

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL APPEAL NO.37 OF 2015**

Ishwar Buddha,
S/o. Itche Buddha,
46 years of age,
r/o. Nepal, presently lodged in
Central Jail Aguada,
Bardez-Goa.

.... Appellant

V/s

State of Goa,
as represented by
Officer-in-charge,
Anti Narcotic Cell P.S.,
Panaji-Goa.

.... Respondents

Shri J. Abreau Lobo, Advocate under Legal Aid Scheme for the
Appellant.

Shri S.R. Rivankar, Public Prosecutor for the Respondent.

CORAM : PRITHVIRAJ K. CHAVAN, J.

Reserved on : 4th November, 2019

Pronounced on : 28th November, 2019

JUDGMENT :

Feeling aggrieved with the judgment of conviction dated 06/12/2014 passed by the Special Judge, NDPS Court, South Goa in Special Case (NDPS) No.6/2013 of the offences under Section 20(b) (ii)(C) of the NDPS Act, by which the appellant is sentenced to undergo rigorous imprisonment for ten years and a fine of ₹1.00 lakh,

in default to suffer imprisonment for one year, the present appeal has been filed.

2. Facts as emerged from the record are as follows:

The Anti Narcotic Cell, Panaji Goa on 11/04/2011 at about 17.30 hours received an information that a person having Nepali features aged between 42 to 45 years with medium built, will be coming to deliver narcotic drugs on the same day between 19.45 hours to 20.45 hours to his prospective customer near La Grace Hotel, KTC bus stand, Margao - Goa. PW7 Shitakant Nayak – PSI – attached to ANC Police Station reduced the information into writing and a copy of the same was sent to the Dy.S.P. ANC, PW2 Naresh Mhamal, for his information.

3. He secured presence of two pancha witnesses namely PW4 Nilesh Sawant and one Venkatesh Bijli. After appraising the pancha witnesses about the raid to be conducted and after introducing the panch witnesses to the members of the raiding party, the entire team proceeded towards the place as per the information. PW7 Shitakant Nayak also carried with him the kit box containing weighing, packing,

sealing material, search lights, torches, field testing kit, etc. They proceeded in a private vehicle and reached near La Grace Hotel, KTC Bus Stand at about 19.40 hours. They concealed their presence in the surrounding area.

4. Around 20.15 hours, PW7 Shitakant Nayak saw a male person having Nepali features carrying a shoulder bag on his shoulder, whose description tallied with the information received, coming towards the KTC bus stand. He informed the members of the raiding party and the panchas that he would be the same person in respect of whom information was received. The said person was standing near La Grace Hotel waiting for his prospective customer. PW7 Shitakant Nayak immediately rushed towards him and also simultaneously signalled the panchas and the members of the raiding party to rush towards him.

5. The said person was accosted by PW7 Shitakant, who introduced himself as the sub-inspector of Anti Narcotic Cell and also the members of the raiding party and panchas to the said person. Upon asking, he disclosed his identity as Ishwar Buddha, son of Itche

Buddha, aged 46 years, native of Rukumb, Zilla-Kakri Gabesar, Odo no.3, Rapti Ansal, Nepal. After appraising the appellant about the information, he was made aware that his personal search as well as the search of his shoulder bag is to be carried out and, therefore, he was informed that the said search will be conducted in the presence of a Gazetted Officer or a Magistrate. The appellant declined the request. He also declined the request of PW7 Shitakant Nayak to search the members of the raiding party.

6. During the search of the shoulder bag, which was having a label stitched on it as “D-Diesel”, the witness found in one of the compartments a transparent auto press polythene packet containing in it blackish colour sticky substances in irregular cylindrical shape wrapped individually in a transparent polythene wrapper. There were 54 such cylindrical shape articles. PW7 Shitakant took a pinch of one of the said sticky articles and tested by means of the drug testing kit, which was found to be positive for “charas”, a narcotic drug. The substance was weighed and found to be about 1.115 kgs along with the auto press polythene packet.

7. During personal search of the appellant nothing objectionable could be noticed, except his identity card and a cash of ₹200/-. The appellant was arrested and was again offered the search of the raiding party and panchas, however, he declined the same. After completing further regular necessary formalities, PW7 Shitakant filed a charge sheet in the Special Court, Margao.

8. The learned Special Judge, NDPS Court, framed a charge on 08/02/2013 under Section 20(b)(ii)(C) of NDPS Act, 1985. It was read over and explained to the appellant to which he pleaded not guilty and claimed a trial.

