
(2000) 01 BOM CK 0052
In the Bombay High Court
Case No : Criminal Appeal No. 128 of 1996

Sadrudin Mohamed Husein Jundah Shah	APPELLANT
Vs	
D.C.B. CID, Narcotic Cell, Azad Maidan Unit and Another	RESPONDENT

Date of Decision : 27-01-2000

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21, 50, 50(1), 8

Citation : (2000) CriLJ 2329 : (2000) 3 MhLj 188

Hon'ble Judges : Vishnu Sahai, J; P.V. Kakade, J

Bench : Division Bench

Advocate : P.S. Cardozo, for the Appellant; Usha Kejriwal, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

Vishnu Sahai, J.—Through this appeal, the appellant challenges the Judgment and order dated 3-11-1995 passed by the Special Judge under the NDPS Act, for Greater Bombay, in NDPS Case No. 1444 of 1990 convicting and sentencing him to undergo 10 years R.I. and to pay a fine of Rs. 1,00,000/- (Rupees One lac only) in default to suffer imprisonment for two years, u/s 21 read with Section 8(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (also referred to as the N.D.P.S. Act).

In short, the prosecution case runs as under :-

On 13th October, 1990, P.I. Alimulla Akbar Ali Khan PW 3 was attached to the Narcotic cell, Azad Maidan Unit, Mumbai. P.I. Shafiq Pathan, PSI's Chaugule, Kachre and Lugde were also attached to the said unit. At about 11 a.m. while they were on duty, in the office, one of the informant of P.I. Shafiq Pathan informed P.I. Alimulla Akbar Ali Khan PW 3 that one Tanzanian National, aged 50 years, tall in height was about to make narcotic transaction in front of Simen's Club, Ballard Pier, Bombay at about 12 noon, on the same day. The superior officers were informed about this and they asked P.I. Alimulla Khan and others to

make arrangements for effecting a raid. After making an entry in the Information Book, P.I. Alimulla Khan called for two panchas in the office. One of them Vijay Rao has been examined as PW 1. Thereafter, having collected sealing and weighing material, portable typewriter and a drug identification kit, P.I. Alimulla Khan and others proceeded towards the spot. They reached there at 11.35 a.m. and took position. They observed that one person was standing on the footpath towards western side of the road, as if waiting for somebody in front of Simen's Club. He was having a dark green colour cloth bag in his hand. In the Court, P.I. Alimulla Khan identified the appellant to be the said man. Feeling suspicious, about his activities, P.I. Alimulla Khan surrounded him. He started running towards Siemen's club but was chased and over-powered by them. When asked his name, he gave out as Sadrudin Mohamad Husein Jundah Shah. Thereafter, he was asked about the contents of the bag which he was carrying. He gave evasive replies. Thereafter, he was informed by P.I. Alimulla Khan and others that they were Police officers and they suspected that he was in possession of narcotic drugs, on the basis of the information received by them. He was also informed whether he wanted his search to be taken in the presence of a Gazetted officer or a Magistrate, but he declined. Thereafter, the bag which he was carrying was searched. In the said bag, one polythene coated rexin bag containing some powdered substance was found. The said bag was cut open. Some powder was taken therefrom and it was tested by the Drug Identification Kit. It gave positive result for heroin substance and when weighed was found to be 2 kg and 200 gms. After the recovery, the necessary sealing etc was done, the recovery panchanama was prepared and the recovered drug sent to the Chemical Analyst.

Thereafter, P.I. Alimulla Khan and others proceeded to the office where API Shafiq Pathan lodged an FIR against the appellant which was counter-signed by PSI Chaugule. On the basis of the FIR, C.R. No. 59 of 1990 was registered against the appellant.

2. After the necessary investigation, on 26-11-1990, the appellant was charge sheeted. The appellant was put up for trial in due course.

During trial, the prosecution examined three witnesses. Two of them, P.I. Alimulla Khan PW 3 and Vijay Rao PW 1 were examined as witnesses of fact. The third witness Police Constable Bhikaji Katkade PW 2 was examined to prove that he had taken the sample to the Chemical Analyst.

The defence of the appellant was that of denial but, he examined no witness to substantiate it.

The learned trial Judge believed the evidence adduced by the prosecution and convicted and sentenced the appellant in the manner stated above.

Hence, this appeal.

3. We have heard learned counsel for the parties and perused the entire material on record. In our view, since there has been an infraction of the provisions

contained in Section 50(1) of the N.D.P.S. Act, this appeal deserves to be allowed.

