

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL APPEAL NO.44 OF 2017**

James Sunday Chinonso,
S/o. Sunday Chinonso,
age 28 years,
Nigerian National,
Presently lodged in
Colvale Modern Jail,
Colvale, Bardez-Goa.

.... Appellant

V/s

1. STATE
(As represented by the
Officer In Charge,
Anti-Narcotic Cell,
Panjim-Goa.)

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

.... Respondents

Shri Kamlakant Poulekar, 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 Criminal Procedure Code, the appellant has impugned the judgment and order of conviction dated 10/03/2017 by the Sessions Judge, Panaji in

Special Criminal Case No.1/2016 for an offence under Section 22(C) of the NDPS Act for having found in possession of 30 square pieces of LSD papers weighing 0.53 gms. He is sentenced to undergo rigorous imprisonment for 10 years and a fine of ₹1,00,000/- and in default, simple imprisonment for one year.

2. Briefly stated the facts are as follows:

On 09/07/2015 at 23.15 hours, reliable information was received by PW6 PI Suraj Halarnkar that a male person in the age group of 25 to 30 years, having negro features, tall height, strong built wearing green coloured T-shirt and blue coloured jeans will be coming at the bus stop near St. Michael Church, Kumarwado, Anjuna between 02.00 hours to 02.15 hours to deliver narcotic drug to his prospective customer on 10/07/2015.

3. Accordingly, PW6 PI Suraj Halarnkar arranged for two panchas and formed a raiding team comprising of PW3 PC Sandesh Volvoikar, PW5 PC Sushant Mahale, panch witness PW4 Siddhesh Volvoikar and another. They took drug detection kit and proceeded to the spot. The appellant was intercepted as per the information in the presence

of pancha witnesses. His search was conducted. PW6 PI Suraj Halarnkar informed him about his right to be searched in presence of a Magistrate or a Gazetted Officer in case he so desires to which the appellant declined. The appellant had also declined the offer to search the members of the raiding party.

4. During search, in the presence of panch witnesses, PW6 PI Suraj Halarnkar had found that the appellant had worn jeans pant having five pockets. There were two air tight polythene packets containing small square shape 30 paper pieces having multi colour. When the paper pieces were tested with the help of the kit and other material, it was informed to the panchas and raiding party that the papers contained LSD (Lysergic Acid Diethylamide), being a narcotic drug, as suspected. When the 30 pieces were weighed on weighing machine, it was found to be 0.53 gms without polythene.

5. In another pocket of the appellant, the Investigating Officer found two multi coloured paper sheets containing 75 square pieces in one sheet. Similar test was conducted for suspected LSD. The weight of both sheets was found to be 1.63 gms without polythene. Apart

from that, the Investigating Officer found one Samsung mobile having blue coloured penal. The sim card including IMEI number came to be recorded in the panchanama. All the articles were duly seized. The Aactiva scooter with a registration no.GA-03-Q-7474 was also searched, however, nothing incriminating was found.

6. The seized muddemal was sent for the report of chemical analysis. After investigation a charge sheet was filed in the Court of Special Judge, Panaji.

7. The learned Special Judge framed a charge against the appellant on 08/07/2016 under Section 22(C) of the NDPS Act. The appellant pleaded not guilty and claimed to be tried.

8. In order to substantiate the case prosecution has examined as many as six witnesses.

9. The defence of the appellant is that of denial of the commission of offence alleged. When a final question was asked as to whether the appellant wanted to say anything in his defence he answered as under:

“On 09/07/2015 I was riding the scooter towards Anjuna Petrol Pump. Two persons on scooter, stopped me saying 'hey'. I turned and he sprayed something in my eye. I fell down. As I was about to stand up, move four police include the two on the bike put me in the car (Swift). This is about 5.30 to 6.00 p.m. I tried to ask what I did wrong Suraj Halarnkar sitted in front of the Swift and introduced himself. He asked me to give him a name of any drug dealer. I said I do not know any as I first came to Goa for holiday. He drive to the ANC Office at 8.30 p.m., Suraj came back to the office and ask me to give him money 3 lacs immediately or he put me in prison. I told him that I don't have such money as I was only here for holiday & I don't know anybody. I asked him to take me to my apartment for raid but he drive by my house without going inside this about 8.30 p.m. on 9/7/2015. They take me to Police Station, that is how I am in jail. There was no Panchanama, thee were two Panchas. I never saw LSD or even heard about it. They brought me to jail after holiday. I was supposed to go to my school. My documents supposed to be in my apartment. I lost everything because of the crime, I do not know.”

