

(2019) 04 BOM CK 0107
In the Bombay High Court
Case No : Criminal Appeal No. 352 Of 2014

Mobin Khan And Ors

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 18-04-2019

Acts Referred:

Narcotics Drugs And Psychotropic Substances Act, 1985 — Section 20, 20(b)(ii)(C),
29, 41, 42, 43, 50
Indian Penal Code, 1860 — Section 34, 392
Code Of Criminal Procedure, 1973 — Section 100

Citation : (2019) 04 BOM CK 0107

Hon'ble Judges : Swapna Joshi, J

Bench : Single Bench

Advocate : A.K. Bhangde, N.N. Samudre, M.J. Khan, A.R. Kulkarni

Final Decision : Dismissed

Judgement

Swapna Joshi, J

[1] This appeal has been directed against the judgment and order dated 23.04.2014 passed by the learned District Judge-6 and Additional Sessions Judge, Nagpur in Special (N.D.P.S.) Case No.07/2013, whereby appellant nos.1 and 2 (hereinafter referred to as "accused") were convicted for the offence punishable under Section 20 (b) (ii) (C) read with Section 29 of the Narcotics Drugs and Psychotropic Substances Act, 1985 (for short 'NDPS Act') and was sentenced to suffer rigorous imprisonment for ten years and to pay a fine of Rs.1,00,000/- in default to suffer simple imprisonment for six months.

[2] The prosecution case in nutshell can be summarized as under :

On 25.11.2012 PW-9 PSI Patil, who was attached to Saoner Police Station, District-Nagpur, on making an entry in the station diary at about 12.25 pm, left the Police Station for patrolling and in search of the accused in Crime No.184/2012 registered in the Police Station for the offence punishable under

Section 392 r/w Section 34 of the Indian Penal Code. At about 10.00 pm, PW-9 PSI Patil was doing a patrolling duty in front of Patansaongi Police Station where PW-2 PI Jamble, PW-10 API Pidurkar along with staff were observing blockade duty. PW-2 PI Jamble asked PW-9 PSI Patil to stay with them during night for blockade duty, therefore, PW-9 joined them. At about 11.30 pm, they noticed one white Indigo car bearing no. MP-28/C-7572 proceeding from Nagpur to Saoner. As the police asked the driver to stop the car, the car was stopped. Accused no.2 Taslimkhan was on a driver seat whereas accused no.1 Mobinkhan had occupied the seat beside him. The accused persons were asked to get down and to open the dicky of the car, they both got scared. Police suspected some foul play. Inside the dicky of the car, they found 14 packets and 4 packets on the rear seat of the car. On making an enquiry, accused no.1 Mobinkhan informed that those packets were containing ganja. PW-9 PSI Patil called for two panchas, so also a weighing machine was arranged. In the presence of the panchas, ganja was weighed, it was about 85 kg. 810 grams. PW-9 PSI Patil collected 18 samples of 24 grams each packets and those packets were sealed and marked as S-1 to S-18. The remaining ganja was packed and sealed separately. The personal search of accused was taken. An amount of Rs.10,610/- and one mobile in the possession of accused no.1 Mobin was found and Rs.40/-, one mobile, driving licence, smart card and xerox copy of insurance receipt was found with accused no.2 Taslimkhan. Seizure panchanama was prepared, vide Exh.22. The accused persons were arrested. Police took the accused as well as the seized articles to Saoner Police Station. PW-9 PSI Patil lodged complaint Exh.93. The offence was registered vide Crime No.3063/2012, on the basis of the said complaint by PW-3 Chhagan Bahat.

PW-2 PI Ashok Jamble submitted the report (Exh.45). The muddemal property was deposited with the Police Station for resealing. PW-3 ASI Chhagan Bhagat resealed the articles. The property was deposited in the Malkhana on 26.11.2012. The sealed samples were sent to C.A. office. The C.A. report was secured (Exh.72). PW-10 API Pidurkar recorded the statements of the witnesses. He submitted the compliance report (Exh.98) to S.D.P.O, Saoner. The remaining muddemal was produced before the learned Magistrate for verification and inventory. The inventory was prepared. After completion of investigation charge-sheet came to be filed in the Special Court. The charge was framed. The evidence was conducted. On hearing both the sides, the learned Special Judge convicted the accused as aforesaid.

