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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

BEFORE

HON'BLE MR. JUSTICE PURUSHAINDR KUMAR KAURAV

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CRL. A. No. 992 of 2017

Between:-

KAMRUDDIN

S/O SHRI ABDULLAH

R/O 3930, URDU BAZAR, JAMA MASJID, DELHI

.....APPELLANT

(Through: Shri Harsh Prabhakar, Mr. Dhruv Chaudhary and Mr. Anirudh Tanwar, Advocates)

AND

STATE (NCT OF DELHI)

..... RESPONDENT

(Through: Shri Utkarsh, Additional Public Prosecutor for the State with Sub-Inspector Mahavir, Police Station: Daryaganj)

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Pronounced on : 10.11.2022

J U D G M E N T

1. This appeal under Section 374(2) of the Code of Criminal Procedure, 1973 (Cr.P.C) is directed against the judgment of conviction and order of sentence dated 31.07.2017 in SC number 13/2017, passed by Special Court (NDPS) District Central, Tis Hazari Court, Delhi.

2. This appeal is being taken up for out of turn hearing for the reason that the maximum sentence awarded to the appellant is 12 years rigorous imprisonment with fine stipulation and in lieu of fine the appellant has to undergo six months further simple imprisonment. As on 29.09.2021, the appellant has already undergone a period of 8 years 2 months 19 days rigorous imprisonment.

3. The learned counsel appearing for the appellant/accused submits that he would confine his submissions only to the extent of non-compliance of the provisions of Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short, 'NDPS Act'). He submitted that the notice under Section 50 of the NDPS Act (Ex.PW5/A) clearly indicates that there is a non-compliance with the mandate of Section 50 of the NDPS Act resulting in causing serious prejudice to the appellant. He has also placed reliance on Ex. PW5/B to indicate that the personal search of the appellant was conducted; however, the appellant was not informed of his legal right of his personal search in the presence of Gazetted Officer or Magistrate.

4. Learned Counsel for the appellant has placed reliance on the decision of the Hon'ble Supreme Court in the matters of *K. Mohanan Vs. State of Kerala*¹, *S.K. Raju @ Abdul Haque @ Jagga Vs. State of West Bengal*², *Sanjeev and another Vs. State of Himachal Pradesh*³ and the decision of this Court in the matter of *Parveen Singh @ Kalia Vs. State of NCT of Delhi*⁴, *Mahindra Singh Vs. State*⁵ and *Akhilesh Bhartiya Vs. State*⁶.

5. Learned APP for the State opposed the submission and he states that

¹ (2000) 10 SCC 222

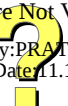
² (2018) 9 SCC 708

³ (2022) 6 SCC 294

⁴ 2010 SCC OnLine Del 3920

⁵ 2011 SCC OnLine Del 1709

⁶ 2020 SCC OnLine Del 306

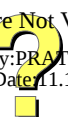


the impugned judgment of conviction and sentence is strictly in accordance with law. The requirement of Section 50 of the NDPS Act has been strictly complied with and an option was given to the appellant to opt for his personal search in the presence of a Magistrate. Since the appellant did not opt for this option, therefore, the prosecution cannot be blamed and on this ground the conviction and sentence cannot be interfered with. According to him, the impugned judgment of conviction and sentence does not call for any interference. Learned APP for the State counsel has relied on the decision of the Hon'ble Supreme Court in the matters of **State of Punjab Vs. Baljinder Singh and Anr.**⁷ and **Dayalu Kashyap Vs. State of Chhatisgarh**⁸.

6. I have heard Shri Harsh Prabhakar, learned counsel appearing for the appellant and Shri Utkarsh, learned APP appearing for the State. I have also perused the record.