9. Prosecution examined as many as seven witnesses in support of its case. The defence of the appellant in the light of cross-examination of the prosecution witnesses vis-a-vis his statement under Section 313 of Cr.P.C. is that he has been falsely implicated in this case. Nowhere it is suggested or stated in the cross-examination that the appellant did not understand Hindi language. No defence evidence has been adduced on his behalf.

10. The learned Special Judge after going through the evidence of the prosecution witnesses and the material on record found that the prosecution had proved its case beyond all reasonable doubts and, therefore, convicted and sentenced the appellant as above.

11. At the outset, Shri Lobo, the learned Counsel appearing for the appellant contended that there is absolutely no discussion and reasoning in the impugned judgment, but only repetition of evidence. The main ground of attack is on the aspect that there is no independent witness examined by the prosecution in the sense that even the sole panch witness PW4 Nilesh Sawant lacks credibility on the ground that, as an insurance agent, he issued policies to several policemen and that is how he obliges them by acting as a pancha witness as per their directions.

12. The next weapon in the armory of Shri Lobo is that record does not reveal that the appellant understood the conversation between Investigating Officer and him or amongst the members of the raiding party. The appellant, according to the learned Counsel, never understood anything during the raid. He has been falsely implicated

in this case. The most important aspect, according to the learned Counsel is that the Investigating Officer has not followed the mandate of the Supreme Court in case of *Arif Khan @ Agha Khan V/s. State of Uttarakhand* reported in *CDJ 2018 SC 464*, in the sense that the appellant was neither asked nor taken to the Gazetted Officer or a Magistrate, as per Section 50 of the said Act. There is no strict compliance of Section 50 which was imperative on the part of the Investigating Officer to first appraise the appellant and then to take him before a Gazetted Officer or a Magistrate. It is further stated that there is nothing on record which would point out that the appellant was made aware of the existence of his such right to be searched before the Gazetted Officer or a Magistrate.

13. Shri Lobo in support of his contention has placed reliance on a judgment of the Hon'ble Supreme Court in case of *State of Rajasthan V/s. Parmanand & Anr.* reported in *(2014) 5 SCC 345* and the judgment of this Court in case of *Mr. Yusuji Hinagata V/s. State & Anr.* in *Criminal Appeal No.36 of 2016*.

14. Shri Rivankar, the learned Public Prosecutor, on the other hand,

supported the impugned judgment and order of conviction. Shri Rivankar tried to distinguish the ratio laid down by the Hon'ble Supreme Court in case of *Parmanand* (supra) vis-a-vis in case of *State of Punjab V/s. Baljinder Singh & Anr.* in *Criminal Appeal Nos.1565-66 of 2019*.

15. I shall discuss the scope and ratio laid down by the Hon'ble Supreme Court in the aforesaid two judgments.

16. The incident in question occurred on 11/04/2011 at 17.30 hours. PW7 Shitakant Nayak along with his raiding team comprising of PW4 Nilesh Sawant, a pancha witness, PW6 Sachin Sawant, another panch witness proceeded to the spot. It would be essential to go through the evidence of an independent witness namely PW4 Nilesh Sawant, who acted as a pancha witness. His evidence reveals that he was called by PW7 Shitakant on 11/04/2011 at the ANC Police Station, Panaji where another pancha Venktesh Bijli was already present. They were appraised of the raid to be conducted in view of the information received by PW7 Shitakant. This witness was introduced with the members of the raiding party as well as shown all

the necessary articles, which were to be carried by the raiding team comprising Ashoka Emblem, a field testing kit, search light, sealing materials, etc., which I have already referred herein above. His testimony further reveals that after reaching the spot near KTC bus stand they noticed the appellant carrying a bag with him. As per the instructions of PW7 Shitakant Nayak, the members of the raiding team immediately surrounded him. PW7 Shitakant introduced him along with other members of the party and inquired with the appellant about his details. The appellant introduced himself as Ishwar Buddha, a Nepali national. The evidence further reveals that PW7 Shitakant appraised the appellant about his right to be searched in the presence of a Gazetted Officer or a Magistrate. However, the appellant declined. The appellant had also declined the request to take the search of all the members of the raiding party. During the search of his shoulder bag, PW7 Shitakant Nayak noticed 54 cylindrical shape black colour sticky substances wrapped in polythene. After testing one of the sticks with the help of drug testing kit, it was found positive for charas. It weighed about 1.115 kgs.

