

THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL APPEAL NO. 82/2018**

Mr. Raymond Locke,
s/o Mr. Mervyn Locke,
major, r/o Assagao,
Bardez, Goa.
(In Judicial custody at Central
Jail, Colvale, through his next
friend, Mr. Gerard Delaney,
major, r/o H. No. 8/5,
Abreuvaddo, Saligao,
Bardez, Goa)

... Appellant.

Versus

The State of Goa,
Through Police Inspector,
Anti Narcotic Cell Police Station,
Goa Police, Panaji, Goa.

... Respondent.

Mr. Ryan Menezes, Advocate for the Appellant.

Mr. S. R. Rivankar, Public Prosecutor / Senior Advocate with Mr.
Rama Rivankar, Advocate for the Respondent.

Coram : M.S. Sonak, J.

Reserved on : 3rd September, 2020.

Pronounced on: 4th September, 2020.

JUDGMENT :

Heard Mr. Ryan Menezes, learned Counsel for the appellant and Mr. S. R. Rivankar, learned Public Prosecutor for the State.

2. This appeal is directed against the judgment and order dated 30.06.2017 made by the Addl. Sessions Judge, Mapusa in Special Case No.32/2014 convicting the appellant under Section 8(c) read with Section 22(c) of the Narcotics Drugs and Psychotropic Substances Act, (NDPS Act) and sentencing him to rigorous imprisonment for 10 years and payment of fine of ₹ 1 lakh and in default of payment of fine, to undergo simple imprisonment for a period of one year.

3. The case of the prosecution is that on 15.03.2014 between 13.15 hours to 17.00 hours, at Pavilion Shed, Vagator Football Ground, Vagator, Bardez, Goa the appellant (accused) was found in illegal possession of 1.3 gms. of LSD papers being commercial quantity and thereby the accused has committed offence punishable under Section 22(c) of the NDPS Act.

4. Upon the accused denying his guilt, the prosecution examined eight witnesses in support of its case. Statement of the accused was thereafter recorded under Section 313 of Cr.P.C. The accused did not lead any defence evidence. By the impugned judgment and order dated 30.06.2017, the learned Addl. Sessions Judge has convicted and sentenced the accused as aforesaid. Hence the present appeal.

5. Mr. Ryan Menezes, the learned Counsel for the appellant submits that there is inconsistency in the deposition of the prosecution witnesses and the same ought not to have been relied upon by the learned Addl. Sessions Judge. He submitted that in this case, the complainant was also the investigating officer and therefore, applying the legal law of the Hon'ble Apex Court in *Mohan Lal Vs. State of Punjab*, {(2018) 17 SCC 627}, the entire investigation and consequently, the conviction is vitiated and is liable to be set aside.

6. Mr. Menezes, the learned Counsel submits that in this case, the Chemical Analyser is only a post graduate i.e. MSC qualification. From the testimony of this so called expert, it is apparent that this witness lacks any expertise in the matter. He

pointed out that there was no purity test undertaken by this expert and in terms of the law laid down in *E. Micheal Raj Vs. Narcotic Control Bureau*, {(2008) 5 SCC 161}, rate of purity of the drug is what is pride. For all these reasons, Mr. Menezes, the learned Counsel submits that the testimony of the so called expert witness was required to be discarded in its entirety.

7. Mr. Menezes, learned Counsel submits that this is a criminal case where there is total breach in mandatory provisions of Section 50 of the NDPS Act. He submits that there is a variance between the testimony of the pancha (PW6) and the testimony of the police officers i.e. PW7 and PW8. He submits that credence will have to be given to some extent to the testimony of PW6 with the testimony of PW7 and PW8. From the testimony of PW6 it is quite evident that the accused was never informed that he has a right to be searched by a gazetted officer or a Magistrate. Mr. Menezes, therefore submits that this is a clear case of breach of the mandatory provisions of Section 50 of the NDPS Act. Mr. Menezes submits that there is no evidence that the accused was informed that he was having a right to be searched because he was suspicious to be in possession of any narcotic drugs. He submits that the effective compliance of the mandate of Section 50 of the

NDPS Act requires that the accused person is clearly informed that he is being searched on suspicion that he is in possession of Narcotic drugs. Mr. Menezes submitted that this is yet another instance that is in breach of the mandatory provisions of Section 50 of the said Act.

