

Andreza

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL APPLICATION (MAIN) NO. 1 OF 2023

STATE, through Anjuna Police Station, ... Applicant/Appellant
Anjuna, Goa.

Versus

Mr. Ugochukuwu Duke Ogboke @ Mr.
Cherizo Ogboke, (Major) s/o Duke
Ogboke, Nigerian National, Presently
lodged "Detention Centre", Old
Judicial Lock Up, Mapusa, Bardez, ...Respondent
Goa.

Mr. S. G. Bhobe, Public Prosecutor *for the Petitioner.*

CORAM: M. S. KARNIK, J
DATED: 18th APRIL 2023

ORDER

1. Heard Mr. Bhobe, learned Public Prosecutor for the Appellant-State of Goa.
2. The Judgment and Order passed by the Additional Sessions Judge-1, North Goa, Panaji, acquitting the Respondent for the offence punishable under Section 20(b)(ii)(B), 20(b)(ii)(C), 21(b) and 21(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985, (herein after referred to as 'NDPS Act') is under challenge in this Appeal for which leave to file the appeal is prayed.
3. The Respondent pleaded not guilty and claimed to be tried. Prosecution examined seven witnesses in support of its case. The

defence was of total denial. The Respondent examined himself and Dw.2 Blossom D' Souza. The Respondent was arrested on 01.05.2015. The Respondent was not on bail during trial. The Respondent though was acquitted, continues to be in detention centre as he was not able to produce necessary valid travel documents of being a foreign national. The Applicant thus has already suffered incarceration for more than eight years.

4. This is an appeal against an acquittal. The relevant consideration for grant of leave to appeal stands crystallised by the Hon'ble Supreme Court in the case of **State of Maharashtra vs. Sujay Mangesh Poyarelar**¹. Paragraphs 32 to 34 which deals with the powers of the Appellate Court in Appeal against the acquittal, being relevant, need to be reproduced. Paragraphs nos. 32 to 34 read thus :

“32. Now, so far as powers of the appellate court in an appeal against acquittal are concerned, no restrictions have been imposed by the Code on such powers while dealing with an order against acquittal. In an appeal against acquittal, the High Court has full power to re-appreciate, review and reweigh at large the evidence on which the order of acquittal is founded and to reach its own conclusion on such evidence. Both questions of fact and of law are open to determination by the appellate court.

¹ 2008(9) SCC 475

33. It is no doubt true that in a case of acquittal, there is a double presumption in favour of the respondent-accused. *Firstly*, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person should be presumed innocent unless he is proved guilty by a competent court of law. *Secondly*, the accused having secured his acquittal, the presumption of his innocence is further reinforced by the trial court (and certainly not weakened). Nonetheless, it is not correct to say that unless the appellate court in an appeal against acquittal under challenge is convinced that the finding of acquittal recorded by the trial court is “*perverse*”, it cannot interfere. If the appellate court on reappreciation of evidence and keeping in view well-established principles, comes to a contrary conclusion and records conviction, such conviction cannot be said to be contrary to law.

34. Recently, in *Chandrappa v. State of Karnataka* [(2007) 4 SCC 415 : (2007) 2 SCC (Cri) 325] , after considering all leading decisions on the point, one of us (C.K. Thakker, J.) laid down the following general principles regarding powers of the appellate court in dealing with an appeal against an order of acquittal : (SCC p. 432, para 42).

“(1) An appellate court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, ‘substantial and compelling reasons’, ‘good and sufficient grounds’, ‘very strong circumstances’, ‘distorted conclusions’, ‘glaring mistakes’, etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of ‘flourishes of language’ to emphasise

the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. *Firstly*, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. *Secondly*, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.”

5. Bearing in mind these principles, with the assistance of the learned Public Prosecutor, I have gone through the depositions, the materials on record and the judgment of the Trial Court.

6. It is an admitted position that the contraband was found in the bag which was carried by the Respondent. It is sought to be contended by learned Public Prosecutor that as the contraband was found in the bag and not on the person of the Respondent, non-compliance of Section 50(1) of the NDPS Act will not vitiate the search. According to learned Public Prosecutor, it is only when the contraband is found on the person of the accused during search that the accused has to be informed of his right to be taken to the nearest Gazetted Officer or Magistrate. Pw.7/PI Mahesh Kerkar, informed the Respondent that he has right to be searched before a Gazetted

Officer or a Magistrate of his choice but the Respondent declined the offer.

7. Learned Public Prosecutor handed over a copy of depositions and the chargesheet. I have gone through the evidence of the Panch witness-PW.6 Sunil Korgaonkar. The panch witness Pw.6 in his deposition stated that PI Mahesh Kerkar informed the said person (Respondent) that he could be searched either at the spot or taking him to the Police Station before the Gazetted Officer, which offer was declined by the Respondent. It is thus the prosecution case that the raiding party had informed the accused that he has a right to be searched before a Gazetted Officer or a Magistrate of his choice which offer was declined by the Respondent. The deposition of panch witness Pw.6/Sunil Korgaonkar assumes relevance as his evidence creates a doubt whether the Respondent was apprised of his right to be searched before a Gazetted Officer or a Magistrate. Once it is the stand of the raiding party that the accused was informed about his right to be searched before a Gazetted Officer or a Magistrate, then it necessarily pre-supposes that the same has to be in terms of what is provided by Section 50(1) of the NDPS Act. Section 50(1) of the NDPS Act, reads thus :

“50. Conditions under which search of person shall be conducted. – (1) When any officer duly authorised under section 42 is about to search any person

under the provisions of section 41, section 42 or section 43, he shall if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.”

