

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

**CRIMINAL APPEAL NO.168 OF 2020
WITH
INTERIM APPLICATION NO.4521 OF 2023
IN
CRIMINAL APPEAL NO.168 OF 2020**

Santander Tarazona Prado & Anr. : Appellants
Vs.
Intelligence Officer & Anr. : Respondents

**WITH
INTERIM APPLICATION NO.510 OF 2023
IN
CRIMINAL APPEAL NO.168 OF 2020**

Juan Fernando Doncel Rivera : Applicant
Vs.
The State of Maharashtra : Respondent

Adv. Taraq Sayed a/w Adv. Ashwini Achari & Adv. Alisha Parekh for the
Appellants/Applicants.
Adv. Manisha Jagtap, for the NCB.

**CORAM : KISHORE C. SANT, J.
RESERVED ON : 18TH MARCH, 2024
PRONOUNCED ON : 7TH MAY, 2024**

PC. :

1. This Appeal arises out of the Judgment & Order passed by the
Learned Special Court, Mumbai under The Narcotic Drugs and
Psychotropic Substances ("in short NDPS Act") 1985 in NDPS Case No.111

of 2012 dated 6th January, 2020. By way of impugned Judgment & Order the Appellant is held guilty of the offence under Section 8(c), punishable under Section 21(c), 29 of the NDPS Act, 1985. Since the appeal is argued mainly on the ground of non-compliance of Section 52 (a) of the NDPS Act no other arguments are advanced in this Court. About the facts there is no much dispute. The necessary facts for the purpose of deciding the appeal are as below:-

2. An information was received by the officers of Narcotics Control Bureau that two South American nationals have checked in Hotel Royal Inn, Khar (West) Mumbai-52 and they are in possession of substantial quantity of cocaine. On that information appropriate authorization was given & a team for conducting a raid was formed. A raid was conducted the present accused persons were apprehended & taken in custody on 15th February, 2012. The such was taken the narcotic substance was seized & same was sent for analysis. It was found to be cocaine. On investigation & chargesheet total four accused persons were tried including present two appellants.

3. The Court after that the trial and on the basis of evidence led before if held present Appellants i.e. original accused Nos.1 & 2 are thus guilty & awarded sentence. For the offence punishable under Section 21(c)

of the Act and awarded a sentence to undergo Rigorous Imprisonment for a turn of 15 years & to pay fine of Rs.2,00,000/- each & in default to suffer Rigorous Imprisonment for three years. For the offence punishable under Section 29 of the Act, Accused Nos.1 to 2 are sentenced to undergo Rigorous Imprisonment for a term of 15 years and to pay fine of Rs.2,00,000/- each in default to suffer Rigorous Imprisonment for three years.

4. Learned Advocate for the Appellants vehemently argued the Appeal. He submits that PW-1 Prakash received information that Accused is staying in hotel. The Accused is in possession of cocaine. On search 10 Kg. cocaine was recovered. In follow up action Accused No.3 was taken. Whereas accused Nos.1 to 2 were in custody.

5. The learned Advocate has taken this Court through the evidence of PW-2 who was working as Intelligence Officer at NCB, Mumbai Zonal Unit. He stated that on 14th February, 2012 he was called by then Zonal Director and was briefed about an information received and directed him to proceed to the hotel where the Appellants were staying. He thereafter formed a team. The team proceeded to Hotel Royal inn at around 14.00 hrs. On going to the hotel they made an inquiry at the reception. They went to the room, they apprised the Accused that they

have received information that the Accused were in possession of substantial quantity of cocaine and informed them that the team needs to take search for recovery of the cocaine. The Accused were informed about the right under Section 50 of NDPS Act to be searched before Gazetted Officer or a Magistrate. The Accused agreed to be searched by the officers attached to NCB. All the members of the team offered their personal search. However, the same was declined by the Accused Nos.1 & 2. He further stated that the team thereafter found three bags in the room. Out of three luggage baggages in one bag there found to contain two shoe boxes. The team firstly opened the the red coloured shoe box. It was found to contain five polythene packets containing white powder in each of them. After cutting the inner polythene bag this witness took out a pinch of the white powder and the same was tested with drug detection kit. The result was positive to the presence of cocaine. He then took the blue coloured shoe box in that box also there were five polythene bags. One was in transparent & other four bags were wrapped in brown scotch tapes. He opened the transparent polythene bag & took the pinch of white coloured power from the bag which again tested positive showing presence of cocaine. He thereafter weighed the polythene bag one by one, each bag was found weighing 1 Kg. They prepared a samples S1 and S2 put the two

sachets and sealed those envelopes with NCB Seal No.3 in presence of panchas. Signatures on the envelopes were obtained of panchas and the Accused Nos.1 & 2. The envelopes marked S1 & S2 then were heat sealed. The samples were then sealed for further process. The bags containing the bulk quantity were kept in corrugated carton. It was closed this scotch tape from all the sides. With the help of jute strings the box of tied and seal was put on the same with NCB Seal No.3. The remaining 10 polythene bags were put in the shoe boxes again & tied those boxes with jute strings.

