
(2019) 07 UK CK 0208

In the Uttarakhand High Court

Case No : Criminal Appeal No. 168, 169 Of 2005

Surendra Singh Rana & Others

APPELLANT

Vs

State Of Uttarakhand & Others

RESPONDENT

Date of Decision : 24-07-2019

Acts Referred:

Citation : (2019) 07 UK CK 0208

Hon'ble Judges : R.C. Khulbe, J

Bench : Single Bench

Advocate : Vinod Sharma, A.K. Sah, Sachin Panwar

Final Decision : Allowed

Judgement

R. C. Khulbe, J

1. Since both these criminal appeals arise from the similar questions of facts and law, therefore, these are taken together and decided by a common judgement.
2. Counter affidavit filed in Criminal Appeal No.169 of 2005 is taken on record. Misc. application, made therefor, stands disposed of.
3. Both the present appeals are preferred by the convicts Surendra Singh Rana and Chait Singh challenging the judgment and order dated 21.09.2005, passed by the learned Special Judge, Uttarkashi, in Special Trial No.11/2003, Case Crime No.120/2003, under Section 8/20 (b) (ii) (B) N.D.P.S. Act, Police Station Maneri, District Uttarkashi and Special Trial No.12/2003, Case Crime No.121/2003, under Section 8/20 (b) (ii) (B) N.D.P.S. Act, Police Station Maneri, District Uttarkashi respectively convicting and sentencing each of the appellants for a period of two and half years rigorous imprisonment and a fine of Rs.5000/- each.
4. The factual matrix of the case is that on 17.10.2003 information was received from informer that two persons after taking charas from Malla Lata are waiting for vehicle for going to Uttarkashi. Believing on this information, the Station House Officer Maneri submitted a written report to Tehsildar Bhatwari for

accompanying him. Thereafter, Station House Officer Maneri Mahipal Singh along with Tehsildar Bhatwari, H.C. Shambhu Singh, Const. Sawaria Singh, Const. Ashok Kumar, Const. Devendra Singh and Const. Indrapal Singh along with informer proceeded towards Malla Lata. As soon as they reached about half a kilometer ahead of Malla, then two persons were seen on road going towards Malla Lata on foot. The informer said that these are the said two persons who have charas in their bags. Saying this the informer went away. Soon the policemen reached near them, both the persons tried to run away. The policemen apprehended them by surrounding them. Both the accused disclosed their names as Surendra Singh and Chait Singh.

5. Search of these two persons was made by S.H.O. in presence of the Magistrate. About 250 grams of charas was recovered from the white colour plastic bag kept in the bag of Surendra Singh and 250 grams of charas was recovered from the white colour plastic bag kept in the bag of Chait Singh. Both persons were asked for license but they could not produce the same. Both the persons were taken into custody along with recovered contrabands. The recovery memo was prepared at the spot by Const. Shambhu Singh as per dictation of S.H.O. Maneri.

6. On the basis of aforesaid recovery, Case Crime Nos.30/2003 against Surendra Singh and 31/2003 against Chait Singh, under Section 8/20 of the NDPS Act were registered at Police Chowki Bhatwari (P.S. Maneri) on 17.10.2003 at 15:15 hours and the investigation was conducted.

7. After completing the investigation separate charge sheets were filed against both the accused persons and cognizance was taken against both the accused and charges were framed on 26.04.2004 under Section 8 read with Section 20 (b) (ii) (B) of the Narcotic Drugs and Psychotropic Substances Act, to which they pleaded not guilty and claimed trial.

8. In order to prove its case, the prosecution produced as many as five witnesses, namely, PW1, Inspector Mahipal Singh, PW2 Const. Indrapal Singh, PW3 Const. Raghunath Singh, PW4 Maya Dutt Joshi (Deputy District Magistrate, Kirti Nagar) and PW5 Chhote Lal Tamta (I.O.).

