
(2005) 11 P&H CK 0008
In the Punjab And Haryana At Chandigarh
Case No : Criminal Appeal No. 640-DB of 2001

Uzoma Gabriel Nwachukwu	Vs	APPELLANT
State of U.T. Chandigarh		RESPONDENT

Date of Decision : 10-11-2005

Acts Referred:

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

Citation : (2006) 1 RCR(Criminal) 293

Hon'ble Judges : Kiran Anand Lall, J; Amar Dutt, J

Bench : Division Bench

Advocate : K.S. Ahluwalia, for the Appellant; R.S. Rai, Senior Standing Counsel, U.T. Chandigarh, for the Respondent

Final Decision : Allowed

Judgement

Amar Dutt, J.—Appellant Uzoma Gabriel Nwachukwu Appellant is aggrieved by the conviction and sentence recorded against him by the Judge (Special Court), Chandigarh on 2/3.8.2001 u/s 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the Act").

2. Briefly stated, the facts of the prosecution case as brought out in the testimony of its witnesses are that on 20.6.1997, P.W.-7 Inspector P.L. Chauhan along with other police officials was present near the turn of the Government College for Girls, Sector 42, Chandigarh where P.W.-8 Anil Kumar and Puran Singh met him. While Inspector was talking with these witnesses, a secret information was received that one Nigerian by the name of Uzoma Gabriel Nwachukwu, who was residing at House No. 3314, Sector 35-D, Chandigarh was habitual of selling smack in the area of Chandigarh. He was stated to have a Moped bearing No. CH-01K 7429 and on 20.6.1997 was to come from the side of Mohali for going to Sector-35 to sell smack and if he was apprehended, sufficient quantity of that contraband could be recovered from him. On the basis of this information, a naka was set up on the turn of Government College for Girls, Section 42, Chandigarh. At about 4.30 P.M., the Appellant came from the side of

Mohali on his Moped and on seeing the police party standing in front of him, stopped the Moped and attempted to turn back, whereupon he was apprehended on suspicion. The Appellant was apprised that the police party suspected that he had smack in his possession and wanted to search him. It was further enquired from him as to whether he would like to be searched before a Gazetted Officer or a Magistrate to which the Appellant replied by saying that he would like to be searched by a Gazetted Officer. In view of this, Surjit Singh, D.S.P. (South) was requested to reach the spot and he served upon the Appellant a similar notice, in reply whereunto Appellant replied that he has no objection to his being searched by the said Officer. A bag made of cloth, which was being carried by Appellant on his left shoulder was searched and two packets one containing 1.800 Kilograms of smack and other containing 1.300 Kilograms of white powdery substance wrapped in a polythene bag were recovered from the same. Out of both these packets two separate samples of 100 grams each were taken and separate parcels were made for the samples and the remaining substance was sealed with the seal 'PL'. The case property was taken into possession through separate recovery memos. Since the Appellant could not produce the permit or license for keeping the smack in his possession, after completion of investigation, a challan was put in the Court. The Special Judge after going through the records framed charge u/s 21 of the Act and as the Appellant pleaded not guilty, the prosecution was called upon to produce its evidence in support of its case.

3. To bring home the charge, the prosecution examined HC Jai Singh as P.W.-1, Constable Som Nath as P.W.-2, Ms. Aelizibeth as P.W.-3, DSP Surjit Singh as P.W.-4, Constable Yash Pal as P.W.-5, Neeraj Kumar as P.W.-6, Inspector P.L. Chauhan as P.W.-7, Anil Kumar as P.W.-8 and Dr. Priyankar Ghose as P.W.-9.

4. When the incriminating circumstances appearing in the prosecution case were put to the Appellant for obtaining his explanation, he denied all the circumstances and asserted as under:

I am innocent, have been falsely implicated in this false case by the I.O. Mr. P.L. Chauhan who was earlier the Incharge of Foreigner Registration Office, where I used to visit him in connection with the renewal registration and visa etc. on behalf of my fellow countrymen/students whom I was representing at that time. Infact he was minting money by holding that key post from the Migerian/foreigners and when I objected to that move by making several representations, and on this account the said officer was nourishing grudge against me and my family. In those days when the present case was foisted upon me Inspector P.L. Chauhan was SHO of P.S. Sector-36, Chandigarh and I was residing with my wife and children in a rented accommodation in Sector-35 which falls under the jurisdiction of P.S. Sector-36, Chandigarh. I along with my wife and children were lifted on 20.6.1997 in the morning and were kept in unlawful detention in the police station where we were tortured and I was forced to sign blank papers under pressure and later on a false recovery was slapped upon me. In fact nothing was recovered from me as alleged. The contraband so planted upon me

was recovered from some acquaintance (acquaintance ?) of another police officer who struck a deal with Inspector P.L. Chauhan who later on let-off the said person and involved me in the present false case. However, my family was let-off on the next day i.e. on 21st of June, 1997. My house was also ransacked by the police and valuables including jewellery was taken away. All the memos have been fabricated in the police station itself and the services of the DSP Surjit Singh were obtained later on as usual as in the case of British Nationals who were involved in false case with the active connivance of this DSP against whom the departmental enquiry was also initiated.

