

HIGH COURT OF UTTARAKHAND AT NAINITAL

Criminal Appeal No. 218 of 2025

Aamir Khan

.....Appellant

Versus

State of Uttarakhand

....Respondent

Present:

Mr. Vikas Singh Yadav, Advocate for the appellant.
Ms. Manisha Rana Singh, D.A.G. for the State.

JUDGMENT

Per: Hon'ble Ravindra Maithani, J.

Instant appeal is preferred against the judgment and order dated 31.05.2023, passed in Special Sessions Trial No. 6 of 2020, State Vs. Aamir Khan, by the court of Special Sessions Judge (NDPS), Almora. By the impugned judgment and order, the appellant has been convicted under Section 8 (C) read with Section 21 (a) of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("the Act") and sentenced to undergo rigorous imprisonment for a period of one year with a fine of Rs. 5000/-. In default of payment of fine, to undergo rigorous imprisonment for a further period of 15 days.

2. According to the prosecution case, 18.06.2019, when PW1 Punita Balodi and PW2 Ashok Kandpal, both Sub Inspectors, Police were on patrolling duty, they were told that two persons, who are into the smack business spotted in the nearby locality. The appellant and the co-accused were thereafter apprehended. They revealed that they have smack with them. They were given option

under Section 50 of the Act. According to the prosecution, the appellant consented to be searched before the Gazetted Officer. Therefore, he was taken before PW3 Kamal Ram Arya, Circle Officer, Police and when the personal search was made, from the possession of the appellant, 7.28 gram smack was recovered. Since, the appeal has been preferred by the appellant Aamir Khan only, the Court would confine its discussion to the extent, it relates to the appellant Aamir Khan.

3. The matter was investigated and after investigation, charge sheet under Sections 8/21 of the Act was submitted against the appellant, based on which the case was instituted against him. On 12.02.2021, charge under Section 8 (c) read with 21 (a) of the Act was framed, to which, the appellant denied and claimed trial.

4. In order to prove the case, the prosecution examined in all seven witnesses, namely, PW1 Sub Inspector Punita Balodi, PW2 Sub Inspector, Ashok Kandpal, PW3 Kamar Ram Arya, PW4 Head Constable 24, Prem Prakash, PW5 Arun Kumar Verma, PW6, Senior Sub Inspector, Sunil Singh Bisht and PW7 Sub Inspector, Rajeev Upreti.

5. After prosecution evidence, the appellant was examined under Section 313 of the Code of Criminal Procedure, 1973. He has stated that he has been false implicated in the case. After hearing the parties, by the impugned judgment and order, the appellant has been convicted and sentenced, as stated hereinbefore. Aggrieved, the appellant is in appeal.

6. Heard learned counsel for the parties and perused the record.

7. Learned counsel for the appellant submits that it is a false case. Nothing was recovered from the appellant. Option under Section 50 of the Act was not as per law.

8. Learned State counsel admits that the compliance of Section 50 of the Act is mandatory and it has to be accordingly made. But, she submits that there is no format, in which the right of an arrestee has to be apprised. It is submitted that it has to be culled out from the attending circumstances. She submits that in the instant case, exhibit A2 is the consent letter issued by the appellant which records the word "right". Therefore, it may be inferred that the appellant was apprised of his right to be searched before any Magistrate or Gazetted Officer.

9. PW1 Sub Inspector, Punita Balodi has proved the FIR. According to the FIR, on the date of incident, she was on patrolling duty when she met PW2 Sub Inspector, Ashok Kandpal. She was informed that two persons have been spotted, who are into smack business. They were apprehended. They revealed that they have smack. Therefore, they were given option under Section 50 of the Act. The appellant consented to be searched before the Gazetted Officer. Therefore, he was taken before the PW3 Kamal Ram Arya and when the search was made, smack was recovered from his possession. She has proved the recovery memo and other documents.

10. PW2 Sub Inspector, Ashok Kandpal and PW3 Kamal Ram Arya have also corroborated the statement of the PW1 Sub Inspector, Punita Balodi.

11. PW4 Head Constable, Prem Prakash was at the Police Station when the FIR was lodged. He proved the official documents. According to him, the recovered article was placed in the *maalkhana*.

12. PW5 Arun Kumar Verma was the Station House Officer at the relevant time. He has proved the extract of the *maalkhana* register, by which the recovered articles were lodged in the *maalkhana*.

13. PW6 Senior Sub Inspector, Sunil Singh Bisht initially conducted the investigation. He prepared the site plan. Thereafter, investigation was taken over by the PW7 Sub Inspector, Rajeev Upreti. He has stated about the steps taken by him during investigation and proved the charge sheet.

14. First and foremost, the Court proceeds to decide the issue relating to compliance of Section 50 of the Act. Section 50 of the Act reads as follows:-

“50. Conditions under which search of persons 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 nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.”

15. The Act does not give any proforma, in which the arrestee may be told of his right under Section 50 of the Act. It has to be communicated effectively to the arrestee person by the person apprehending him.

