcotic Drugs and Psychotropic Substances Act, 1985.

D Allowing the appeal, the Court

E HELD: 1.1 In view of the Constitution Bench decision in Baldev Singh the personal search of the accused-appellant resulting in the recovery of contraband did not violate s. 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985. [para 11] [619-B]

*State of Punjab v. Baldev Singh* 1999 (3) SCR 977= (1999) 6 SCC 172; *State of Punjab v. Balbir Singh* 1994 (2) SCR 208 = (1994) 3 SCC 299 - referred to.

F 1.2 The expression 'chance recovery' has not been defined anywhere and its plain and simple meaning seems to be a recovery made by chance or by accident or unexpectedly, as in the instant case, where the recovery of contraband may not have been unexpected, but the recovery of charas certainly was unexpected notwithstanding the submission that drugs are easily available in the area. The police officers had no reason to believe that the accused was carrying any drugs. It was plainly a chance or accidental or unexpected recovery of charas - the accused could well have been

carrying any other contraband such as, smuggled gold, stolen property or an illegal firearm or even some other drug. [para 14, 16] [620-C, G-H; 621-A-B] A

1.3 Mere suspicion, even if it is 'positive suspicion' or grave suspicion cannot be equated with 'reason to believe'. These are two completely different concepts. It is this positive suspicion, and not any reason to believe, that led to the chance recovery of charas from the person of the accused. The view of the High Court that since the police officers had a positive suspicion that the accused was carrying some contraband, therefore, it could be said or assumed that they had reason to believe or prior information that he was carrying charas or some other narcotic substance and so, before his personal or body search was conducted, the provisions of s.50 of the Act ought to have been complied with, cannot be sustained. The recovery of charas on personal search of the accused was clearly a chance recovery and, in view of Baldev Singh, it was not necessary for the police officers to comply with the provisions of s. 50 of the Act. [para 19 and 21] [621-F-G; 622-B-D] B C D E

*Joti Parshad v. State of Haryana*, 1993 Supp (2) SCC 497; and *Sheo Nath Singh v. Appellate Assistant CIT* (1972) 3 SCC 234 - relied on.

*Mohinder Kumar v. State, Panaji Goa* (1998) 8 SCC 655; *Sorabkhan Gandhkhan Pathan v. State of Gujarat* (2004) 13 SCC 608; *Bharatbhai Bhagwanjibhai v. State of Gujarat* 2002 (3) Suppl. SCR 491 = (2002) 8 SCC 327 - referred to. F

1.4 In the circumstances, the judgment and order passed by the High Court is set aside and the decision of the trial court convicting the accused of an offence u/s 20 of the Act upheld. [para 22] [622-E-F] G

#### Case Law Reference:

1999 (3) SCR 977 referred to para 1 H

- A      1993 Supp (2) SCC 497      relied on      para 11  
          1994 (2) SCR 208      referred to      para 11  
          (1998) 8 SCC 655      referred to      para 15  
 B      (2004) 13 SCC 608      referred to      para 15  
          (1972) 3 SCC 234      relied on      para 19  
          2002(3) Suppl. SCR 49      referred to      para 20

C      CRIMINAL APPELLATE JURISDICTION : Criminal Appeal  
 No. 1101 of 2005.

From the Judgment and Order dated 11.06.2004 of the High Court of Himachal Pradesh at Shimla in Criminal Appeal No. 37 of 2002.

D      Suryanarayana Singh, Addl. AG, Pragati Neekhra for the Appellant.

Debasis Misra, R.P. Vyas (AC) for the Respondent.

E      The Judgment of the Court was delivered by

F      **MADAN B. LOKUR, J.** 1. The question before us is whether the accidental or chance recovery of narcotic drugs during a personal or body search would attract the provisions of Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short the Act). In our opinion, the issue is no longer *res integra* having been answered in the negative by the Constitution Bench in *State of Punjab v. Baldev Singh*.<sup>1</sup>

G      **The facts:**

2. The respondent Sunil Kumar was travelling in a bus on 9th December, 2000 away from Chamba in Himachal Pradesh. The bus was stopped at Dhundiara Bungalow at about 1.15

H      1. (1999) 6 SCC 172.

p.m. for a 'traffic check' by ASI Joga Singh (PW-13), in-charge of Police Post Banikhet, accompanied by Head Constable Pritam Singh (PW-3), Constable Mazid Mohammad (PW-2) and Constable Des Raj (PW-5) all of whom were acting under the supervision of Gulab Singh (PW-12) the Deputy Superintendent of Police, Dalhousie. A 'traffic check', we were told, means a check for ticketless passengers etc. We were also told that narcotic substances are quite easily available in the Chamba area, but the bus was not stopped for checking the carriage or transportation of any narcotics.

