

(2019) 07 DEL CK 0320

In the Delhi High Court

Case No : Criminal Appeal No. 578 Of 2017

Sumit Rai @ Subodh Rai

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 29-07-2019

Acts Referred:

Constitution Of India, 1950 — Article 141

Narcotic Drugs And Psychotropic Substances Act, 1985 — Section 20, 20(b)(ii)(C),
20(C), 42, 50, 57

Code Of Criminal Procedure, 1973 — Section 428

Citation : (2019) 262 DLT 685 : (2019) 6 AD(Delhi) 665 : (2019) 177 DRJ 138 :
(2019) 3 JCC 3108 : (2019) 3 Crimes 210

Hon'ble Judges : C. Hari Shankar, J

Bench : Single Bench

Advocate : S.B. Dandapani, Meenakshi Chauhan

Final Decision : Allowed

Judgement

C. Hari Shankar, J

1. For being found in possession of 100 kg ganja (cannabis), at 7:15 AM on 27th April, 2013, the appellant Sumit Rai @ Subodh Rai stands convicted,

vide judgment dated 4th March, 2015, passed by the learned Additional Sessions Judge (hereinafter referred to as "the learned ASJ") under

Section 20(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the NDPS Act"). Consequently, vide

order dated 10th March, 2015, the appellant has been sentenced, by the learned ASJ, to suffer, 10 years' rigorous imprisonment (RI) alongwith fine

of Rs. ₹ 1 lakh, with default simple imprisonment of 6 months. He has been extended the benefit of Section 428 of the Code of Criminal

Procedure, 1973.

2. The appellant is in appeal.

3. The appeal of the appellant is entitled to succeed on the basis of the judgment of the Supreme Court in *Arif Khan v. State of Uttarakhand*, AIR

2018 SC 2123, read with *Dilip v. State of M.P.*, (2007) 1 SCC 450 and *State of Rajasthan v. Parmanand*, (2014) 5 SCC 345. Seen together, these

decisions mandate that the search, pursuant to which narcotics are recovered from an accused, or from the person of an accused or from the baggage

carried by an accused, where the accused is also searched alongwith his baggage, Section 50 of the NDPS Act mandates that the search be

necessarily carried out in the presence of a Magistrate or a Gazetted Officer, even where the accused declines the offer, made to him in that regard.

In the present case, the search of the appellant was not conducted in the presence of a Gazetted Officer or a Magistrate, on the ground that the

appellant had refused the offer, extended to him in that regard. The ganja, the recovery of which has led to these proceedings, was found contained in

four plastic bags, being carried by the appellant. His search was conducted alongwith the search of the bags. Rigorous compliance with the mandate

of Section 50 of the NDPS Act was, in these circumstances, necessary, as per the law laid down in *Arif Khan* (supra) - which has been followed by

me in, inter alia, *Deepak Shamsher Thapa v. State*, 256 (2019) DLT 543, *Gurteg Singh Batth v. State*, 254 (2018) DLT 551 and *Sikodh Mahto v. State*,

2019 SCC OnLine Del 8897 inasmuch as the appellant's search was not conducted in the presence of a Magistrate or a Gazetted Officer,

therefore, the search stood vitiated, and, with it, so did the alleged recovery of ganja and all the proceedings that emanated therefrom, culminating in

the conviction and sentencing of the appellant.

4. A brief factual background may, however, be provided, for the sake of the record.

5. The version of the prosecution, which stands borne out by the statements of Const. Vijender (PW-6), Head Const. (HC) Charan Singh (PW-7),