8. Finally, Mr. Menezes, submits that in terms of the law laid down by the Hon'ble Supreme Court in the case of *Arif Khan alias Agha Khan Vs. State of Uttarakhand*, {(2018) 18 SCC 380}, there can be no waiver of the mandatory provisions in Section 50 of the NDPS Act. Therefore, even though the accused may have waived his right to be searched informed of gazetted officer or a Magistrate, the search of the accused person should have been carried out before a gazetted officer or a Magistrate. He submits that in this case, since admittedly no such search was carried out before a gazetted officer or a Magistrate, there is a clear breach of the provisions of Section 50 of the NDPS Act which are mandatory in nature.

9. Mr. Menezes submits that for the aforesaid reasons, the impugned judgment and order convicting the appellant is liable to be set aside and the appellant be set at liberty forthwith.

10. Mr. S.R.Rivankar, the learned Public Prosecutor counters the contentions of Mr. Menezes and defends the impugned judgment and order on the basis of the reasoning reflected therein. He submits that there is no breach whatsoever of the provisions of Section 50 of the NDPS Act and there is full compliance in terms of the decision of the Constitution Bench in *Vijaysinh Chandubha Jadeja Vs. State of Gujarat*, {(2011) 1 SCC 609}. He submits that Mr. Menezes is attempting to misconstrue the decision in *Arif Khan* (supra) as laying down some law contrary to the law laid down by the Constitution Bench in *Jadeja* (supra).

11. Mr. Rivankar, submits that in this case an expert has been examined on behalf of the prosecution and there is absolutely no good ground to discard the testimony of such expert.

12. Mr. Rivankar, submits that the law laid down in *Mohan Lal* (supra) no longer holds the field in view of the latest decision of the Hon'ble Supreme Court in *Mukesh Singh Vs State (Narcotic Branch of Delhi)*, SLP Cri C Diary 39528/2018 decided on 31.08.2020. He also submits that the decision in *E. Micheal Raj* (supra) no longer represents the correct position in law. By virtue

of the decision of the larger bench, in *Hira Singh and another Vs. Union of India and another*, {(2020) SCC online 382}

13. For all the aforesaid reasons Mr. Rivankar submits that this appeal is liable to be dismissed.

14. The rival contentions now fall for my determination.

15. In this case, the testimony of PW6, Pw7 and Pw8 clearly establishes that the LSD paper weighing about 1.3 gms. was found to be consciously in possession of the accused and was recovered from his person. The so called inconsistency pointed out by Mr. Menezes can hardly be styled as an inconsistency or contradiction. The learned Sessions Judge has quite carefully marshalled the evidence on record and there is really no reason to discard the testimony of the prosecution witnesses on the aspect of the raid and the finding of the narcotic drugs on the person of the accused on 15.03.2014. Accordingly, there is really no merit in the first contention of Mr. Menezes.

16. The second contention in this appeal relates to the qualification of the Chemical Analyzer i.e. the expert examined by

the prosecution. The record indicates that in the present case the prosecution has examined K.M. Varshney (PW1) as the Chemical Analyser/expert in order to establish that the substance recovered from the person of the accused was nothing but a LSD paper which is a narcotic drug, for the purpose of the NDPS Act.

17. From the testimony of Shri K. M. Varshney (PW1), it is evident that he was working as a Deputy Director Chemistry at CFSL Hyderabad since April, 2020. He has deposed that he has worked in various capacities in CFSL and has total experience of chemical analysis of about 31 years out of which 23 years experience was in Forensic Laboratories. He has deposed that he has examined about 1000 exhibits of various types including NDPS substances received at the laboratories. He has deposed that he is a post graduate in Chemistry with first division. He has testified that he has deposed in number of court cases and given evidence in various courts all over the country. He has also deposed that he is working as Coordinator-cum-Dy Director and Scientist D in the Central Forensic Science Laboratory in Pune since July, 2014. It is mainly no case made out by the accused to disbelieve the qualification of the expert or to discard the testimony of the expert.

18. Upon perusal of the testimony of PW1, it is evident that this witness was indeed an expert in the matter of chemical analysis and his testimony has withstood the cross examination.

19. Merely because in respect of certain matters he has candidly accepted that he does not know the answer or that he is not able to say anything, does not mean that this witness is not an expert when it come to analysis of the narcotic drugs or testing whether any substance is a narcotic drug or psychotropic substance. This witness has deposed to the technical details and there is no case to discard the testimony of this witness on the ground urged by Mr. Menezes or otherwise.

20. The contention, based upon *E Micheal Raj* (supra) can be of no avail to the accused in view of the law now laid down by a Larger Bench of the Hon'ble Supreme Court in the case of *Hira Singh* (supra). In fact, Coordinate Bench of the Supreme Court disagreed with the view in *E. Micheal Raj* (supra) and consequently a reference was made to the Larger Bench in *Hira Singh* (supra).

