

(2019) 06 BOM CK 0101
In the Bombay High Court
Case No : Criminal Appeal No. 591 Of 2018

Rehanabi Sheikh Atiq And Ors

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 27-06-2019

Acts Referred:

Narcotic Drugs And Psychotropic Substances Act, 1985 — Section 20(b)(ii)(B), 41, 42, 43, 50, 50(1)
Indian Penal Code, 1860 — Section 34
Code Of Criminal Procedure, 1973 — Section 100

Citation : (2019) 06 BOM CK 0101

Hon'ble Judges : Rohit B. Deo, J

Bench : Single Bench

Advocate : A. Bhangde, N.B. Jawade

Final Decision : Allowed

Judgement

Rohit B. Deo, J

1. The appellants are assailing the judgment dated 30/08/2018 rendered by the Additional Sessions Judge, Wardha in Special (NDPS) Case 2/2012

whereby the appellants who shall be referred to as the 'accused' hereinafter are convicted for offence punishable under Section 20(b)(ii)(B) of the

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act for short) read with Section 34 of the Indian Penal Code are sentenced to

suffer rigorous imprisonment for seven years and to payment of fine of Rs.25,000/ each, and in default of payment of fine to undergo further simple imprisonment of thirty days.

2. The prosecution case :?

Police Inspector Sharif Khan of Ashti Police Station received secret information

that a tall well built lady wearing a red and green saree

accompanied by a youth wearing black jacket and blue jeans are possessing a military green bag containing ganja and are at the Shirkutni Bus Stop.

Police Inspector Sharif Khan reduced the said information into writing, summoned panchas, a photographer and weighman. Police Inspector Sharif

Khan proceeded to the spot and saw the lady and the youth who were possessing a green military bag. They disclosed their names in presence of the

panchas, the raiding party introduced themselves, notice under Section 50(1) of the NDPS Act was given and the lady and the youth were asked

whether they wished to be searched before a Magistrate or a Gazetted Officer, both the lady and the youth declined. The search was carried out in

the presence of the panchas and ganja was found in the green military bag.

3. Shri A. Bhangde, learned Counsel for the accused would submit that the judgment of conviction is illegal and the accused are entitled to acquittal on

the short ground of non-compliance of the mandatory procedure prescribed under Section 50 of the NDPS Act.

Section 50 of the NDPS Act reads thus :

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

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.

(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.

4. In *State of Punjab vs. Baldev Singh*, (1999) 6 SCC 172, Section 50 of the NDPS Act is held mandatory. A divergent view was taken in *State of*

Himachal Pradesh vs. Pirthi Chand, (1996) 2 SCC 37. In view of the divergent views, a reference was made to the Constitution Bench (*State of*

Punjab vs. Baldev Singh (1999) 6 SCC 172). It would be relevant to notice the following conclusions drawn by the Constitution Bench of the Hon'ble

Apex Court :

“(1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to

inform the person concerned of his right under sub-section (1) of Section 50 of being taken to the nearest gazetted officer or the nearest Magistrate

for making the search. However, such information may not necessarily be in writing.

(2) That failure to inform the person concerned about the existence of his right to be searched before a gazetted officer or a Magistrate would cause

prejudice to an accused.

(3) That a search made by an empowered officer, on prior information, without informing the person of his right that if he so requires, he shall be

taken before a gazetted officer or a Magistrate for search and in case he so opts, failure to conduct his search before a gazetted officer or a

Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused,

where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted

in violation of the provisions of Section 50 of the Act.”

5. In *State of Rajasthan vs. Parmanand & Another*, 2014(1) Crimes 324 (SC), the Hon'ble Apex Court held that if merely a bag carried by person is

searched without there being any search of his person, Section 50 of the NDPS

Act will have no application. However, if both the bag and the person is searched, Section 50 of the NDPS Act will be attracted.

