

IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL APPEAL NO.15 OF 2016.

Krishna S/o Kavi Raj Malla,
Major of age, r/o C/o Sadashiv
Dabolkar, New Waddo
Morjim, Pernem Goa, and
n/o Central Market Baranani,
Zilla Dihani, Baranani, Nepal.
Presently lodge at Central Jail,
Colvale Goa.

.... Appellant.

Vs.

STATE
Anti Narcotic Police Station
Panaji, Goa.

.... Respondent.

Coram:- PRITHVIRAJ K. CHAVAN,J.

Reserved on:-4 June 2019.

Pronounced on:-10th June 2019.

Shri L. Raghunandan, Advocate for the appellant.

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

JUDGMENT:-

By this appeal under Section 374 of Code of Criminal Procedure, 1973, the appellant impugnes the judgment and order dated 10.11.2014 by which he has been convicted by the Special Judge of Narcotic Drugs & Psychotropic Substances Court, Mapusa for the offence punishable under Section 20(b)(ii)(C) of Narcotics &

Psychotropic Substances Act, 1985 (for short "NDPS Act") for being found in illegal possession of commercial quantity of "Charas" weighing 2.225 kgs. He came to be convicted and sentenced to undergo rigorous imprisonment for ten years alongwith fine of Rs.1,00,000/- and in default to undergo rigorous imprisonment for six months.

2. The facts, in brief, can be summarised as follows:-

The Anti Narcotic Cell Panaji Goa, received a reliable information that a person in the age group of 20 to 25 years, having Nepali features, would be coming near Milagres Church, Madlo waddo, Morjim, Pernem Goa to deliver Narcotic drug to his prospective customer on 29.11.2011 between 18.40 hrs to 19.30 hrs. PW7 Lady Police Sub-Inspector Mira D'Silva of Anti Narcoti Police Station (for short "ANC") reduced the information into writing, sent its copy to the Deputy Superintendent of Police, ANC and arranged for a raid. When the raiding party alongwith all raiding equipments reached near Milagres Church, Madlo Waddo, Morjim, Pernem Goa, they noticed appellant waiting near the said church for his prospective customer. The raiding team of PW7 Mira D'Silva, apprehended the appellant on the spot. On being asked he told his name as Krishna Kavi Raj Malla (Appellant). He was told that he had a right to be searched in presence of Gazetted Officer or Magistrate.

However, appellant declined the offer. He also declined to search the members of the raiding party including the panchas when such offer was made.

3. PI Tushar Lotlikar, conducted the personal search of the appellant and found alleged contraband on his person which was after a test by PW7 Mira D'Silva found positive for "Charas", a narcotic drug. After drawing the usual panchanama, completing the procedure and after arresting the appellant/accused, PW7 Mira D'Silva lodged the complaint on 30.11.2011 with ANC Panaji Goa. After recording the statements of the witnesses and sending the muddemal for chemical analysis, a chargesheet came to be filed against the appellant before the Special Court of NDPS under Sections 20(b)(ii)(C) of the NDPS Act.

4. A charge came to be framed by Special Judge in the said case on 19.7.2012. The appellant pleaded not guilty and claimed to be tried. The prosecution at the trial examined seven witnesses.

5. The learned Special Judge by the impugned judgment and order dated 10.11.2014 found the appellant guilty of the offence punishable under Section 20(b)(ii)(C) of the NDPS Act as he was found in illegal possession of commercial quantity of "Charas"

weighing 2.225 kgs and sentenced him as above.

6. Aggrieved, the appellant preferred instant appeal. At the outset the learned Counsel appearing for the appellant drew my attention to the various grounds raised in the memo of appeal, however his main thrust was on the point that there was non compliance of Section 50 of the NDPS Act while conducting personal search of the appellant. The learned Counsel has also stressed that the trial Court has failed to appreciate the statutory language enshrined in Section 50 of NDPS Act which provision explicitly made it obligatory on the authorised officer to inform the accused about his right under Section 50 of the NDPS Act. A mere offer or option given by the officer to the appellant does not amount to compliance of Section 50 of NDPS Act. The learned Counsel further argued that the record in the sense of testimonies of pancha witnesses or investigating officer does not indicate as to what exact words in Hindi were used by the members of the raiding party with the appellant in order to convey his statutory right to get himself personally searched in the presence of Gazetted Officer or a Magistrate. Merely saying that there was a conversation in Hindi would not be sufficient in order to comply with the mandatory legal provisions. My attention is also drawn to the fact that the Police Inspector Shri Tushar Lotlikar, who alleged to have conducted the personal search of the appellant

was not examined by the prosecution thereby raising serious doubt of recovery of the alleged contraband substance from the possession of the appellant.

