

NAFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

CRIMINAL APPEAL NO. 982 OF 2001

Shiv Kumar, S/o Dashrath Ramteke, aged about 25 years, R/o Ramnagar, behind B.N.C. Mill, Rajnandgaon, District Rajnandgaon (C.G.)

... Appellant

Versus

State of Chhattisgarh, through Police Station, Rajnandgaon, District Rajnandgaon (C.G.)

... Respondent

For Appellant	:	Mr. Shobhit Koshta, Advocate, under instructions of Mr. Vishnu Koshta, Advocate.
For Respondent-State	:	Mr. S.R.J. Jaiswal, Panel Lawyer.

Hon'ble Shri Justice P. Sam Koshy

Judgment on Board

07/12/2016

1. The Appellant stands convicted for the offence under Section 20(B) (i) of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act' in short) and sentenced to undergo R.I. for 1 year and fine of Rs.5000/- with default sentence of R.I. for 2 months, as ordered on 13.9.2001 by the Special Judge (N.D.P.S. Act) Rajnandgaon, in Special Criminal Case No. 13 of 2000.

2. Relevant facts for the adjudication of the present case are that the Police Station Rajnandgaon received a secret information in respect of a person carrying cannabis and trying to sell it at the Bhagat Singh Chowk. Based upon the said information, necessary compliance under the provisions of the NDPS Act was done and a search team was constituted and sent to the spot from where on the basis of the informations provided the Appellant was questioned and searched and during the search he was found to be in possession of 600gram of Ganja which was put in small packets in the pockets of the trouser and the shirt which the Appellant was

wearing. Thereafter, the proceedings as per the NDPS Act was complied with and an FIR was registered as Crime No.93 of 2000 at Police Station Rajnandgaon for the offence under the provisions of the NDPS Act against the Appellant. In due course, after the necessary compliance under the NDPS Act, charge-sheet was filed and the matter was put to trial before the Special Judge (N.D.P.S. Act) Rajnandgaon where the case was registered as Special Criminal Case No. 13 of 2000.

3. During the course of trial, the prosecution examined as many as 5 witnesses in support of its case. However, no witnesses were examined on behalf of the accused in his defence. After the conclusion of the trial, the Court below found the Appellant to be guilty of having committed the offence under Section 20(B)(i) of the NDPS Act and sentenced him to the period as stipulated in the first paragraph of this judgment, which gave rise to the filing of the present appeal.

4. Counsel for the Appellant assailing the impugned judgment submits that he intends to challenge the very basis of the prosecution as the prosecution has miserably failed to comply with the first step which was supposed to be carried out by the prosecution at the time of the search and seizure of the contraband from the possession of the Appellant. According to the Counsel for the Appellant, the inception of the prosecution itself is bad in law for the reason that the necessary compliance under Section 50 of the NDPS Act was not undertaken by the prosecution and therefore the entire case of the prosecution stands vitiated and collapsed. According to him, while the search was being conducted the first requirement of law as is specified under Section 50 of the NDPS Act was that of the option being given to the person who is being searched of having the liberty of being searched before a Gazetted Officer or a Magistrate.

5. According to the Counsel for the Appellant, in the instant case the search team straightaway conducted a search and has not put a question or given an option to the Appellant of his right of being searched in the presence of a Gazetted Officer or a Magistrate. According to him, this deficiency vitiates the entire prosecution case and the investigation and the entire trial subsequently is of no significance. Counsel for the Appellant heavily relying upon the case of **Kalayath Nassar Vs. State of Kerala**, reported in **1999 (7) SCC 309**, submits that the present case is identical to the facts of the case of **Kalayath Nassar**.

6. Counsel for the Appellant took the Court through the statement of PW-3 Rohit Kumar Kurre, the CSP, and also took the Court through the Exhibit P-6 which is a search panchnama from which it reflects that only his consent was sought of being searched by the team conducting the raid and that no such question or option of his having the liberty of his being searched in presence of a Gazetted Officer or a Magistrate was put to him. According to the Counsel for the Appellant, this lacuna on the part of the prosecution is fatal and the entire case of the prosecution is not sustainable any further.