4. It is well settled that where a person is sought to be searched for possession of narcotic drug, by an authorised Officer on the basis of prior information that he was in possession of such a drug, he has to be apprised u/s 50(1) of the N.D.P.S. Act whether he would like to be searched before a Gazetted Officer or a Magistrate and the failure to do so, would cause prejudice to him and render the recovery of the illicit article suspicious and vitiate his conviction and sentence, where the same has only been recorded on the basis of possession of illicit article effected from his person. The ratio to which we have referred above, has been laid down in para 55 (1) to 55 (3) of the decision of Constitution Bench reported in AIR 1999 SC 2378 : 1999 Cri LJ 3672 State of Punjab v. Baldev Singh etc.

The said paras read thus :-

On the basis of the reasoning and discussion above, the following conclusions arise :

(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 concerned person 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 concerned person 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 the instant case, in our view, the prosecution has failed to prove beyond reasonable doubt that the appellant was informed of his right u/s 50(1) of NDPS Act, of being searched before a Gazetted Officer. In this connection, it would be necessary to refer to the recovery panchanama Exhibit 8. Its perusal shows that the appellant was only asked whether he wanted to be searched by any S.E.M. (Special Executive Magistrate) or any Magistrate. In the trial Court, during the course of cross-examination, P.I. Alimulla Khan PW 3 who had prepared the recovery panchanama Exhibit 8, was confronted about the omission in recovery panchanama to inform the appellant of his right to be searched before a Gazetted Officer in terms of Section 50 of the NDPS Act.

In para 13, he was specifically questioned on this aspect and he replied thus :-

It is correct to suggest that choice apprising his right to be searched before a Gazetted Officer was not informed to the accused was not reflected in the panchanama. But, it is informed to the accused apprising his right to be searched before S.E.M. or Magistrate, if he desired so was informed to him. As well as same has been reflected in seizure panchanama Exh. 8.

6. Since the recovery panchanama was a contemporaneous document and in the same, it has not been mentioned that the appellant was apprised of his right to be searched before a Gazetted Officer and the public panch of recovery Mr. Vijay Rao is also silent on the appellant being informed whether he wanted his search to be taken in the presence of a Gazetted officer or a Magistrate. In our view, it would be unsafe to accept the substantive statement of P.I. Alimulla Khan PW 3 to the effect that he had asked the appellant whether he wanted to be searched not only before a Magistrate but, also before a Gazetted Officer.

7. Since Section 50(1) of the NDPS Act, as construed by the Apex Court in its Constitution Bench Judgment, reported in AIR 1999 SC 2378 : 1999 Cri LJ 3672) (supra) gives a dual right to the accused namely of his being informed whether he wanted to be searched before a Gazetted Officer or a Magistrate and in our view, it has not been proved beyond reasonable doubt that the appellant was apprised of his right to be searched before a Gazetted officer, there is non-compliance of Section 50(1) of the NDPS Act.

8. Since the only basis of conviction of the appellant is the recovery of illicit drug from him, on account of non-compliance of Section 50(1) of the NDPS Act, prejudice has been caused to the appellant, the recovery of the illicit drug from him is rendered doubtful; and his conviction and sentence is vitiated.

Before parting with the Judgment, we would like to refer to the decision of the Delhi High Court referred to in para 8 of the Judgment of the trial Court. The said decision was rendered in a case under the NDPS Act and the point involved was whether there was violation of Section 50 of the NDPS Act. The said decision is reported in S.P. Vaithianathan Vs. K. Shanmuganathan, . A perusal of para 8 of the Judgment of the trial Court, where the said decision has been discussed shows that an offer was made to the accused whether he wanted to be searched before a Gazetted Officer and no offer was made to him whether he wanted to be searched in the presence of a Magistrate. The Delhi High Court held that the failure to apprise the accused whether he would like to be searched before a Magistrate, violated his right u/s 50(1) of the NDPS Act. In our case, the position is converse, inasmuch our finding is that it has only been proved beyond reasonable doubt that the appellant was informed whether he wanted to be searched in the presence of a S.E.M. (Special Executive Magistrate) and a Magistrate and no offer was made to him whether he wanted a search in the presence of a Gazetted Officer. In our view the logic applied by the Delhi High Court in the case referred to above would also be applicable to our case and as a

necessary imperative, the appellant would have to be acquitted.

9. In the result, this appeal is allowed. The conviction and sentence of the appellant for the offence u/s 21 read with Section 8(c) of the NDPS Act, 1985 is set aside. He is acquitted thereunder. In case he has paid the fine, it shall stand refunded to him. The appellant is in jail and shall be released forthwith unless wanted in some other case.