17. The evidence of PW4 further gives all the details in a usual

manner as to how the entire procedure of seizure of the articles and drawing of panchanama was effected by PW7 Shitakant Nayak.

18. The cross-examination of this witness was futile in the sense that nothing could be elicited, which would render his testimony unbelievable. Merely because he admits in cross that he is acquainted with the police personnel as a LIC agent, in itself, would not be sufficient to brand him as an interested witness. It is more particularly in the light of the fact that he had acted as a pancha witness for the first time in his life. He cannot be said to be a stock police witness.

19. The testimony of PW6 Police Constable Sachin Sawant corroborates in material particulars the testimony of PW4 Nilesh Sawant and was also the testimony of PW7 Shitakant Naik, who is the Investigating Officer. By and large, even the cross-examination is on the same line and there is nothing in their cross-examination by which it can be said that their testimonies have been rebutted in cross-examination.

20. PW1 Nilima Mishal is a Junior Scientific Officer, who had

carefully examined and analysed the contraband sent to her by the Investigating Officer in a sealed packet. She opined that after examining the substance microscopically as well as by conducting the scientific test such as Beams acid test and Neagm's test, she found said material as charas. There is no effective cross-examination of PW1 Nilima by the defence. Similarly, PW3 Sushant Naik is also a Scientific Assistant attached to SB Crime Branch Goa. His duties are to visit the scene of crime, collect exhibits and assist the Investigating Officer in collecting exhibits, receiving exhibits from the police station on behalf of the Superintendent of Police, Crime and forwarding the same to the concerned laboratory for examination under the signature of Superintendent of Police, Crime. In this case, PW3 Sushant Naik had personally handed over the sealed envelope containing 1.115 kgs of suspected charas in the office of FDA on 12/04/2011 which is at Exhibit 38.

21. Reverting back to the crucial issue as to whether there was compliance of Section 50 of the NDPS Act, Shri Lobo has placed heavy reliance upon a judgment of the Hon'ble Supreme Court in the case of *Arif Khan* (supra), while discussing the scope of Section 50 of

the NDPS Act. Paras 20 to 24, 26 & 27 of the said judgment read thus:

“20. In other words, the question that arises for consideration in this appeal is whether the prosecution was able to prove that the procedure prescribed under Section 50 of the NDPS Act was followed by the Police Officials in letter and spirit while making the search and recovery of the contraband “Charas” from the appellant (accused).

*21. What is the true scope and object of Section 50 of the NDPS Act, what are the duties, obligation and the powers conferred on the authorities under Section 50 and whether the compliance of requirements of Section 50 are mandatory or directory, remains no more res integra and are now settled by the two decisions of the Constitution Bench of this Court in **State of Punjab V/s. Baldev Singh (1999) 6 SCC 172** and **Vijaysinh Chandubha Jadeja V/s. State of Gujarat 2011 (1) SCC 609**.*

*22. Indeed, the latter Constitution Bench decision rendered in the case of **Vijaysinh Chandubha Jadeja** (supra) has settled the aforementioned questions after taking into considerations all previous case law on the subject.*

*23. Their Lordships have held in **Vijaysinh Chandubha Jadeja** (supra) that the requirements of Section 50 of the NDPS Act are mandatory and, therefore, the provisions of Section 50 must be strictly complied with. It is held that it is imperative on the part of the Police Officer to apprise the person intended to be searched of his right under Section 50 to be searched only before a Gazetted officer or a Magistrate. It is held that it is equally mandatory on the part of the*

authorized officer to make the suspect aware of the existence of his right to be searched before a Gazetted Officer or a Magistrate, if so required by him and this requires a strict compliance. It is ruled that the suspect person may or may not choose to exercise the right provided to him under Section 50 of the NDPS Act but so far as the officer is concerned, an obligation is cast upon him under Section 50 of the NDPS Act to apprise the suspect of his right to be searched before a Gazetted Officer or a Magistrate. (See also **Ashok Kumar Sharma V/s. State of Rajasthan, 2013 (2) SCC 67** and **Narcotics Control Bureau V/s. Sukh Dev Raj Sodhi, 2011 (6) SCC 392**).(emphasis supplied)

24. Keeping in view the aforementioned principle of law laid down by this Court, we have to examine the question arising in this case as to whether the prosecution followed the mandatory procedure prescribed under Section 50 of the NDPS Act while making search and recovery of the contraband “Charas” from the appellant and, if so, whether it was done in the presence of a Magistrate or a Gazetted Officer so as to make the search and recovery of contraband “Charas” from the appellant in conformity with the requirements of Section 50.