6. Learned Advocate pointed out from the cross of PW-2 who deposed that on 17th February, 2012 he recorded statement of Accused No.1. Learned Advocate thus submits that in the evidence of PW-2, there is nothing to show that he has complied with Section 52-A of the Act. He relied upon the Judgments of the Hon'ble Apex Court has below:-

- (1) *Union of India Vs. Mohanlal & Another*¹
- (2) *Simarnjit Singh Vs. State of Punjab*²
- (3) *Yusuf @ Asif Vs. State*³
- (4) *Mohammed Khalid And Another Vs. The State of Telangana*⁴

In respect of non-compliance of Section 52-A of the Act.

1 (2016) 3 SCC 379

2 Cr. Appeal No.1443 of 2023

3 Cr. Appeal No.3191 of 2023

4 Cr. Appeal No.1610 of 2023

7. Learned Advocate for the Respondent No.2 vehemently argued that from the evidence of PW-2, it is clearly seen that the prosecution has followed the procedure. The PW-2 in his evidence has clearly deposed that the Accused was informed about his rights to get search done in the presence of Magistrate or Gazetted Officer. It is on the refusal of the accused persons the search was taken by the officers. Before taking the search the officers had also offered to the accused to take search of the officers which was also declined by the accused person. There is no dispute about the contents in the packets found in the luggage bags of the accused persons. It is further submitted that the evidence on record is sufficient to prove the guilty of the accused. The Trial Court has rightly passed the Judgment & Order. No interference is called for.

8. As stated at the beginning the learned Advocate for the Appellants argued mainly on the point of non-compliance of Section 52-A. The Appellants have relied on various judgments. This Court feels is sufficient to consider only few of them. In the case of ***Union of Indian Vs. Mohanlal*** (supra) the Hon'ble Apex Court had considered the provision of Sections 52-A & 55 of the NDPS Act, which provides for handling & disposal of seized narcotic drugs and psychotropic substances. After considering the provisions in detail the Hon'ble Apex Court has held that

observance of procedure under Section 52-A is mandatory. If the procedure is not complied with, the Accused deserves to be acquitted.

9. In the case of ***Simarnjit Singh*** (supra) the Hon'ble Apex Court quoted paragraph Nos.15 & 17 of the Judgment in the case of Mohanlal (supra) & held when the drawing of the samples from all the packets at the time seizure is not in conformity with the law, it creates a serious doubt about the prosecution's case that substance recovered was a contraband. In that case the Court found that the case of the prosecution was not free from suspicion and there was no proof beyond a reasonable doubt. In view of that the conviction recorded by the Court and upheld by the High Court was quashed and set aside.

10. So far as the Judgment in the case of ***Usuf @ Asif*** (supra) the Hon'ble Apex Court again considered the Judgment in the case of Mohanlal (supra). In the said case the Hon'ble Apex Court observed that there was a failure on the part of the concerned authorities to lead primary evidence and the same vitiated the conviction. Observing thus conviction of the Appellant in that case by setting aside by the Judgment & Order of the High Court and the Trial Court.

11. Learned Advocate further relied upon the latest Judgment of the Hon'ble Apex Court in the case ***Mohammed Khalid And Another Vs.***

The State of Telangana (supra). The Hon'ble Court considered the provisions of Section 52-A. The Court considered the provision of Sections 43 & 49 of the Act. The said case was based on confessions of the Accused. In that case the Court also considered that the evidence of police witnesses was full of contradictions and thoroughly unconvincing & conviction of the Trial Court affirmed by the High Court was held to be illegal. The Appeal was allowed by setting aside the conviction of the Appellants in that case.

12. Thus, looking at the submissions, this Court finds that in the present case also prosecution has not shown the compliance of Section 52-A of the Act which is mandatory and thereby failed to prove its case beyond reasonable doubt.

13. This Court finds that under such circumstances the conviction and sentence deserves to be quashed & set aside.

14. The Appeal is thus allowed. Impugned Judgment & Order is quashed & set aside. The Applicants shall be set free if not required in any other offence.

15. Pending Interim Application if any stand disposed of.

(KISHORE C. SANT, J.)