



**HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JODHPUR**

S.B. Criminal Appeal No. 520/1999

Ladulal S/o Shri Gopilal, by caste Gurjar, R/o Jhalaria, PS Asind,
District Bhilwara, Rajasthan

-----Appellant

Versus

State of Rajasthan

-----Respondent

Connected With

S.B. Criminal Appeal No. 606/1999

Ladulal S/o Shri Gopilal, by caste Gurjar, R/o Jhalaria, PS Asind,
District Bhilwara, Rajasthan

-----Appellant

Versus

State of Rajasthan.

-----Respondent

For Appellant(s) : Mr. Suresh Kumbhat
For Respondent(s) : Mr. Anil Joshi, PP

HON'BLE MR. JUSTICE SANDEEP MEHTA

Judgment

04/01/2020

1. The appellant herein has been convicted and sentenced as below vide the judgment dated 13.08.1999 passed by learned Special Judge, NDPS Act Cases, Bhilwara in Sessions Case No.38/1998 as below:-

Offence Under Section	Imprisonment	Fine	Sentence in default of fine
8/18 of NDPS Act	10 years' R.I.	Rs.1,00,000/-	6 months' RI

2. The instant represented appeal (No.520/1999) and the Jail Appeal (No.606/99) have both been preferred by the appellant



Ladulal under Section 374 (2) Cr.P.C. for assailing the judgment dated 13.08.1999. Since both these appeals arise out of a common judgment, the same are being heard and decided together.

3. Brief facts relevant and essential for disposal of the instant appeal are narrated hereinbelow:-

As per the prosecution case, the appellant was apprehended by Shri Sumer Singh (PW.5), SHO PS Asind, Bhilwara on 08.07.1998 while carrying suspected contraband opium weighing 250 grams. Before proceeding to undertake the personal search, the Seizure Officer Shri Sumer Singh (PW.5) allegedly gave a notice (Ex.P/2) under Section 50 of the NDPS Act to the appellant, the substratum whereof reads as below:-

“उपरोक्त मौतबीरान के समक्ष अपराधी श्री लादुलाल S/o गोपी गुजर उम्र 32 साल R/o जालरीया P.S. आसीन्द जिसके पास अफीम होने की सम्भावना है । जिसको कहा गया की तेरे पास अफीम है तुम्हारी तलाशी गजिटेड अफसर या मजिस्ट्रेट साब के सम्मुख लेना है के पास चलो ।

Allegedly after receiving consent of the accused that he was desirous of being searched by the SHO himself, the Seizure Officer Sumer Singh proceeded to take personal search of the accused appellant and during the said process, suspected contraband opium was found in the right pocket of the appellant's shirt, which weighed at 250 grams. One sample of 50 grams was taken out therefrom. The sample as well as the remnant contraband were sealed in separate packets. After investigation, a charge-sheet came to be filed against the appellant for the offence under Section 8/18 of the NDPS Act in the Special Court, NDPS Act



Cases, Bhilwara. After completion of the trial, the appellant has been convicted and sentenced as above. Hence, this appeal.

4. Shri Suresh Kumbhat, learned counsel representing the appellant has advanced two-fold submissions for assailing the appellant's conviction as recorded by the trial court. His first and foremost contention is that the Seizure Officer Shri Sumer Singh (PW.5) did not comply with the mandatory requirement of Section 50 of the NDPS Act while conducting personal search of the appellant who was not apprised of the existence of his right to be searched before a Magistrate or a Gazetted Officer. Shri Kumbhat further submitted that even while deposing in the court, the Seizure Officer Shri Sumer Singh (PW.5) did not state that he apprised the appellant of his right to be searched before a Gazetted Officer or a Magistrate. The second contention of Shri Kumbhat, learned counsel representing the appellant is that the packet of sample allegedly taken out from the recovered contraband and the remnant Muddamaal weighing 200 grams were not deposited in the Maalkhana, as reflected in the Maalkhana Register entry (Ex.P/19), which fact as per him goes to the root of the matter and vitiates the entire prosecution case. He thus, urges that the impugned judgment of conviction is bad in the eyes of law and prays that the impugned judgment should be set aside and the accused-appellant be acquitted of the charge. In support of his contention, Shri Kumbhat has relied upon the judgment rendered by Hon'ble the Supreme Court in the case of **Arif Khan @ Agha Khan vs State of Uttarakhand : AIR 2018 SC 2013.**



5. Learned Public Prosecutor on the other hand has vehemently & fervently opposed the submissions advanced by Shri Kumbhat and urges that the appellant was apprehended while carrying significant quantity of contraband opium (250 grams). The factum of seizure has been duly proved in the evidence of the prosecution witnesses and as such, there is no reason to interfere in the impugned judgment of conviction. He thus, implored the Court to reject the appeal and affirm the impugned judgment.

6. I have heard and considered the submissions advanced at bar and have gone through the impugned judgment as well as the record.