10. The learned Special Judge found the evidence of the prosecution witnesses believable and hence convicted and sentenced the

appellant as above.

11. Aggrieved, the appellant has approached this Court by way of an instant appeal.

12. At the outset, Shri Poulekar drew my attention to the charge which indicates that 0.53 gms of LSD was found however, there is a defect in the charge as the learned Special Judge has not mentioned whether it is 0.53 gms or it is measured in some other form. No doubt if it is 0.53 gms it is to be treated as a commercial quantity. Shri Poulekar has drawn my attention to the testimony of PW1 Satish Nailkar, Junior Scientific Officer (Chemistry) in Central Forensic Science Laboratory, Hyderabad, who had opined that the weight mentioned of Exhibit I on the envelope is 0.53 gms, whereas on weighing the said substance in the laboratory it was found to be 0.4955 gms. Similarly, the weight mentioned of Exhibit (II) on the envelope is 1.63 gms, whereas on weighing the said substance in the laboratory it was found to be 1.6009 gms. PW1 Satish justified the difference of weight due to sensitive and sophisticated weighing machines used in the laboratory as compared to the weighing

machines used by the Investigating Officer at the time of conducting raid. Shri Poulekar has, therefore, rightly submitted that there is a substantial change in the weight of LSD and, therefore, it cannot be said to be a conclusive proof of exact weight of LSD. He also contends that the Investigating Officer and the complainant is the same person and, therefore, it will come within the purview of the judgment of *Mohan Lal V/s. State Of Punjab* reported in *AIR 2018 SC 3853*.

13. Shri Poulekar further contends that there is non-compliance of Section 50 of the NDPS Act in view of the judgment of *Arif Khan @ Agha Khan V/s. State of Uttarakhand* reported in *CDJ 2018 SC 464*. He further submits that there is non-compliance of Section 52(A) of the NDPS Act in the sense that no samples were taken in the presence of the Magistrate. The learned Counsel has, therefore, prayed for quashing the impugned judgment and order of conviction passed by the learned Special Judge, being perverse, illegal and in ignorance of the mandatory provisions of the NDPS Act.

14. Shri Rivankar fairly concedes that in view of the judgment of

the Supreme Court in the case of *Arif Khan* (supra) as well as the judgment of this Court in case of *Krishna S/o. Kavi Raj Malla V/s. State (Criminal Appeal No.15/2016)* the prosecution has no case.

15. 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.”*

16. 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.

17. This Court in the case of **Krishna Malla** (supra), has observed 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**."*

18. As already stated above, the charge Exhibit 5-C itself is defective in the sense it does not disclose the weight of contraband nor it indicates whether the charge was read over and explained to the appellant and then he understood the same. Be that as it may.

19. PW6 PI Suraj Halarnkar is the Investigating Officer and informant both, who lodged the complaint on behalf of Anti-Narcotic Cell. He testified as stated in the complaint as regards receipt of information and the raid which was conducted on 10/07/2015 around midnight. The sum and substance of his evidence is that the person intercepted (appellant) had negro features with strong built and tall

height. PW6 PI Suraj Halarnkar introduced himself as a PI of Anti-Narcotic Cell and the other members of the raiding party. The appellant, on being asked, said that his name is James Sunday Chinonso, a Nigerian National.

20. Indeed, there is no compliance of Section 50 of the NDPS Act inasmuch as it reveals from the evidence of this witness that he simply informed the appellant that the appellant had a right to be searched in the presence of a Gazetted Officer or a Magistrate, if he desires, however, the appellant declined. The appellant also declined to search the members of the raiding party including the panchas when an offer was made. The Investigating Officer had, thereafter, followed the usual procedure of seizure of the contraband articles i.e. the perforated sheets of papers. His testimony obviously is corroborated by PW3 PC Sandesh, PW4 Siddhesh and PW5 Sushant. Their testimonies are almost similar.