Insp. Sanjay Ghade (PW-8), is that, on 27th April, 2013, a secret informer visited the office of the Narcotics Cell, Shakarpur at about 6:40 AM and

informed ASI Devender that the appellant, who used to deal in ganja would be arriving, between 7:00 and 7:30 AM, at Chatta Rail, Old Delhi, and

would be carrying ganja. Pursuant thereto, a raiding party was constituted,

consisting of ASI Devender, Const. Vijender (PW-6), HC Charan Singh (PW-7), Const. Shani Kumar and the Driver Const. Manoj Kumar. The said team reached the spot indicated by the secret informer at Chatta Rail at about 7:15 AM. There, they found the appellant, in the possession of four plastic bags, tied with plastic rope. The appellant was informed that, under Section 50 of the NDPS Act, he had a right to have his search, and the search of the bags found in his possession, carried out in the presence of a Magistrate or a Gazetted Officer. The appellant declined the request, whereupon the search of the appellant, and of the bags found in his possession was carried out by the Investigating Officer (I/O) ASI Devender. Each of the four bags was found to contain 25 kg of a substance, which, on being tested with the Drug Field Testing Kit carried by the raiding team, was found to be ganja. Two samples of 250 gm each, of the alleged ganja, was retrieved from each of the bags, making a total of eight samples, of which pullandas were prepared and sealed. These samples, on being tested by the Forensic Science Laboratory (FSL) were also, as per the report of the FSL, found to be ganja.

6. On the basis of the above, the appellant was charged with having infringed Clause (C) of Sub-Section (b)(ii) of Section 20 of the NDPS Act, which reads thus:

20. Punishment for contravention in relation to cannabis plant and cannabis.—Whoever, in contravention of any provisions of this Act or any rule or order made or condition of licence granted thereunder, —

xxx xxx xxx

(b) produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports, inter-State or uses cannabis, shall be punishable—

xxx xxx xxx

(ii) where such contravention relates to sub-clause (b),—

xxx xxx xxx

(C) and involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty

years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees:

Provided that the court may, for reasons to be recorded in the judgment, impose

a fine exceeding two lakh rupees.â??

7. The appellant pleaded not guilty, and was subjected to trial. The prosecution led the evidence of nine witnesses, whereas the appellant did not chose

to lead the evidence of any witness. On the basis of the seizure affected from the appellant, read with the report of the FSL, the learned ASJ has

proceeded to convict the appellant under Section 20(C) of the NDPS Act, and to sentence him as already stated in para 1 (supra).

8. Section 50 of the NDPS Act reads thus:

â??50. Conditions under which search of persons shall be conducted.â??

(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.â??

9. The special report under Section 57 of the NDPS Act, as prepared by ASI Devender Singh and proved by ASI Om Prakash (PW-3) reads thus :

â??CASE FIR NO.76/13 DATED 27.4.13 U/S 20 NDPS ACT PS CRIME BRANCH, DELHI.

Subject:- Special Report u/s 57 NDPS Act regarding seizure of 100 Kg Ganja

Sir,

It is submitted that on 27.04.13 on receiving of a secret information vide DD No.4 at 6.30 AM and after compliance of section 42 NDPS Act, a raid

was conducted Near Chhatta rail, Old Delhi Railway Station and one person namely Sumit Rai @ Subodh S/O Gholtan Rai R/O Chanchal Park,

Nangloi Delhi Age 20 years was apprehended at 7.15 A.M. Notice u/s 50 NDPS Act was served upon him and his legal rights were explained. After

his refusal, formal search was conducted by me as per law. During search four white colour plastic bags were recovered from his possession. On

checking of all bags total 100 Kg Ganja (25 Kg Ganja in each plastic bag) was recovered. Eight samples of 250/250 gram each were taken out from

the recovered Ganja and prepared 8 parcels, marked as ?A-1, A-2, B-1, B-2, C-1, C-2, D-1 & D-2. Rest of recovered 24.500 Kg Ganja in each

plastic bag were converted into four parcels and were marked as A, B, C & D ? Regarding recovery of Ganja, I also filled up FSL form. All twelve

parcels marked A, A-1, A-2, B, B-1, B-2, C, C-1, C-2, D, D-1, D-2 and FSL Form were sealed with official seal of 6BPSNB DELHI. The seal after

use was handed over to HC Charan Singh No.906/Crime. I took all the twelve parcels and FSL Form into police possession through seizure memo. I

prepared the rukka u/s 20 NDPS Act against accused person and handed over to Ct. Bijender Singh No. 473/Crime along with case property, FLS

Form and carbon copy of seizure memo for registration of the case and depositing of case property by SHO/Crime Branch. SI Rajni Kant is carrying

out further investigation of the case. This is for kind information please.

