

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.478 OF 2017

Amechi Uvanyasi Dboy	]	
Nigerian National, Age:33 years,	]	
R/o, Shri Krupa Bldg., Flat No.404,	]	
Plot No.49, Sector-02,	]	
Pachnand Nagar, Taloja Phase No.1,	]	
Taloja Road, Navi Mumbai,	]	
(At present undergoing sentence	]	
at Kolhapur Central Prison, Kolhapur	]	Appellant
		(Org. Accused No.1)

Versus

The State of Maharashtra	]	
(Anti Narcotic Cell C.R. N.57/12	]	
dated 11/03/2012)	]	Respondent
		(Original Complainant)

.....
Mr. Dilip Mishra i/b Mr. Ayaz Khan, for the Appellant.

Ms. M.R. Tidke, Additional Public Prosecutor, for Respondent-State.

....

CORAM : PRITHVIRAJ K. CHAVAN, J.

RESERVED ON : 6TH JANUARY, 2020.

PRONOUNCED ON : 23rd JANUARY, 2020.

JUDGMENT:

Challenge in this appeal is to a judgment and order of conviction dated 27th March, 2017 passed by the learned special Judge, Narcotic Drug and Psychotropic Substances, Court at Greater Bombay wherein one of the four accused approached this Court, who along with one more accused had been sentenced to undergo rigorous imprisonment for two years with a fine of Rs.50,000/-, in default, to undergo rigorous imprisonment for four months of an offence punishable under section 8 (c) r/w section 21 (b) of Narcotic Drug and Psychotropic Substances Act, 1985 (for short 'N.D.P.S') as well as rigorous imprisonment for one year with fine of Rs.25,000/-, in default, rigorous imprisonment for two months of an offence punishable under section 29 of the N.D.P.S Act.

2. Facts in brief are as follows.

Pursuant to a secret information received by P.W.4-Vilas Jadhav on 11th March, 2012 to the effect that some Nigerian nationals were indulged in illicit business of cocaine and were coming near an open place in front of N.J. Road, Masjid Bandar. He made an entry in the *Khabari* Book at about 9.40 a.m and informed his Superior P.W.7- A.P.I-Hanumant Appa Vetel. P.W.7-A.P.I-Vetal, in turn, passed

the secret information to P.I.-Mr. Kavalekar. The information was communicated to Assistant Commissioner of Police-Kharpade. P.I.-Kavalekar, as per the instructions of the superior, summoned staff members Head Constable-Waghmare, Police Naik-Kadam, Police Naik-Chavan, Police Naik-Salve, Police Constable -Rane, Police Constable-Pansare and Driver Mane in his chamber. He appraised the members of the staff about a raid to be conducted pursuant to the information received. He asked Police Constable-Pansare to bring two Panch witnesses. Accordingly, two panch witnesses were summoned at the Police Station around 10.15 a.m. A.P.I-Vetal obtained all the necessary implements and material required for the purpose of conducting a raid. Police Constable-Pansare brought two Panch witnesses and introduced them with the Police Inspector. Panchas and members of raiding staff were introduced with each other. Details of Panch witnesses were noted down and they were informed about the raid to be conducted and its purpose. It was also ascertained from the Panch witnesses as to whether they had, previously, acted as panch witnesses to which they answered in the negative. The Panch witnesses were appraised about the process of search, seizure and arrest.

3. A.P.I-Vetal had drawn a pre-tap panchanama on the official computer. After reading the same, it was signed by Panch witnesses. An entry was taken in the station diary before going for the raid. Thereafter, the raiding party boarded a Qualis Jeep bearing registration No.MH-01-BA-4326 and a Gypsy bearing Registration No.MH-01-BA-774.