8. The object of providing the right under Section 50(1) of the NDPS Act came up for consideration before the Hon'ble Supreme Court in the case of **Vijaysinh Chandubha Jadeja vs. State of Gujarat**². Their Lordships at Paragraphs 28 and 29, observed thus :

“28. We shall now deal with the two decisions, referred to in the referral order, wherein “substantial compliance” with the requirement embodied in Section 50 of the NDPS Act has been held to be sufficient. In *Prabha Shankar Dubey* [(2004) 2 SCC 56 : 2004 SCC (Cri) 420] a two Judge Bench of this Court culled out the ratio of *Baldev Singh case* [(1999) 6 SCC 172 : 1999 SCC (Cri) 1080] on the issue before us, as follows: (*Prabha Shankar Dubey case* [(2004) 2 SCC 56 : 2004 SCC (Cri) 420] , SCC p. 64, para 11)

“11. ... What the officer concerned is required to do is to convey about the choice the accused has. The accused (suspect) has to be told in a way that he becomes aware that the choice is his and not of the officer concerned, even though there is no specific form. The use of the word ‘right’ at relevant places in the decision of *Baldev Singh case* [(1999) 6 SCC 172 : 1999 SCC (Cri) 1080] seems to be to lay effective emphasis that it is not by the grace of the officer the choice has to be given but more by way of a right in the ‘suspect’ at that stage to be given such a choice and the inevitable consequences that have to follow by transgressing it.”

However, while gauging whether or not the stated requirements of Section 50 had been met on facts of that

² (2011) 1 SCC 609

case, finding similarity in the nature of evidence on this aspect between the case at hand and *Joseph Fernandez* [(2000) 1 SCC 707 : 2000 SCC (Cri) 300] the Court chose to follow the views echoed in the latter case, wherein it was held that the searching officer's information to the suspect to the effect that "if you wish you may be searched in the presence of a gazetted officer or a Magistrate" was in substantial compliance with the requirement of Section 50 of the NDPS Act. Nevertheless, the Court indicated the reason for use of expression "substantial compliance" in the following words: (*Prabha Shankar Dubey case* [(2004) 2 SCC 56 : 2004 SCC (Cri) 420] , SCC p. 64, para 12)

"12. The use of the expression 'substantial compliance' was made in the background that the searching officer had Section 50 in mind and it was unaided by the interpretation placed on it by the Constitution Bench in *Baldev Singh case* [(1999) 6 SCC 172 : 1999 SCC (Cri) 1080] . A line or a word in a judgment cannot be read in isolation or as if interpreting a statutory provision, to impute a different meaning to the observations."

It is manifest from the afore-extracted paragraph that *Joseph Fernandez* [(2000) 1 SCC 707 : 2000 SCC (Cri) 300] does not notice the ratio of *Baldev Singh* [(1999) 6 SCC 172 : 1999 SCC (Cri) 1080] and in *Prabha Shankar Dubey* [(2004) 2 SCC 56 : 2004 SCC (Cri) 420] , *Joseph Fernandez* is followed ignoring the dictum laid down in *Baldev Singh case* [(1999) 6 SCC 172 : 1999 SCC (Cri) 1080].

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.”

9. It is thus seen that there is no proper compliance with the provisions of sub-section (1) of Section 50 of the NDPS Act. Learned Public Prosecutor further submitted that the Trial Court committed an error in holding that there is non-compliance of Section 50(1) only on the basis of the evidence of Pw.6. It is submitted by learned Public Prosecutor that the panchanama cannot be discarded and has to be relied upon which indicates that there is proper compliance of sub-section (1) of Section 50 of the NDPS Act. I am not inclined to persuade myself to the submissions made by the learned Public Prosecutor. The Trial Court has correctly relied upon the decision of this Court in the case of **Mahendra vs. State of Maharashtra**³, while observing that substantive evidence is that which is recorded in Court and that the panchanama is not substantive evidence. In my opinion, the Trial Court has not committed error in taking a view that

3 (2013) SCC OnLine Bom 850

the evidence of the police witness is inconsistent with the evidence of the independent pancha. The Trial Court has observed that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted.

10. In the facts of the present case, I am of the opinion that merely because two reasonable conclusions are possible on the basis of the evidence on record, it is not open for this Court to disturb finding of acquittal recorded by the Trial Court. I, therefore, do not find any merit in the appeal. It is not possible for me to form an opinion on the basis of entire evidence on record that the Order of acquittal is illegal, unwarranted or contrary to law.

11. The leave to file the appeal is rejected.

M. S. KARNIK, J

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