

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 48 OF 2017

Chidi Oscita Okonkowa,
Presently in Judicial Custody
at Colvale, Goa.

..... Appellant

V e r s u s

1. The State of Goa,
Shri V. A. Kavlekar,
Investigating Officer
Thr. Anjuna Police Station,
Anjuna Goa.

2. Public Prosecutor
High Court.
Panjim, Goa.

..... Respondents

Mr. T. George John, Advocate for the Appellant.

Mr. Pravin Faldessai, Additional Public Prosecutor for the
State-Respondents.

CORAM : M. S. JAWALKAR, J.

RESERVED DATE: 13th January, 2021

PRONOUNCED ON : 29th January, 2021

JUDGMENT

The present Appeal is filed by the appellant being

aggrieved by the judgment and order convicting the appellant in Special Criminal Case No. 41/2014 (NDPS) by Sessions Judge, North Goa, Panaji vide order dated 19.08.2017. Accused was found guilty of the offence punishable under Section 21(b) of the NDPS Act and was awarded rigorous imprisonment for two years and payment of fine of Rs.50,000/-.

2. The charge against the accused was that on 17.02.2014, between 14:30 hours to 17:30 hours, near St. Antony's Chapel at St. Anthony Prias waddo, Anjuna, Goa, the accused was found in illegal possession of narcotic drug known as cocaine weighing 4.90 grams worth Rs.50,000/-.

3. The Appeal is filed on the ground that the learned Sessions Judge showed complete non application of mind and also failed to consider written arguments. It is vehemently argued by the learned Advocate T. George John that mandatory provision of Section 50 of the NDPS is not complied with. So also, there are omissions in the deposition of the witnesses.

4. He relied on citation **Arif Khan alias Agha Khan Vs. State of Uttarakhand, AIR 2018 SC 2123** and submitted that it is mandatory to search a suspect in presence of a Magistrate or Gazetted Officer. He also relied on the judgment of this Court in Criminal Appeal No. 57/2016 dated 12.10.2020 in the case of **Ivan Miguel Vs. State & Another**, wherein this Court after relying on the decision in the case of **Arif Khan alias Agha Khan** (supra) allowed the Appeal and the order of conviction was set aside.

5. As against this, the learned Additional Public Prosecutor relied on the judgment of the Constitution Bench of the Hon'ble Apex Court in the case of **Vijaysinh Chandubha Jadeja Vs. State of Gujarat, (2011) 1 SCC 609** and the following decisions of this Court:

- (a) Criminal Appeal No. 82/2018 decided on 04.09.2020 in the case of **Mr. Raymond Locke Vs. the State of Goa**;
- (b) Criminal Appeal No. 9/2017 decided on 17.09.2020 in the case of **Kushal Puri Vs. State & Another** and

(c) Criminal Appeal No. 57/2016 decided on 12.10.2020 in the case of **Ivan Miguel Vs. State & Another.**

6. Heard learned Counsel for appellant as well as learned APP Shri Pravin Faldessai for the respondent-State. The main ground in appeal appears to be that mandatory provision under Section 50 of NDPS Act, is not complied by the Investigating Officer and, on that count only, the order is liable to be quashed and set aside.

7. Learned Counsel for the appellant relied on **Arif Khan** (supra) in support of his contention. On perusal of the said citation, it clearly appears that before proceeding to consider the facts, the Apex Court referred **Vijay Sinh Chandubha Jadeja** (supra) for referring requirements of Section 50 of the NDPS Act, which are mandatory. 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 this requires a strict compliance. It is ruled that the suspect person may or may not chose 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 before a Magistrate. The Hon'ble Apex Court in the matter of **Arif Khan** (supra), examined the question arising in the case before the Hon'ble Apex Court keeping in view the aforementioned principle of law laid down by the Apex Court in **Jadeja's** (supra) case. Thus, mandatory provision is to apprise the accused about his right to be searched before a Gazetted Officer or a Magistrate. Thus, after considering the peculiar facts that the raiding party intercepted the person concerned and thereafter on apprehending the accused he was informed by the police personnel that he has a legal right to be searched in the presence of Gazetted Officer or Magistrate is held as non compliance of mandatory provision.

8. The learned APP also pointed out that there is no contrary view taken by the Hon'ble Apex Court in **Arif Khan** (supra) to the view taken in **Jadeja's** (supra) and well as **Baldev Singh's** (supra), matters. Both the judgments are of Constitutional Bench of five Judges considering Section 50 of NDPS Act. Thus, what is mandatory of Section 50 is to apprise the accused about his right to be searched in presence of Gazetted Officer or the Magistrate if such person so requires. It is not mandatory, that even after apprising him of his right he chooses not to be searched in presence of Gazetted Officer or Magistrate, it is not obligatory for the authorised Officer to produce suspect person before the Gazetted Officer or Magistrate. This Court also in Criminal Appeal No.57 of 2016, considered the judgment of **Arif Khan** (supra) and of Constitutional Bench decision of **Jadeja** (supra) and **Baldev Singh** (supra).

9. So far as reliance of judgment in Criminal Appeal no. 15 of 2016 of this Court relied on by the appellant is concerned, the facts are different. In the said matter, there

was no clear evidence as to whether the appellant was apprised of his right to be searched before the Gazetted Officer or Magistrate. The witnesses deposed that PI who had conversation with the appellant in Hindi language, they could not understand. In view thereof, they are unable to say whether appellant was made aware about his right by the authorised officer or not.