9. PW1 Inspector Mahipal Singh stated in his statement that on 17.10.2003 he was posted as Station House Officer Maneri. On that day he received information from the informer that two persons after taking charas from Malla Lata are waiting for vehicle for going to Uttarkashi. Believing on this information he submitted a written report to Tehsildar Bhatwari for accompanying him. Thereafter, he along with Tehsildar Bhatwari and H.C. Shambhu Singh, Const. Sawaria Singh, Const. Ashok Kumar, Const. Devendra Singh, Const. Indrapal Singh and informer proceeded towards Malla Lata. As soon as they reached about half a kilometer ahead of Malla, then two persons were seen on road going towards Malla Lata on foot. The informer said that these are the said two persons who have charas in their bags. Saying this, the informer went away. Soon the

policemen reached near them, both the persons tried to run away. The policemen apprehended them by surrounding them. On asking their names and addresses, search was made in the presence of Magistrate. Both the accused disclosed their names as Surendra Singh and Chait Singh. 250 grams of charas was recovered from the white colour plastic bag kept in the bag of Surendra Singh and 250 grams of charas was recovered from the white colour plastic bag kept in the bag of Chait Singh. The recovered contraband was then placed in the same bags and chain were locked and sealed on spot in presence of Tehsildar and specimen of seal was taken. Both persons were asked for license but they could not produce the same. Both the persons were taken into custody along with recovered contrabands. The recovery memo (Ex.Ka-1) was prepared at the spot under his signatures.

10. PW2 Const. Indrapal Singh narrated the story as stated by PW1 Inspector Mahipal Singh.

11. PW3 Const. Raghunath Singh stated that on 17.10.2003 Inspector Mahipal Singh had submitted a report Ex.Ka-3 in the chowki. On the basis of which, he had written the chick FIR as Ex.Ka-2. He has proved the Ex. Ka-2 in his writing and signatures.

12. PW4 Maya Dutt Joshi, S.D.M. Kirtinagar stated that on 17.10.2003 he was posted as Tehsildar, Tehsil Bhatwari. He got information from PW1 Mahipal Singh, Police Inspector Maneri that two persons are coming with charas and search of the accused will be made in his presence. On this information he along with Police Inspector and five other police personnel reached at the spot near Lata. The informer told them there that these persons are carrying charas in their bags. On this information both the accused were caught by the police at 1:30 p.m. The Inspector asked their names and made search of their bags and after search 250 grams charas from the bag of Surendra Singh and 250 grams charas from the bag of Chait Singh was recovered. Recovery memo was prepared by the police at the spot.

13. PW5 SI Chhote Lal, is the Investigating Officer of the case, who recorded statements of the witnesses, prepared the spot map and submitted separate charge sheets against Surendra Singh and Chait Singh.

14. After completion of prosecution evidence, statements of accused persons under Section 313 Cr.P.C. were recorded. In defence, no evidence was produced by the accused.

15. After hearing both the parties, the learned trial Court convicted accused persons for the offence punishable under Section 8/20 (b) (ii) (B) N.D.P.S. Act, and sentenced each one of them to undergo rigorous imprisonment for a period of two and half years and a fine of Rs.5000/- each.

16. I have heard learned Counsel for the parties and perused the evidences and other material available in the record.

17. It is argued by learned Counsel for the appellants that learned trial Court has committed a grave error in not appreciating the fact that the charge sheets were vitiated by non-compliance of the procedure laid down under Section 50 of the ND&PS Act.

18. The learned counsel for the appellants has placed reliance on following judgments pronounced by the Apex Court and High Courts:-

1) State of Punjab Vs. Baldev Singh (1999) 6 SCC 172.

2) Union of India Vs. Mohan Lal & Anr. (2016) 3 SCC 379.

3) Union of India Vs. Jarooparam (2018) 4 SCC 334.

4) S.K. Raju @ Abdul Haque @ Jagga (2018) 9 SCC 708.

19. Learned counsel for the appellants drawn my attention towards the provisions as envisaged in Section 50 of the NDPS Act and argued that in the present case the arresting party did not comply with the provisions of Section 50 of the NDPS Act, which is mandatory as directed by the Hon'ble Apex Court in the State of Punjab Vs. Baldev Singh (Supra).