[3] I have heard both the sides. With the able assistance of the learned advocate for the accused and the learned APP, I have gone through the record and proceedings of the case.

[4] The main contention of both the learned advocates for the appellants was that the mandatory provisions under Section 50 of NDPS Act are not complied with, although the police was bound to do so. Hence, the conviction of the accused under these provisions stands vitiated. It is not disputed that the other

provisions under the NDPS Act are complied with.

[5] As against this, the learned APP vociferously contended that there was no occasion for the police party to comply with the provisions under Section 50 of NDPS Act as the police had not received secret information about the said contraband kept in the car. Furthermore since the provisions under Section 50 are restricted to personal search, there is no question of complying the provisions for the search of the car.

[6] The short question which arises for consideration in this case is, whether the investigating agency has followed the mandatory provisions under Section 50 of NDPS Act while conducting the raid and violation of the said Act has vitiated the conviction on that ground. The defence does not seriously dispute that other provisions under the said act are followed by the investigating agency.

[7] The learned advocates for the appellants Shri Bhangde and Shri Samudre vociferously argued that the provisions under Section 50 of the Act were not complied with by the raiding party. The facts on record show that the raiding party was checking of vehicles on the highway. The police asked the accused to halt the car and accordingly it was stopped. The accused were asked to open the dicky of the car, they were frightened. Police found 14 packets in the dicky of the car and four packets kept on the rear seat of the car. A-1, on making enquiry, informed that those packets were containing ganja. The ganja was taken charge on weighing it and drawing the samples of it. It is amply clear that no provisions under Section 50 of NDPS Act were followed :

50. Conditions under which search of persons shall be conducted :- (1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided

under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.

Keeping in mind the aforesaid provisions, the case laws relied upon by both the sides are to be read carefully.

[8] The learned advocate Mr. Bhangde placed reliance upon 2018 (2) Crimes 389 (SC) (Arif Khan @ Agha Khan .vs. State of Uttarakhand), wherein the Hon'ble Apex Court held that :

28. First, it is an admitted fact emerging from the record of the case that the appellant was not produced before any Magistrate or Gazetted Officer; Second, it is also an admitted fact that due to the aforementioned first reason, the search and recovery of the contraband "Charas" was not made from the appellant in the presence of any Magistrate or Gazetted Officer; Third, it is also an admitted fact that none of the police officials of the raiding party, who recovered the contraband "Charas" from him, was the Gazetted Officer and nor they could be and, therefore, they were not empowered to make search and recovery from the appellant of the contraband "Charas" as provided under Section 50 of the NDPS Act except in the presence of either a Magistrate or a Gazetted Officer; Fourth, in order to make the search and recovery of the contraband articles from the body of the suspect, the search and recovery has to be in conformity with the requirements of Section 50 of the NDPS Act. It is, therefore, mandatory for the prosecution to prove that the search and recovery was made from the appellant in the presence of a Magistrate or a Gazetted Officer.

The facts of the case differ from the facts of the case in hand. In the case before the Hon'ble Apex Court, the secret information was received by the police that one person is travelling by bus carrying with him some contraband articles, the raiding party intercepted the accused and the search was conducted. Therefore, the Hon'ble Apex Court held that the procedure prescribed under Section 50 of the NDPS Act has to be followed by the police officials in letter and spirit while making search and recovery of contraband from the accused.

[9] The learned advocate further placed reliance upon 2014 ALL MR (Cri) 1953 (Thulile Goodness Dhalmini .vs. Union of India and another) wherein it is held by the Division Bench of this Court that :

(A) Narcotic Drugs and Psychotropic Substances Act (1985), S.50 - Search and seizure - Officers in Air Intelligence Unit (AIU) specifically stating that accused carried suitcase as handbag, was sniffed by sniffer dog and gave positive indication of some narcotic substance. Not a case of chance recovery - Once AIU officers had reason to believe that accused was carrying narcotic drugs - Provisions of S. 50 has to be complied with.