He, however, chose not to lead any evidence.

5. After hearing the learned Counsel for the parties and perusing the record, the trial Court convicted the Appellant u/s 21 of the Act and sentenced him to undergo rigorous imprisonment for fifteen years and to pay a fine of Rs. 1 lac. In default of payment of fine, he was ordered to undergo further rigorous imprisonment for one year. Hence, the present appeal.

6. On 24.2.2004 arguments in this case were heard by a Bench of this Court consisting of Swatanter Kumar and S.S. Saron, JJ. and their Lordships passed the following orders:

During the course of hearing an important question of law has come up for consideration and that is "whether an accused has right, or a legal right or even accused would be justified in making a legitimate prayer for re-analysis of the sample collected by the investigating officer or even from the remaining substance during the course of trial or appeal" as this question is likely to effect large number of cases and in interest of all the States/investigating agencies, we consider it necessary to put at notice the States of Punjab and Haryana, both to argue this question of law de hors the facts of this case.

During the course of hearing, it has also been brought to our notice that quintals of the contraband collected by the State agencies particularly, the State of Punjab in quintals have been found as containing no substance which would be prohibited under the provisions of this Act.

We have already given notice and notices have been accepted by Mr. Salil Sagar and Mr. D.P. Singh, appearing for the State of Punjab and Haryana respectively. Mr. Sagar shall also answer the above contention raised before this Court.

Registry is directed to tag the file of 4494-M of 1997 for the purpose of this reference.

7. The hearing in this case could not be completed before that Bench and ultimately it was listed before us.

8. We have heard Mr. K.S. Ahluwalia, learned Counsel for the Appellant, Mr. R.S. Rai, learned Senior Standing Counsel for U.T., Chandigarh, Mr. S.S. Randhawa, learned Senior Deputy Advocate General, Punjab and Mr. B.S. Rana, learned

Senior Deputy Advocate General, Haryana and with their assistance have perused the record.

9. Mr. K.S. Ahluwalia, learned Counsel appearing on behalf of the Appellant had assailed the conviction and sentence of the Appellant on the ground that while convicting the Appellant, the trial Court had over-looked a fatal discrepancy in the prosecution case inasmuch as out of the two polythene bags one containing 1.300 Kgs. of white coloured powdery substance and the second containing 1.800 Kgs. of brown coloured smack, which were alleged to have been recovered, the samples whereof when sent to the Central Forensic Science Laboratory are described by the F.S.L. as Exhibit-1: White coloured powdery substance (approx. wt. 99.28 gm) and Exhibit-2: Dark grey coloured powdery (approx. wt. 98.56 gm), the report of the F.S.L. does not find any Diacetylmorphine (Heroin) in exhibit-1 while the description of second sample given by the F.S.L. is as dark grey coloured instead of brown coloured smack. On the basis of this, learned Counsel stated that conviction and sentence of the Appellant cannot be sustained. He further stated that in any case, Appellant, who is a Nigerian has already undergone more than 8 years of sentence and taking into consideration that he was a student of Panjab University and had been conferred a Doctorate degree in Business Management, his case should be considered for reduction in the sentence to the period already undergone, so that he may be able to go back to his country and start a new life.

10. On behalf of the State, it was submitted that trial Court judgment does not suffer from any infirmity and taking into consideration the quantity of narcotics, which has been recovered from the Appellant, the appeal may be dismissed.