7. The case of the prosecution in brief is that on 02.08.1991 at about 7:30 PM, Sub Inspector Satpal Singh received secret information that the appellant is likely to supply *charas* in heavy quantity. On the basis of the secret information, after appropriate approval from higher authorities, a raid was conducted. Raiding party reached in front of Delite Cinema, where the accused was apprehended having a raxine bag in his right hand. Inspector Rajendra Singh disclosed his identity as well as the identity of the raiding party to the accused after his apprehension. The accused was offered that his search could be conducted before any Gazetted Officer or Magistrate, if he so desired. The accused did not opt for search to be conducted in the presence of the Gazetted Officer. Accordingly, the reply of the accused was

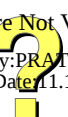
⁷ 2019 SCC OnLine SC 1408



noted in the notice given to him under Section 50 of the NDPS Act. Thereafter, SI Satpal Singh had taken the formal search of the appellant/accused and the *thaila* of the appellant. On searching of *thaila*, a polythene bag tied with a string was recovered which was opened intact and out of it, three polythene packets were recovered. These packets were further checked. One packet had *charas* in the shape of sticks and in the other two bags *charas* was in the shape of balls. The first bag was given serial No. 1 and others were given serial numbers 2 and 3. In all the three packets a total of 5 kg *charas* was found. From all the three packets 50 gram *charas* each was taken out as sample and they were also given serial Nos. 1/1, 2/2 and 3/3. All the parcels were seized with the seal of SPA and were taken in possession *vide* recovery memo Ex. PW5/C. CFSL form was also filled. Same seal was also affixed thereon. After the other necessary formalities the case property was deposited in the *malkhana* and site plans etc. were prepared. The appellant was arrested and after completion of the investigation chargesheet was filed before the competent court. Charge under Section 20 NDPS Act was framed against the appellant to which he pleaded not guilty and claimed trial. The prosecution has examined eight witnesses to prove its case. After closure of the prosecution evidence, the statement of the appellant under Section 313 of Cr.P.C were recorded. The appellant/ accused denied all the allegations but he did not lead any evidence in his defence.

8. The Learned Special Judge after considering the entire material available on record found that the seized contraband was of commercial quantity and the prosecution has successfully proved its case beyond

⁸ (2022) SCC OnLine SC 334

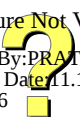


reasonable doubt and accordingly convicted the appellant under Section 20(c) of the NDPS Act vide order dated 31.07.2017 and sentenced to undergo rigorous imprisonment for 12 years with a fine to the tune of Rs.1 lakh and in default of fine to further undergo simple imprisonment for six months.

9. To appreciate the submissions made by the learned counsel appearing for the appellant that there is breach of the provisions of Section 50 of the NDPS Act, this court finds it appropriate to consider a few relevant decisions which have been cited the by the learned counsel appearing for the parties.

10. The Hon'ble Supreme Court in the case of *K. Mohanan (supra)* had an occasion to consider the scope and ambit of Section 50 of the NDPS Act as to whether the accused is to be necessarily informed of his right to search in the presence of Magistrate or whether there can be option given to him for his search being conducted in the presence of a Gazetted Officer or a Magistrate. In that case, the Hon'ble Supreme Court was dealing with the issue whether the mandatory requirement of Section 50 of the NDPS Act was complied with or not. The appellant in that case was asked whether he was required to be produced before Gazetted Officer or a Magistrate for the purpose of search and the appellant therein answered in negative. The Hon'ble Supreme Court in order to ascertain the authenticity of the submission called for the original record and found that the recital is substantially correct. It is thus seen that in that case the appellant therein was asked whether he wanted to be produced before a Gazetted Officer or Magistrate to which his answer was 'no'.

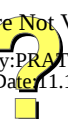
11. The Hon'ble Supreme Court while placing reliance in its earlier



pronouncement in the case of *State of Punjab Vs. Baldev Singh*⁹ has held that if the accused, who was subjected to search was merely asked whether he required to be searched in the presence of Gazetted Officer or a Magistrate, it cannot be treated as communicating to him that he had right under law to be searched so. In view of the aforesaid fact, the Hon'ble Supreme Court concluded that there was non-compliance of Section 50 of the NDPS Act and consequently in the absence of any other independent evidence to show that the appellant was in possession of the contraband article, he was acquitted.

