

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.168 of 2016

Judgment Reserved on : 4.2.2020

Judgment Delivered on : 8.6.2020

Raja Sonkar, son of Raju Sonkar, aged about 19 years, resident of Shivpara, Bajrang Chowk, near Gaurachaura, Police Station Durg, District Durg, Chhattisgarh

---- Appellant

versus

State of Chhattisgarh through Station House Officer, Police Station Durg, District Durg, Chhattisgarh

--- Respondent

For Appellant	:	Shri B.P. Singh, Advocate
For Respondent	:	Shri Anand Verma, Dy. Govt. Advocate

Hon'ble Shri Justice Arvind Singh Chandel

C.A.V. JUDGMENT

1. The instant appeal has been preferred against the judgment dated 23.9.2015 passed by the Special Judge under the Narcotic Drugs and Psychotropic Substances Act, 1985 (henceforth 'the Act'), Durg in N.D.P.S. Case No.7 of 2015, whereby the Appellant has been convicted and sentenced as under:

<u>Conviction</u>	<u>Sentence</u>
Under Section 21(b) of the Act	Rigorous Imprisonment for 8 years and fine of Rs.25,000/- with default stipulation

2. Prosecution case, in brief, is that on 1.4.2015 at 14:45 hours, Manish Shende (PW9), Sub-Inspector, posted in Police Station

Durg received a telephonic information from an informant that in front of Vardhman Bhawan situated in Shivpara one person, namely, Raja Sonkar (the Appellant) had in his possession brown sugar in different pouches and was trying to sell them. Sub-Inspector Manish Shende (PW9) recorded this information in Rojnamcha Sanha (Ex.P28) and in compliance of the provision contained in Section 42(2) of the Act, forwarded the said information to higher officer City Superintendent of Police, Durg vide Ex.P20. Meanwhile, he called witnesses and in their presence he prepared Mukhbir Suchna Panchnama (Ex.P4). Thereafter, he proceeded towards the spot along with other staff and the witnesses. On the spot, he surrounded the Appellant and caught him. For personal search of the Appellant, he gave him notice (Ex.P5) under Section 50 of the Act. Over Ex.P5 itself, the Appellant consented to be searched by Sub-Inspector Manish Shende (PW9) himself. On being searched, it was found that the Appellant had kept total 88 pouches of brown sugar in the pocket of his pant and he had also kept one work paper of golden colour. Sub-Inspector Manish Shende (PW9) prepared search panchnama (Ex.P8). He also prepared a panchnama (Ex.P9) against the recovery of 88 pouches of brown sugar. Identification of the recovered substance was done and a panchnama thereof (Ex.P10) was prepared. The recovered brown sugar was mixed and a panchnama thereof (Ex.P12) was prepared. Weight of the recovered brown sugar was done and weight panchnama (Ex.P13) was prepared. On being weighed, total quantity of the recovered brown sugar was found to be 11.520 Gms. The whole quantity of the recovered brown sugar was kept in an envelope and the empty 88 pouches were kept in other envelope and both the envelopes

were sealed and a seal of P.S. Durg C.G. was affixed over both the envelopes. Both the envelopes were seized vide seizure memo (Ex.P14). Specimen seal panchnama (Ex.P15) was prepared. The Appellant was arrested on the spot itself vide Ex.P17. Dehati Nalishi (Ex.P36) was recorded. After return to the police station, First Information Report (Ex.P37) was registered. Sub-Inspector Manish Shende (PW9) handed over both the seized envelopes to Malkhana-in-Charge Shankar Prajapati (PW5), who received their deposit in the Malkhana and made an entry thereof in the Malkhana register (Ex.P21). Both the seized envelopes were delivered in the Forensic Science Laboratory (FSL) by Constable Musafir Singh Yadav (PW7) on 4.4.2015 and he obtained acknowledgment thereof (Ex.P23) from the FSL. FSL report is Ex.P40, which is positive. Statements of witnesses were recorded under Section 161 of the Code of Criminal Procedure. On completion of the investigation, a charge-sheet was filed against the Appellant. Charge was framed against him.

3. In support of its case, the prosecution examined as many as 9 witnesses. In examination under Section 313 of the Code of Criminal Procedure, the Appellant denied the guilt and pleaded innocence. No witness has been examined in defence.
4. On completion of the trial, vide the impugned judgment, the Trial Court convicted and sentenced the Appellant as mentioned in first paragraph of this judgment. Hence, this appeal.
5. Learned Counsel appearing for the Appellant submitted that without there being any clinching and reliable evidence on record