3. Be that as it may, during the check, Constable Mazid Mohammad noticed the passenger occupying seat No. 20 (Sunil Kumar) concealing something under his clothes. Therefore, Sunil Kumar was asked to disembark from the bus and then asked to open his trousers. When he did so, the police officers found a polythene envelope tied below his belly with the help of a "parna" (piece of cloth). The polythene envelope was opened and was found to contain what looked like charas.

4. Steps were taken by the police officers to weigh and seize the item recovered as well as to seal necessary samples for the purpose of examination. We are not concerned with the correctness of this procedure, since there is no dispute about it. Suffice it to say that the item recovered was found to be charas weighing about 2.300 kilos.

5. On these broad facts Sunil Kumar was prosecuted for conscious possession of a narcotic substance and was prosecuted for an offence punishable under Section 20 of the Act.

#### Decision of the Trial Court:

6. The Sessions Judge, Chamba Division, Chamba, Himachal Pradesh in Sessions Case No. 9 of 2001 gave a rather detailed judgment and concluded that Sunil Kumar was in conscious possession of a narcotic substance and the

A recovery thereof was a chance recovery. Accordingly, the provisions of Section 42 of the Act relating to search and seizure were not applicable since the police officials had no prior information about the possession of charas by Sunil Kumar. For arriving at this conclusion, the Trial Judge placed  
B reliance on *Baldev Singh*.

7. The Sessions Judge in his judgment and order dated 28th November, 2001 found Sunil Kumar guilty of the offence charged and subsequently by an order dated 29th November, 2001 he was sentenced to undergo rigorous imprisonment of  
C 10 years and to pay a fine of Rs. 1 lakh and in default of payment of fine to further undergo simple imprisonment for one year.

#### Decision of the High Court:

D 8. Feeling aggrieved, Sunil Kumar preferred Criminal Appeal No. 37 of 2002 before the High Court of Himachal Pradesh. In its decision dated 11th June, 2004 the High Court held that the recovery of charas was not a chance recovery.<sup>2</sup>

E 9. It was held that though the search conducted was a random search, but the police officers had a positive suspicion that Sunil Kumar might be carrying contraband. It is for this reason that he was asked to get down from the bus and then subjected to a body search. Therefore it was not a chance  
F recovery. According to the High Court, this attracted the provisions of Section 50 of the Act and Sunil Kumar ought to have been given an option of being searched before a Gazetted Officer or a Magistrate in compliance with Section 50 of the Act. Since this option was not given, the conviction and sentence  
G imposed upon Sunil Kumar was not justified.

10. Accordingly, the appeal filed by Sunil Kumar was allowed by the High Court.

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H 2. MANU/HP/0123/2004.

**Chance recovery:**

11. The State is in appeal against the acquittal of Sunil Kumar and the broad submission is that the recovery of charas from him was a chance recovery. Under these circumstances, in view of the Constitution Bench decision in *Baldev Singh* which endorsed the view taken in *State of Punjab v. Balbir Singh*<sup>3</sup> the personal search of Sunil Kumar resulting in the recovery of contraband did not violate Section 50 of the Act. Reliance was placed by learned counsel on paragraph 25 in *Balbir Singh* which was also endorsed by the Constitution Bench. It was submitted that it is only after a chance or accidental recovery of any narcotic drug or psychotropic substance by any police officer that the provisions of the Act would come into play. It is then that the empowered officer should be informed and that empowered officer should thereafter proceed to investigate the matter in accordance with the provisions of the Act.

12. The relevant extract of paragraph 25 of *Balbir Singh* reads 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

3. (1994) 3 SCC 299.

A stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act.”

B 13. In view of the opinion expressed by the Trial Court and the High Court, we need to firstly understand what a ‘chance recovery’ is. The next question would be whether the provisions of Section 50 of the Act would apply when there is a chance recovery.

