

Arif Khan @ Agha Khan vs The State Of Uttarakhand on 27 April, 2018

Equivalent citations: AIR 2018 SUPREME COURT 2123, (2018) 187 ALLINDCAS 143 (SC), (2018) 104 ALLCRIC 610, (2018) 187 ALLINDCAS 143, (2018) 2 ALLCRIR 2082, (2018) 2 BOMCR(CRI) 813, (2018) 2 CRILR(RAJ) 464, (2018) 2 CRIMES 389, (2018) 2 CURCRIR 191, (2018) 2 JLJR 378, 2018 (2) KLT SN 67 (SC), (2018) 2 ORISSA LR 204, (2018) 2 PAT LJR 438, (2018) 2 RECCRIR 931, (2018) 2 UC 1013, (2018) 3 ALLCRILR 42, (2018) 6 SCALE 456, (2018) 71 OCR 192, 2018 CRILR(SC MAH GUJ) 464, 2018 CRILR(SC&MP) 464, (2019) 1 MADLW(CRI) 925, 2019 (3) SCC (CRI) 176, AIR 2018 SC(CRI) 761

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Bench: Abhay Manohar Sapre, R.K. Agrawal

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 273 OF 2007

Arif Khan @ Agha Khan ... Appellant(s)

Versus

State of Uttarakhand ... Respondent(s)

JUDGMENT

Abhay Manohar Sapre, J.

1. This appeal is filed by the accused against the final judgment and order dated 26.06.2006 passed by the High Court of Uttaranchal at Nainital in Criminal Appeal No.368 of 2004 whereby the High Court confirmed the judgment and order dated 09.11.2004 passed by the Additional Sessions Judge, Fast Track Court II, Udham Singh Nagar in Special Sessions Trial No.20 of 2003 by which the appellant-accused was convicted for the offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as “the NDPS Act”) and sentenced him to undergo rigorous imprisonment for 10 years and a fine of Rs.1,00,000/-.

2. In order to appreciate the issue involved in the appeal, few facts need to be mentioned hereinbelow.

3. In short, the case of the prosecution is as under:

4. On 23.11.2002, a secret information was received in P.S. Kichha from one unknown informant that one person is travelling in a roadways bus carrying with him some contraband articles. The secret informant also gave information that the person concerned would get down near the railway crossing from the Bus and would approach towards a place called “Chowki Pul Bhatta” along with contraband article.

5. The raiding party headed by SHO-Harish Mehra, who was on duty at P.S. Kichha along with the police officials on duty accordingly left for the place informed by the informant.

6. On reaching the informed place, the raiding party waited for sometime and thereafter spotted the person concerned, who was approaching towards the place informed to them. The raiding party intercepted the person concerned.

7. Thereafter, the accused was asked by the police personnel of raiding party as to whether he is in possession of contraband “Charas”. The accused admitted that he is in possession of “Charas”. On apprehending the accused, he was informed by the police personnel that he has a legal right to be searched in the presence of a Gazetted Officer or a Magistrate to which the accused replied that he has a faith on the raiding police party and consented to be searched by them.

8. The raiding police party accordingly obtained his consent in writing to be searched by the raiding police party. The raiding police party then searched the accused which resulted in seizure of “Charas” weighing around 2.5 K.G. in quantity from his body.

9. It is this incident, which gave rise to prosecution of the appellant (accused) for commission of the offence punishable under Section 20 of the NDPS Act in Special Sessions Trial No.20/2003. After investigation, the prosecution filed the charge sheet (Ex- 11) against the appellant and examined 5 witnesses to bring home the charge levelled against the appellant.

10. By order dated 09.11.2004, the Additional Sessions Judge/ Fast Track Court II, Udham Singh Nagar held that the prosecution was able to prove the case beyond reasonable doubt against the appellant and accordingly convicted him for the offences punishable under Section 20 of the NDPS Act and sentenced him to undergo rigorous imprisonment for 10 years and a fine of Rs.1,00,000/-.

11. The accused felt aggrieved and filed appeal in the High Court at Nainital. By impugned judgment, the High Court dismissed the appeal and upheld the order of Additional Sessions Judge, which has given rise to filing of the present appeal by the accused by way of special leave in this Court.

12. Heard Mr. J.C. Gupta, learned senior counsel for the appellant (accused) and Mr. Ashutosh Kumar Sharma, learned counsel for the respondent-State.

13. Learned counsel for the appellant (accused) while assailing the legality and correctness of the impugned judgment contended that both the Courts below erred in holding the appellant guilty of commission of the offence in question and thus erred in convicting him for the alleged offence under the NDPS Act.

