

**IN THE HIGH COURT OF UTTARAKHAND**  
**AT NAINITAL**

THE HON'BLE SRI JUSTICE ALOK KUMAR VERMA

**10<sup>th</sup> APRIL, 2023**

**CRIMINAL APPEAL NO. 01 of 2006**

Between:

Devendra Singh Malik .....Appellant

and

State of Uttarakhand .....Respondent

Counsel for the Appellant : Mr. Sandeep Adhikari,  
Amicus Curiae (through  
video conferencing).

Counsel for the Respondent : Mr. S.T. Bhardwaj,  
Deputy Advocate General.

**Hon'ble Alok Kumar Verma,J.**

Present Criminal Appeal has been filed against the judgment dated 15.12.2005, passed by learned Special Sessions Judge, Champawat in Special Sessions Trial No. 03 of 2003, "State vs. Devendra Singh Malik", by which, the appellant Devendra Singh Malilk has been convicted and sentenced to undergo rigorous imprisonment for a period of ten years along with a fine of Rs. 1,00,000/- for the offence under Section 18 read with Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short, "Act, 1985").

**2.** Facts to the limited extent necessary, are that on 07.11.2003, Sub-Inspector K.P. Singh (PW1), Constable

Ramesh Ram and Constable Mubarik Hassan Rizvi (PW3) were on patrolling duty. When they reached near the bridge, they saw the accused coming from Nepal. Seeing the police, he started going back. On suspicion, he was apprehended at 15:00 hrs. He was asked the reason for running away. He told that he had one kilogram *Charas*. On enquiry, he told his name and address. Sub-Inspector K.P. Singh told the accused that he has to be searched before a Magistrate or a Gazette Officer, so does he want to go to any of them for search. The accused said that he has full faith in him. He does not want to go to anyone. The accused asked him to search. His personal search was conducted. On search, *Charas* (Material Ext. 1) was recovered from his *pajama* he was wearing. On weighing, its weight was found to be one kilogram. He was arrested. In spite of an endeavour, no public witness could be secured. The recovered article was seized. The said recovered article was taken into possession vide recovery memo (Ext. Ka3). An FIR (Ext. Ka4) was lodged by Sub-Inspector K.P. Singh. Sample of recovered material was sent to Forensic Science Laboratory, Agra. On examination, the Chemical Examiner found the same to be "*Charas*". Charge-sheet was filed after completion of investigation.

- 3.** Charge under Section 18 read with Section 20 of the Act, 1985 was framed. Appellant-accused pleaded not guilty and claimed to be tried.
- 4.** Prosecution in support of his case, examined five witnesses.
- 5.** (PW1) Sub-Inspector K.P. Singh, informant, and (PW3) Constable Mubarik Hassan Rizvi were members of arresting party.
- 6.** (PW2) Constable Laxman Chand is the scribe of the First Information Report.
- 7.** (PW4) Station Officer B.C. Pant is the Investigating Officer. He proved the charge-sheet (Ext. ka 9).
- 8.** (PW5) Head Constable Hansraj Singh produced 100 gram sample of the recovered material in sealed condition before the Special Court on 11.11.2003 and on 14.11.2003, he made the sample available to the Forensic Science Laboratory, Agra.
- 9.** The Special Court examined Alok Shukla, Senior Scientist, (CW1) as a Court witness. He proved the report (Ext. Ka 7) of Forensic Science Laboratory, Agra.
- 10.** Statement of the accused was recorded under Section 313 of the Code of Criminal Procedure, 1973. He denied all the incriminating evidence, produced by the prosecution.

11. Accused has not adduced any defence evidence.
12. Mr. Sandeep Adhikari, learned Amicus Curiae, contended that mandatory provision of Section 50 of the Act, 1985, was not followed by the searching party. Appellant was not informed of his legal right by the searching officer. Therefore, the impugned judgment is bad in the eyes of law.
13. On the other hand, Mr. S.T. Bhardwaj, learned Deputy Advocate General for the State, has supported the impugned judgment.
14. As per the Table prepared in terms of Section 2 (XXiia) and Section 2 (Viia) of the Act, 1985, lesser than 100 grams of *Charas* is small quantity and greater than 1 kg is commercial quantity (Entry No. 23). Therefore, according to the prosecution, recovered contraband was non-commercial.
15. The provisions of Section 50 of the Act, 1985 are as under: -
- "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 the 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."

**16.** PW1 Sub-Inspector, K.P. Singh and PW3 Constable Mubarik Hassan Rizvi stated that on 07.11.2003, when they were on patrolling duty, appellant-accused was apprehended and he told that he had one kg. Charas. Appellant-accused was told that he was to be searched before a Magistrate or a Gazetted Officer, so did he want to go to any of them for search. He replied that he has full faith in them and he does not want to go to anyone. He asked the police party to search him. On his search, one kg. Charas (Material Ext. 1) was recovered from his pajama he was wearing. According to these two witnesses, appellant-

accused was not apprised of his right to be searched before a Gazetted Officer or a Magistrate. Appellant-accused was not informed of his legal right to be searched in the presence of a Gazetted Officer or a Magistrate. What was informed to him, was that as if he desires, he can be searched before the Magistrate or a Gazetted Officer.

**17.** Section 50 of the Act, 1985, casts duty on empowered officer to inform the suspect of his right to be searched in the presence of the Gazetted Officer or Magistrate.

**18.** In **“Vijaysinh Chandubha Jadeja vs. State of Gujrat, (2011) 1 SCC 609”**, Constitutional Bench of the Hon’ble Supreme Court has held as under: -

“29. In view of the foregoing discussion, we are of the firm opinion that the object with which 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 in so far as the obligation of the authorised officer under subsection (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires a 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."

**19.** In **Arif Khan vs. State of Uttarakhand, (2018) 18 SCC 380**, the Hon'ble Supreme Court held that the suspects may or may not choose to exercise the right provided to them under Section 50 of the NDPS Act but as 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.

**20.** It is well settled that when the law provides for doing of an act in a particular manner, it necessarily prohibits the doing of that act in any other manner.

**21.** In the present matter, appellant was not informed of his legal right, therefore, non-compliance of Section 50 of the Act, 1985 makes sufficient case for acquittal. Accordingly, the present appeal is allowed. The impugned judgment of the conviction and sentence dated 15.12.2005, passed by learned Special Sessions Judge, Champawat, is set aside. Appellant is acquitted of the charge under Section 18 read with Section 20 of the Act, 1985. Appellant-accused is in judicial custody. Appellant shall be released from jail, in case, he is not otherwise required in any other case.

**22.** Appellant is directed to make compliance of Section 437 A of the Code of Criminal Procedure, 1973 within six weeks from today by appearing before the court concerned and execute a personal bond and two reliable sureties, each in the like amount to the satisfaction of the court concerned.

**23.** Registry is directed to provide a copy of this judgment to the Superintendent of concerned jail and the concerned Trial Court for intimation and compliance.

**24.** The Trial Court Records be sent back.

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**ALOK KUMAR VERMA, J.**

Dt: 10<sup>th</sup> April, 2023  
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