4. After reaching the spot and parking the vehicles in front of Oriented Transport on P. D'Mellow Road, as per the instructions of the Officer, members of the raiding Committee laid a trap. They noticed seven Nigerians beneath a tree. At about 12.40 p.m, the raiding party encircled those seven Nigerians. However, three Nigerians made their escape good after having scuffled with the raiding team. P.I-Kavalekar had exhibited his Identity Card and introduced himself as well as Members of the raiding party to the remaining four Nigerians. They were inquired about their names, occupation and residence in English. They were informed about the search to be conducted pursuant to an information and had been asked to conduct search of the members of raiding party, however, they declined.

5. P.I- Kavalekar issued a letter to the Nigerians under section 50 of the N.D.P.S Act as well as appraised them orally if they wanted to conduct their search in the presence of a Gazetted Officer or the nearest Magistrate, however, they declined.

6. Police Head Constable-Waghmare, as per the directions of P.I-Kavalekar took search of the present appellant wherein he noticed a transparent plastic bag in the right side pocket of his pant with a knot. The packet was taken in the custody by Head Constable-Waghmare and handed it over to the P.I-Kavalekar. On opening the same, a white coloured powder was noticed. On inquiry, the appellant informed that it was cocaine. The said powder was tested with the help of testing kit and it was confirmed to be cocaine. It weighed 15 grams when placed on an electronic weighing machine.

7. The P.I-Kavalekar thereafter took two samples of one gram each and placed it in transparent pouch which was duly stapled. Those two pouches were separately wrapped in brown paper packet which were sealed by sealing wax. After affixing the labels, signatures of Panch witnesses were obtained over the labels and also of A.P.I-Vetal. The remaining 13 gram cocaine was sealed in the similar manner.

8. During personal search of the appellant, a cash of Rs.350/- was found in his pant's left pocket having denomination of Rs.100/- (3 notes) and one note of denomination of Rs.50/-. The currency notes were put in a brown coloured packet and were sealed in the similar manner. Search of rest of the accused was also effected, however, they are not before this Court.

9. It seems that original accused Nos.3 and 4 namely Madueabuchi Navanja Okoro and Joseph Ezekele Eeroekway absconded and the prosecution could only prosecute the appellant and one Chikujevko Vaku Samuel. This appeal is only by the present appellant Amechi Uvanyasi D boy.

10. A Panchanama was drawn after taking search and seizure of each of the accused. A print out was taken from a portable printer. Panch witnesses found recitals of the panchanama to be true and correct and thereafter they put their signatures. A.P.I-Vetal attested their signatures by putting his signature beneath the same. The appellant and other accused were arrested and brought to Cuffe Parade Office along with Muddemal property.

11. An F.I.R was lodged by P.W.4-A.P.I Vetal which is proved at **Exhibit 66**. Subsequently, Muddemal property was sent for chemical analysis. The Investigating Officer, after conducting the investigation, filed a Charge-sheet in the Court of Special Judge, N.D.P.S Greater Mumbai against the appellant and two others.

12. The appellant and other two accused were produced before the Special Court on 2nd January, 2015. The learned Special Judge framed a charge below **Exhibit 27** under section 8 (c) punishable under section 21 (b) and 29 of the N.D.P.S Act. It was explained to the appellant to which he pleaded not guilty and claimed a trial. His defence was simple denial and false implication in this case. No defence evidence has been adduced by the appellant.

13. The prosecution examined as many as seven witnesses in order to substantiate the charge. The learned Special Judge, after going through the evidence of prosecution witnesses and the documents on record, and after hearing the prosecution and the defence, convicted and sentenced the appellant as above.

14. I heard Mr. Mishra, learned Counsel for the appellant and the learned Additional Public Prosecutor. It is brought to my notice that the appellant has already undergone the sentence awarded by the Special Court and, therefore the learned Counsel for the appellant has not taken much pains to go through the evidence of the prosecution witnesses and other material in order to show as to whether the prosecution has, in fact, proved the charge beyond all reasonable doubts. Nevertheless, the learned Counsel emphasized that there is breach of section 50 of the N.D.P.S Act in as much as the appellant was not taken either before the Gazetted Officer or before the Magistrate for conducting his personal search. It is contended that there is a violation of Section 42 of the N.D.P.S Act as there is no proper compliance of the mandate as provided under section 42 (1) of the said Act. It is contended that there is no corroboration to the sole independent witness P.W.5- Subhash Shirsat by another prosecution witness and, therefore, it cannot be said that the charge has been established beyond doubt. The learned Counsel also questioned the presence of P.W.6-Kavalekar at the spot during the raid.

