

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL APPEAL NO.36 OF 2016**

Mr. Yusuji Hinagata,
S/o. Katsuni, Age 50 years,
R/o Anjuna, Bardez-Goa.
(Presently lodged at the
Central Jail Colvale, Bardez-Goa).

.... Appellant

V/s

1. STATE
(As represented by the
Officer In Charge,
Anti-Narcotic Police
Station, Panaji-Goa.

2. The Public Prosecutor
High Court Building,
Altinho, Panaji-Goa.

.... Respondents

Ms. Caroline Collasso, Advocate for the Appellant.
Shri S.R. Rivankar, Public Prosecutor for the Respondents.

Coram:- PRITHVIRAJ K. CHAVAN, J.

Reserved on :- 26th September, 2019

Pronounced on :- 1st October, 2019

JUDGMENT :

By this appeal under Section 374 of the Code of Criminal Procedure, 1973, the appellant impugns the judgment and order dated 25/01/2016, by which he has been convicted by the Special Judge of Narcotic Drugs and Psychotropic Substances Court, Mapusa of an

offence punishable under Section 8(c) read with Section 22(C) and 20(b)(ii)(B) of the Narcotic Drugs and Psychotropic Substances Act, 1985, (for short 'NDPS Act') for being found in illegal possession of 1.81 gms of LSD liquid and 568 gms of charas. He has been sentenced to undergo rigorous imprisonment for 10 years and a fine of ₹1,00,000/-, in default, rigorous imprisonment for one year and rigorous imprisonment for 5 years with fine of ₹50,000/-, in default rigorous imprisonment for one year, respectively. The substantive sentences were directed to run concurrently.

2. Factual matrix can be summarised as follows:

The Anti-Narcotic Cell, Panaji, Goa on 17/07/2013 received reliable and secret information that on 18/07/2013, a wheatish complexion, tall male of medium built, aged about 45 to 50 years wearing yellow colour T-shirt and dark grey colour 3/4th pant will be coming on a black colour Activa scooter bearing no.GA-03-T-9811 to deliver narcotic drugs between 00.00 hrs. to 1.00 hrs. to his prospective customer near football ground, small Vagator, Anjuna, Bardez-Goa. The Investigating Officer PW8 PSI Vidhya Pagui reduced the information into writing. A copy of the information was

sent to PW3 Dy.S.P. ANC, Shri Sammy Tavares. PW8 Vidhya Pagui, thereafter, made necessary preparation for conducting a raid with the help of police staff and panch witnesses. The panch witnesses PW6 Mahendra Colvalkar and Bhalchandra Murgaonkar were introduced with the members of the raiding party. The panchas were also shown the Ashoka Emblem to be used during the raid.

3. The raiding team proceeded to the spot of incident in two private Swift cars bearing numbers GA-04-C-1860 and GA-03-C-6768. At around 00.25 hrs. they saw a male of the given description proceeding to the football ground on a scooter from Anjuna side. He alighted from the scooter and stood near it. Since his description matched with the information, he was intercepted by the raiding team led by PW8 Vidhya Pagui. She introduced herself and the other members of the team. On being asked, the said person disclosed his name as Yasuji Hinagata, son of Katsuni, aged 50 years, Japanese National. He was informed by PW8 Vidhya Pagui, about the information received by the Anti Narcotic Cell and about the personal search to be effected. PW8 Vidhya Pagui, thereafter, requested PW5 PI Suraj Halarnkar to conduct personal search of the appellant. PW5 PI Suraj Halarnkar

informed the appellant that he had a right to be searched in presence of Gazetted Officer or a Magistrate and, if he desires, a search will be conducted in the presence of Officer/s. However, the appellant declined the offer. The appellant had also declined to take search of the members of the raiding party when he was asked to do so.

4. PW5 PI Suraj Halarnkar, thereafter, took search of the 3/4th pant of the appellant which had six pockets. During search, a blue coloured plastic polythene bag with a knot was recovered, wherein there were 55 black coloured balls enclosed in a transparent wrapper. When the balls were minutely observed, they were found smelling of charas which is a narcotic drug. A small piece of charas was tested with the help of field testing (drug detection) kit. The test was positive.

5. Thereafter, during further search, the appellant was found in possession of a glass bottle with white coloured cap having a dropper. The bottle was of amber colour. It contained some liquid. When the liquid was smelled, it was suspected to be LSD, a psychotropic substance.

