

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Bivas Pattanayak

C.R.A. 90 of 2020
(CRAN 1 of 2020)

Ishdan Seikh
-Vs-
Union of India

With

C.R.A. 744 of 2019
(CRAN 3 of 2021)

Ali Hossain Sk. @ Ali Hussain Seikh
-Vs-
Narcotics Control Bureau

For the Appellant : Mr. Angshuman Chakraborty, Adv.
[in CRA 90/2020]

For the Appellant : Mr. Soumyajit Das Mahapatra, Adv.
[in CRA 744/2019] Mr. Ali Ahsan Alamgir, Adv.
Ms. Riya Das, Adv.
Ms. Rabia Khatoon, Adv.

For the NCB : Mr. Sagar Saha, Adv.

Heard on : 06.05.2022

Judgment on : 06.05.2022

Joymalya Bagchi, J. :-

Appellants have assailed judgment and order dated 03.12.2019 and 04.12.2019 passed by the learned Judge, Special Court under NDPS

Act-cum-learned Additional Sessions Judge, 12th Court, Alipore, 24-Parganas (South) in NDPS Case No.36 of 2015 convicting the appellants for commission of offence punishable under Section 22(c) read with Section 29 of the NDPS Act and sentencing them to suffer rigorous imprisonment for ten years and to pay a fine of Rs.1,00,000/-, in default, to undergo rigorous imprisonment for six months more.

Crux of the prosecution case is to the effect on 07.10.2013 Sri Debasish Chowdhury, Superintendent, Narcotic Control Bureau (PW3) received information two persons from Village: Baro Nalda, Dist.: Nadia will be coming to Sealdah station to deliver a consignment of preparation of '*Alprazolam*' to others. The information was reduced into writing and submitted before the Zonal Director viz. Sri Subrata Biswas. Upon necessary movement order being obtained, a team comprising of Sri Debasish Chowdhury (PW3), Surajit Sen (PW2), Debasish Bhattacharjee (PW4) and others proceeded towards Sealdah Station. They reached the spot at 1:00 P.M. and kept surveillance. At about 01:30 P.M. the source pointed out two suspects. The NCB team members encircled them. One of the suspects was carrying a khaki colour backpack and the other was accompanying him. The NCB officers disclosed their identity and expressed their intention to search both of them. Offer was given to the suspects who divulged their identity as the appellants that they had a right to be searched before a Magistrate or a Gazetted Officer or before a Gazetted Officer, who is a member of the raiding party. The appellants

agreed to be searched before a Gazetted Officer, who is a member of the raiding party. Upon search of the khaki colour backpack of appellant viz. Ali Hossain Sk. @ Ali Hussain Seikh, a transparent polythene packet containing some cream coloured powder was recovered. A railway ticket from Palassey to Sealdah, cash of Rs.380/- and one black Karbon mobile were also recovered from his possession. From the possession of the appellant viz. Ishdan Seikh, similar train ticket, cash of Rs. 420/- and a black Karbon mobile were also recovered. The cream coloured powder was suspected to be a preparation of '*Alprazolam*' and was weighed. Total weight was found to be 232 gms. Two samples of five grams each were taken from the suspected material. They were kept in separate envelopes marked 'S1' and 'S2' respectively. Remaining material was kept in an envelope marked as 'M'. Envelopes were duly signed by the members of the raiding party, appellants and independent witnesses. Other articles recovered from the appellants including cash was also seized. After search, notices were issued under Section 67 of the NDPS Act to the appellants and their statements were recorded. Thereafter, the appellants were arrested and produced in court. In course of investigation, samples were sent for chemical examination and report of the chemical examiner was obtained. The said report disclosed presence of '*Diazepam*' and '*Alprazolam*' in the samples. Petition of complaint was filed against the appellants. Charge was framed under Section 22(c) read with Section 29 of the NDPS Act. Appellants pleaded not guilty and

claimed to be tried. In course of trial, prosecution examined five witnesses and exhibited a number of documents including chemical examiner's report as Exhibit-18. Defence of the appellants was one of innocence and false implication. In conclusion of trial, learned trial Judge by the impugned judgment and order dated 03.12.2019 and 04.12.2019 convicted and sentenced the appellants, as aforesaid.