11. We have carefully considered the rival contentions and have perused the record.

12. The case in hand deals with a situation where according to the State two recoveries has been effected, one of 1.800 Kgs. and another of 1.300 Kgs. The recovery memo described the former as brown coloured smack and the latter was indicated as white powdery substance. While what was described as brown sugar on the sample being tested in the Forensic Science Laboratory was found to be containing 23.02% of Diacetylmorphine, the chemical name of the drug popularly known as Heroin but no traces of Heroin were found in white powdery substance. Since the colour of the first sample was described by the Central Forensic Science Laboratory as dark grey, a doubt arose in our mind as to whether what had reached the Central Forensic Science Laboratory was actually the sample, which was taken. Accordingly, while exercising our powers u/s 391 read with Section 482 Code of Criminal Procedure we had requested the Director, Central Forensic Science Laboratory to send an Officer competent to perform again the analysis of the remaining samples, which were being retained in the Malkhana. In response to the request, Dr. A.K. Dalela, Junior Scientific Officer (Explosive), who had eventually appeared as CW-1 had come to the High Court and taken the samples on 30.8.2005 and submitted a fresh report which by and

large confirmed the analysis given by his colleague except one variation inasmuch as the brown coloured smack which was analysed by him was found to be containing 5.4% of Diacetylmorphine and white powdery substance did not contain any Diacetylmorphine as earlier opined by Dr. Priyankar Ghose. After recording the statement of Dr. Dalela, both the learned Counsel for the parties had been given an opportunity of cross-examining him. The additional incriminating part of the evidence brought on record in the statement of Dr. Dalela was put to the Appellant by recording his supplementary statement u/s 313 Cr.P.C., whereafter, we had heard arguments afresh.

13. The Appellant in the present case is a citizen of Nigeria, who had come to India for pursuing his studies. It is not disputed that he achieved some success in the academic field inasmuch as he had been conferred his Doctorate degree by the Department of Commerce, Panjab University, Chandigarh. Somewhere along with the line, he seems to have fallen to devious ways and apparently started pushing sales of narcotic drugs. He was apprehended on the date of occurrence i.e. 20.6.1997 by P.W.-7 P.L. Chauhan and when his hand bag, which he was carrying, was searched in the presence of Deputy Superintendent of Police, two packets were found therein. From these packets samples were taken and forwarded to Central Forensic Science Laboratory for being examined for the presence of narcotic drugs. In the report, it is stated that one sample exhibit-2 was found to contain 23.02% of Diacetylmorphine, the chemical, which is popularly known as Heroin. The other packet i.e. exhibit-1 did not contain any narcotic drug or psychotropic substance. But in view of the fact that first sample exhibit-2 contained 23.02% of Diacetylmorphine, a charge-sheet was presented against the Appellant. He faced trial u/s 21 of the Act. As already indicated by us, the prosecution had examined P.W.-4 Surjit Singh, Dy. Superintendent of Police, P.W.-7 Inspector P.L. Chauchan and P.W.-8 Anil Kumar and on the conclusion of the trial, after assessing the stand taken by the Appellant, the trial Court had convicted and sentenced the Appellant.

14. We have, with the assistance of learned Counsel for the parties, scanned through the evidence. Though the notice Ex. PD served on the Appellant may strictly not conform to the requirements which have been crystalised in judicial precedents about the terms in which an accused is required to be apprised of his right to have a search of his person conducted before a Gazetted Officer or a Magistrate yet as it is well settled by judicial precedents that for searching any baggage, which is being carried by a person, notice u/s 50 of the Act would not be required. The Apex Court in *Kalema Tumba Vs. State of Maharashtra and Another*, has observed as under:

5. Ms. M. Quamaruddin, learned Counsel for the Appellant, submitted that the mandatory requirement of Section 50 of the NDPS Act was not complied with and, therefore, the evidence regarding recovery and seizure of heroin should be regarded as illegal. She further submitted that the Appellant could not have been convicted on the basis of that evidence. It was submitted by her that the

Appellant was not told, before the search by the officers of the Narcotics Control Bureau, that he had a right to be searched in presence of a Gazetted Officer or a Magistrate. This contention deserves to be rejected because only when the person of an accused is to be searched then he is required to be informed about his right to be examined in presence of a Gazetted Officer or a Magistrate. As rightly pointed out by the High Court search of baggage of a person is not the same thing as search of the person himself. In *State of Punjab Vs. Baldev Singh, etc. etc.*, this Court has held that the requirement of informing the accused about his right u/s 50 comes into existence only when person of the accused is to be searched. The decision of this Court in *State of Punjab v. Jasbir Singh*, (1995) 9 JT (SC) 308, wherein it was held that though poppy straw was recovered from the bags of the accused, yet he was required to be informed about his right to be searched in presence of a Gazetted Officer or a Magistrate, now stands overruled by the decision in *Baldev Singh's case* (supra). If a person is carrying a bag or some other article with him and narcotic drug or the psychotropic substance is found from it, it cannot be said it was found from his 'person'. In this case heroin was found from a bag belonging to the Appellant and not from his person and, therefore, it was not necessary to make an offer for search in presence of a Gazetted officer or a Magistrate.