(B) Narcotic Drugs and Psychotropic Substances Act (1985), S.50 - Search and

seizure - Even if contraband is not found on person of accused but found in bag taken by him as cabin baggage - S.50 would be attracted and non-compliance would vitiate conviction.

In that case the handbag was sniffed by sniffer dog and gave positive indication of narcotic drug. Thus this court came to the conclusion that it was not a case of chance recovery. In the instant case it was a case of chance recovery. On opening of the dicky and car, the police came to know that there was ganja in the car and its dicky.

There was no opportunity to comply the provisions under Section 50 of NDPS Act.

[10] Per contra, the learned APP relied upon the judgment in case of Gulsher Mohammed .vs. State of Himachal Pradesh, reported in (2015) 17 SCC 682, wherein the sweet shop of appellant-accused was searched for narcotic drugs, after nothing incriminating on his person was found, leading to recovery of 500 gm charas in his shop, High Court reversed his acquittal and convicted under S. 20 of NDPS Act. It was held that the said mandatory requirement prescribed under Section 50 will have to be complied with only when a search is carried out on the body of a person and the same cannot have any effect, when it comes to the question of effecting a search on any premises for which the compliance required to be carried out is as has been set out in Section 42 of the said Act itself. It was held "as in the light of our above conclusion, we do not find any scope even to invoke Section 100 Cr.P.C. as was canvassed by the learned counsel on behalf of the appellant by relying upon Section 50 which has no application relating to a search of a premises". The aforesaid case law is applicable to the facts and circumstances of the present case.

[11] In the instant case no secret information was received. Hence there was no question of compliance of Section 42 of NDPS Act followed by Section 50 of the Act. Only as per the provisions under Section 100 of the Cr.P.C. the search was carried out. As discussed in the aforesaid judgment of the Hon'ble Apex Court, the provisions under Section 50 of the NDPS Act are applicable to the personal search and not the search of the car.

[12] In case of Sk. Raju @ Abdul Haque @ Jagga .vs. State of West Bengal unreported judgment of the Hon'ble Apex Court in Criminal Appeal No.459/2017, decided on September 05, 2018, it is held by the Hon'ble Apex Court that Section 50 applies only in case of a search of a person as distinguished from search of any premises, etc.

[13] In (1994) 3 SCC 299 (State of Punjab .vs. Balbir Singh), it is held that :

25. The questions considered above arise frequently before the trial courts. Therefore we find it necessary to set out our conclusions which are 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 stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act.

[14] In (2014) 13 SCC 344 (Yasihey Yobin and another .vs. Department of Customs, Shillong, it is held that :

A. Narcotic Drugs and Psychotropic Substances Act, 1985 - S.50 - Search of bag belonging to accused - Recovery of contraband - Requirements of S. 50, reiterated, not attracted when there is no inextricable connection between search of a person and bag - On facts, held , during search conducted in residence of A-1, on search of contents of bag brought by co-accused A-2 contraband substance was seized by officials - Inextricable connection between search of a person and bag not established here but rather it was only search of bag and therefore search and seizure conducted by gazetted officer did not require compliance with S. 50.

[15] Thus, in the instant case, the police was on patrolling duty in front of Patansavangi Police Station where PW-2, PW-10 and staff were observing blockade duty. PW-9 joined them. At 11.30 pm, they noticed indigo car proceeding from Nagpur to Saoner. As the police asked the driver to stop the car, the car was stopped. The accused no.1 was asked to open the dicky of the car. Police found there 14 packets of ganja in the dicky of the car as well as four packets on the rear seat of the car. It shows that accused were aware that ganja was kept in the car. There was no occasion for the police for complying the provisions under NDPS Act initially, however they complied it thereafter.

[16] In view of the facts and circumstances, it is held that the prosecution has proved its case beyond reasonable doubt. No interference is called for in the impugned judgment and order passed by the trial court. The appeal is therefore dismissed.