16. The question is whether substantial compliance of Section 50 has submit space under the Scheme of the Act or whether compliance of Section 50 should be mandatorily strictly be made.

17. In the case of Joseph Fernandez Vs. State of Goa, (2000) 1 SCC 707, the Hon’ble Supreme Court interpreted the provisions of Section 50 of the Act. In that case, the searching officer informed the arrestee that **“if you wish you may be searched in the presence of a gazetted officer or a magistrate”**; it was held that it was substantial compliance with the requirement of Section 50 of the Act.

18. In the case of Prabha Shankar Dubey Vs. State of M.P., (2004) 2 SCC 56, the arrestee was conveyed **that “by way of this notice you are informed that we have received information that you are illegally carrying opium with you, therefore, we are required to search your scooter and you for this purpose. You would like to give me search or you would like to be searched by any gazetted officer or by a Magistrate?”** This was held to be substantial compliance for Section 50 of the Act.

19. In the case of Krishna Kanwar (Smt) alias Thakuraeen Vs. State of Rajasthan, (2004) 2 SCC 608, the Hon’ble Supreme Court observed that **“since no specific mode or manner is prescribed or intended, the court has to see the substance and not the form of intimation. Whether the requirements of Section 50 have been met is a question which is to be decided on the facts of each case and there cannot be any sweeping generalization and/or a straitjacket formula.”**

20. In the case of Vijaysinh Chandubha Jadeja Vs. State of Gujarat, (2011) 1 SCC 609, the Hon’ble Supreme Court interpreted the law on the subject. In that case, the Hon’ble Supreme Court took into consideration the principles of law, as laid down in the case of Joseph Fernandez (*supra*), Prabha Shankar Dubey (*supra*) and others and finally in paras 29 and 30 observed as follows:-

“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.

30. As observed in Presidential Poll, In re [(1974) 2 SCC 33] : (SCC p. 49, para 13)

“13. ... It is the duty of the courts to get at the real intention of the legislature by carefully attending [to] the whole scope of the provision to be construed. ‘The key to the opening of every law is the reason and spirit of the law, it is the animus imponentis, the intention of the law maker expressed in the law itself, taken as a whole.’ ”

21. According to the FIR, when the appellant alongwith the co-accused was apprehended, they were told that **“you may get your search done before any Magistrate or Gazetted Officer”**. It is the prosecution case that a consent letter was also prepared which is exhibit A2 on the record. It is much vague. According to it, the appellant was informed of his legal right under Section 50 of the Act, that he is ready to be searched before any Magistrate/Gazetted Officer. It makes out no meaning.

22. PW1 Sub Inspector Punita Balodi in para 5 of her statement has stated that appellant was given an option that he may get his search to be made before any Magistrate or Gazetted Officer. Thereafter, according to this witness, the appellant consented. In the similar manner, PW2 Sub Inspector, Ashok Kandpal has also stated that option under Section 50 of the Act was given to the appellant. PW3 Kamal Nath Arya is the person before whom according to the prosecution, the search of the appellant was made. He does not speak

of the option that was given to the appellant under Section 50 of the Act. He says that on that date, on handset, he was informed by the PW2 Sub Inspector, Ashok Kandpal that the appellant had given his consent to be searched before Gazetted Officer/Magistrate. If this was the communication given by the PW2 Sub Inspector, Ashok Kandpal, it demolishes the prosecution case that any option to be searched was ever given to the appellant, in accordance with the provisions of Section 50 of the Act.

23. It is not stated in the FIR that the appellant was ever informed of his right to be searched before the Magistrate or the Gazetted Officer. He was simply told that he may get his search made before Gazetted Officer or Magistrate. The consent letter also reveals less. It also does not reflect that compliance of Section 50 of the Act was, as such made.

24. Having considered the evidence on record alongwith the material that was placed by the prosecution, this Court is of the view that in the instant case, the appellant was not apprised of his right to be searched before the Gazetted Officer or the Magistrate. The mandatory compliance of Section 50 of the Act has not been made and failure to make compliance of Section 50 of the Act in the instant case renders the recovery, suspects and vitiates the conviction on this ground alone, the appellant is liable to be acquitted. Accordingly, the impugned judgment and order dated 31.05.2023 passed by the court below deserves to be set aside. Accordingly, the appeal deserves to be allowed.

25. The appeal is allowed.

26. The impugned judgment and order dated 31.05.2023 passed by the learned Special Sessions Judge (NDPS), Almora in Special Sessions Trial No. 6 of 2020 is set aside. The appellant is acquitted of the charge under Section 8 (C) read with Section 21 (a) of the Narcotic Drugs and Psychotropic Substances Act, 1985.

27. The appellant is in jail. Let he be set free forthwith, if not wanted in any other case.

28. Let the copy of this judgment alongwith the Lower Court Record be sent to the court below for compliance.

(Ravindra Maithani, J.)
05.08.2025

Jitendra