14. Learned counsel contended that the prosecution has failed to ensure mandatory compliance of Section 50 of the NDPS Act inasmuch as the alleged recovery/search of the contraband (Charas) made by the raiding police party from the appellant's body was not done in accordance with the procedure prescribed under Section 50 of the NDPS Act which according to learned counsel is mandatory as held by this Court in the case of *Vijaysinh Chandubha Jadeja vs. State of Gujarat*, 2011(1) SCC 609.

15. Learned counsel urged that the search/recovery of the alleged contraband from the appellant ought to have been made only in the presence of either a Magistrate or a Gazetted Officer only.

16. It was urged that since admittedly the prosecution did not make the search/recovery from the appellant in the presence of a Magistrate or a Gazetted Officer and, therefore, the alleged recovery of the contraband "Charas" from the appellant is rendered illegal being in contravention of requirements of Section 50 of the NDPS Act thereby entitling the appellant for an acquittal from the charges.

17. In reply, learned counsel appearing for the respondent (State) supported the reasoning and conclusion arrived at in the impugned judgment and, therefore, prayed for upholding of the impugned judgment.

18. Having heard the learned counsel for the parties and on perusal of the record of the case, we are inclined to allow the appeal and while setting aside of the impugned judgment acquit the appellant from the charges in question.

19. The short question which arises for consideration in the appeal is whether the search/recovery made by the police officials from the appellant (accused) of the alleged contraband (charas) can be held to be in accordance with the procedure prescribed under Section 50 of the NDPS Act.

20. In other words, the question that arises for consideration in this appeal is whether the prosecution was able to prove that the procedure prescribed under Section 50 of the NDPS Act was followed by the Police Officials in letter and spirit while making the search and recovery of the contraband "Charas" from the appellant (accused).

21. What is the true scope and object of Section 50 of the NDPS Act, what are the duties, obligation and the powers conferred on the authorities under Section 50 and whether the compliance of requirements of Section 50 are mandatory or directory, remains no more *res integra* and are now settled by the two decisions of the Constitution Bench of this Court in *State of Punjab vs. Baldev Singh* (1999) 6 SCC 172 and *Vijaysinh Chandubha Jadeja* (*supra*).

22. Indeed, the latter Constitution Bench decision rendered in the case of *Vijaysinh Chandubha Jadeja* (supra) has settled the aforementioned questions after taking into considerations all previous case law on the subject.

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)

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.

27. We do not agree to this finding of the two Courts below as, in our opinion, a search and recovery made from the appellant of the alleged contraband “Charas” does not satisfy the mandatory requirements of Section 50 as held by this Court in the case of *Vijaysinh Chandubha Jadeja* (supra). This we say for the following reasons.

28. First, it is an admitted fact emerging from the record of the case that the appellant was not produced before any Magistrate or Gazetted Officer; Second, it is also an admitted fact that due to the aforementioned first reason, the search and recovery of the contraband “Charas” was not made

from the appellant in the presence of any Magistrate or Gazetted Officer; Third, it is also an admitted fact that none of the police officials of the raiding party, who recovered the contraband “Charas” from him, was the Gazetted Officer and nor they could be and, therefore, they were not empowered to make search and recovery from the appellant of the contraband “Charas” as provided under Section 50 of the NDPS Act except in the presence of either a Magistrate or a Gazetted Officer; Fourth, in order to make the search and recovery of the contraband articles from the body of the suspect, the search and recovery has to be in conformity with the requirements of Section 50 of the NDPS Act. It is, therefore, mandatory for the prosecution to prove that the search and recovery was made from the appellant in the presence of a Magistrate or a Gazetted Officer.

29. Though, the prosecution examined as many as five police officials (PW-1 to PW-5) of the raiding police party but none of them deposed that the search/recovery was made in presence of any Magistrate or a Gazetted Officer.

30. For the aforementioned reasons, we are of the considered opinion that the prosecution was not able to prove that the search and recovery of the contraband (Charas) made from the appellant was in accordance with the procedure prescribed under Section 50 of the NDPS Act. Since the non-compliance of the mandatory procedure prescribed under Section 50 of the NDPS Act is fatal to the prosecution case and, in this case, we have found that the prosecution has failed to prove the compliance as required in law, the appellant is entitled to claim its benefit to seek his acquittal.

31. In the light of the foregoing discussion, the appeal succeeds and is allowed. Impugned judgment is set aside. As a consequence thereof, the appellant's conviction is set aside and he is acquitted of the charges in question.

.....J (R.K. AGRAWAL)J. (ABHAY MANOHAR
SAPRE) New Delhi, April 27, 2018