20. Before going into the provisions of Section 50, it is necessary to note down the history of the NDPS. Prior to the passing of the NDPS Act, 1985 control over narcotic drugs was being generally exercised through certain Central enactments, though some of the States also had enacted certain statutes with a view to deal with illicit traffic in drugs. The Opium Act, 1857 related mainly to preventing illicit cultivation of poppy, regulating cultivation of poppy and manufacture of opium. The Opium Act, 1878 supplemented the Opium Act, 1857 and made possession, transportation, import, export, sale, etc. of opium also an offence. The Dangerous Drugs Act, 1930, was enacted with a view to suppress traffic in contraband and abuse of dangerous drugs, particularly derived from opium, Indian hemp and coca leaf etc. The Act prescribed maximum punishment of imprisonment for three years with or without fine, insofar as the first offence is concerned and for the second or the subsequent offence the punishment could go up to four years' RI. These Acts, however, failed to control illicit drug traffic and drug abuse on the other hand exhibited an upward trend. New drugs of addiction known as psychotropic substances also appeared on the scene posing serious problems. It was noticed that there was an absence of comprehensive law to enable effective control over psychotropic substances in the manner envisaged by the International Convention on Psychotropic Substances, 1971. The need for the enactment of some comprehensive legislation on narcotic drugs and psychotropic was, therefore, felt. Parliament with a view to meet a social challenge of great dimensions, enacted the NDPS Act, 1985 to consolidate and amend existing provisions relating to control over drug abuse etc. and to provide for enhanced penalties particularly for trafficking and various other offences.

21. When the matter came up for consideration before the Constitutional Bench in Baldev Singh's case, the different High Courts had different views regarding

the personal search as envisaged in Section 50 of the Act. The Constitutional Bench of the Hon'ble Apex Court in Baldev Singh's case laid down the following conditions:-

"(1) That when an empowered officer or a duly authorized 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 gazette 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 gazette 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 gazette officer or a Magistrate for search and in case he so opts, failure to conduct his search before a gazette 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.

(4) That there is indeed need to protect society from criminals. The societal intent in safety will suffer if persons who commit crimes are left off because the evidence against them is to be treated as if it does not exist. The answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously inviting action against the official concerned so that the laxity on the part of the investigating authority is curbed. In every case the end result is important but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of the judicial process may come under a cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for the law and may have the effect of unconscionably compromising the administration of justice. That cannot be permitted. An accused is entitled to a fair trial. A conviction resulting from an unfair trial is contrary to our concept of justice. The use of evidence collected in breach of the safeguards provided by Section 50-a. the trial, would render the trial unfair.

(5) That whether or not the safeguards provided in Section 50 have been duly observed would have to be determined by the court on the basis of the evidence led at the trial. Finding on that issue, one way or the other would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of Section 50 and,

particularly, the safeguards provided therein were duly complied with, it would not be permissible to cut short a criminal trial.

(6) That in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Section 50 are mandatory or directory, but hold that failure to inform the person concerned of his right as emanating from sub-section (1) of Section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law.

(7) That an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search.

(8) A presumption under Section 54 of the Act can only be raised after the prosecution has established that the accused was found to be in possession of the contraband in a search conducted in accordance with the mandate of Section 50. An illegal search cannot entitle the prosecution to raise a presumption under Section 54 of the Act."

22. The Hon'ble Apex Court's judgment is applicable only where the contrabands and psychotropic substances are recovered from the possession of the person.

23. In the State of Himachal Pradesh Vs. Pawan Kumar (2005) 4 SCC 350, a three judges bench of the Hon'ble Apex Court held that the search of an article which was being carried out by a person in his hand or on his shoulder or head etc. would not attract Section 50. It was held thus:-

"11....In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc.therefore, it is not possible to include these articles within the ambit of the word "person" occurring in Section 50 of the Act.