15. Per contra, the learned Additional Public Prosecutor supported the impugned judgment by contending that the Special Court has correctly appreciated the evidence of prosecution witnesses and there is hardly any scope for interference in the light of the fact that the prosecution has proved the charge beyond all reasonable doubts.

16. P.W.4-Vilas Jadhav who was attached to Azad Maidan Police Station has testified as to how he received a secret information and further course of action undertaken by the team as already discussed hereinabove till lodging of the F.I.R.

17. P.W.1-Dilip Athavale was attached as Police Naik with Anti Narcotic Cell. His role was to carry Muddemal property A-1, B-1, C-1, D-1 to Forensic Science Laboratory Kalina. The letter to that effect bearing Outward No.290 of 2012 dated 13th March, 2012 is proved at **Exhibit 37**. Nothing could be elicited in his cross by the defence. The articles comprising of four packets marked as A-1, B-1, C-1 and D-1 were carried out by this witness from the store to the Forensic Science Laboratory, Kalina. They are marked as Article-1, Article-2, Article-3 and Article-4 respectively.

18. P.W.2- Police Head Constable-Shivaji Laxman Mane was working as Store Keeper at the relevant time who had received Muddemal stated hereinabove and effected an entry in the register which is proved at **Exhibit 42**. He testified that all muddemal packets which were in sealed condition were stored by him in the Malkhana. A station diary entry effected by him is proved at **Exhibit 44** indicating the return of the samples from the Laboratory. One Mr. P.N. Nimbalkar had collected muddemal samples for being deposited in the trial Court. Entry to that effect is proved at **Exhibit 46**.

19. The next important witness is P.W.5-Subhash Shirsat – Panch witness. As already stated hereinabove, he acted as Panch witness at the time of conducting raid. So far as the appellant is concerned, it has come in the evidence of this witness that after nabbing four Nigerians, there was a conversation between them and the Police Officer in English language. A search was conducted in the presence of this witness, but, unfortunately he could not remember name of the appellant. However, they informed the Police Officer that their Visas were missing. Interestingly, P.W.5-Subhash Shirsat admits that he did not understand the conversation between the Police and the appellant because it was in English. However, the

fact remains that the entire exercise of effecting search of the appellant was carried out in the presence of P.W.5-Subhash Shirsat and he has also identified signatures put by him over the print out taken from a laptop. Relevant letters which were signed by this witness, another Panch and Police Officer are proved at **Exhibit 70 to Exhibit 73** only to the extent of proving the signatures.

20. Defence has tried to shatter the evidence of P.W.5-Subhash Shirsat in the cross-examination. However, except bringing on record that this witness did not know English language, there is no much substance in the cross which can be said to be of any assistance to the defence. The presence of this witness on the spot for three hours, search and sealing of the contraband has been reiterated in the cross. It has also been elicited that P.W.4-A.P.I-Vetal had typed the panchanama.

21. P.W.6-Sunil Kavalekar was In-charge of Anti Narcotic Cell of Azad Maidan Police Station at the relevant time. The sum and substance of his evidence is that he was a member of raiding team and after apprehending the appellant and others, he had issued a letter under section 50 of the N.D.P.S Act and informed the appellant

about his right to be searched before the nearest Magistrate or a Gazetted Officer, if he so demands for his personal search. PW-6 Sunil Khavalekar obtained his signature on the office copy of the letter in the presence of Panch witnesses. Those letters are proved at **Exhibit 70 to Exhibit 73**. His evidence is in conformity with the testimony of other witnesses in so far as the procedure followed for search, seizure and sealing the contraband.