Submitted please

Sd/-

(DEVENDER SINGH)

A.S.I.NARCOTICS CELL

DATED â?" 28.04.13â??

10. It is clear, from a reading of the above report under Section 57 of the NDPS Act, that simultaneous search of the appellant, and the bags in his

possession, was conducted. This immediately calls into application of the judgments of the Supreme Court in Dilip (*supra*) and Parmanand (*supra*), in which the Supreme Court held that, if the recovery of contraband took place from the bag carried by the accused, and the accused as well as his bags were simultaneously searched, Section 50 of the NDPS Act would apply, and compliance therewith would be mandatory.

11. In the circumstances, the applicability of Section 50 of the NDPS Act, to the facts of the present case, cannot be gainsaid. Indeed, the raiding team was also, apparently, of the view that Section 50 of the NDPS Act would apply, as they offered, to the appellant, the opportunity of having his search, and the search of the bags found in his possession, being conducted in the presence of a Magistrate or a Gazetted Officer, and proceeded to search the appellant, and his bags only after the appellant had refused the said offer.

12. The question that arises, then, is whether, once the appellant had refused the offer of having his search, and the search of the bags in his possession, conducted by a Magistrate or a Gazetted Officer, the I/O was justified in proceeding to conduct the search of the appellant and his bags himself.

13. On this aspect, Arif Khan (*supra*) marks a radical change, in the jurisprudence relating to Section 50 of the NDPS Act. The facts of the said case strikingly mirror those of the present, and may, therefore, be briefly adverted to. Pursuant to receipt of secret information, a raiding party was constituted, which spotted the appellant Arif Khan approaching, and intercepted him. On being questioned, he admitted being in possession of charas.

He was informed of his right to have his search conducted by a Gazetted Officer or a Magistrate, to which he responded that he had faith on the raiding police party and consented to be searched by them. After having obtained the said consent, in writing, the raiding police party searched the accused, resulting in seizure of charas, weighing 2.5 kg, from his body. Arif Khan was, accordingly, prosecuted for commission of the offence punishable under Section 20 of the NDPS Act. The prosecution resulted in conviction, by order dated 9th November, 2004, of the learned ASJ. An appeal, preferred thereagainst, was dismissed by the High Court of Uttarakhand. Arif Khan appeal further, to the Supreme Court.

14. The principal contention advanced, by learned counsel appearing for Arif Khan before the Supreme Court, was that there had been violation of

Section 50 of the NDPS Act, inasmuch as the search of Arif Khan had not been conducted in accordance with the said provision. Reliance was

placed, for the said purpose, on the judgment of the Supreme Court in *Vijaysinh Chandubha Jadeja v. State of Gujarat*, (2011) 1 SCC 609. It was

contended that the search/recovery of the alleged contraband from Arif Khan ought to have been made only in the presence of either a Magistrate or

a Gazetted Officer. The response of the prosecution has been recorded, in para 26 of the judgment, in the following words:

“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 fully complied with and hence the appellant was liable to be convicted for

the offence punishable under the NDPS Act.”

(Italics and underlining supplied)

15. The Supreme Court proceeds, in paras 27 to 31 of the judgment, to hold thus:

“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*

(*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 (PW-1 to PW-5) 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.

31. In the light of the foregoing discussion, the appeal succeeds and is allowed. Impugned judgment is set aside. As a consequence thereof, the

appellants conviction is set aside and he is acquitted of the charges in question.

(Emphasis supplied)

16. Insofar as the facts, essential for determination of the controversy in issue are concerned, the present case cannot be distinguished, in any manner,

from Arif Khan (supra). The only difference, on facts which makes no difference to the legal position is that, in Arif Khan (supra), the

appellant Arif Khan, on being queried, confessed to carrying charas, whereas the appellant, in the present case, did not do so. In the present case, too,

the alleged contraband ganja was recovered from the bags of the appellants. In the present case, too, the search of the bags, and the seizure of ganja

therefrom, was effected by the raiding team, in the absence of any Magistrate or a Gazetted Officer.

