

Neutral Citation No. - 2024:AHC-LKO:59091

Reserved on 12.08.2024

Delivered on 30.08.2024

Court No. - 16

Case :- CRIMINAL APPEAL No. - 2432 of 2006

Appellant :- Motu Nat

Respondent :- State of U.P.

Counsel for Appellant :- Rajesh Kumar

Counsel for Respondent :- Govt.Advocate

Hon'ble Shamim Ahmed,J.

1. The case is taken up in the revised call.
2. This criminal appeal has been filed under Section 374(2) of the Criminal Procedure Code (Cr.P.C.) against the judgment and order dated 18.09.2006 passed by the court of Additional Sessions Judge (F.T.C.), Court No. 32, Barabanki, in Case No. 99 of 2006 (State vs. Motu Nat), arising out of Case Crime No. 148 of 2006, relating to Police Station Safdarganj, District Barabanki. The appellant was convicted under Section 8/21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) and sentenced to 10 months of rigorous imprisonment and a fine of Rs. 3000/-, with default stipulation.
3. The brief facts of the case are that the prosecution alleged that on 27.03.2006, the appellant, Motu Nat, was apprehended by the police in possession of a narcotic substance, identified as heroin. The recovery was allegedly made during a routine check near a public place and the appellant was subsequently charged under Section 8/21 of the NDPS Act. The trial court convicted the appellant based on the

testimony of P.W.1, Constable Tej Pratap Tiwari, and the appellant's statement under Section 313 Cr.P.C.

4. Learned counsel for the appellant submits that the prosecution case rests solely on the testimony of P.W.1, a police constable, without any independent corroboration. It was contended that the absence of independent witnesses raises serious doubts about the veracity of the prosecution's case.

5. Learned counsel for the appellant further submits that It was submitted that the search and seizure were conducted in violation of the mandatory provisions of Section 50 of the NDPS Act, which requires the presence of a Magistrate or Gazetted Officer. The search was conducted without adhering to this legal requirement, rendering the entire procedure illegal.

6. Learned counsel for the appellant further submits that The counsel argued that the FIR and the subsequent investigation were biased and did not follow the principles of natural justice. The investigation was conducted with a predetermined notion of guilt, which is evident from the lack of proper documentation and the hurried manner in which the charge sheet was filed.

7. Learned counsel for the appellant further submits that The counsel contended that the trial court erred in convicting the appellant based on his statement under Section 313 Cr.P.C. without any corroborating evidence. It was argued that such a statement cannot be the sole basis for conviction.

8. Learned counsel for the appellant further submits that The counsel also pointed out that the appellant, being economically disadvantaged, could not arrange for bail, and has already spent a significant period in custody. This factor should have been considered by the trial court while evaluating the sentence.

9. The learned Additional Government Advocate (AGA) submits that the testimony of P.W.1, Constable Tej Pratap Tiwari, is credible and

sufficient to establish the guilt of the appellant. The AGA contended that the law does not mandate the presence of independent witnesses for conviction, as long as the evidence on record is reliable.

10. The learned Additional Government Advocate (AGA) further submits that while there may have been procedural lapses, they do not vitiate the entire case. It was argued that non-compliance with Section 50 of the NDPS Act does not automatically lead to acquittal unless the accused can show prejudice.

11. The learned Additional Government Advocate (AGA) further submits that the appellant's statement under Section 313 Cr.P.C., wherein he admitted to possessing the substance, corroborates the prosecution's case. It was argued that this admission is sufficient to sustain the conviction.

12. After considering the arguments advanced by learned counsel for the parties and after perusal of record, this Court finds that the prosecution case is based on oral testimony of police personnel. It is settled principle of law that only on account of the fact that prosecution case is based on testimony of police witness, it cannot be thrown out, if the evidence of such witness is wholly reliable.

13. Section 50 of the NDPS Act is a mandatory provision, requiring that the accused be informed of their right to be searched before a Magistrate or a Gazetted Officer. This provision is a crucial safeguard to ensure the fairness of the investigation. In the present case, the record indicates that the search was conducted in the absence of both a Magistrate and a Gazetted Officer. The prosecution has not produced any evidence to show that the appellant was informed of his rights under Section 50. This non-compliance vitiates the search and the subsequent recovery of the narcotic substance.

14. The Supreme Court, in multiple judgments, has held that strict compliance with Section 50 is necessary, and any deviation from this mandate renders the search illegal. Therefore, the failure to comply

with this provision in the present case severely undermines the prosecution's case.