26. It is the case of the prosecution and which found acceptance by the two Courts below that since the appellant (accused) was apprised of his right to be searched in the presence of either a Magistrate or a Gazetted Officer but despite telling him about his legal right available to him under Section 50 in relation to the search, the appellant (accused) gave his consent in writing to be searched by the police officials (raiding party), the two Courts below came to a conclusion that the requirements of Section 50 stood fully complied with and hence the appellant was liable to be convicted for the offence punishable under the NDPS Act.

27. *We do not agree to this finding of the two Courts below as, in our opinion, a search and recovery made from the appellant of the alleged contraband “Charas” does not satisfy the mandatory requirements of Section 50 as held by this Court in the case of **Vijaysinh Chandubha Jadeja** (supra). This we say for the following reasons.”*

22. Shri Lobo has also pressed into service another judgment of the Supreme Court in the case of **Parmanand** (supra).

23. On the other hand, Shri Rivankar, the learned Public Prosecutor relied upon the latest decision of the Supreme Court in case of **Baljinder Singh** (supra). In case of **Parmanand** (supra), the Hon'ble Supreme Court after taking into consideration the earlier case law on the subject, more particularly, having taken into consideration the judgment in case of **Dharmaveer Lekhram Sharma V/s. State of Maharashtra** reported in (2001) 1 Crimes 586 (Bom.), **State of Punjab V/s. Baldev Singh** reported in (1999) 6 SCC 172 and **Paramjit Singh V/s. State of Punjab** reported in (1997) 1 Crimes 242 (P&H), held at para 15 thus:

“15. Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person

is also searched, Section 50 of the NDPS Act will have application. In this case, respondent No.1 Parmanand's bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of respondent No.2 Surajmal was also conducted. Therefore, in light of judgments of this Court mentioned in the preceding paragraphs, Section 50 of the NDPS Act will have application."

24. In the case of **Parmanand** (supra), the respondents i.e. Parmanand was found carrying a bag which was searched in which opium was recovered. However, when his personal search was also effected nothing was found on his person. It is observed by the Hon'ble Supreme Court that if the bag carried by the suspect is searched and his person is also searched, then Section 50 of the NDPS Act will have application. According to the Hon'ble Supreme Court, the Investigating Officer had breached Section 50 of the NDPS Act, for, if the personal search of the respondent was to be effected, he should have been made aware of his right to be searched in the presence of a Gazetted Officer or a Magistrate. It is further noticed by the Supreme Court in para 16 of the judgment as follows:

"16. It is now necessary to examine whether in this case, Section 50 of the NDPS Act is breached or not. The police witnesses have stated that the respondents were informed that they have a right to be searched before a nearest gazetted officer or a nearest Magistrate or before PW-5 J.S. Negi, the

Superintendent. They were given a written notice. As stated by the Constitution Bench in Baldev Singh (supra), it is not necessary to inform the accused person, in writing, of his right under Section 50(1) of the NDPS Act. His right can be orally communicated to him. But, in this case, there was no individual communication of right. A common notice was given on which only respondent No.2 Surajmal is stated to have signed for himself and for respondent No.1 Parmanand. Respondent No.1 Parmanand did not sign.”

25. In case of **Parmanand** (supra), reliance has been placed by the Supreme Court in its earlier judgment in case of **Union of India V/s. Shah Alam** reported in (2009) 16 SCC 644. In the case of Shah Alam (supra) heroin was first recovered from the bags carried by the respondents therein. Thereafter, their personal search was taken but nothing was recovered from their person. It was urged that since personal search did not lead any recovery, there was no need to comply with the provisions of Section 50 of the NDPS Act. Following the ratio of the Court in case of **Dilip V/s. State of M.P.** reported in (2007) 1 SCC 450, it was held that since the provisions of Section 50 of the NDPS Act were not complied with, the High Court was right in acquitting the respondent on that ground.

26. Shri Lobo, therefore, strenuously urged to acquit the appellant in

view of the fact that neither there is any evidence of the pancha witness PW4 Nilesh Sawant nor it is testified by any of the prosecution witnesses including PW7 Shitakant Nayak that before effecting the personal search the appellant was taken to the nearest Magistrate or a Gazetted Officer.