22. What is important to be seen in the case at hand is as to whether mandate of Section 50 of the N.D.P.S Act had been strictly adhered to. There are several pronouncements of the Hon'ble Supreme Court in that regard. In case of **Arif Khan alias Agha Khan Vs. State of Uttarakhand, AIR 2018 Supreme Court 2123** in paragraph 26 and 27, the Supreme Court 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.”*

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 N.D.P.S Act, but it was obligatory upon the Officer concerned under section 50 of the N.D.P.S Act to appraise the suspect of his right to be searched before a Gazetted Officer or a Magistrate.

23. Similar is the view echoed in another judgment of the Supreme Court in case of **Vijaysingh Chandubha Jadeja Vs. State of Gujarat, (2011) 1 Supreme Court Cases 699**. Paragraphs 24 and 29 of the said judgment can be reproduced which read as follows:

“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, 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 the 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 insofar 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 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.

24. The position of law *qua* section 50 of the NDPS Act has further been lucidly clarified in a latest decision of the Hon'ble Supreme Court in the case of **State of Punjab Vs. Baljinder Singh, (2019) 10 Supreme Court Cases 473**. In this judgment, the Hon'ble Supreme Court was dealing with a peculiar aspect of 'personal search' vis-a-vis search of vehicle or container or premises which was not in compliance with section 50. It is held that Section 50 of the NDPS Act affords protection to a person in matters concerning "personal search" and stipulate various safeguards. It is only upon fulfillment of and strict adherence to said requirements, that contraband recovered pursuant to "personal search" of person can be

relied upon as a circumstance against such person. The object of Section 50 is to check misuse of power to avoid harm to innocent person and to minimise allegations of planting or foisting of false cases by law enforcement agencies. It is not only imperative on the part of empowered officer to apprise person intended to be searched, of his right to be searched before a gazetted officer or a Magistrate, but it is mandatory to take him before such officer. Failure to comply with the provisions of section 50 would render recovery of contraband otiose and would vitiate the conviction if the same is recorded on the basis of recovery of contraband from the person of the accused during such search.

25. This is what had exactly been happened in the case at hand where the officer concerned had only apprised the appellant of his right to be get searched before the gazetted officer or a Magistrate but merely because the appellant declined, the search ought not to have effected by the Police Officer. Instead, the appellant ought to have been taken to the nearest Gazetted Officer or a Magistrate. On that count itself the judgment of conviction rendered by the learned Special Judge deserves to be quashed and set aside, for, the learned Special Judge committed a grave error in law by not following the

ratio laid down by the Supreme Court in the aforesaid judgments. The learned Special Judge placed reliance upon the testimony of P.W.6-A.P.I Kavalekar on the point of compliance of section 50 of the N.D.P.C Act which is wholly erroneous and incorrect.

26. The findings arrived at by the learned Special Judge are perverse inasmuch as he has blindly accepted the version of the prosecution witnesses ignoring the scope and spirit of section 50 as enunciated by the Supreme Court in the case of **Arif Khan alias Agha Khan** (supra). On that count itself, the impugned judgment needs to be set aside.

27. For the reasons aforesaid and as a corollary of the discussion hereinabove, the impugned judgment, therefore needs to be quashed and set aside.

28. Upshot of the aforesaid discussion is that the appeal needs to be allowed. Now, to the order.

: ORDER :

[1] Appeal is allowed.

[2] The impugned judgment and order of conviction and sentence dated 27th March, 2017 passed by the

Special Judge, N.D.P.S, Greater Mumbai is quashed and set aside.

- [3] The appellant is acquitted of the offence punishable under section 8(c) r/w section 21 (b) and section 29 of the N.D.P.S Act.
- [4] Fine amount, if paid, be refunded to the appellant.
- [5] The order as regards disposal of Muddemal property is maintained.
- [6] The appeal stands disposed of in the aforesaid terms.

29. All concerned to act on the basis of the authenticated copy of the judgment.

[PRITHVIRAJ K. CHAVAN, J.]