Hon'ble Supreme Court in *Vijaysinh Chandubha Jadeja Vs. State of Gujarat, 2010 (2) EFR 755*, while discussing the importance and relevancy of section 50 of N.D.P.S. Act, in para-22, has opined as under:-

"22. In view of the foregoing discussion, we are of the firm opinion that the object with which right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect, viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that in so far as the obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires a strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision. As observed in Re Presidential Poll (1974) 2 SCC 33, it is the duty of the courts to get at the real intention of the Legislature by carefully attending to the whole scope of the provision to be construed. "The key to the opening of every law is the reason and spirit of the law, it is the animus imponentis, the intention of the

law maker expressed in the law itself, taken as a whole." We are of the opinion that the concept of "substantial compliance" with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said Section in Joseph Fernandez (supra) and Prabha Shankar Dubey (supra) is neither borne out from the language of sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in Baldev Singh's case (supra). Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf. We also feel that though Section 50 gives an option to the empowered officer to take such person (suspect) either before the nearest gazetted officer or the Magistrate but in order to impart authenticity, transparency and creditworthiness to the entire proceedings, in the first instance, an endeavour should be to produce the suspect before the nearest Magistrate, who enjoys more confidence of the common man compared to any other officer. It would not only add legitimacy to the search proceedings, it may verily strengthen the prosecution as well."

15. Hon'ble Supreme Court in ***State of Rajasthan Vs. Parmanand and another, (2014) 2 SCC (Cri) 563***, again in paragraph-17, has opined as under:-

"In our opinion, a joint communication of the right available under Section 50(1) of the NDPS Act to the accused would frustrate the very purport of Section 50. Communication of the said right to the person who is about to be searched is not an empty formality. It has a

purpose. Most of the offences under the NDPS Act carry stringent punishment and, therefore, the prescribed procedure has to be meticulously followed. These are minimum safeguards available to an accused against the possibility of false involvement. The communication of this right has to be clear, unambiguous and individual. The accused must be made aware of the existence of such a right. This right would be of little significance if the beneficiary thereof is not able to exercise it for want of knowledge about its existence. A joint communication of the right may not be clear or unequivocal. It may create confusion. It may result in diluting the right. We are, therefore, of the view that the accused must be individually informed that under Section 50(1) of the NDPS Act, he has a right to be searched before a nearest gazetted officer or before a nearest Magistrate. Similar view taken by the Punjab & Haryana High Court in Paramjit Singh and the Bombay High Court in Dharamveer Lekhram Sharma meets with our approval."

16. In addition to above, admittedly the appellant, prior to his search, was not produced before any Gazetted Officer or Magistrate, whereas according to prosecution before his search the police personnel were informed by the appellant that he was carrying the charas. Prosecution has also not produced any written consent of the appellant for his search. From perusal of testimony of prosecution witnesses, it does not transpire that any efforts were made by them to produce the appellant before any Gazetted Officer or Magistrate, as required by Section 50 of N.D.P.S. Act, in view of law laid down by Apex Court in ***Vijaysinh Chandubha Jadeja (Supra)***.

17. The prosecution's case is primarily based on the testimony of P.W.1, Constable Tej Pratap Tiwari. While it is true that the law does not require the testimony of a police officer to be corroborated by independent witnesses, the absence of such corroboration can raise doubts, particularly in cases involving serious charges under the NDPS Act. In the present case, the absence of independent witnesses, coupled with the procedural lapses in the investigation, significantly weakens the prosecution's case.

18. Furthermore, the appellant's counsel rightly pointed out that the investigation appears to have been conducted in a biased and hurried manner. The FIR, which forms the foundation of the prosecution's case, does not inspire confidence due to the lack of transparency in the investigation process.

19. The trial court relied heavily on the appellant's statement under Section 313 Cr.P.C. to convict him. However, it is a well-settled principle that a statement under Section 313 Cr.P.C. cannot be the sole basis for conviction unless it is corroborated by independent evidence. In the present case, the trial court erred in using this statement as the primary basis for conviction, especially in the absence of other corroborative evidence.

20. The trial court did not give due consideration to the defense version, which was plausible and raised significant doubts about the prosecution's case. The defense argued that the appellant was falsely implicated due to personal enmity and that the recovery was not genuine. The trial court's failure to consider these aspects constitutes a miscarriage of justice.

21. The cumulative effect of the aforementioned points creates a substantial doubt regarding the prosecution's case. The principle of criminal jurisprudence mandates that if there is any reasonable doubt in the prosecution's case, the benefit of the doubt must go to the

accused. In the present case, the prosecution has failed to prove the guilt of the appellant beyond all reasonable doubt.

22. In view of the above discussion, this Court is of the opinion that the conviction and sentence passed by the learned trial court are unsustainable. The prosecution has failed to establish the guilt of the appellant beyond all reasonable doubt. Therefore, the judgment and order dated 18.09.2006 passed by the learned Additional Sessions Judge (F.T.C.), Court No. 32, Barabanki is set aside and reversed. The appellant, Motu Nat, is acquitted of the charges levelled against him. Consequently, the appeal is allowed his personal bond and surety bond are cancelled and sureties are discharged.

23. Let a copy of this judgment be sent to the trial court for information and necessary compliance.

24. No order as to costs.

Order Date :- 30.08.2024

Arvind

(Shamim Ahmed,J.)