Mr. Soumyajit Das Mahapatra, learned advocate appearing for the appellant viz. Ali Hossain Sk. @ Ali Hussain Seikh in CRA 744 of 2019 submits search was conducted in violation of Section 50 of the NDPS Act. Appellant viz. Ali Hossain Sk. @ Ali Hussain Seikh was not informed of his right to be brought before a Magistrate or a Gazetted Officer. On the other hand, he was told he also had a right to be searched before a Gazetted Officer who is a member of the raiding party. In ***State of Rajasthan vs. Parmanand & Anr.***¹, the Apex Court held such offer is not in consonance to Section 50 of the NDPS Act. Hence, search conducted in violation of the mandatory requirements under Section 50 of the NDPS Act and the conviction of the appellant viz. Ali Hossain Sk. @ Ali Hussain Seikh is liable to be set aside on such score alone.

Mr. Angshuman Chakraborty, learned advocate appearing for the appellant viz. Ishdan Seikh in CRA 90 of 2020 while adopting the submissions of Mr. Mahapatra further submits no recovery had been effected from his client. Statements of the appellants recorded under

¹ (2014) 5 SCC 345

Section 67 of the NDPS Act are inadmissible in view of the law declared in ***Tofan Singh vs. State of Tamil Nadu***². Mere presence of Ishdan Seikh along with Ali Hossain Sk. @ Ali Hussain Seikh cannot give rise to an inference that the said appellant abetted the possession of narcotic substance.

Nobody appears for the Union of India in CRA 90 of 2020. Mr. Sagar Saha, learned advocate appears for NCB in CRA 744 of 2019. As both the appeals arise out of the selfsame judgment and order, he is requested to represent NCB in the other appeal being CRA 90 of 2020. His appointment may be regularised.

Mr. Saha submits recovery was made from a bag carried by Ali Hossain Sk. @ Ali Hussain Seikh. No personal search was undertaken. Appellants had voluntarily handed over their personal effects. Hence, Section 50 of the NDPS Act does not get attracted in the facts of the case. He further submits both the appellants were travelling together and from the conduct of the appellant viz. Ishdan Seikh it is clear he abetted possession of narcotic by Ali Hossain Sk. @ Ali Hussain Seikh.

Principal challenge thrown to the conviction of the appellants is non-compliance of the statutory requirements of Section 50 of the NDPS Act.

PW2 (Surajit Sen), PW3 (Debasish Chowdhury) and PW4 (Debasish Bhattacharjee) are members of the raiding party. These witnesses stated

² (2021) 4 SCC 1

on receipt of secret information which was diarised, they had proceeded to Sealdah Station to work out the information. Around 01.30 P.M. two persons were identified by the source. They encircled the persons who were the appellants. A notice was issued under Section 50 of the NDPS Act stating the appellants had a right to be searched in presence of a Gazetted Officer or a Magistrate or a member of the raiding party, who is a Gazetted Officer. Notices have been exhibited as Exhibits-2 & 3. Both the appellants expressed their desire to be searched before a Gazetted Officer who is a member of the raiding party. The replies were exhibited as Exhibits-4 & 5. Thereafter, appellants were searched. From the backpack of appellant viz. Ali Hossain Sk. @ Ali Hussain Seikh, cream coloured powder was recovered which was suspected to be a preparation of 'Alprazolam'. Personal search of the appellants also yielded other articles namely, railway tickets, mobile phones and cash. Samples were drawn from the suspected material and kept in separate envelopes. Remaining material was kept in another envelope.

From the aforesaid evidence on record it appears during the operation NCB officers had undertaken personal search of the appellants although narcotic substance was recovered from a backpack carried by Ali Hossain Sk. @ Ali Hussain Seikh. Mr. Saha referred to the cross-examination of PW2, wherein the witness sought to wriggle out of the position by stating they did not undertake personal search and the personal properties were voluntarily handed over by the appellants. This

stance of PW2 is wholly inconsistent with the materials on record. All witnesses including PW2 (during chief) admitted there was personal search of the appellants at the time of recovery of narcotics from the backpack and pursuant to such search, mobile phone, railway ticket and cash were seized.

I have also examined the inventory report (Exhibit-7/1) prepared by PW2 in connection with the aforesaid search and seizure. In the inventory report, PW2 has unequivocally stated personal search had been undertaken and the personal articles including cash were recovered from the appellants.

In view of the aforesaid evidence on record including contemporaneous documents prepared by PW2 in relation to the search of the appellants, I am inclined to hold there was personal search of the appellants at the time when the narcotic substance was recovered from a bag carried by appellant viz. Ali Hossain Sk. @ Ali Hussain Seikh.

In ***State of Rajasthan vs. Parmanand & Anr.*** (supra), the Apex Court, inter alia, held as follows :-

“15... if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application.....”