17. It may be noted here, that none of the witnesses, in the present case,

deposed that, the I/O, who had conducted the search of the appellant and the bags in his possession, was a Gazetted Officer. Rather, the deposition of PW-6 Const. Vijender and PW-7 Head Const. Charan Singh corroborate

each other in deposing that the I/O only proceeded to search the appellant, and the bags in his possession, consequent to the appellant refusing the

offer to have such search conducted by a Gazetted Officer or before a Magistrate.

18. The ratio decidendi of Arif Khan (supra), as contained in para 28 of the said decision applies, therefore, to the present case on all fours. While it is

true that Vijaysinh Chandubha Jadeja (supra) would seem to suggest that, once the accused was offered the option of having his search conducted in

the presence of a Magistrate or a Gazetted Officer, and he declined the offer, Section 50 stood complied with, Arif Khan (supra), after noticing

Vijaysinh Chandubha Jadeja (supra), as well as the law laid down therein, holds, nevertheless, that, even where the accused "as in that case, and as

in the present case "declined the offer under Section 50 of the NDPS Act, the raiding team was, nevertheless, required to have the search of the

appellant conducted in the presence of a Gazetted Officer or Magistrate. The said enunciation of the law binds me, by virtue of Article 141 of the

Constitution of India.

19. Respectfully following the judgment of the Supreme Court in Arif Khan (supra), therefore, I hold the objection, of Mr. Dandapani, regarding non-

compliance, with the provisions of Section 50 of the NDPS Act, in the present case, as the appellant, and the bags carried by him, were searched by

the raiding team, and not in the presence of any Gazetted Officer or Magistrate, to merit acceptance.

20. In view of this position, it would neither be necessary, nor appropriate, for this Court to venture into the allegations, or the findings, regarding the

nature and identity of the substance found in the bags carried by the appellants, as the failure, on the part of the raiding team, to proceed in

accordance with Section 50 of the NDPS Act, vitiates the very search and seizure of the said material. All subsequent efforts at identifying the nature

of the material, allegedly seized from the bags of the appellants, whether by using the Drug Field Testing Kit carried by the raiding team, or by way of

the report of the FSL, would pale into insignificance.

21. In Parmanand (supra), the Supreme Court held that communication of the

right, available under Section 50 of the NDPS Act, to the person about to be searched, was not an empty formality, and had a purpose, as offences under the NDPS Act carries stringent punishments and, therefore, the prescribed procedure was required to be meticulously followed. This procedure, it was further clarified, provided the "minimum safeguards available to an accused against the possibility of false involvement". Further, in *Ali Mustaffa Abdul Rehman Moosa v. State of Kerala*, AIR 1995 SC

244, the Supreme Court held thus:

"The judgment cannot be interpreted to lay down that a contraband seized as a result of illegal search or seizure, can be used to fasten that liability of unlawful possession of the contraband on the person from whom the contraband had allegedly been seized in a legal manner. Unlawful possession of the contraband is the sine qua non for conviction under the NDPS Act and that factor has to be established by the prosecution beyond a reasonable doubt. Indeed the seized contraband is evidence but in absence of proof of possession of the same, and accused cannot be held guilty under the NDPS Act."

22. There can be no manner of doubt, therefore, that failure to comply with Section 50 of the NDPS Act is fatal to the case of the prosecution, which stands vitiated, in its entirety, thereby.

23. Notably, in *Arif Khan* (supra) too, once the Supreme Court found the seizure of the alleged charas to have been effected in violation of Section 50 of the NDPS Act, it did not proceed to discuss any other aspect of the matter, and acquitted the appellant/accused, in that case, on that sole ground.

24. An identical outcome must, of necessity, visit the present proceedings.

Conclusion

25. As the result of the above discussion, the appeal succeeds. The appellant is acquitted of the charge against him. The impugned judgment dated 4th March, 2015, and order on sentence, dated 10th March, 2015, of the learned ASJ, are quashed and set aside. The appellant shall be released forthwith, unless his incarceration is required in any other case.

26. Copy of the judgment also be sent to the appellant through the Jail Superintendent.