against the Appellant, the Trial Court has wrongly convicted him. Relying upon the judgment of the Supreme Court in **Arif Khan alias Agha Khan v. State of Uttarakhand**, AIR 2018 SC 2123, it was further submitted that in the case in hand provision of Section 50 of the Act has not been duly complied with. In the case in hand, Investigating Officer Sub-Inspector Manish Shende (PW9) has admitted that he was not a gazetted officer at the relevant time and bodily search of the Appellant was made by him. Since the search was not made by a Magistrate or a gazetted officer, the provision of Section 50 of the Act has not been duly complied with. It was further submitted that the provision of Section 55 of the Act has also not been complied with and this fact has been admitted by the Trial Court also. Despite that, the Trial Court has wrongly convicted the Appellant. It was further submitted that the independent witnesses have not supported the case of the prosecution and the case of the prosecution is totally based upon the statements of police witnesses. There are material contradictions in the statements of Malkhana-in-Charge Shankar Prajapati (PW5) and Musafir Singh Yadav (PW7). According to the statement of Shankar Prajapati (PW5), both the sealed envelopes were handed over to Musafir Singh Yadav (PW7) on 3.4.2015 for delivery in the FSL, but Musafir Singh Yadav (PW7) did not deliver the envelopes in the FSL on 3.4.2015 and returned the same to him on 3.4.2015 itself. According to Shankar Prajapati (PW5), he kept the envelopes in the Malkhana and again handed over those envelopes to Musafir Singh Yadav (PW7) on 4.4.2015 for their delivery in the FSL and Musafir Singh Yadav (PW7) delivered the envelopes in the FSL on 4.4.2015. Contrary to this, Musafir Singh Yadav (PW7) has deposed that he received the envelopes on

3.4.2015 and delivered them in the FSL on 4.4.2015. Musafir Singh Yadav (PW7) has categorically denied the fact that he had returned the envelopes and deposited them back in the Malkhana on 3.4.2015. Referring to the duty certificate (Ex.P24) of Musafir Singh Yadav (PW7), it was further submitted that according to the entries of Ex.P24, Musafir Singh Yadav (PW7) went to Raipur on 3.4.2015 and stayed there in the night and delivered the envelopes in the FSL on 4.4.2015. It was further submitted that according to the case of the prosecution itself, two envelopes were prepared and over both the envelopes a seal of P.S. Durg C.G. was affixed and over those envelopes signature of Sub-Inspector Manish Shende (PW9) only was put. The said envelopes did not contain signature of any of the witnesses nor of the Appellant. After obtaining of both the envelopes by Musafir Singh Yadav (PW7) from the Malkhana, they remained in possession of Musafir Singh Yadav (PW7) on 3.4.2015 and 4.4.2015. Since both the envelopes contained seal of P.S. Durg C.G. and signature of Sub-Inspector Manish Shende (PW9) only, possibility of change of the envelopes cannot be ruled out. Therefore, the conviction of the Appellant is not in accordance with law and the evidence available on record. Hence, it was prayed that conviction of the Appellant be set aside.

6. Learned Counsel appearing for the State opposed the above submission and supported the impugned judgment of conviction and sentence.
7. I have heard Learned Counsel appearing for the parties and perused the record minutely.

8. Prior to examination of the provision contained in Section 50 of the Act, it would be appropriate to reproduce the same, which reads thus:

“50. Conditions under which search of persons shall be conducted.—(1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorised under Section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.”

9. While dealing with the issue in **Arif Khan case** (supra), the Supreme Court observed as follows:

“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. Baldev Singh* (1999) 6 SCC 172 : (AIR 1999 SC 2378) and *Vijaysinh Chandubha Jadeja* (AIR 2011 SC 77) (supra).

22. Indeed, the latter Constitution Bench decision rendered in the case of *Vijaysinh Chandubha Jadeja* (AIR 2011 SC 77) (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* (AIR 2011 SC 77) (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 authorised 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. State of Rajasthan*, 2013 (2) SCC 67 and *Narcotics Control Bureau v. Sukh Dev Raj Sodhi*, 2011 (6) SCC 392 : (AIR 2011 SC 1939).”

It was further observed by the Supreme Court as under:

“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* (AIR 2011 SC 77) (supra). This we say for the following reasons.

28. First, it is an admitted fact emerging from the record of the case that the appellant was not produced before any Magistrate or Gazetted Officer; Second, it is also an admitted fact that due to the aforementioned first reason, the search and recovery of the contraband “Charas” was not made from the appellant in the presence of any Magistrate or Gazetted Officer; Third, it is also an admitted fact that none of the police officials of the raiding party, who recovered the contraband “Charas” from him, was the Gazetted Officer and nor they could be and, therefore, they were not empowered to make search and recovery from the appellant of the contraband “Charas” as provided under Section 50 of the NDPS Act except in the presence of either a Magistrate or a Gazetted Officer; Fourth, in order to make the search and recovery of the contraband articles from the body of the suspect, the search and recovery has to be in conformity with the requirements of Section 50 of the NDPS Act. It is, therefore, mandatory for the prosecution to prove that the search and recovery was made from the appellant in the presence of a Magistrate or a Gazetted Officer.”