27. On the other hand, it would be expedient to look into the latest view of the Hon'ble Supreme Court in case of **Baljinder Singh** (supra), wherein it is observed that the decision of the Supreme Court in case of **Dilip** (supra) is not the correct view which is opposed to the law laid down by the Supreme Court in case of **Baldev Singh** (supra) and other judgments.

28. In **Baljinder Singh** (supra), following questions arose before the Hon'ble Supreme Court in view of para 10 of the said judgment:

If a person found to be in possession of a vehicle containing contraband is subjected to personal search, which may not be in conformity with the requirements under Section 50 of the Act; but

the search of the vehicle results in recovery of contraband material, which stands proved independently;

would the accused be entitled to benefit of acquittal on the ground of non-compliance of Section 50 of the Act even in respect of material found in the

search of the vehicle.

29. While answering these questions and after taking into consideration all the previous case laws, including the judgment of the Supreme Court in case of ***Baldev Singh*** (supra) and ***Vijaysinh Chandubha Jadeja V/s. State of Gujarat*** reported in ***2011 (1) SCC 609***, it is observed by the Supreme Court that during search if an illicit article is seized from the person during personal search conducted in violation of the safeguards provided in Section 50 of the Act cannot by itself be used as admissible evidence of proof of unlawful possession of contraband.

But the question is, if there be any other material or article recovered during the investigation, would the infraction with respect to personal search also affect the qualitative value of the other material circumstance?

30. Thus, it can be seen that the mandate of Section 50 would be made applicable only for the “personal search” of the accused or the suspect and it cannot be extended or thereafter would be made applicable to a search of a vehicle or a bag or a container or premises. It would be apposite to refer to para 17 of the judgment which reads

thus:

17. The conclusion (3) as recorded by the Constitution Bench in Para 57 of its judgment in Baldev Singh clearly states that the conviction may not be based “only” on the basis of possession of an illicit article recovered from personal search in violation of the requirements under Section 50 of the Act but if there be other evidence on record, such material can certainly be looked into.

In the instant case, the personal search of the accused did not result in recovery of any contraband. Even if there was any such recovery, the same could not be relied upon for want of compliance of the requirements of Section 50 of the Act. But the search of the vehicle and recovery of contraband pursuant thereto having stood proved, merely because there was non-compliance of Section 50 of the Act as far as “personal search” was concerned, no benefit can be extended so as to invalidate the effect of recovery from the search of the vehicle. Any such idea would be directly in the teeth of conclusion (3) as aforesaid.

31. The principles laid down by the Supreme Court in **Baljinder Singh** (supra) thus can be distinguished from the judgment of the Hon'ble Supreme Court in case of **Parmanand** (supra).

32. In the case at hand, commercial quantity of charas weighing about 1.115 kgs comprising 54 pieces of dark brown colour sticky substance came to be recovered during the search of the shoulder bag of the appellant. Nothing incriminating, in the sense any contraband

articles were found during the personal search of the appellant by PW7 Shitakant in the presence of raiding team including the pancha witness PW4 Nilesh Sawant and, therefore, in my view the evidence and material on record completely established the presence and possession of contraband material in the shoulder bag of the appellant and not on his person and, as such, there is no breach of Section 50 of the NDPS Act.

33. I am afraid, the argument of Shri Lobo that merely because the search was made after the arrest of the appellant and, therefore, the ratio laid down by the Supreme Court in *Parmanand's* case (supra) would be applicable, would not stand to reason.

34. The argument of the learned Counsel that the panchanama does not reveal that the appellant understood the language of the police or was explained to him, also is without any substance for the reason that it is neither stated by the appellant in his 313 statement nor it has been suggested to the prosecution witnesses. Rather, it is testified by PW7 Shitakant Nayak that the conversation between him and the appellant was in Hindi. Even the complaint Exhibit 67 reveals that the

conversation between PW7 Shitakant and the appellant was in Hindi language which he understood. More so, how the appellant answered the questions put to him by the Special Judge during his examination under Section 313 of Cr.P.C.?

35. As such, this argument of the learned Counsel also falls on the ground.

36. The learned Special Judge in the impugned judgment has meticulously and properly appreciated all the facts, evidence and circumstances on record and after hearing on the point of sentence rightly passed the judgment and order of conviction.

37. The impugned judgment, therefore, does not warrant interference in appeal and, as such, it stands dismissed.

PRITHVIRAJ K. CHAVAN, J.

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