7. There is no dispute that the suspected contraband was found and seized from the pocket of the shirt worn by the appellant. The search was a personal search and thus, the Seizure Officer was under an obligation to comply with the mandatory requirements of Section 50 of the NDPS Act. By virtue of the said provision, before taking personal search of the accused, the Seizure Officer was required to apprise the accused of the existence of his right to be searched before a Gazetted Officer or a Magistrate. The provision has to be complied with strictly, as has been held by a Constitution Bench Supreme Court decision in the case of **State of Punjab vs Baldev Singh (1999) 6 SCC 172**. However, a perusal of the notice under Section 50 of the NDPS Act given by the Seizure Officer to the accused (reproduced supra) and the evidence of the Seizure Officer Shri Sumer Singh (PW.5) makes it clear that the IO casually conveyed the accused that he could be searched before a Gazetted Officer or a Magistrate. No



attempt was made to apprise the accused of the existence of a right to be searched before either of the two. Hon'ble the Supreme Court had the occasion to recently consider this aspect of law in the case of **Arif Khan @ Agha Khan vs State of Uttarakhand (referred to supra)** wherein it was held as below:-



"23. Their Lordships have held in *Vijaysinh Chandubha Jadeja (supra)* that the requirements of Section 50 of the NDPS Act are mandatory and, therefore, the provisions of Section 50 must be strictly complied with. It is held that it is imperative on the part of the Police Officer to apprise the person intended to be searched of his right under Section 50 to be searched only before a Gazetted officer or a Magistrate. It is held that it is equally mandatory on the part of the authorized officer to make the suspect aware of the existence of his right to be searched before a Gazetted Officer or a Magistrate, if so required by him and this requires a strict compliance. It is ruled that the suspect person may or may not choose to exercise the right provided to him 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. (See also *Ashok Kumar Sharma vs. State of Rajasthan*, 2013 (2)SCC 67 and *Narcotics Control Bureau vs. Sukh Dev Raj Sodhi*, 2011 (6) SCC 392.

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24. Keeping in view the aforementioned principle of law laid down by this Court, we have to examine the question arising in this case as to whether the prosecution followed the mandatory procedure prescribed under Section 50 of the NDPS Act while making search and recovery of the contraband "Charas" from the appellant and, if so, whether it was done in the presence of a Magistrate or a Gazetted Officer so as to make the search and recovery of contraband "Charas" from the appellant in conformity with the requirements of Section 50.



25. In our considered view, the evidence adduced by the prosecution neither suggested and nor proved that the search and the recovery was made from the appellant in the presence of either a Magistrate or a Gazetted Officer.

26. It is the case of the prosecution and which found acceptance by the two Courts below that since the appellant (accused) was apprised of his right to be searched in the presence of either a Magistrate or a Gazetted Officer but despite telling him about his legal right available to him under Section 50 in relation to the search, the appellant (accused) gave his consent in writing to be searched by the police officials (raiding party), the two Courts below came to a conclusion that the requirements of Section 50 stood fully complied with and hence the appellant was liable to be convicted for the offence punishable under the NDPS Act. "

8. Manifestly thus, seen in the light of the above proposition of law, the notice given to the accused by the Seizure Officer Shri Sumer Singh (PW.5) is not compliant with the mandate of Section 50 of the Act of 1985. Thus, apparently, the seizure of contraband allegedly affected during the personal search of the appellant is vitiated on account of non-compliance of the mandatory requirements of Section 50 of the NDPS Act.

9. In addition thereto, there is another circumstance which is sufficient to satisfy the Court that the conviction of the appellant cannot be affirmed. The prosecution is under an obligation to satisfy the Court during its evidence that seizure of the contraband was actually made. This can be done by exhibiting Muddamal and the sample during evidence of the Seizure Officer or by proving inventory under Section 52A of the NDPS Act.



However, since Section 52A of the NDPS Act was not in existence when the seizure was made, no inventory could have been prepared at that point of time. Nonetheless, in the entire evidence of the prosecution witnesses, neither the Muddamal nor the sample packet returned from the FSL were exhibited and hence there is no satisfactory material available on record which can satisfy the Court that the seizure of contraband opium was actually effected by the Seizure Office Sumer Singh during personal search of the appellant.

10. In wake of the discussion made hereinabove, I am of the firm opinion that the conviction of the appellant as recorded by the trial court by the impugned judgment is absolutely contrary to law as well as the facts and cannot be sustained.

11. Accordingly, both these appeals deserve to be and are hereby allowed. The impugned judgment dated 13.08.1999 passed by the learned Special Judge, NDPS Act Cases, Bhilwara in Sessions Case No.38/1998 is hereby quashed and set aside. The appellant Ladulal S/o Shri Gopilal is acquitted of the charge under Section 8/18 of the NDPS Act. He is on bail. Thus, he need not surrender. His bail bonds are discharged.

12. However, keeping in view the provisions of Section 437-A Cr.P.C., the accused appellant is directed to furnish a personal bond in the sum of Rs.15,000/- and a surety bond in the like amount before the learned trial court which shall be effective for a period of six months to the effect that in the event of filing of a Special Leave Petition against the present judgment on receipt of



notice thereof, the appellant shall appear before the Supreme Court.

13. Record be returned to the trial court forthwith.



14-Sudhir Asopa/-

(SANDEEP MEHTA),J

RAJASTHAN HIGH COURT



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