

CRIMINAL APPEAL NO. 377 OF 1996

K.V. Kolge, Intelligence Officer]
 Directorate of Revenue Intelligence]
 through Public Prosecutor for]
 Union of India] ... Appellant

V/s.

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|----|---------------------------|---|-----------------|
| 1. | Shri Sanjay Ramdas Dhurve |] | |
| 2. | Shri. Vasant Ganu Alimkar |] | |
| 3. | The State of Maharashtra |] | ... Respondents |

Mr. Jitendra B. Mishra, Spl. P.P. i/b J.R.Solanki for the Appellant.
Mr. Niranjan Mundargi a/w. Ms K. Mehta i/b Mr. Rakesh Jadhav
for Respondent Nos.1 and 2.
Ms S.V. Sonawane, APP for the Respondent.

**CORAM : PRASANNA B. VARALE &
N.R. BORKAR, JJ.**

DATE : 27.8.2021.

JUDGMENT

1] This appeal takes an exception to the judgment and order dated 2.4.1996 passed by the Special Court, under N.D.P.S. Act in N.D.P.S. Special Case No.31 of 1993. By the impugned judgment and order, the respondent Nos.1 and 2, who were accused Nos.1 and 2 respectively before the trial

Court, have been acquitted of the offences punishable under Section 8 (c) read with 22 and under Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short “NDPS Act”).

2] It is the case of the prosecution that on 29.1.1993 at about 2.00 p.m., PW-1 Shri.K.V. Kolge, who at the relevant time was working as an Intelligence Officer with the Directorate of Revenue Intelligence, Bombay Zonal Unit, had received an information that the accused would be coming at Cawasji Patel Street, Fort, Bombay for sale of Methaqualone powder a psychotropic substance. The said information was reduced into writing. The panch witnesses were called and they were apprised about the information. Thereafter, PW-1 and other officers alongwith panch witnesses reached to the spot at about 2.15 p.m.

3] According to the prosecution, at about 4.30 p.m., both the accused came there and at that time accused No.1 was carrying a plastic bag in his hand and a cloth bag on his shoulder. The accused were intercepted and were brought to

the office of Directorate of Revenue Intelligence for detail examination of the bags.

4] The contents of the bags were then examined in presence of panch witnesses. They were found to contain 7 K.G. powder which was grayish-white in colour. The said powder was tested and it was found to be Methaqualone powder. The samples were collected in presence of panch witnesses. The samples were then sent to Forensic Science Laboratory (FSL) for analysis. On receipt of FSL report confirming that grayish-white powder found in possession of the accused was Methaqualone powder a psychotropic substance covered under Section 2(xxiii) of the NDPS Act, the complaint was filed against the accused for the offences punishable under Section 8(c) (22) read with 29 of NDPS Act.

5] The accused were charged and tried for the abovesaid offences. As stated earlier, the trial Court by the impugned judgement and order acquitted both the accused for the said offences.

6] We have heard the learned Special Public Prosecutor for the appellant / DRI and the learned counsel for respondent Nos.1 and 2.

7] The learned Special Public Prosecutor for the appellant has submitted that the trial Court had erred in acquitting the accused for non-compliance of Section 50 of the NDPS Act. It is submitted that Section 50 of the NDPS Act is not attracted in the present case as the psychotropic substance was found in the bag which the accused No.1 was carrying and not on his person. It is thus submitted that the order of acquittal needs to be set aside and accused need to be convicted for the offences for which they were charged.

9] In support of the submission, the learned Special Public Prosecutor has relied upon the judgments of Hon'ble Supreme Court in the case of ***Rajesh Dhiman vs. State of Himachal Pradesh*** reported in ***CDJ 2020 SC 785*** and the ***State of Haryana vs. Ranbir*** reported in ***CDJ 2006 SC 301***.