21. In *Hira Singh* (supra), the reference was answered in the following terms:

" 10. It was possible to examine the wider issue raised by the respondents upon accepting their argument that the decision in E. Micheal Raj is per incuriam. However, in our view, that decision has interpreted Section 21 of the Act. That interpretation would bind us. Moreover, that decision has been subsequently noted in other decisions of this Court in Harjit Singh V. State of Punjab, Kashmiri Lal V. State of Haryana, State V. Mushtaq Ahmad – followed or distinguished. In Amarsingh Ramjibhai Barot V. State of Gujarat quantity of entire mixgture was reckoned and no limited to the pure drug content therein. Significantly, in none of these decisions, was the Court called upon to examine the issues now raised by the respondents. Further all these decisions are of two judge Bench. "

22. From the aforesaid, it is quite clear that the decision in *E. Micheal Raj* (supra) as held by a Larger Bench of the Hon'ble Supreme Court has not laid down good law. Therefore, it is not possible to up hold Mr. Menezes's contention based upon *E. Micheal Raj* (supra). Rather the decision of the Larger Bench in *Hira Singh* (supra) will have to be followed. This is an additional reason for holding that there is no infirmity whatsoever in the testing process undertaken by the experts in the present case.

23. Similarly, the contention of Mr. Menezes, based upon *Mohan LaL* (Supra) also cannot be accepted for atleast two reasons. Firstly in *Varinder Kumar Vs. State of Himachal Pradesh*,

{(2020) 2 SCC 321} the Hon'ble Apex Court has itself held that the law laid down in *Mohan Lal* (supra) was only prospective and therefore inapplicable to prosecutions, trial and appeals instituted prior to the said decision i.e. 16.6.2018. To the prosecution in this case, the law laid down in *Mohan Lal* (supra) will therefore not apply. Second, recently the Larger Bench of the Hon'ble Supreme Court in the case of *Mukesh Singh* (supra) has not accepted the position of law expounded in *Mohan Lal* (supra). For these two reasons, the contention of Mr. Menezes based upon *Mohan Lal* (supra) will have to be rejected.

24. Finally it is necessary to consider the contention about breach of the provisions of Section 50 of the NDPS Act. The provisions of Section 50 of the NDPS Act, read 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.

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.]

25. In this case, PW6 the pancha witness has clearly deposed that the PSI from the raiding party clearly informed the accused that if he so wants, the search can be taken in the presence of a Magistrate or a gazetted officer. However, the accused declined the offer. Further, PW6 has deposed that PSI Gadekar also offered search of all the members of the raiding party to the accused, however, the accused declined this offer as well and it was only

thereafter the accused was searched. In the cross examination no dent has been made to the testimony of PW6 an independent pancha.

26. The panchanama of the raid is a part of the record and has been deposed to by PW6. The panchanama also contains a clear statement that "before commencing the personal search of the accused PSI Dinesh Gadekar informed the accused that he has a right to be searched in the presence of a gazetted officer or a Magistrate and if he desires his search will be conducted in the presence of a Gazetted Officer or Magistrate". The panchanama also records that "PSI Gadekar informed the accused that he has a right to search the members of the raiding party including the panchas offered them to search. However, the accused had again declined this offer".

27. PSI Dinesh Gadekar has himself deposed as PW8 in this matter. He has also deposed that before commencing the personal search of the accused he informed the accused that he has a right to be searched in the presence of a gazetted officer or a Magistrate and if desires, as he will conduct personal search. Pw8 also deposed that he offered himself and all the members of the raiding

party for search to the accused. PW8 further deposed that both these offers were declined by the accused. Again, no dent whatsoever has been made to the testimony of PW8.

28. PW7 Suraj Halarnkar, a Police Inspector attached to the Anti Narcotic Cell, has also deposed on lines similar to the deposition of PW6 and PW8. Again, there is no dent made to the testimony of PW7 in the course of the cross examination.

29. The import of Section 50 of the NDPS Act has been explained by the Constitution Bench in the case of *Jadeja* (supra).

