

2023 LiveLaw (SC) 724 : 2023 INSC 776

**IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
ABHAY S. OKA; J., PANKAJ MITHAL; J.**

August 22, 2023.

CRIMINAL APPEAL NO. 2499 OF 2023 (ARISING OUT OF S.L.P. (CRIMINAL) NO. 3166 OF 2023)

MINA PUN versus STATE OF UTTAR PRADESH

Narcotic Drugs and Psychotropic Substances Act, 1985; Section 50 - Accused were not informed about their right to be searched before a Magistrate or a Gazetted officer - There was a violation of the safeguard provided by Section 50 of the NDPS Act - Conviction cannot be sustained.

WITH CRIMINAL APPEAL NO. OF 2023 (ARISING OUT OF S.L.P. (CRIMINAL) No. 3167 OF 2023)

(Arising out of impugned final judgment and order dated 18-09-2018 in JA No. 6522/2017 passed by the High Court of Judicature at Allahabad)

For Petitioner(s) Mr. Ajit Sharma, AOR Mr. A. Renganath, Adv.

For Respondent(s) Mr. Naresh Kumar, Adv. Mr. Dhawal Uniyal, AOR Mr. Ankur Prakash, AOR

J U D G M E N T

ABHAY S. OKA, J.

1. Heard learned counsel for the appellants and learned counsel for the respondent.
2. In the present appeals, the challenge is to the conviction of the appellants for the offences punishable under Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, "NDPS Act"). The substantive sentence imposed on the appellants is ten years of rigorous imprisonment. The appellants were directed to pay a fine of Rs.1,00,000/(Rupees One Lakh) and in default of payment of fine, to suffer rigorous imprisonment for two years.
3. It is not in dispute that the appellants have undergone the entire substantive sentence and a sentence for a period of six months in default of the payment of the fine. The High Court has upheld the order of conviction.
4. The first submission made by Mr. Ajit Sharma, learned counsel appointed as Amicus Curiae, is of the violation of the safeguard provided in Section 50 of the NDPS Act. He invited our attention to the evidence of Sanjay Singh (PW-4), a Police Officer who was present at the time of the seizure of the contraband. He also invited our attention to the cross-examination of the said witness in which the witness admitted that a consent letter was already prepared on which the signatures of the appellants were taken. However, he admitted that there is no mention in the consent letters that the appellants were informed that they have a right to say that their body search should be conducted before a Magistrate or a Gazetted Officer.
5. The case of the prosecution is that on the body search of the appellants, packets of charas were found. It is necessary for us to reproduce the relevant part of the cross-examination of Sanjay Singh (PW-4). The same reads thus:

"Consent-letter was prepared before taking search of accused, on which Exhibit Ka-1 is marked. There is no mention in this consent-letter that it is right of accused that they can give their body search before some Magistrate or Gazetted Officer. Recovery of material was made from body of the accused. Recovery was done at public place. There is no other arrest in memo, there is no independent witness, time of arrest is 12.10 O'clock. There is no mention of A.M. or P.M., but incident was of daytime. Information regarding arrival of accused persons from spy has not been

mentioned anywhere beside the Memo. No information was done before arrest. Weight of material was done with electronic scale. I reached on police station Dhebrua at 14.55 O'clock. G.D. and F.I.R. was instituted together.”

(underlines supplied)

6. Thus, it is an admitted position that in the consent letter, it is not mentioned that the appellants were informed about their right to insist that either a Magistrate or a Gazetted Officer remains present when their body search is conducted.

7. Learned counsel appearing for the appellants read over the consent letter at Exhibit Ka-1 which only records that the appellants had voluntarily agreed to a body search. Thus, the appellants were not informed about their right to be searched before a Magistrate or a Gazetted officer.

8. In view of the law laid down by a Constitution bench of this Court in **Vijaysinh Jadeja vs State of Gujarat**¹, it is crystal clear that there was a violation of the safeguard provided by Section 50 of the NDPS Act. In paragraphs 24 and 29 of its decision, the Constitution Bench held thus:

“24. Although the Constitution Bench in Baldev Singh case [(1999) 6 SCC 172 : 1999 SCC (Cri) 1080] did not decide in absolute terms the question whether or not Section 50 of the NDPS Act was directory or mandatory yet it was held that provisions of sub-section (1) of Section 50 make it imperative for the empowered officer to “inform” the person concerned (suspect) about the existence of his right that if he so requires, he shall be searched before a gazetted officer or a Magistrate; failure to “inform” the suspect about the existence of his said right would cause prejudice to him, and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from the person during a search conducted in violation of the provisions of Section 50 of the NDPS Act. The Court also noted that it was not necessary that the information required to be given under Section 50 should be in a prescribed form or in writing but it was mandatory that the suspect was made aware of the existence of his right to be searched before a gazetted officer or a Magistrate, if so required by him. We respectfully concur with these conclusions. Any other interpretation of the provision would make the valuable right conferred on the suspect illusory and a farce.

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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.”

¹ (2011) 1 SCC 609

(underlines supplied)

9. Therefore, the conviction of the appellants cannot be sustained. Accordingly, the appeals are allowed, and the appellants are acquitted of the offences alleged against them. If the appellants are already enlarged on bail, we direct that their bail bonds stand cancelled. If the appellants continue to be in custody, they shall be forthwith set at liberty.

10. Pending application(s) also stand disposed of.

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