7. Counsel for the Appellant further contended that the very fact that the compliance of Section 50 of the NDPS Act has not been done by the prosecution has prejudiced the interest of the Appellant substantially and therefore the conviction and sentence deserves to be set aside. It was also contended by the Counsel for the Appellant that even on merits the case of the prosecution has not been established or proved by any independent witnesses as all the independent witnesses cited by the prosecution have not supported the case of the prosecution or have turned hostile and therefore the case rests only upon the departmental witnesses examined during the course of evidence. Counsel for the Appellant further submits

that it is also a case where one of the seizure witnesses namely Shankar has not even been examined in spite of the fact that the other witnesses have turned hostile, which further weakens the case of the prosecution. It was also contended by the Counsel for the Appellant that once when the case has not been proved by the independent witnesses then the case of the prosecution ought to have been conducted in a more strict manner inasmuch as all the statutory compliance ought to have been followed with, which in the instant case does not appear to have been done. Therefore, he prayed for the setting aside of the impugned judgment and also prayed for the acquittal of the Appellant.

8. It was lastly contended by the Counsel for the Appellant that if for any reason the Court is not inclined to assess the earlier two grounds of the case getting vitiated for non-compliance of Section 50 of the NDPS Act and also the case has not been supported by any independent witnesses then the Court may consider the case of the Appellant on the sentence part, as the Appellant has already remained in jail for a period of about 3½ months i.e. 109 days to be precise, considering the quantity of contraband seized, upholding the conviction the sentence may be modified to the period already undergone.

9. Per contra, Counsel for the State opposing the appeal submits that it is a case where the departmental witnesses i.e., the Investigating Officer as well as the other witnesses examined on behalf of the prosecution have supported the case of the prosecution and therefore the case cannot be said to be in any manner bad in law. The State Counsel took the Court through the evidence of PW-3 Rohit Kumar Kurre, the CSP, who had proved Exhibit P-9, the weighment panchnama. According to the State Counsel, from the evidence of PW-3 Rohit Kumar Kurre, it is evidently clear that the Appellant had voluntarily without any objection whatsoever

had accepted for being searched by the search team who had stopped him on 9.2.2000 suspecting him of carrying Ganja. According to the State Counsel, once when the Appellant has voluntarily accepted of being searched by the search team present in the spot and he having not claimed for being searched in presence of a Magistrate or a Gazetted Officer, it cannot be said that there is non-compliance of Section 50 of the NDPS Act, and therefore prayed for the rejection of the said objection.

10. So far as the merits of the case is concerned, Counsel for the State submits that there are sufficient judgments laid down by the Supreme Court which categorically hold that even in spite of independent witnesses turning hostile the accused person can be convicted only on the basis of the deposition of the departmental witnesses. In the instant case also according to the State Counsel though the independent witnesses have turned hostile but the departmental witnesses have supported the case of the prosecution and therefore it cannot be said that the Court below has committed any error of law while reaching to the conclusion of the Appellant having found to be in possession of Ganja in his pockets.

11. Having heard the rival contentions put forth on behalf of either side and on perusal of the records, the facts which are necessary for the disposal of the present appeal are, that the search in the instant case was conducted on 9.2.2000. The search was conducted in presence of PW-1 V.S. Dwivedi, the T.I., PW-3 Rohit Kumar Kurre, the CSP and PW-2 Deenbandhu, the weighment witness. In addition, from the statement of PW-3 Rohit Kumar Kurre it also reflects that there were other police officers also in their company but who have not been cited as witnesses nor have been examined. Exhibit P-6 is the search panchnama prepared and which has been proved by PW-3 Rohit Kumar Kurre. A perusal of the said document clearly reflects the fact that only permission was sought

from the Appellant and who had given his consent of being searched and based upon which the search panchanama was prepared. Thus, from the contents of Exhibit P-6 and also the statement of PW-3 Rohit Kumar Kurre it does not reflect that the team which had gone for search had at any point of time informed the Appellant of his right of being searched in presence of a Magistrate or a Gazetted Officer. Further, from the evidences which have come on record on behalf of the prosecution there does not appear to be any other witnesses who have deposed other than what has been stated by PW-3 Rohit Kumar Kurre insofar as the compliance of Section 50 of the NDPS Act.