12. In another decision relied upon by the learned counsel appearing for the appellant is the case of *S.K. Raju (supra)* the Hon'ble Supreme Court was dealing with the issue as to whether Section 50(1) of the NDPS Act was required to be complied with, when *charas* was recovered only from the bag of the appellant/accused therein and no *charas* was found on his person. In paragraph No. 22 of the said decision, it has been noted that PW-2 conducted search of the bag of the appellant therein as well as of the appellant's trouser. It was found that the search was not only of the bag which the appellant was carrying, but also of the appellant's person. Since the search of the appellant was also involved, therefore the Hon'ble Supreme Court has held that Section 50 of the NDPS Act would be attracted in that case. It has been held that as soon as search of a person takes place the requirement of mandatory compliance with Section 50 of the NDPS Act is attracted irrespective of whether contraband has been recovered from the possession of the detainee or not. It has been held that it was imperative for the officer who had under taken the search to inform the appellant of his

⁹ (1999) 6 SCC 172



legal right to be searched in the presence of either a Gazetted Officer or a Magistrate.

13. The Hon'ble Supreme Court in the case of ***Vijay Singh Chandubha Jadeja v. State of Gujarat***¹⁰ has held that Section 50 of the NDPS Act gives an option to the empowered officer to take such person (suspect) either before the nearest Gazetted Officer or the Magistrate but in order to impart authenticity, transparency and creditworthiness to the entire proceedings, in the first instance, an endeavour should be to produce the suspect before the nearest Magistrate, who enjoys more confidence of the common man compared to any other officer. It would not only add legitimacy to the search proceedings, it may verily strengthen the prosecution as well.

14. The Hon'ble Supreme Court in the case of ***Arif Khan @ Agha Khan v. The State Of Uttarakhand***¹¹, while considering various other pronouncements including the decision in the cases of ***Ashok Kumar Sharma v. State of Rajasthan***¹² and ***Narcotics Control Bureau v. Sukh Dev Raj Sodhi***¹³ has held that the suspects may or may not choose to exercise the right provided to them 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.

15. The Hon'ble Supreme Court in the case of ***Sanjeev and Anr. Vs. State of Himachal Pradesh (supra)*** was considering an appeal at the instance of the convict against the judgment of the High Court reversing the acquittal rendered in favour of the appellant by the trial court. One of the reason the

¹⁰ (2011) 1 SCC 609

¹¹ (2018) 18 SCC 380

¹² (2013) 2 SCC 67



trial court acquitted the appellant in that case was that the police did not give any option to the appellant to be searched before the Magistrate or competent Gazetted Officer. In paragraph No. 10 of the said decision the Hon'ble Supreme Court has noted that the arrest memo or other documents do not reflect that any option or choice was given to the accused before their personal search was undertaken. It has been held in that case that the personal search did not result in recovery of any contraband material but the non-compliance of requirement of affording an option was one of the reason which weighed with the trial court in disbelieving the case of the prosecution. In that case the bag was carried to the vehicle. It is stated in paragraph No. 3 of that decision that when the police party had searched the other side of the Rora bridge, they found the appellant's therein sitting by the side of *bone fire* and the bag was lying on the ground near them. As the police put search light towards the direction of the appellants, they tried to run away. The police party followed them and after having crossed a distance of about 100 metre, they were nabbed. Thereafter, a bag was also retrieved which was found to contain *charas* weighing about 1.5 kg and the procedure for taking personal search of the accused was followed. Under the aforesaid circumstances, the Hon'ble Supreme Court has come to the conclusion that despite the personal search not resulting into a recovery of any contraband material, there was non-compliance of requirement of Section 50 of the NDPS Act. Hence, the order of conviction and sentence by the High Court was set aside and the order of acquittal recorded by the trial court was restored.

16. In the decision of ***Parveen Singh @ Kalia (supra)***, a Coordinate

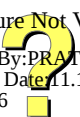
¹³ (2011) 6 SCC 392

Bench of this court in paragraph No. 6 has noted that the appellant, therein, was informed that if he so desire he can be taken to the Magistrate or Gazetted Officer for his search in his presence. It has been noted that since the appellant was only informed about the option and not about his right to be searched before the Magistrate or Gazetted Officer, the conviction of the appellant therein was set aside. Paragraph No. 6 of the decision in the case of **Praveen Singh @ Kalia (supra)** is reproduced as under:-

“6. The Section 50 notice in the present case states that since there is an information as to the possession of heroin and he has been apprehended and is required to be searched, if he so desires he can first take the search of the Police party. On refusal, the Appellant was asked that if he so desire then his search can be taken before a Magistrate or a Gazetted Officer. This was also declined by the Appellant. A perusal of Exhibit PW6/A, the notice under Section 50 of the NDPS Act and the testimony of PW11 the Investigating Officer shows that the Appellant was informed only about the option and not about his right of being searched before a Magistrate or a Gazetted Officer. The Appellant is thus entitled to be acquitted.”