7. The learned Counsel for the appellant has placed reliance upon the judgment of the Supreme Court in the case of **Arif Khan @ Agha Khan Vs State of Uttarakhand, 2018 AIR (SC) 2123**.

8. On the other hand, learned Public Prosecutor Shri Rivankar though submits that there was a due compliance of Section 50 of the NDPS Act so as to say that an option was given to the appellant if he wanted to be searched in the presence of Gazette Officer. However, the appellant had declined the said offer. The learned Public Prosecutor drew my attention to "if said person so required" in the definition of Section 50 of the NDPS Act. However, he fairly concedes that in view of the ratio laid down by the Supreme Court in the case of **Arif Khan (Supra)**, the impugned judgment and order of conviction and sentence would not sustain.

9. The testimony of PW3 Stalin Fernandes who was summoned to act as a pancha witness by PW7 Mira D'Silva testified on oath that he had accompanied the raiding party on 29.11.2011 for conducting a narcotic raid. He gave a vivid account as to how the

raiding party alongwith other members including PI Shri Tushar Lotlikar and other panchas caught the appellant raid handed with "Charas" near Milagres Church, Madlo Waddo, Morjim Pernem.

10. His evidence specifically indicates about the communication between PW7 Mira D'Silva and the appellant wherein she had informed the appellant about his right to be searched in the presence of Gazetted Officer or Magistrate, which the appellant declined. His evidence reveals that as per the request of PW7 Mira D' Silva, PI Shri Tushar Lotlikar had conducted personal search of the appellant pursuant to which he found a blackish colour sticky substance, square in shape in a transparent auto press polythene packet. When it was tested by PW7 Mira D'Silva, with the help of kit, it was found to be positive being "Charas". The appellant could not justify its possession with him which weighed 2.225 kgs.

11. Apart from that, during the search a Pan Card in the name of the appellant, a social security card, a Nokia mobile hand set and cash of Rs.200/- were found on his person.

12. It is the evidence of PW3 Stalin Fernandes that it was PI Shri Tushar Lotlikar who had a conversation with the appellant in Hindi language which the appellant understood. PW4 Prakash

Polekar has also corroborated the testimony of PW3 Stalin Fernandes that conversation was between the appellant and the PI Shri Tushar Lotlikar and not between the appellant and PSI Mira D'Silva.

13. In contrast PW7 Mira D'Silva in her complaint with the ANC specifically stated that she had a conversation in Hindi with the appellant which he understood. The search panchanama at Exh. 25 colly reveals the conversation between PW7 Mira D'Silva and the appellant in Hind language. This is a serious inconsistency in the evidence of prosecution witnesses as to who, in fact, had conversation with the appellant which would go to the root of the prosecution case.

14. If the testimonies of PW3 Stalin Fernandes and PW4 Prakash Polekar are to be believed then it was PI Shri Tushar Lotlikar who had conversation with the appellant. However, he had not been examined and therefore, it is difficult to believe the prosecution story that there was a mandatory compliance of Section 50 in informing the appellant about his right to be searched in the presence of Gazetted Officer or Magistrate.

15. On the other hand, if the evidence of PW7 Mira D'Silva is to be believed, then even otherwise there is no clear and convincing evidence as to what was the communication in Hind language which

the appellant had followed, who is stated to be a Nepali citizen.

16. In the case of **Arif Khan**(supra), the Hon'ble Supreme Court while discussing the scope of Section 50 of the NDPS has observed at paragraphs 20 to 24, 26 and 27 as under:-

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 vs. Baldev Singh](#) (1999) 6 SCC 172 and Vijaysinh Chandubha Jadeja (supra).*
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 vs. State of Rajasthan](#), 2013 (2) SCC 67 and [Narcotics Control Bureau vs. 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 apprise the suspect of his right to be searched before a Gazetted Officer or a Magistrate.

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. On this count also conviction and sentence of the appellant

by the Special Court would not stand and needs to be quashed and set aside.

20. The corollary of the aforesaid discussions is that the appeal needs to be allowed by setting aside the impugned judgment and order of conviction passed by the Special Court in Special Criminal Case No. 6/2012. I, therefore, pass the following:-

ORDER

- i. Appeal is allowed.
- ii. The judgment and order of conviction passed by the Special Judge on 10.11.2014 in Special Criminal Case No.6/2012 is quashed and set aside.
- iii. Appellant is acquitted of the offence punishable under Section 20(b)(ii)(C) of the NDPS Act 1985.
- iv. Fine amount, if paid be refunded to the appellant.
- v. Appellant be set at liberty if his detention is not required in any other case.
- vi. Order as regards disposal of the muddemal property is maintained.
- vii. Appeal stands disposed of accordingly.

PRITHVIRAJ K. CHAVAN, J.

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