

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.52 of 2015

Arising Out of PS.Case No. -38 Year- 2008 Thana -SIKTA District- WEST CHAMPARAN
(BETTIAH)

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Anwar Khan Son of Mohammad Khan, resident of village - Fulwariya Bazaar, P.S.-
Teghra, District - Begusarai.

.... Appellant/s

Versus

1. The State of Bihar
2. Union of India, Director, S.S.B. North Frontier, Bihar, Patna

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Umesh Chandra Verma, Advocate
For the Union of India : Mr. Manoj Kumar Singh, C.G.C.
For the State : Mrs.Abha Singh, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 04-05-2015

Heard Mr. Umesh Chandra Verma, learned counsel for the
petitioner, Mr. Manoj Kumar Singh, learned counsel for the Union of
India and Smt. Abha Singh, learned counsel for the State.

2. This appeal arises out of a judgment of conviction dated
28.11.2014 and order of sentence dated 29.11.2014 passed by the
learned 2nd Additional District and Sessions Judge, West Champaran,
Bettiah in Trial No.33 of 2008 arising out of Kista P.S. Case No.38 of
2008, whereby the appellant has been held guilty under sections
20(b)(ii)(C), 22(c) and 23(c) of the Narcotic Drugs and Psychotropic
Substances Act, 1985 (hereinafter referred to as “the NDPS Act”) and
sentenced to undergo rigorous imprisonment for ten years under each
of the sections and fine of rupees one lac under each of the sections
and in case of non-payment of fine, he has been ordered to further

undergo simple imprisonment for one year under each of the sections, and all the sentences have ordered to run concurrently.

3. According to the prosecution case, on 24th June, 2008 at about 6.45 a.m. while the informant Amit Singh, Assistant Commandant, 27th Battalion, SSB "B" Company, Sikta along with Head Constable Gunamani Handrik was on evening patrolling duty and was coming from Sikta Bazar Border Chowk towards Company Head Office, he saw a person aged about seventy five years silently coming towards Border Chowk under torn umbrella from the side of village Purainiya, who was stopped in between pillar no.408/2 and 409 and, on search, six packets tied with his waist and two packets tied with his thigh containing *Charas* like substance were recovered, and the same was confirmed as *Charas* on verification by Narcotics checking kits at the police station, in respect of which, he could not give satisfactory explanation and, on query, the apprehended person disclosed his name as the appellant Anwar Khan.

4. It has been claimed that the appellant used to deal in sale and purchase of *Charas* and was bringing the same for personal benefit. Thereafter, the appellant and seized four kilograms of *Charas* along with written report were produced before the officer-in-charge, Sikta Police Station for necessary action. On the basis of the above written report, Sikta P.S. Case No.38 of 2008, was registered under

sections 20, 22 and 23 of the NDPS Act and investigation was taken up.

5. On conclusion of investigation, the investigating officer of the case submitted charge-sheet No.40 of 2008 dated 22.8.2008 under sections 20, 22 and 23 of the NDPS Act before the court below against the appellant and after taking cognizance for the offences mentioned in the police report and after complying with the mandatory requirements of section 207 of the Code of Criminal Procedure, charges were framed against the appellant on 28th June, 2009 for the offences punishable under sections 20(b)(ii), 22 and 23 of the NDPS Act to which the appellant pleaded not guilty and claimed to be tried.

6. In course of trial, altogether six witnesses were examined in support of the case. They are P.W.1 Amit Singh (informant); P.W.2 Gunamani Handrick (Head Constable); P.W.3 T.J.Singh, (a member of 27th Batallian, SSB "B" Company); P.W.4 Kongla Kishore Babu (another member of 27th Batallian SSB "B" Company); P.W.5 Rameshwar Sharma (seizure list witness) and P.W.6 Naresh Prasad (seizure list witness). Apart from the oral evidence, the prosecution has also led documentary evidences which were marked as exhibits. They are (i) Exhibit 1, signature on the production-cum-seizure list; (ii) Exhibit 1/2, signature on the production-cum- seizure list; (iii)



Exhibit 1/3, signature on the production-cum-seizure list; (iv) Exhibit 1/1, signature on the arrest memo ; (v) Exhibit 1/5, signature on the arrest memo; (vi) Exhibit 1/5, signature on the arrest memo; (vii) Exhibit 1/6, signature on the arrest memo ; (viii) Exhibit 1/4, signature on seizure list prepared by SSB; (ix) Exhibit 2, written report and (x) Exhibit 3, chemical examination report of forensic science laboratory.

7. After the prosecution closed its evidence, the appellant was examined under section 313 of the Code of Criminal Procedure. In his statement recorded under section 313 of the Code of Criminal Procedure, the appellant has pleaded his innocence. He has stated that his implication in the case is absolutely false. However, no witness was examined in support of the defence during trial.