12. At this juncture, it would be relevant to rely upon the decision of the Supreme Court rendered in the case of **Kalayath Nassar** (supra) which has been cited by the Counsel for the Appellant, which lays down the law on this field. The said law stands unsettled till now and still holds good. Relevant paragraphs of the said judgment are reproduced as under :

“5. The legal position has since been changed with the pronouncement of the decision of the Constitution Bench of this Court in *State of Punjab v. Baldev Singh*, JT (1999) 4 SC 595. It has been held that a search conducted in violation of Section 50 of the Act would vitiate the search and prejudice would be caused to the accused if the requirements are not complied with.

6. The dictum in *Balbir Singh* (1994 (3) SCC 299) has been explained away by the Constitution Bench. In a case where the Searching Officer failed to communicate to the accused, who was subjected to search, that he has a right to be searched in the presence of a gazetted officer or a Magistrate there would be non-compliance with the requirement of Section 50. Merely for the reason that the accused did not make a request to the searching officer on his own that the search should be conducted in the presence of such officer it cannot be held that there was no need to inform him of that right.

7. In view of the change in the legal position with the pronouncement of the Constitution Bench decision in the aforesaid case the search conducted in this case must be held to have been vitiated. Consequently, it must be inferred that prejudice has been caused to the accused. The evidence concerning the search is not acceptable in view of non-

compliance with the requirements of Section 50. There is no other evidence, apart from the search, to prove that appellant was in possession of the forbidden article. As such we are unable to sustain the conviction and sentence passed by the trial court which were confirmed by the High Court.”

13. When the principles laid down by the Supreme Court in the above referred judgment are compared to the facts of the present case it clearly stipulate that the facts of the present case are somewhat similar to the case of the facts of the said judgment of the Supreme Court. In the instant case also the contention of the State Counsel is that the Appellant had not sought for being searched in presence of a Magistrate or a Gazetted Officer and that he had voluntarily accepted of him being searched by the search party would meet the requirement of Section 50 of the NDPS Act has been unserved by the Supreme Court in the afore referred paragraphs of **Kalayath Nassar** case.

14. In view of the authoritative decision of the Supreme Court, this Court has no hesitation in reaching to the conclusion that in the present case also the prosecution has failed to show the mandatory compliance of Section 50 of the NDPS Act so far as the right of the accused-appellant of being searched by a Magistrate or a Gazetted Officer is concerned. In the absence of the said mandatory compliance, the entire case of the prosecution gets vitiated and the criminal case and trial itself would not be sustainable. In the given factual matrix of the case, this Court is inclined to accept the objection of the Counsel for the Appellant of the case being vitiated and the claim of the Appellant being prejudiced for non-compliance of Section 50 of the NDPS Act.

15. In view of the fact that the objection of the Counsel for the Appellant regarding non-compliance of Section 50 of the NDPS Act being decided in favour of the Appellant, this Court is of the opinion that there would be no

useful purpose for further considering the other aspects of the case as raised by the Counsel for the Appellant, neither would it be proper for this Court to enter into the merits of the case. Thus, on the ground of non-compliance of the mandatory provisions of Section 50 of the NDPS Act and in the light of the above referred judgment of the Supreme Court, the instant appeal deserves to be allowed.

16. Resultantly, the appeal is allowed. The impugned judgment of conviction and sentence is set aside and the Appellant stands acquitted of the charge levelled against him.

17. It is necessary to mention here that by order dated 18.11.2003 this Court had cancelled the bail granted to the Appellant on 26.11.2001 and had directed the concerned Trial Court to take necessary action in this regard. However, till date it is not known whether the Appellant has been arrested or is still at large. It is therefore directed that in case the Appellant has been arrested and he is in jail, the concerned jail authorities shall set him free, if not required in any other case, subject to the provisions contained in Section 437-A of CrPC.

Sd/-
(P. Sam Koshy)
Judge