15. The Apex Court in *Megh Singh Vs. State of Punjab*, has also observed as under:

16. A bare reading of Section 50 shows that it only applies in case of personal search of a person. It does not extend to search of a vehicle or a container or a bag, or premises. [See *Kalema Tumba Vs. State of Maharashtra and Another*, , *The State of Punjab Vs. Baldev Singh, etc. etc.*, , *Gurbax Singh v. State of Haryana*, 2001 (1) RCR (Cr.) 702 (SC) : 2001 (3) SCC 28]. The language of Section 50 is implicitly clear that the search has to be in relation to a person as contrasted to search of premises, vehicles or articles. This position was settled beyond doubt by the Constitution Bench in *Baldev Singh's case* (supra). Above being the position, the contention regarding non-compliance of Section 50 of the Act is also without any substance.

16. We are, therefore, of the view that the failure to apprise the accused of his right to have his personal search conducted by a Gazetted Officer or a Magistrate would be of little consequence.

17. On going through the record, we further find that in the statements of P.W.-4 DSP Surjit Singh, P.W.-7 Inspector P.L. Chauhan and P.W.-8 Anil Kumar, no dent was made by the defence, which would discredit the witnesses in such a manner as would render it unsafe for the Court to accept their testimony. It was in view of this that for determining whether the Appellant had on 20.6.1997 contravened the provisions of Section 21 of the Act, it became necessary for us to scrutinise the report Ex. PK submitted by Central Forensic Science Laboratory with regard to tests which had been conducted by it on the parcels of duly sealed samples of narcotic drugs recovered from the custody of the Appellant. This report as

already indicated by us clearly indicates that sample exhibit-2, which was taken from the packet containing 1.800 Kilograms of smack was found to contain 23.02% of Diacetylmorphine which would bring the contents of contraband to 23.02 grams from the sample taken of 100 grams. However, in sample taken from the packet containing 1.300 kilograms of white powdery substance, no traces of Diacetylmorphine was found. It was in view of this report that the question of re-examination of the sample had to be gone into and as we ourselves felt the necessity of having this doubt cleared, we directed Shri Ashok Kumar Dalela, Junior Scientific Officer, Central Forensic Science Laboratory, Chandigarh to take fresh samples and submit his report. The result of the report was that in the remaining 1.700 Kilograms of substances, which was recovered from the Appellant, traces of Diacetylmorphine were limited to only 5.4% which would bring the contents of contraband to 91.8 grams. The doubt naturally arose about the correctness of initial sampling as the variation was upto the level of 17.62%. Be that as it may, it would not be appropriate for us to comment any further on the level of investigation as even after so many years, the remaining substance which was got re-tested had 5.4% of Diacetylmorphine, which in our opinion would render culpable act of the Appellant having in his custody heroin of a lesser quality than the original samples. In view of this, we have no doubt that Appellant had contravened the provisions of Section 21 of the Act and Amendment Act No. 9 of 2001 clearly operates prospectively as indicated in Section 41 of the Amending Act and as such he would not be entitled to any benefit of the changes incorporated in the Narcotic Drugs and Psychotropic Substances Act, 1985 through the aforesaid Amending Act.

17-A. We may now turn to the arguments urged on behalf of the Appellant that as quantitatively Appellant has only been found to be in possession of only 114.82 grams of Diacetylmorphine, the Court should after taking into consideration the intention of the Legislature specifying small and large quantities, take this factor into consideration for modulating the sentence imposed on the Appellant for appropriately reducing the same. We have given out thoughtful consideration to this submission. The Appellant came to this country for the purpose of pursuing of his studies in the Department of Commerce and has been achieved some measure of success in that field inasmuch as he has conferred Doctorate by the Department of Business Management of Panjab University, Chandigarh. Somewhere along with line he seems to have gone astray. It is possible that he was being used as a tool for pushing drugs amongst University students. He has already married and has three children. He has also undergone about 7 years of the sentence imposed upon him. He has been found quantitatively to be in possession of 114.82 grams of heroin, which after amendment of 2001 is much less than the large quantity. In this view of the matter, as the amendment of 2001 has been held to be prospective in its operation, it may only be possible for us to rely upon the same for considering the reduction in sentence. Taking all these factors into consideration, we feel that the ends of justice would be sufficiently met if while upholding the sentence of

fine, the period of rigorous imprisonment imposed upon the Appellant is reduced to 10 years. We further direct that once the Appellant serves the sentences imposed in the present case and unless he is wanted in any other case, steps should be taken by the Ministry of External Affairs, Government of India to have him deported back to the country of his origin at the earliest.

Appeal partly allowed.