In the light of the aforesaid declaration of law, I hold Section 50 applies to the search conducted by the NCB officers in the present case.

The next question which arises is whether offer made by NCB officers to the appellants that they have a right to be searched before a Magistrate or a Gazetted Officer or a Gazetted Officer, who is a member of the raiding party is in consonance with the statutory requirements of Section 50 or not.

In ***State of Rajasthan vs. Parmanand & Anr.*** (supra), negating the argument on behalf of the prosecution that an offer to be searched before the nearest Magistrate or Gazetted Officer or a Gazetted Officer of the raiding party is a valid compliance of Section 50 of the NDPS Act, the Court held as follows : -

“19. We also notice that PW10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate or before the nearest Gazetted Officer or before PW5 J.S. Negi, the Superintendent, who was a part of the raiding party. It is the prosecution case that the respondents informed the officers that they would like to be searched before PW5, J.S. Negi by PW10 SI Qureshi. This, in our opinion, is again a breach of Section 50(1) of the NDPS Act. The idea behind taking an accused to the Magistrate or the nearest Gazetted Officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer. Therefore, it was improper for PW10 SI Qureshi to tell the respondents that a third alternative was available and that they could be searched before PW5 J.S. Negi, the Superintendent who was part of the raiding party. PW5 J.S. Negi cannot be called an independent officer. We are not expressing any opinion on the question whether if the respondents had voluntarily expressed that they wanted to be searched before PW5 J.S. Negi, the search would have been vitiated or not. But PW10 SI Qureshi could not have given a third opinion to the respondents when Section 50(1) of the NDPS Act does not provide for it and when such opinion would frustrate the provisions of Section 50(1) of the NDPS Act. On this ground also, in our opinion, the search conducted by PW10 SI Qureshi is vitiated.”

In the present case, the appellants were misled by the incorrect offer given to them that they could be searched by a Gazetted Officer who is a member of the raiding party. A Gazetted Officer who had proceeded to the place of occurrence after entertaining reasonable belief that the accused persons may be carrying narcotic substance cannot be said to

be an independent person before whom the law contemplates a search. In this backdrop, acceptance of the offer by the appellants to be searched before an officer who is a member of the raiding party cannot be said to be a voluntary expression of their desire to be searched before such officer. There is a clear misdirection in law in the offer given to the appellants and accordingly they were misled to agree to a search before an officer who was a member of the raiding party. By no stretch of imagination, such acknowledgment on their part can be said to be a voluntary relinquishment of the right enshrined under Section 50 of the NDPS Act.

Crux of the safeguard enshrined in Section 50 of the NDPS Act is that an accused should be made aware of his right to be brought before a Magistrate or a Gazetted Officer prior to a personal search. Such offer may be oral or in writing but the terms of the offer must be clear, unequivocal and not create confusion in the mind of an accused with regard to the lawful requirements prior to the search in any manner whatsoever.

In this regard it may be profitable to refer to the observations of the Constitution Bench in ***Vijaysinh Chandubha Jadeja vs. State of Gujarat***³, wherein the Bench held there must be strict compliance of Section 50 of the NDPS Act. The Bench held as follows :-

“29... 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

³ (2011) 1 SCC 609

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 Bench negated the concept of substantive compliance with regard to Section 50 holding as follows :-

“31. We are of the opinion that the concept of “substantial compliance” with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said section in *Joseph Fernandez and Probha Shankar Dubey* is neither borne out from the language of sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in *Baldev Singh* case. Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf.”

Recovery of narcotic from a bag carried by a person would attract Section 50 of the NDPS Act if in course of such search, the body of the suspect has also been searched. There is ample evidence on record a body search of the appellants had also been undertaken when narcotic was recovered from a bag carried by the appellant viz. Ali Hossain Sk. @ Ali Hussain Seikh. Failure to comply with Section 50 in course of such search vitiates the seizure and the consequential conviction.

In view of the aforesaid discussion, I am constrained to hold conviction and sentence of the appellants are liable to be set aside.

Both the appeals are accordingly, allowed.

Connected applications, if any, are also disposed of.

Appellants viz. Ishdan Seikh and Ali Hossain Sk. @ Ali Hussain Seikh shall be released from custody, if not wanted in any other case, upon execution of a bond to the satisfaction of the trial court which shall

remain in force for a period of six months in terms of Section 437A of the Code of Criminal Procedure.

Lower court records along with a copy of this judgment be sent down at once to the learned trial Court for necessary action.

Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

I agree.

(Bivas Pattanayak, J.)

(Joymalya Bagchi, J.)

akd/as/PA