16....After the decision in State of Punjab Vs.Baldev Singh, (1999) 6 SCC 172, this Court has consistently held that Section 50 would only apply to search of a person and not to any bag, article or container, etc. being carried by him."

24. Learned counsel for the appellants also drawn my attention in the case of S.K. Raju @ Abdul Haque @ Jagga Vs. State of West Bengal (Supra) and submitted that the search conducted by PW1 Inspector Mahipal Singh was not only a bag which the appellants' were carrying but also searched both the appellants' person. Accordingly, PW1 Inspector Mahipal Singh was required to comply with the requirement of Section 50(1) of the NDPS Act.

25. I am unable to accept the submission made by the learned counsel for the

appellants, because from the recovery memo (Ex.Ka-1), it is clear that both the bags of the appellants' were searched in presence of PW4 Maya Dutt Joshi, Tehsildar-Bhatwari. But the appellants were not personally searched by the police party at the spot. As per G.D. (Ex.Ka-3) both the appellants were personally searched at police station after the recovery, which was a separate personal search. So, the dictum of Hon'ble Apex Court in S.K. Raju @ Abdul Haque @ Jagga Vs. State of West Bengal (Supra) will not be applicable in the present case because in that case Hon'ble Apex Court has held that if the search and seizure is made in public place besides bag of the accused being searched, search of the accused was also conducted, which resulted in recovery of cash from his trouser and contraband was recovered from bag carried by accused, the compliance of Section 50 of NDPS is mandatory.

26. The Hon'ble Apex Court in State of Rajasthan Vs. Parmanand, (2014) 5 SCC 345 has held that:

"15 Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application."

27. Before discussing further, it is necessary to assess the facts of the case also. As per recovery memo (Ex.Ka-1), the informer has given prior information to SHO Maneri, PW1 Inspector Mahipal Singh. On this information, he gave written information to PW4 Maya Dutt Joshi, Tehsildar-Bhatwari. But that written information is not in record, which was very important piece of evidence, but has been withheld without any cause.

28. As per PW5 SI Chhote Lal Tamta, 250 grams charas was recovered from the bag of Surendra Singh Rana and 250 grams charas was recovered from the bag of Chait Singh. But he clearly stated that he did not measure the said charas, neither at the spot nor thereafter. PW2 Const. Indrapal Singh also stated the same version.

29. From the evidence, it is clear that the said charas were not measured. Without measuring the charas, it cannot be said that 250 grams contraband charas was found from the accused Surendra Singh Rana and 250 grams charas was found from the accused Chait Singh. The prosecution has failed to prove the quantity of the charas as well.

30. PW5 SI Chhote Lal, who is the Investigating Officer, stated that before sending the charas to Agra for chemical examination there were seals of CJM Uttarkashi and District Judge also. But these samples of seals are not brought on record.

31. The incident took place in a motorable road where the public witness can easily be available but arresting party did not try to call any independent witness to witness the incident.

32. As per the statement of PW5, Chhote Lal, sample seals of 50-50 grams were taken before the District Judge Uttarkashi on 20.11.2003 and the said samples were sent to FSL, Agra for examination through Const. Dinesh Kumar. But neither samples of seals were produced nor the Const. Dinesh Kumar came at the witness box to prove these facts.

33. Lastly, the learned counsel for the appellants centred his argument on the provision of 52(a) of the Act and submitted that Hon'ble Apex Court in Union of India Vs. Jarooparam (2018) 4 SCC 334, held that if the contraband is not disposed of as per the provisions of Section 50(a) during trial the accused is entitled for acquittal.

34. Section 52 (a) of the Act deals with the provisions of disposal of seized narcotic drugs and psychotropic substances as under:-

"52A. Disposal of seized narcotic drugs and psychotropic substances.-

(1) The Central Government may, having regard to the hazardous nature, vulnerability to theft, substitution, constraint of proper storage space or any other relevant consideration, in respect of any narcotic drugs, psychotropic substances, controlled substances or conveyances, by notification in the Official Gazette, specify such narcotic drugs, psychotropic substances, controlled substances or conveyances or class of narcotic drugs, class of psychotropic substances, class of controlled substances or conveyances, which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time, determine after following the procedure hereinafter specified.