10] On the other hand, the learned counsel for the respondent Nos.1 and 2 submits that the trial Court has rightly acquitted the respondents for the non-compliance of Section 50 of the NDPS Act. It is submitted that admittedly, the accused were intercepted on the basis of prior information. It is submitted that in such circumstances, it was imperative for PW-1 to inform the accused their right to be searched before a Gazetted Officer. It is submitted that, admittedly, this option was not given to the accused. It is submitted that thus no interference is called for in the order impugned.

11] The Constitution Bench of the Hon'ble Supreme Court in the case of ***State of Punjab vs. Baldev Singh*** – reported in ***CDJ 1999 SC 388***, while interpreting Section 50 of the NDPS Act has held thus:

“54. On the basis of the reasoning and discussion above, the following conclusions arise:

(1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the concerned person of his right under Sub-section (1) of Section 50 of being taken to the nearest Gazetted Officer or the nearest Magistrate for making the search. However, such information may not

necessarily be in writing;

(2) That failure to inform the concerned person about the existence of his right to be searched before a Gazetted Officer or a Magistrate would cause prejudice to an accused;

(3) That a search made, by an empowered officer, on prior information, without informing the person of his right that, if he so requires, he shall be taken before a Gazetted Officer or a Magistrate for search 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 his person, during a search conducted in violation of the provisions of Section 50 of the Act;

(4) That there is indeed need to protect society from criminals. The societal intent in safety will suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it does not exist. The answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously inviting action against the concerned official so that the laxity on the part of the investigating authority is curbed. In every case the end result is important but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of judicial process may come under cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for law and may have the effect of unconscionably compromising the administration of justice. That cannot be permitted. An accused is entitled to a fair trial. A conviction resulting from an

unfair trial is contrary to our concept of justice. The use of evidence collected in breach of the safeguards provided by Section 50 at the trial, would render the trial unfair;

(5) That whether or not the safeguards provided in Section 50 have been duly observed would have to be determined by the Court on the basis of evidence led at the trial. Finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of Section 50, and particularly the safeguards provided therein were duly complied with, it would not be permissible to cut- short a criminal trial;

(6) That in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Section 50 are mandatory or directory, but, hold that failure to inform the concerned person of his right as emanating from Sub-section (1) of Section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law;

(7) That an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search;

(8) A presumption under Section 54 of the Act can only be raised after the prosecution has established that the accused was found to be in possession of the contraband in a search conducted in accordance with

the mandate of Section 50. An illegal search cannot entitle the prosecution to raise a presumption under Section 54 of the Act;

(9) That the judgment in Pooran Mal's case cannot be understood to have laid down that an illicit article seized during a search of a person, on prior information, conducted in violation of the provisions of Section 50 of the Act, can by itself be used as evidence of unlawful possession of the illicit article on the person from whom the contraband has been seized during the illegal search;

(10) That the judgment in Ali Mustaffa's case correctly interprets and distinguishes the judgment in Pooran Mal's case and the broad observations made in Pirthi Chand's case and Jasbir Singh's case are not in tune with the correct exposition of law as laid down in Pooran Mal's case."

12] Admittedly, in the present case, the accused were intercepted on the basis of prior information and it was not the case of chance recovery. In such circumstances, it was imperative for PW-1 to inform the accused their right under Section 50 of the NDPS Act to be searched before a Gazetted Officer. The submission that Section 50 of the NDPS Act is not attracted in the present case cannot be accepted in view of the judgment of Hon'ble Supreme Court in the case of *State of Punjab vs. Baldev Singh (supra)*. The judgments relied upon by the learned Special Public Prosecutor would not apply to the present case, as they all are in relation to chance

recovery. The trial Court was therefore, justified in acquitting the respondent Nos.1 and 2 (accused Nos.1 and 2) for non-compliance of Section 50 of the NDPS Act.

13] Considering the above facts and circumstances, no interference is called for in the impugned judgment and order of acquittal. In the result, the following order is passed.

ORDER

Criminal Appeal stands dismissed.

(N.R. BORKAR, J.)

(PRASANNA B. VARALE, J.)