17. In another decision of the Coordinate Bench of this court in the case of **Mahinder Singh Vs. State (supra)** similar view has been taken and it has been noted that the appellant therein was only informed about the option and not about the right. The appellant in the case of **Mahinder Singh (supra)** was also acquitted. Paragraph 6 of the said decision is reproduced as under:-

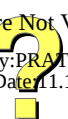
“6. Section 50 notices in the present case state that since there is an information as to the possession of heroin and the Appellants have been apprehended and are required to be searched, if they so desires they can first take the search of the Police party. On refusal, the Appellants were asked that if they so desire then their search can be taken before a Magistrate or a Gazetted Officer. This was also declined by the Appellants. A perusal of Ex. PW5/A and Ex. PW 5/H and



testimony of PW11 and PW9 shows that, the notices under Section 50 of the NDPS Act and the witnesses informed only about the option and not about the right of being searched before a Magistrate or a Gazetted Officer. The Appellants are thus entitled to be acquitted.”

18. This court in the case of **Akhilesh Bharti Vs. State (supra)** had an occasion to consider various earlier decisions of the Hon’ble Supreme Court and of this Court with respect to provisions of Section 50 of the NDPS Act, its compliance and result of its non-compliance. It has been held that the decision of **S.K. Raju (supra)** of the Hon’ble Supreme Court was dealing with the situation where merely a bag carried by a person is searched without there being any search of person, therefore, Section 50 of the NDPS Act will have no application but if the personal search of the accused is also conducted, the provision of Section 50 of the NDPS Act would wholly apply. While noting the decision of the Hon’ble Supreme Court in the case of **Baljinder Singh (supra)**, it has been said that the personal search of the accused did not result into the recovery of any contraband but there was a recovery of contraband effected from the vehicle in which the accused persons were seated with one of them being the driver. Paragraph No. 22 of the **S.K. Raju (supra)** is reproduced as under:-

“PW-2 conducted a search of the bag of the appellant as well as of the appellant’s trousers. Therefore, the search conducted by PW-2 was not only of the bag which the appellant was carrying, but also of the appellant’s person. Since the search of the person of the appellant was also involved, Section 50 would be attracted in this case. Accordingly, PW-2 was required to comply with the requirements of Section 50(1). As soon as the search of a person takes place, the requirement of mandatory compliance with Section 50 is attracted, irrespective of whether contraband is recovered from the person of the detainee or not. It was, therefore, imperative for PW-2 to inform the appellant of



his legal right to be searched in the presence of either a gazetted officer or a magistrate. From Exhibit-3, it can be discerned that the appellant was informed of his legal right to be searched in the presence of a magistrate or a gazetted officer. The appellant opted for the latter alternative. Exhibit-4 is a record of the events after the arrival of PW-4 on the scene. After the arrival of PW-4, the appellant was once again asked by him, whether he wished to be searched in the presence of a gazetted officer or a magistrate. This was the second option which was presented to him. When he reiterated his desire to be searched before a gazetted officer, PW-4 inquired of the appellant whether he wished to search PW-2 before his own search was conducted by PW-2. The appellant agreed to search PW-2. Only the personal belongings of PW-2 were found by the appellant. It was only after this that a search of the appellant was conducted and charas recovered. Before the appellant's search was conducted, both PW2 and PW-4 on different occasions apprised the appellant of his legal right to be searched either in the presence of a gazetted officer or a magistrate. The options given by both PW-2 and PW-4 were unambiguous. Merely because the appellant was given an option of searching PW-2 before the latter conducted his search, would not vitiate the search. In Parmanand, in addition to the option of being searched by the gazetted officer or the magistrate, the detainee was given a 'third' alternative by the empowered officer which was to be searched by an officer who was a part of the raiding team. This was found to be contrary to the intent of Section 50(1). The option given to the appellant of searching PW-2 in the case at hand, before the latter searched the appellant, did not vitiate the process in which a search of the appellant was conducted. The search of the appellant was as a matter of fact conducted in the presence of PW-4, a gazetted officer, in consonance with the voluntary communication made by the appellant to both PW-2 and PW-4. There was strict compliance with the requirements of Section 50(1) as stipulated by this Court in Vijaysinh."