8. Learned counsel for the appellant has submitted that the trial court has completely erred in appreciating the evidence led before it. The witnesses examined on behalf of the prosecution have completely failed to prove the case of the prosecution. He has submitted that the prosecution has failed to comply with the mandatory requirements of section 50 of the NDPS Act before conducting search of the person of the appellant. According to him, it was imperative on the part of the officer, who conducted search and seizure of *Charas* in question from possession of the appellant, to apprise the appellant that he has a right under section 50 of the NDPS

Act to be searched before a Gazetted Officer or a Magistrate. In absence of the appellant having been told of his above right, the entire prosecution case has got vitiated against the appellant.

9. He has further contended that P.Ws. 1 and 2 were members of the patrolling party, and their evidence ought to have been scrutinized with great care and caution, which the court below failed to do. The other two witnesses (P.Ws. 3 and 4) were members of 27th Battalion, SSB "B" Company, and according to their evidence, it would appear that they were not present at the time of alleged seizure of contraband in question from possession of the appellant.

10. It has further been contended that P.Ws. 5 and 6 being witnesses to the seizure have not supported the case of the prosecution at all. In their deposition, they have categorically stated that no seizure of any contraband from possession of the appellant was made in their presence.

11. It has further been contended that there is no evidence on the point as to when the representative samples from eight packets in question were sent to the Forensic Science Laboratory for chemical examination as well as to the custody of contraband during interregnum period in between time of seizure and when it was sent to Forensic Science Laboratory for chemical examination and, thus, the report of Forensic Science Laboratory, which has been taken into

evidence under section 293 of the Code of Criminal Procedure would be of no help to the prosecution.

12. Lastly, it has been contended that the material exhibit i.e. eight packets of *Charas* was not produced in the court and there is no evidence in respect of the fact that the seized articles were disposed of in terms of section 52-A (2) of the NDPS Act.

13. On the other hand, learned counsel for the Union of India has contended that the prosecution case has been supported by the witnesses examined during trial. The informant has fully corroborated the allegations made in the first information report, which finds further corroboration from the evidence of P.Ws. 2, 3 and 4. The two seizure list witnesses have not disputed their signature over the seizure memo and, hence, their evidence to the effect that the seizure of contraband was not made in their presence is not believable. He has submitted that it would be apparent from their evidence that they have been gained over by the defence due to which they have stated that though the seizure memo contains their signature but the recovery of charas was not made in their presence. He has further contended that though the mandatory requirements of section 50 of the NDPS Act have not been complied with but the same would not vitiate the trial, as even otherwise, there is cogent evidence to the effect that the appellant was found in possession of eight packets of

Chars.

14. Learned counsel for the State has adopted the arguments advanced on behalf of the counsel appearing for Union of India.

15. I have heard the respective counsel for the parties, and with their assistance perused the record.

16. In his deposition, P.W.1, Amit Singh has stated that on 24th June, 2008 he was posted on the post of Sikta Company Commandant. At about 6.45 p.m., while on evening patrolling duty, he along with Head Constable Gunamani Handrik (P.W.2) was coming towards the Company Head Office from the side of Sikta Border Chowk, he saw an old person under torn umbrella was coming from the side of village Purainiya. P.W.2, Gunamani Handrik noticed something tied under the waist of the appellant and then he asked him to make search, and on search in presence of two witnesses, eight packets containing 4 kilograms of charas were recovered from the appellant's possession. According to him, at the place of occurrence itself, seizure list was prepared, and on the same P.W.5 (Rameshwar Sharma) and P.W.6 (Naresh Prasad) put their signatures and the appellant was brought to Sikta Police Station, where production-cum-seizure list (Ext.1) was prepared, and the informant, P.W.3 (T.J.Singh) and P.W.4 (Kongla Kishore Babu) put their signatures on

it. He has further stated that he wrote written report (Ext.2).

17. P.W.2 Gunamani Handrik has stated in his deposition that while he was posted at Company Headquarter, Sikta on 24.06.2008, at about 6.30 p.m., he along with P.W.1 (Amit Singh) was coming back from evening patrolling duty and when he reached between the Border Pillar No. 408/2 and 409, the appellant was seen, and on search six packets from his waist and two packets from his thigh, in total 8 packets of charas weighting 4 kgs. were recovered. He has further deposed that seizure list was prepared in presence of two witnesses. According to him, Sikta police was called at the place of occurrence itself and then he along with P.W.1 accompanied the police to the police station where P.W.1 produced the appellant before the police. In cross-examination, he has admitted that the seizure list was not prepared in his presence. He has further admitted that the seizure list does not contain his signature. He admits that charas in question was not weighed at the place of occurrence. He further admits that he himself did not see the charas. He has also admitted that the police had never recorded his statement and for the first time he was deposing before the Court.

18. P.W.3 T.J.Singh has stated in his deposition that he was posted at S.S.B. Comp Sikta on 24th June, 2008. He saw the informant holding the appellant from whose possession 4 kilograms of



charas was recovered. He put his signature (Ext.1/2) on the seizure list. According to him, the appellant along with *charas* was brought to the police station. It would appear from the record that the appellant did not cross-examine this witness. At this stage, I think it proper to record that the appellant was all along in jail during trial and in absence of lawyer to defend the appellant, the trial court ought to have appointed some lawyer to defend the case of the appellant and to cross-examine P.W.3.