6. In the presence of panchas, those contraband articles were duly seized by following the regular procedure. The substances were weighed. The glass bottle along with the suspected LSD was found to be 8.89 gms. The exact weight of the liquid LSD was found to be 1.81 gms. The weight of the empty vial was 2.52 gms.

7. PW8 Vidhay Pagui, thereafter, completed the usual procedure, i.e., requesting PW5 PI Suraj Halarnkar to conduct the personal search of the appellant. Accordingly, PW5 PI Suraj Halarnkar, as already stated hereinabove, conducted personal search of the appellant. Before effecting the search, he had informed the appellant that he has a right to be searched in the presence of a Gazetted Officer or a Magistrate, which the appellant declined. The appellant had also declined his right to search the members of the raiding party.

8. After completing the formalities of seizure, the appellant was arrested. Meanwhile, PW8 Vidhya Pagui was transferred from ANC Police Station and, therefore, she handed over the investigation to PW5 PI Suraj Halarnkar. The Investigating Officer recorded

statements of the witnesses. The seized muddemal was sent for chemical analysis. After investigation, a charge sheet was filed before the Special Judge NDPS Court, Mapsua against the appellant under Section 22(C) and 20(b)(ii)(B) of the NDPS Act.

9. The appellant was brought before the Special Judge on 04/09/2014. After hearing the prosecution and the defence, the learned Special Judge framed a charge at Exhibit C-6 against the appellant under Sections 8(c), 22(C) and under Section 20(b)(ii)(B) of the NDPS Act. The appellant pleaded not guilty and claimed to be tried.

10. The defence of the appellant, as emerged from the line of cross-examination as well as from his statement under Section 313 of Criminal Procedure Code is that he has been falsely implicated in this case. According to the appellant, at the time of alleged raid, there were heavy rains. He had relied upon a letter of the Consulate General of Japan dated 29/08/2015 along with weather report dated 17/07/2013 which is at Exhibit C-43. No defence evidence has been adduced on his behalf.

11. To substantiate the charge, prosecution has examined 8 witnesses. The learned Special Judge after going through the evidence of the witnesses and the documents on record, convicted and sentenced the appellant as above.

12. Aggrieved, the appellant has preferred instant appeal.

13. At the outset, Ms. Collasso, the learned Counsel appearing for the appellant contended that the entire case of the prosecution is based on total falsity as there are several discrepancies and lacunae demonstrating as to how the appellant has been falsely implicated in this case. The first and foremost ground of attack by the learned Counsel is that the appellant does not know or understood English language at all. He can only speak his mother tongue i.e. Japanese language. There is nothing on record to indicate that any attempt was made either by PW8 Vidhya Pagui or PW5 PI Suraj Halarnkar to ascertain as to whether the appellant understood the alleged conversation between the Investigating Agency and himself. So far as the description of the appellant is concerned, it is submitted that

neither he is tall nor of wheatish complexion. The learned Counsel has emphasized more on the mandate of Section 50 of the NDPS Act while conducting the personal search of the appellant. It is contended that the Trial Court has miserably failed to appreciate that the Investigating Officer had failed to follow the dicta of Section 50 of the NDPS Act in letter and spirit, inasmuch as neither there is evidence that the appellant was aware of his right to be searched before a Magistrate or a Gazetted Officer nor any attempt has been made to take him to such officer. It is also pointed out that actual search of the appellant was effected by PW5 PI Suraj Halarnkar and not by PW8 Vidhya Pagui and, therefore, on that aspect also there is a serious doubt about the genuineness of the prosecution case.

14. The learned Counsel has also drawn my attention to the search panchanama, which indicates that the conversation between PW8 Vidhya Pagui and the appellant was in English language, regardless of the fact as to whether the appellant understood English. Thus, it is submitted that the appellant has been incarcerated for a long period of more than 6 years and, therefore, it is a fit case to acquit him of the charges by quashing the impugned judgment and order of conviction.

15. The learned Public Prosecutor Shri S.R. Rivankar, fairly conceded that the judgment of this Court in case of ***Krishna S/o. Kavi Raj Malla V/s. State (Criminal Appeal No.15/2016)*** as well as the judgment of the Hon'ble Supreme Court in the case of ***Arif Khan @ Agha Khan V/s. State of Uttarakhand*** reported in ***CDJ 2018 SC 464***, is squarely applicable to the case in hand. He urged to pass the necessary orders.

