

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL.NO.692 OF 2015
WITH
CRIMINAL APPLICATION NO.757 OF 2015

Samsun Donald Dokubo .. Applicant
-Versus-
The State of Maharashtra .. Respondent

Ms.Sartaj Shaikh for applicant
Ms. Anamika Malhotra, APP for State

CORAM : A.R.JOSHI, J.
DATE : 24th August 2015

JUDGEMENT

1] Heard the rival submissions on this appeal, preferred by the appellant challenging his conviction in the matter of offences punishable under section 8(c) read with section 21(b) of Narcotics Drugs and Psychotropic Substances Act, 1985 (for short the Act).

2] Presently, the appellant is in jail and already has undergone imprisonment for more than one year and six months, out of the total imprisonment of two years awarded against him.

3] The challenge in the present appeal is to the judgement and

order dated 23rd March 2015 passed by Special Judge under the NDPS Act. The appellant was sentenced to suffer R.I. for two years and to pay a fine of Rs.5000/-. In default of payment of fine, he was to suffer S.I. for three months.

4] The case of the prosecution in nutshell is that, the police officer, P.W.4 then attached to Anti Narcotic Cell of Bandra received secret information in the afternoon of 6th February 2014 regarding one named African national coming at a particular place in front of Tunga International Hotel, MIDC Andheri (East), for selling heroin to his customer at about 5.00 to 6.00 p.m. The description as to the clothes of the said person was also mentioned in the information. After recording down the said information, it was passed on to the superiors. Station diary was made. A pre-trap panchanama procedure was adopted at Bandra office after calling two pancha witnesses. Various articles required for the raid were collected, including brass seal and also computer and printer. Thereafter, raid was conducted at the given place. The present appellant arrived at about 5.00 p.m. at the said place and the police officer P.W.5 ascertained that he was the same person, as mentioned in the

secret information. Thereafter, the police party and panchas proceeded further and surrounded the appellant. After disclosing identity of the police officers, the appellant was apprehended and he was appraised, apparently, regarding his right under section 50 of the Act. Thereafter, his search was conducted during which from his pant pocket total 92 grams of heroin was found. It was tested on the field testing kit and two samples of 5 grams each were prepared and panchanama was prepared and signed by the raiding party members, panchas and also by the appellant. The appellant was taken to the unit office and offence was registered and during investigation sample packet was sent for chemical analysers report and C.A. report was obtained. On conclusion of the investigation, charge sheet was filed and the matter was tried before the special court and ended in conviction as mentioned earlier.

5] It is the case of the prosecution that total 92 grams of Heroin was found with the appellant and it being non commercial quantity and falling between small quantity and commercial quantity, he was appropriately charged and was sentenced to suffer R.I. for two years.

6] The main thrust of the argument on behalf of the appellant is of non compliance of the mandatory provisions of section 50 of the Act. To substantiate this argument, the attention of this court is drawn towards the evidence of P.W.4, P.W.5, P.W.6 and P.W.7, who are important witnesses, insofar as this compliance with section 50 of NDPS Act is concerned. P.W.4 is the complainant, who initially received the information and reported it to the superior P.W.5, Police Officer, Mr.Raorane. P.W.6 was also raiding party member and he carried out investigation and P.W.7 is pancha witness. So far as compliance with section 50 of the Act is concerned, it was the job allegedly done by P.W.5 police officer, Mr.Raorane. So far as the appraisal of right under section 50 is concerned, the substantive evidence of P.W.4 to P.W.7 is also of significance. In order to appreciate the arguments advanced on behalf of the appellant, the actual words used by these witnesses insofar as compliance with section 50 of the Act is concerned, are reproduced hereinunder for sake of ready reference.

P.W.4 in his notes of evidence in para 5 mentioned to the

following effect:-

“then P.I. Raorane disclosed him the information received by him and also told him provisions of section 50 of NDPS Act about search and seizure and his right. Then, the letter in English was given to the accused about his right and on the said letter he put the endorsement that the raiding party can take his search and also sign the same.”

The substantive evidence of P.W.5, who is a police officer who has allegedly appraised the accused of the rights under section 50 is as under:-

“I then disclosed him the information received by H.C.Tupe and also told him about his right under section 50 of NDPS Act and then issued letter in writing to him. The contents of the letter were that he has a right to give search in front of Magistrate or gazetted officer and if he desires the arrangements will be made. He orally told that he do not want to be searched before the Magistrate or gazetted officer and police can take his search. He also put

endorsement on the letter that police can take his search and signed the same.”