19. P.W.4 Kongla Kishore Babu has stated that he was in the camp of 27th Battalion S.S.B at the time of occurrence and when he received information asking him to come with the seizure memo, he went to Sikta Bazar Police Station with the same. There he saw the appellant with *charas*. He identified his signature (Ext.1/3) on the seizure list. In cross-examination he has admitted that no officer like B.D.O. or C.O. was present at the time of seizure. He has further admitted that when search was carried out he did not get himself searched. He has admitted that none of the villagers put their signature on the seizure list.

20. P.W.5 Rameshwar Sharma and P.W.6 Naresh Prasad have deposed that the *charas* in question was not recovered in their presence but the police had taken their respective signatures on the seizure list which have been marked as Ex.t.1/4 and Ext.1/5. They

have expressed complete ignorance about the seizure of any contraband from the possession of the appellant. Surprisingly, the prosecution has not declared them hostile.

21. Having heard respective counsel for the parties, in view of the nature of evidence led before the court, I am of the view that the prosecution has completely failed to prove the charges against the appellant. The Investigating Officer of the case has not been examined and there is no explanation as to why he failed to depose before the court during trial. His non-examination has certainly caused prejudice to the defence.

22. I am of the view that the prosecution cannot resile from the deposition of the two seizure list witnesses (P.Ws. 5 and 6), who have categorically stated that no search and seizure were made in their presence. They are prosecution witnesses and for the reasons best known to the prosecution, they have not been declared hostile. In that event, each and every word stated by them would be binding on prosecution. In that situation, there is no option before the Court but to believe that their signatures were taken on blank sheet of paper and the same has been converted into seizure list by the investigating agency.

23. The learned counsel for the appellant has rightly contended that there is no evidence on the points as to when the



representative samples from each of the 8 packets were drawn and sent to FSL for chemical examination, as to custody of contraband during interregnum period in between time of its seizure and the time when it was sent to FSL, and thus, the report received from FSL cannot be said to be of the same recovered and seized charas.

24. I further find that the material exhibit i.e. charas has not been produced in court and, there is no evidence of its disposal in terms of the provisions of Section 52-A (2) of the NDPS Act. Further, there is no evidence on the point of preparation of inventory, mode of packing, marks etc. identifying particulars of sampling from each and every packet of seized contraband, and of sealing them.

25. I further find that the alleged search and seizure were conducted in utter violation of the safeguards provided under section 50 of the NDPS Act. The scope of the provision of Section 50 of the NDPS Act is no more res integra. In *Vijaysinh Chandubha Jadeja Vs. The State of Gujarat* reported in (2007) 1 SCC 433, a three Judge Bench of the Apex Court has taken the view that the accused must be informed of his right to be searched in presence of a Magistrate and/or a Gazetted Officer, but in the light of some other judgments of the Apex Court, the matter was referred to a larger Bench and, accordingly, a Constitution Bench was constituted in order to give an authoritative pronouncement on the provision of Section 50 of the

NDPS Act.

26. The Constitution Bench of the Apex Court in *Vijaysinh Chandubha Jadeja Vs. The State of Gujarat* reported in (2011) 1 SCC 609, formulated the question to be answered in paragraph 1 of the judgment which reads as under :

“1.The short question arising for consideration in this batch of appeals is whether Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short “the NDPS Act”) casts a duty on the empowered officer to “inform” the suspect of his right to be searched in the presence of a Gazetted Officer or a Magistrate, if he so desires or whether a mere enquiry by the said officer as to whether the suspect would like to be searched in the presence of a Magistrate or a Gazetted Officer can be said to be due compliance with the mandate of the said Section ?

27. The Constitution Bench of the Apex Court in the aforesaid case after discussing the provision of section 50 of the NDPS Act, answered the question in detail in paragraphs 29, 31 and 32 of the judgment which reads as under:-

“29. In view of the foregoing discussions, we are of the firm opinion that the object with which the 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 minimize 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 insofar as the obligation of the authorized officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires 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.”

31. 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 and Prabha Shankar Dubey 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 case. 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.

32. 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.”

28. In view of the evidence collected during trial in the present case, it is apparent that neither the search nor seizure was made in presence of a Gazetted Officer or a Magistrate nor the appellant was ever informed of his right to be searched in presence of a Magistrate or a Gazetted Officer.

29. Regard being had to the law laid down by the Constitution Bench of the Apex Court in *Vijaysinh Chandubha Jadeja* (supra), I am of the view that non-compliance with the provisions of Section 50 of the NDPS Act, has vitiated the entire prosecution initiated against the appellant.

30. On the facts and in the circumstances of the case and in view of the law laid down by the Apex Court in *Vijaysinh Chandubha Jadeja* (supra), the judgment and order passed by the court below cannot be sustained. Accordingly, the conviction and sentence recorded by the trial court are set aside. The appellant, who is in jail, is directed to be released forthwith, if not required in any other case.

(Ashwani Kumar Singh, J)

Md.S./-

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