16. The Hon'ble Supreme Court in case of ***Arif Khan*** (supra) while discussing the scope of Section 50 of the NDPS Act in para 20 to 24, 26 and 27 observed as follows:

“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**).*

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.”*

17. In view of the ratio laid down by the Hon'ble Supreme Court that even if the suspect may or may not choose to exercise the right of search provided to him under Section 50 of the NDPS Act, but it was obligatory upon the Officer concerned under Section 50 of the NDPS Act to appraise the suspect of his right to be searched before a Gazetted Officer or a Magistrate.

18. This Court in the case of **Krishna Malla** (supra), has observed at para 18 as follows:

*“18. The Hon'ble Supreme Court has also considered the ratio laid down by it in the case of **Ashok Kumar Sharma Vs State of Rajasthan, 2013(2) SCC 67**. In the case before the Hon'ble Supreme Court, the appellant was apprised of his right to be searched in the presence of either a Magistrate or Gazetted Officer but despite telling him about legal right available to him under Section 50 in relation to search, the appellant gave his consent in writing to be searched by the police officials and therefore, the trial Court and the High Court concluded that there was due compliance of Section 50. The Supreme Court, however, held that it was not agreed with the findings of two Courts below, as according to the Supreme Court, the alleged recovery made from the appellant does not satisfy the mandatory requirements of Section 50 as held by the Supreme Court in case of **Vijajsinh Chandubha Jadeja Vs State of Gujarat, reported in 2011(1) SCC 609**.”*

19. The impugned judgment and order of conviction by the Special Court, therefore, would not stand and needs to be quashed and set aside.

20. Apart from that, it is pertinent to note that the charge itself is defective, in the sense, it nowhere reveals that the contents of the charge were explained to the appellant in the language understood by him and after following the same he pleaded not guilty. The words in

the charge read thus:

“And I hereby direct that you be tried by this Court on the said charge on this 4th day of month of September of the year, 2014”.

This is significant in the light of the fact that the appellant does not know English language. It is more surprising to note that the learned Special Judge in an order dated 04/09/2014 at page no.24 of the paper book had stated that the learned Advocate appearing for the appellant did not argue the matter on charge and left it to the Court, which also can be said to be against the right of the accused to be heard at the time of framing the charge. It is apparent that the charge was framed sans giving a proper hearing to the appellant.

21. PW4 Police Constable Mayur Gawade, PW6 Mahendra Colvalkar, who is the pancha witness of seizure and search, as well as PW8 Vidhya Pagui, the informant and complainant, have spoken in tune. Their evidence is literally the same as regards the raid, search and seizure of the appellant as well as drawing of panchanama. If the evidence of the aforesaid witnesses is juxtaposed, one thing is quite clear that none had testified that the appellant understood English conversation between PW5 PI Suraj Halarnkar and PW8 PSI Vishya

Pagui vis-a-vis the appellant. If the defence of the appellant is accepted in view of the weather report, that on 17/07/2013, there were rains, then how could the contraband articles be seized as the raid was conducted in an open place near the football ground at small Vagator around midnight? It is neither the case of the prosecution that any one of the members of the raiding party was well versed with Japanese language nor it is their case that the appellant understood Konkani. The Investigating Officer had neither seized the clothes of the appellant on his person from where the contraband articles were alleged to have found nor his passport came to be seized for the reasons best known to him. Had the appellant understood the conversation, perhaps, he would have agreed to be searched before the Magistrate or a Gazetted Officer. The learned Special Judge of the NDPS Court, in the impugned judgment, has miserably failed to appreciate the aforesaid aspects and instead, convicted and sentenced the appellant, which can be said to be an ipsedixitism on his part.

22. For the reasons aforesaid and as a corollary of the discussion herein above, the impugned judgment, therefore, needs to be quashed and set aside. Consequently, I pass the following order :

ORDER

- (i) The appeal is allowed.
- (ii) The impugned judgment and order of conviction and sentence dated 25/01/2016 passed by the Special Judge NDPS Court in Special Criminal Case No.12/2014 is quashed and set aside.
- (iii) The appellant is acquitted of the offence punishable under Section 8(c), read with Section 22(C) & 20(b)(ii) (B) of the NDPS Act.
- (iv) Fine amount, if paid, be refunded to the appellant.
- (v) The appellant be set at liberty forthwith, if his detention is not required in any other case.
- (vi) Order as regards disposal of muddemal property is maintained.
- (vii) The appeal stands disposed of in the aforesaid terms.
- (viii) All concerned to act on the authenticated copy of the order.

PRITHVIRAJ K. CHAVAN, J.

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