(2) Where any narcotic drug or psychotropic substance, controlled substances or conveyances has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs or psychotropic substances, controlled substances or conveyances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances, controlled substances or conveyances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs or psychotropic substances, controlled substances or conveyances in any proceedings under this Act and make an application, to any Magistrate for the purpose of--

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such Magistrate, photographs of such drugs, substances or conveyances and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples

so drawn.

(3) Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs, psychotropic substances, controlled substances or conveyances and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence]."

35. From the impugned judgments and orders dated 21.09.2005 passed by the Special Judge Uttarkashi, it is clear that till that date the said charas was not disposed of by any authority as per the procedure laid down under Section 52(a) of the Act and it was lying before the police without any cause.

36. From the record, it is clear that the inventory has not been prepared as per the mandate of Section 52(a) of the NDPS as much as certification and photocopy etc. of the recovered contraband has not been done in the present case.

37. Hon'ble Apex Court in Union of India Vs. Mohan Lal & Anr. (2016) 3 SCC 379, has held that:-

"19.... There is in our opinion no manner of doubt that the seizure of the contraband must be followed by an application for drawing of samples and certification as contemplated under the Act. There is equally no doubt that the process of making any such application and resultant sampling and certification cannot be left to the whims of the officers concerned. The scheme of the Act in general and Section 52-A in particular, does not brook any delay in the matter of making of an application or the drawing of samples and certification. While we see no room for prescribing or reading a time frame into the provision, we are of the view that an application for sampling and certification ought to be made without undue delay and the Magistrate on receipt of any such application will be expected to attend to the application and do the needful, within a reasonable period and without any undue delay or procrastination as is mandated by sub-section (3) of Section 52A (supra). We hope and trust that the High Courts will keep a close watch on the performance of the Magistrates in this regard and through the Magistrates on the agencies that are dealing with the menace of drugs which has taken alarming dimensions in this country partly because of the ineffective and lackadaisical enforcement of the laws and procedures and cavalier manner in which the agencies and at times Magistracy in this country addresses a problem of such serious dimensions."

38. From the perusal of record, it is clear that in the present case, the prosecution did not comply with the directions given in the judgment of the Hon'ble Apex Court as given in Union of India Vs. Mohan Lal's case (supra).

39. In view of the foregoing discussion, this Court has come to the conclusion that the compliance of the mandatory provisions of NDPS Act has not been done in the present case.

40. FSL reports dated 21.01.2004 are on record, which are paper nos.31-Ka and 33-Ka but neither the genuineness of the said reports was admitted by the appellants-accused nor the same were duly proved by the prosecution. Apart from that, there are major contradictions amongst the prosecution witnesses regarding the alleged recovery; moreover, even the alleged recovered charas was never measured.

41. In view of the above observations, this Court is of the opinion that the compliance of the mandatory provisions of NDPS Act has not been done by the prosecution and the prosecution has failed to prove its case against the appellants beyond reasonable doubts. Consequently, the appeals succeed. Impugned judgments and orders dated 21.09.2005 passed by the learned Special Judge, Uttarkashi, in Special Trial No.11/2003, Case Crime No.120/2003, under Section 8/20 (b) (ii) (B) N.D.P.S. Act, Police Station Maneri, District Uttarkashi and Special Trial No.12/2003, Case Crime No.121/2003, under Section 8/20 (b) (ii) (B) N.D.P.S. Act, Police Station Maneri, District Uttarkashi respectively convicting and sentencing each of the appellants for a period of two and half years' rigorous imprisonment with a fine of Rs.5000/- each are hereby set aside. Appellants need not to surrender before the Courts below. Accordingly, the bail bonds of the appellants are cancelled and sureties are discharged from their liabilities.