19. On the basis of the aforesaid decision relied upon by the learned counsel appearing for the appellant, it can be concluded that the requirement

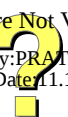


of Section 50 of the NDPS Act is mandatory and it is not only an option to be given to the accused but he has to be informed about his legal statutory right which he enjoys for his search to be conducted in the presence of the Gazetted Officer or a Magistrate.

20. If the notice under Section 50 of the NDPS Act in the instant case is examined, the same would clearly indicate that the appellant was not informed about his legal right to be searched in the presence of Gazetted Officer or the Magistrate. What was informed to him, was that as if he desires, he can be taken to Gazetted Officer or the Magistrate. As has been held by this court on the basis of pronouncement of Hon'ble Supreme Court that the appellant has to be informed about his rights of his search in the presence of Gazetted Officer or Magistrate, this court finds that there is non-compliance of the provisions of Section 50 of the NDPS Act. It is to be noted that there is no other recovery or evidence to substantiate the charges against the appellant.

21. So far as the judgment relied upon by the learned counsel appearing for the State in the case of *State of Punjab (supra)* is concerned, a perusal of paragraph No. 7 thereto would clearly indicate that the search of the vehicle had resulted in the recovery of 7 bags of puppy husk containing 34 kg in each bag. The recovery of the contraband from the vehicle is an independent factor which can be taken into consideration without compliance of Section 50 of the NDPS Act, and, therefore the said decision would not come in the rescue of the state.

22. As far as decision in the case of *Dayalu Kashyap (supra)* is concerned, in the said case also the recovery was conducted from polythene



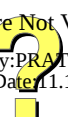
bag which was being carried on a *Kanwar* and the Hon'ble Supreme Court has clearly indicated that the recovery was not from the person. In the present case the search of the appellant was admittedly conducted, however, the recovery was not found from his person but has been found from the bag which he was holding in his hand. Under these circumstances, notwithstanding the fact that there was no recovery from the person of the appellant, the search of the person of the appellant was done.

23. In the decision of *S.K. Raju (supra)*, the Hon'ble Supreme Court has clearly held that since the search of the person of the appellant therein was also involved, therefore, Section 50 of the NDPS Act would be attracted in that case and accordingly the requirement of Section 50(1) of the NDPS Act was insisted.

24. So far as the decision relied upon by learned APP for the state in the case of *State of HP Vs. Pawan Kumar*¹⁴ is concerned, it is to be stated that in paragraph No. 17 of the decision in the case of *S.K. Raju (supra)* the Hon'ble Supreme Court has taken note of the decision in the case of *Pawan Kumar (supra)*. The distinction between the two situations has been considered and if a bag, article or container etc. being carried by an accused is subjected to search independently without there being any search of the person of the appellant, the decision in the case of *Pawan Kumar (supra)* would have application. However, in a case where the person of accused is subjected to search along with the search of bag, article or container which he holds in his hand, there is requirement of compliance of Section 50 of the NDPS Act.

25. In view of the aforesaid discussion, it is found that in the present case

¹⁴ (2005) 4 SCC 350



admittedly the person of the appellant was searched but no recovery therefrom was found and the recovery from the bag which he was holding in his hand has been affected and there is non-compliance of the provisions of Section 50 of the NDPS Act.

26. Accordingly, the conviction and sentence of the appellant is, therefore, set aside. The appeal is allowed. The appellant be set at liberty, if he is not required in any other case.

PURUSHAINDRA KUMAR KAURAV
(JUDGE)

NOVEMBER 10, 2022
HP