C 14. The expression ‘chance recovery’ has not been defined anywhere and its plain and simple meaning seems to be a recovery made by chance or by accident or unexpectedly. In *Mohinder Kumar v. State, Panaji, Goa*<sup>4</sup> this Court considered a chance recovery as one when a police officer “stumbles on” narcotic drugs when he makes a search. In *Sorabkhan Gandhkhan Pathan v. State of Gujarat*<sup>5</sup> the police officer, while searching for illicit liquor, accidentally found some charas. This was treated as a ‘chance recovery’.

E 15. Applying this to the facts of the present appeal, it is clear that the police officers were looking for passengers who were travelling ticketless and nothing more. They accidentally or unexpectedly came across drugs carried by a passenger. This can only be described as a recovery by chance since they were neither looking for drugs nor expecting to find drugs carried by anybody.

F 16. It is not possible to accept the view of the High Court that since the police officers conducted a random search and had a “positive suspicion” that Sunil Kumar was carrying contraband, the recovery of charas from his person was not a chance recovery. The recovery of contraband may not have been unexpected, but the recovery of charas certainly was unexpected notwithstanding the submission that drugs are easily available in the Chamba area. The police officers had no reason to believe that Sunil Kumar was carrying any drugs

4. (1998) 8 SCC 655.

H 5. (2004) 13 SCC 608.

and indeed that is also not the case set up in this appeal. It was plainly a chance or accidental or unexpected recovery of charas – Sunil Kumar could well have been carrying any other contraband such as, smuggled gold, stolen property or an illegal firearm or even some other drug.

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17. We are not going into the issue whether the personal or body search of Sunil Kumar (without a warrant) was at all permitted by law under these circumstances. That was not an issue raised or canvassed before the Trial Court or the High Court or even before us, although it has been adverted to in the written submissions by learned counsel assisting us on behalf of Sunil Kumar.

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#### **Applicability of Section 50 of the Act:**

18. As far as the applicability of Section 50 of the Act in a chance recovery is concerned, the issue is no longer *res integra* in view of the decision of the Constitution Bench in *Baldev Singh*.

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19. It is true that Sunil Kumar behaved in a suspicious manner which resulted in his personal search being conducted after he disembarked from the bus. However, there is no evidence to suggest that before he was asked to alight from the bus, the police officers were aware that he was carrying a narcotic drug, even though the Chamba area may be one where such drugs are easily available. At best, it could be said the police officers suspected Sunil Kumar of carrying drugs and nothing more. Mere suspicion, even if it is 'positive suspicion' or grave suspicion cannot be equated with 'reason to believe'.<sup>6</sup> These are two completely different concepts. It is this positive suspicion, and not any reason to believe, that led to the chance recovery of charas from the person of Sunil Kumar.

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20. Similarly, the positive suspicion entertained by the

6. *Joti Parshad v. State of Haryana*, 1993 Supp (2) SCC 497 and *Sheo Nath Singh v. Appellate Assistant CIT*, (1972) 3 SCC 234.

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A police officers cannot be equated with prior information.<sup>7</sup> The procedure to be followed when there is prior information of the carrying of contraband drugs is laid down in the Act and it is nobody's case that that procedure was followed, let alone contemplated.

B 21. We are not in agreement with the view of the High Court that since the police officers had a positive suspicion that Sunil Kumar was carrying some contraband, therefore, it could be said or assumed that they had reason to believe or prior information that he was carrying charas or some other narcotic substance and so, before his personal or body search was conducted, the provisions of Section 50 of the Act ought to have been complied with. The recovery of charas on the body or personal search of Sunil Kumar was clearly a chance recovery and, in view of *Baldev Singh*, it was not necessary for the police officers to comply with the provisions of Section 50 of the Act.

**Conclusion:**

E 22. Under the circumstances, we set aside the judgment and order passed by the High Court and uphold the decision of the Trial Court convicting Sunil Kumar for an offence punishable under Section 20 of the Act. Necessary steps be taken to apprehend Sunil Kumar to serve out the remainder of his sentence.

F 23. The appeal is allowed.

R.P.

Appeal allowed.

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7. *Bharatbhai Bhagwanjibhai v. State of Gujarat*, (2002) 8 SCC 327.