Now the substantive evidence of P.W.6 on this aspect is as follows:-

“Then P.I. Raorane explained him in English about his right of search. He replied that police can take his search. The letter in writing was also issued to him by P.I. Raorane. He had endorsed on the said letter that police can take his search. The contents of the letter were about the provisions of section 50 of the NDPS Act and the same was that he can intimate to the nearest Magistrate for his search. The said letter was signed by the accused and panch witness. The letter was signed by P.I. Raorane also. I have not signed the letter.”

6] The above substantive evidence of this prosecution witness is to be read in juxtaposition of the contents of the said letter which is at Exh.31. The contents are as under:-

“As per section 50 of the NDPS Act, 1985 you have right to give your personal search either in presence of nearest Magistrate or gazetted officer. If you demand so, we will make arrangement to that effect.”

7] This Court has carefully gone through the substantive evidence of the prosecution witness P.W. 4, 5 and 6 and specifically the substantive evidence of P.W.5. It must be said that none of these witnesses have stated that P.W.5 specifically apprised the appellant accused that he has a right of taking his search in presence of Magistrate or gazetted officer. All these witnesses speak regarding such right without giving the details but they have reiterated the details as mentioned in the letter Exh.31. This aspect has been dealt with in detail and in fact the ratio propounded in the authority of K. Mohanan Vs. State of Kerala, reported in 2000 S.C.C. (Cri.) 1228 was taken shelter of on behalf of the appellant. In fact, this was the case also cited before the trial court but the trial court did not appreciate the ratio propounded by the said authority and came to the conclusion that there was compliance of the mandatory provision of section 50 of the Act. In the considered view of this

court, specifically in the light of substantive evidence of P,W.5 coupled with the evidence of P.W.4 and 6, it must be said that the said mandatory provisions of section 50 are not complied with in the letter and spirit. Moreover, on this aspect the observations of this court in the case of Nilkanth s/o. Mahadeo Chandekar Vs. State of Maharashtra reported in 2000(supp) Bom. C.R. 685 (Nagpur Bench) and in the case of Shiv Kumar @ Ashok Mishra Vs. Special Judge of NDPS Court reported in 1997 Bom. C.R. (Cri) 865 (Panaji bench) are of much significance. In the first authority, it is specifically observed, based on the facts of that matter, by Nagpur bench of this Court that the police officer concerned had not stated that the accused was made aware of his right to be searched in the presence of gazetted officer or a Magistrate and it was further observed that the evidence was restricted to issuance of notice in writing that he was asked as to whether he would want to take search of police and the panch and thereafter, the search of the accused was taken.

8] Needless to mention that in number of decisions of the Hon'ble Apex Court, the matter of compliance of section 50 of NDPS Act by

I.O. who carries out search and seizure is emphasised and treated as valuable right given to the accused and the compliance of such right is treated as mandatory requirement of NDPS Act.

9] Considering the mandate of law as to establishment of compliance with section 50 of NDPS Act must be spelt out by the concerned officer taking search, in the opinion of this Court, in the present matter, there is no such clear understanding given to the appellant accused of his rights of taking his search in the presence of Magistrate or Gazetted officer and as such on this ground itself, the case of prosecution must fail.

10] Apart from the above, there is another discrepancy brought to the notice of the court to the effect that the panchnama, Exh.35, on the contents of which panch witness was cross examined show that both the panchas were called at Anti Narcotics Cell at Bandra unit on 6th February 2014 at 13.30 hours. As against this, admittedly, according to the case of the prosecution, information was received by police officer Tupe P.W.4 at 13.30 hours itself. Thereafter, it was reduced into station diary vide Exh.34 and it was done at 13.50 hrs.

Definitely, thereafter, the information was passed on to the superiors and then pre-trap panchanama procedure was conducted and then panchas were brought to the anti narcotics cell. If this sequence of events is accepted, then, it cannot be said that panchas were called at 13.30 hrs. By pointing out this, it is submitted on behalf of the appellants that doubt has been created as to whether the raid was conducted in the manner as stated by the police witness and in that event benefit of doubt is required to be given in favour of the appellant accused.

11] For the reasons mentioned above and mainly for the reason that there is no strict compliance with section 50 of the NDPS Act, it must be stated that the prosecution has failed to establish the charge against the appellant accused beyond reasonable doubt and in that event, the present appeal must succeed and the same is accordingly disposed of with the following order:-

(a) Appeal is allowed. Impugned judgement and order dated 23rd March 2015 is quashed and set aside;

(b) the appellant be released from custody, if not required in any other matter;

(c) Fine amount if already paid by the appellant accused be refunded back to him;

(d) Passport of the appellant which is reportedly taken in custody during his arrest by the investigating agency be returned to him on usual undertaking.

(A.R.JOSHI, J.)