The relevant decision is found in para 24 and 29:-

"24. Although the Constitution Bench in Baldev Singh case did not decide in absolute terms the question whether or not Section 50 of the NDPS Act was directory or mandatory yet it was held that provisions of sub-section (1) of Section 50 make it imperative for the empowered officer to "inform" the person concerned (suspect) about the existence of his right that if he so requires, he shall be searched before a gazetted officer or a Magistrate; failure to "inform" the suspect about the existence of his said right would cause prejudice to him, and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from the person during a search conducted in violation of the provisions of Section 50 of the NDPS Act. The Court also noted that it was not necessary that the information

required to be given under Section 50 should be in a prescribed form or in writing but it was mandatory that the suspect was made aware of the existence of his right to be searched before a gazetted officer or a Magistrate, if so required by him. We respectfully concur with these conclusions. Any other interpretation of the provision would make the valuable right conferred on the suspect illusory and a farce.

29. In view of the foregoing discussion, we are of the firm opinion that the object with which right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect, viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that in so far as the obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires a strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision."

30. From the aforesaid, it is quite clear that the provisions of Section 50 of the NDPS Act are mandatory. The mandate extends to informing the suspect about the existence of his right that if he so requires, he shall be searched before a gazetted officer or a Magistrate. Any failure to inform the suspect about the existence of

the said right would cause prejudice to him and incase if he so opts, failure to conduct his search before a gazetted officer or a Magistrate may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from the person during a search conducted in violation of the provisions of Section 50 of the NDPS Act.

31. The Constitution Bench also noted that it was not necessary that the information required to be given under Section 50 should be in a prescribed form or in writing but it was mandatory that the suspect was made aware of the existence of his right to be searched before a Gazetted officer or a Magistrate, if so required by him. In fact, these were the observations in an earlier Constitution Bench decision in *State of Punjab Vs Baldev Singh*, {(1996) 6 SCC 172} which were concurred with by the Constitution Bench in *Jadeja* (supra).

32. The Constitution Bench, after explaining the mandatory provisions of Section 50 of the said Act, proceeded to hold at para 29 that the failure to comply with the provision of Section 50 of the

NDPS Act would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. The Constitution Bench however, very specifically held in para 29 at once the mandatory provision of section 50 of the NDPS Act i.e. apprising the suspect of his right to be searched before a gazetted officer or a Magistrate is complied with, thereafter, the suspect may or may not chose to exercise the right provided to him under the said provision.

33. From the evidence on record in the present case, it is clear that the accused was clearly and unequivocally informed of his right to be searched before the gazetted officer or a Magistrate, but, thereafter, the accused, has chosen not to exercise such right provided to him under the said provision. In such a situation, it is difficult to hold that there is any non compliance with the provisions of Section 50 of the NDPS Act as explained by the Constitution Benches in *Baldev Singh* (supra) and *Jadeja* (supra)

34. Mr. Rivankar, the learned Public Prosecutor is quite right in his submission that Mr. Menezes seeks to construe the decision of the Hon'ble Supreme Court in *Arif Khan* (supra) as laying down

same proposition which is contrary to the proposition laid down by the two Constitution Benches of the Hon'ble Apex Court in *Baldev Singh* (supra) and *Jadeja* (supra). In fact, on perusal of the decision in *Arif Khan* (supra) it is clear that the Hon'ble Apex Court has referred to the decision in *Jadeja* (supra) as well as *Baldev Singh* (supra) and therefore, in the state of the evidence in the present case, it is difficult to accept Mr. Menezes's contention that there has been no compliance with the mandatory provisions of Section 50 of the said Act.

35. In *Arif Khan* (supra), the facts as set out in para 3, 4 and 5 reveal that the raid party directly approached the suspect and asked him whether he is in possession of contraband "Charas". Thereupon, the accused is stated to have admitted to have been in possession of "Charas". The raiding party upon apprehending the accused and had thereafter informed him that he has a right to be searched in the presence of a gazetted officer or a Magistrate. It is in these circumstances that the Division Bench of the Hon'ble Supreme Court held that there was breach of the provisions of Section 50 of the NDPS Act.

36. Therefore, the decision, of the Hon'ble Division Bench of

the Hon'ble Supreme Court cannot be construed as having laid down any law contrary to the law laid down by the two Constitution Benches of the Hon'ble Apex Court in the case of *Baldev Singh* (supra) and *Jadeja* (supra).

37. For all the aforesaid reasons, it is not possible to accept the contention that there has been a breach of the mandatory provisions of Section 50 of the NDPS Act in the present case.

38. The learned Addl. Sessions Judge, as quite correctly evaluated the evidence on record and there is no infirmity in the conviction recorded.

39. Accordingly, for all the aforesaid reasons, this appeal is liable to be dismissed and is hereby dismissed.

40. There shall be no order as to costs.

M.S. SONAK, J.

MF/-