6. In *Arif Khan @ Agha Khan vs. State of Uttarakhand*, 2018 ALL SCR (Cri) 98,0 the Hon'ble Apex Court refers to the Constitution Bench

judgment in *Vijaysinh Chandubha Jadeja vs. State of Gujarat*, 2010 ALL MR (Cri) 4023 (SC) which enunciates that the provisions of Section 50 of the

NDPS Act must be strictly complied with and that it is imperative on the part of the Police Officer to appraise the person intended to be searched of

his right under Section 50 of the NDPS Act to be searched only before a Gazetted Officer or a Magistrate. The Hon'ble Apex Court then observes

thus :

“26. It is the case of the prosecution and which found acceptance by the two Courts below that since the appellant (accused) was apprised of his

right to be searched in the presence of either a Magistrate or a Gazetted Officer but despite telling him about his legal right available to him under

Section 50 in relation to the search, the appellant (accused) gave his consent in writing to be searched by the police officials (raiding party), the two

Courts below came to a conclusion that the requirements of Section 50 stood fully complied with and hence the appellant was liable to be convicted

for the offence punishable under the NDPS Act.

27. We do not agree to this finding of the two Courts below as, in our opinion, a search and recovery made from the appellant of the alleged

contraband “Charas” does not satisfy the mandatory requirements of Section 50 as held by this Court in the case of *Vijaysinh Chandubha Jadeja*

(2010 ALL MR (Cri) 4023 (SC) : 2010 ALL SCR 2655 (supra). This we say for the following reasons.

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.

29. Though, the prosecution examined as many as five police officials (PW1 to PW5) of the raiding police party but none of them deposed that the

search/recovery was made in presence of any Magistrate or a Gazetted Officer.

30. For the aforementioned reasons, we are of the considered opinion that the prosecution was not able to prove that the search and recovery of the

contraband (Charas) made from the appellant was in accordance with the procedure prescribed under Section 50 of the NDPS Act. Since the non

compliance of the mandatory procedure prescribed under Section 50 of the NDPS Act is fatal to the prosecution case and, in this case, we have found

that the prosecution has failed to prove the compliance as required in law, the appellant is entitled to claim its benefit to seek his acquittal.

7. In all fairness, the learned Additional Public Prosecutor Shri N.B. Jawade does not dispute that not only the bag but the person of the accused was

searched.

8. PW 4 Police Inspector Sharif Khan has deposed that the personal search of the accused was taken. PW 7 Rajendra Dakhore who was then

Assistant Sub Inspector at Police Station Ashti and was a member of the raiding party, candidly admits in the cross examination that the personal

search of the accused was taken and the search of the bag was taken three minutes thereafter.

9. Irrefutably, since personal search of the accused was taken alongwith the search of the bag, provisions of Section 50 of the NDPS Act are

attracted and non compliance therewith will vitiate the judgment of conviction.

10. Concededly, the raiding party was not accompanied by a Gazetted Officer or a Magistrate. The communication issued by PW 4 Sharif Khan in

purported compliance of the provisions of Section 50 of the NDPS Act (Exhibit 75) shows that Police Inspector Sharif Khan informed the accused

that there is a provision in Section 50(1) of the NDPS Act to conduct the search

in the presence of the Gazetted Officer or Magistrate and that he (Police Inspector Sharif Khan) is the Gazetted Officer in the raiding party. The endorsement made by the accused is that search of the bag may be taken. The non-compliance of the provisions of Section 50(1) of the NDPS Act, is obvious and glaring. In the teeth of the evidence on record, the irresistible conclusion is that there is no compliance of the mandatory provisions of Section 50 of the NDPS Act.

11. The judgment dated 30-08-2018 rendered by the District Judge and Additional Sessions Judge, Wardha in Special (NDPS) Case 2/2012 is set aside.

12. The appellants-accused are acquitted of the offence punishable under Section 20(b)(ii)(B) of the Narcotic Drugs and Psychotropic Substances Act, 1985 read with Section 34 of the Indian Penal Code.

13. The appellants-accused shall be released from Jail custody unless their custody is required in connection with any other crime.

14. The fine, if any, paid by the appellants-accused be refunded to them.

15. The appeal is allowed accordingly.