21. It is pertinent to note that though PW1 Satish Nailkar found the contraband substance to be LSD, a doubt is created that if substance containing LSD is exposed to sunlight, moisture and heat even if it is

kept in the in the envelope/polythene, it degrades. He opined that it is quite possible that when the substance is found with the accused and tested with the testing kit, it may give positive result for presence of LSD but due to exposure as disclosed above, there is a possibility of having negative result in the substance, while conducting test in the laboratory after lapse of period, as it was found by him in the present matter.

22. The learned Special Judge has, therefore, committed a grave error in stating that it is not the case of PW1 Satish that Exhibit II was exposed to sunlight, moisture or heat in the laboratory. How can it be the case of PW1 Satish, who is an expert to whom the contraband articles were forwarded for analysis? What has been opined by PW1 Satish is that a due care should be taken by the Investigating Agency to ensure proper sealing and avoidance of exposure to the sunlight, moisture or heat before forwarding samples to the laboratory. The learned Judge went on to observe that the opinion of PW1 Satish is not a conclusive proof of exact weight of LSD or even about the authenticity of the psychotropic substance. The learned Judge has failed to appreciate the evidence of PW1 Satish that the result of

Exhibit II was negative which was forwarded immediately along with Exhibit I and was delivered to the laboratory on 13/07/2015. The learned Special Judge, it seems, expected of the CFSL that they should ensure safe custody of the contrabands forwarded to it by the Investigating Agency, dehors any material on record that the contrabands in the instant case were not placed in safe custody by the laboratory. Such observations without any material on record need to be discarded.

23. The learned Special Judge has also failed to note that it is not the report of the chemical analyser that he had tested 30 square papers of the alleged LSD individually and separately in order to come to a conclusion that each and every piece out of 30 square pieces (Exhibit I) contained LSD. Even there is disparity in so far as the weight of the contraband is concerned as already stated herein above.

24. The learned Special Judge has not followed the ratio laid down by the Supreme Court in case of *Ariff Khan* (supra). It is observed by the learned Special Judge in para 17 which reads thus:

“17. PW6 PI Suraj then deposed that he told the accused about the specific and reliable information received by

him that the accused will be coming at the said place to deliver narcotic drugs and for that purpose he wanted to conduct search of the accused for the suspected drugs. He then deposed that before commencing the search of the person of the accused, he told the accused about his right to be searched in presence of a gazetted officer or a magistrate if he so desires; however, he declined the said offer. PW6 PI Suraj then offered the search of the raiding party and the pancha witnesses to the accused which was again declined by him. Both theses offers given by the raiding officer to the accused have been confirmed by PW3 PC Sandesh and PW4 Siddhesh the pancha witness. There is absolutely no deviation from the above disclosure and both these witnesses have categorically stated that before conducting personal search of the accused he was told about his right to be searched in presence of a gazetted officer or a magistrate and the accused declined the said offer. This fact is also found recorded in the panchanama at Exhibit 31 and thus there is substantial compliance of Section 50 of NDPS Act. No material has been brought on record to rebut this aspect or even to create any doubt about the procedure which has been deposed by the raiding officer and supported by independent pancha witness. Thus the contemporaneous material brought on record clearly proves that there is full compliance of the mandatory provision of NDPS Act on the part of the raiding officer before conducting personal

search of the accused.”

25. Such findings are perverse inasmuch as the learned Special Judge has blindly accepted the version of the prosecution witnesses ignoring the scope and spirit of Section 50 as enunciated by the Supreme Court in *Ariff Khan* (supra). On that count itself the impugned judgment needs to be quashed and set aside.

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

O R D E R

- (i) The appeal is allowed.
- (ii) The impugned judgment and order of conviction and sentence dated 10/03/2017 passed by the Special Judge NDPS Court in Special Criminal Case No.1/2016 is quashed and set aside.
- (iii) The appellant is acquitted of the offence punishable under Section 22(C) 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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