10. In the present matter, it is duly established by Pw.11, I.O., and Pw.6, panch witness, that the accused was before search apprised about his right to be searched before the Gazetted Officer or the Magistrate. Thus, I see no reason to interfere with the order passed by the learned Sessions Court on this ground for non-compliance of mandatory provision.

11. So far as other contentions mainly based on omissions brought on record, those are not material, so as to vitiate the trial. It is the contention of the appellant that Pw.1 is not the expert as he has not conducted any test to detect odour. However, on this stray statement, he cannot be

labelled by the accused that he is not expert specifically when he is Co-ordinator cum Deputy Director and Scientist-D in CFSL, Pune, since 2014. He has worked in CFSL, Hyderabad Chandigarh in various capacities.

12. The learned Counsel also pointed out Pw.6, panch witness, does not recollect the name of panch witness no.2. However, it is not the case that he has not deposed that another panch witness was not there. Only thing is that he could not recollect the name. Therefore, it cannot raise any doubt about his trustworthiness. Another objection raised by the appellant is that he deposed that police have received some information but not stated PSI Shinde. However, this objection is having no substance. PSI Shinde also includes in the category of police. It is also the contention of the appellant that Pw.6 deposed that he does not recollect whether PSI Shinde told the accused anything before conducting the search. However, he did not depose that nothing was said by PSI Shinde to the accused before personal search. He deposed that panchanama was drawn in his presence as well as property was attached in his

presence. Exhibits 51 and 52 duly prove this witness in which there is specific mention of compliance of Section 50. Pw.7 corroborates and also specifically deposed that PSI Shinde asked to the accused whether he wants his personal search to be taken before the Magistrate. In view thereof, non-recollection by the witness cannot be said to be fatal to the prosecution case specifically when other evidence is on record to establish the prosecution case.

13. So far as Pw.7 is concerned, it is submitted that he failed to mention 'Gazetted Officer' and only referred to Magistrate as the authorities before whom the suspect can be searched. This objection is having no substance in view of the evidence of Pw.6 and also Pw.11. Non-mention of Gazetted Officer by the panch witness and only mention of Magistrate will hardly make any difference. The panchanama is duly proved by examining Pw.6, Pw.11 and Pw.7. Only the reference of mentioning of Gazetted Officer is not there in deposition, it no way vitiates the prosecution case. It is not expected from a panch witness to depose each and every word or conversation as it is. However, broadly

from this witness it appears that the appellant/accused was asked whether he is willing to be searched in presence of Magistrate in compliance of Section 50 of the NDPS Act. Thus, there is no substance in the grounds raised in the appeal.

14. So far as Pw.11 is concerned, it is the contention of the appellant that he stood retired on 31st May, 2014 and however, it is not made clear how it is going to affect his deposition. It is further pointed out that Pw.11 was not having any list of Gazetted Officer or Executive Magistrate and, therefore, it is doubtful whether accused was offered to be produced before the Magistrate or Gazetted Officer before his personal search. If deposition of Pw.11 is read, he deposed that nearest Gazetted Officer is SDPO, Mapusa. Only because he was not having any list of Gazetted Officer or Executive Magistrate, it cannot be doubted that no offer in compliance with Section 50 was given to the accused.

15. After going through the entire evidence, I do not see any material discrepancy, contradiction or omission

which vitiates the trial for the sake of number of objections/grounds raised in this appeal. The judgment of learned Trial Court

16. Thus, I do not see any reason to interfere in the judgment and order passed by Sessions Court in Special Criminal Case no. 41 of 2014 which is well reasoned order taking into consideration all aspects from raid, search upto CFSL report, etc. There is no illegality in the order passed by learned Sessions Court.

17. In view of the evidence and circumstances established on record, the charge against the accused is proved beyond reasonable doubt. The appeal is without any merit and is liable to be dismissed.

18. Accordingly, I proceed to pass the following :

ORDER

(i) The Appeal is dismissed.

(ii) No orders as to costs.

(iii) Accused, if on bail, his bail bonds stand cancelled. Accused to surrender before the learned Sessions Court, North Goa, on 5th February, 2021 to serve the sentence.

M. S. JAWALKAR, J.

EV/arp/*

Date : 29th January, 2021

JUDGMENT CONTINUED

19. At this juncture, learned Counsel for the appellant requests for suspension of the sentence as appellant wants to approach the Hon'ble Apex Court against the present Judgment and Order. The matter is placed on 3rd February, 2021, to hear the appellant and the learned Additional Public Prosecutor on this aspect.

M. S. JAWALKAR, J.

arp/*

Date : 3rd February, 2021

20. None present for the appellant. Hence, stand over to 8th February, 2021 for submissions on suspension of sentence.

M. S. JAWALKAR, J.

EV

Date : 8th February, 2021

JUDGMENT CONTINUED

21. Heard Mr. T. George John, the learned Counsel for the appellant and Mr. Pravin Faldessai, the learned Additional Public Prosecutor for the respondents.

22. There is no such provision of suspending the sentence after the order is passed. A request is made by Mr. T. George John, the learned Counsel for the appellant that as the appellant wants to challenge the order before the Hon'ble Apex Court, the order of dismissal of Appeal be stayed and suspend the sentence imposed vide order dated

29.01.2021. However, there is no such provision and therefore, the appellant to surrender himself before the learned Sessions Court, North Goa, for serving the remaining punishment imposed by the learned Sessions Judge.

23. In view of the above, the request of suspension of sentence is rejected. The date earlier given by this Court to surrender before the Sessions Court, North Goa is modified and now, the appellant is directed to surrender himself before the learned Sessions Judge, North Goa on 15th February, 2021 to serve the sentence.

M. S. JAWALKAR, J.

EV

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