10. I shall now examine the facts of the case in hand in the light of the provision contained in Section 50 of the Act and the observation of the Supreme Court in **Arif Khan case** (supra).
11. In the instant case, it is not in dispute that Manish Shende (PW9) was posted as a Sub-Inspector in Police Station Durg. He was not a gazetted officer. According to the prosecution story, contraband brown sugar was seized from the pocket of the pant of the Appellant. The notice under Section 50 of the Act which was given to the Appellant is Ex.P5 in which the Appellant has been informed that he could get his search done through a Magistrate or a

Gazetted Officer or through the Investigating Officer himself. The Appellant consented to be searched by the Investigating Officer himself. Thereafter, his search was done vide Ex.P8. Looking to the provision of Section 50 of the Act and the observation made by the Supreme Court in **Arif Khan case** (supra), in the instant case, the search of the Appellant could be done by a Magistrate or a Gazetted Officer only. But, the search was not conducted by a Magistrate or a Gazetted Officer and it was conducted by Investigating Officer Manish Shende (PW9), who, at that time, was a Sub-Inspector. As contained in sub-section (5) of Section 50 of the Act, if Investigating Officer Manish Shende (PW9), having empowered under Section 100 of the Code of Criminal Procedure, conducted search of the Appellant then according to sub-section (6) of Section 50 of the Act, he must have recorded the reason for doing so and within seventy-two hours of the search he must have sent a copy of the reason recorded by him to his immediate official superior. But, this has not been complied with by Investigating Officer Manish Shende (PW9). Thus, it is clear that in this case there is complete non-compliance of the provision contained in Section 50 of the Act.

12. With regard to the provision contained in Section 55 of the Act, there is no dispute that Investigating Officer Manish Shende (PW9) was a Sub-Inspector. He was not the Station House Officer of concerned Police Station Durg. He himself had prepared both the envelopes and affixed seal of P.S. Durg C.G. over those envelopes and according to the case of the prosecution both the envelopes were deposited in the Malkhana by Manish Shende (PW9) himself. Before depositing the envelopes in the Malkhana, no seal of the

Station House Officer of Police Station Durg was affixed over those envelopes. Thus, there is complete violation of the provision contained in Section 55 of the Act also and the Trial Court has also observed this.

13. I shall now consider the other argument advanced by Learned Counsel appearing for the Appellant. According to the Court statement of Malkhana-in-Charge Shankar Prajapati (PW5), on 3.4.2015, he had handed over the sealed envelopes to Musafir Singh Yadav (PW7) for their delivery in the FSL. But, Musafir Singh Yadav (PW7) could not deliver the same in the FSL on 3.4.2015 and, therefore, he returned and deposited those envelopes in the Malkhana on 3.4.2015 itself. On 4.4.2015 again, Shankar Prajapati (PW5) handed over those envelopes to Musafir Singh Yadav (PW7) and Musafir Singh Yadav (PW7) delivered the said envelopes in the FSL on 4.4.2015 itself. Contradicting the above statement of Shankar Prajapati (PW5), Musafir Singh Yadav (PW7) has deposed that he received the envelopes on 3.4.2015 and delivered the same in the FSL on 4.4.2015. He has denied that he had returned the envelopes to Malkhana-in-Charge Shankar Prajapati (PW5) on 3.4.2015 and had again obtained the same on 4.4.2015 for their delivery in the FSL. There is no entry in the Malkhana register to show that on 3.4.2015 the envelopes were returned and deposited back in the Malkhana and the same were again handed over on 4.4.2015 for delivery in the FSL. As stated by Musafir Singh Yadav (PW7) and as per the entries of his duty certificate (Ex.P24), on 3.4.2015, he obtained the envelopes from the Malkhana and went to Raipur, but he stayed there and on next day, i.e., 4.4.2015, he delivered the envelopes in the FSL. A

judicial notice of the fact can be taken that maximum distance between Durg and Raipur is about 40 Kms. Despite that, Musafir Singh Yadav (PW7) has not offered any explanation that even after the said distance being of 40 Kms. why did he not deliver the envelopes in the FSL on 3.4.2015 itself. Though the seal of P.S. Durg C.G. affixed over the seized envelopes was found intact while receiving the envelopes in the FSL, it is established from the evidence of the prosecution that over the envelopes only the signature of Investigating Officer Manish Shende (PW9) was put and the seal of P.S. Durg C.G. was affixed. According to the entries of Malkhana register, both the envelopes were handed over on 3.4.2015 for delivery in the FSL and they were delivered in the FSL on 4.4.2015. Since over both the envelopes no signature of any witness or the Appellant was put nor the seal of the Station House Officer was affixed, possibility of tampering of the envelopes between the period from 3.4.2015 to 4.4.2015 cannot be ruled out.

14. On a minute examination of the above stated evidence, it is clear that in the instant case, the prosecution has not complied with the provisions contained in Sections 50 and 55 of the Act. There are material contradictions in the statements of Shankar Prajapati (PW5) and Musafir Singh Yadav (PW7). As already discussed, it is observed that there could be tampering in the envelopes. Thus, conviction of the Appellant is not sustainable. Finding of the Trial Court is not in accordance with law and the evidence on record. The Appellant is entitled to get benefit of doubt.

15. Consequently, the appeal is allowed. The impugned judgment of conviction and sentence is set aside. The Appellant is acquitted of

the charge framed against him. He is reported to be in jail. If he is not required in any other case, he be set at liberty forthwith.

- 16.** Record of the Court below be sent back along with a copy of this judgment forthwith for information and necessary compliance.

Sd/-

(Arvind Singh Chandel)
Judge