

Neutral Citation No. - 2024:AHC-LKO:49861

Reserved on 11.07.2024

Delivered on 24.07.2024

AFR

Court No. - 16

Case :- CRIMINAL APPEAL No. - 1305 of 2006

Appellant :- Mohd.Yusuf

Respondent :- The State Of U.P.

Counsel for Appellant :- Atul Verma

Counsel for Respondent :- Govt.Advocate

Hon'ble Shamim Ahmed,J.

1. The case is taken up in the revised call.
2. Heard learned counsel for the parties.
3. This appeal has been preferred against the judgment and order dated 13.07.2006 passed by learned Additional Sessions Judge, F.T.C.-VII, Lucknow in Sessions Trial No.176 of 2002, whereby the appellant has been convicted and sentenced for three months imprisonment for the offence under Section 8/18/21 of NDPS Act alongwith fine of Rs.2,000/-
4. The prosecution story, in brief, as disclosed in the first information report, is the Sub Inspector Arvind Kumar got an information from a reliable source that a man is selling smack near RPM Quarter Line, therefore, he alongwith some police personnel went to search him. The police party caught that man and on being asked his name, he told his name as Mohd.Yusuf. On being searched, 30 packets of smack were recovered from his possession. On the basis of aforesaid incident, Case Crime No.176 of 2002, under Sections 8/18/21 of N.D.P.S. Act was registered at Police Station Alambagh, District Lucknow.

5. Investigation was handed over to the Sub Inspector K.K. Yadav, who in turn got the sample chemically examined and received a report. He took the statements of witnesses of recovery and prepared the site plan and on finding sufficient evidence, he filed charge sheet against the accused in the Court.

6. The accused-appellant was charged for offence u/s 8/18/21 N.D.P.S. Act; to which he pleaded not guilty and claimed for trial.

7. In support of the prosecution case, the prosecution examined S.I. Arvind Kumar as P.W.-1, Constable Hasan Afroz as P.W.-2, Sughar Singh as P.W.-3 and K.K. Yadav, S.I. as P.W.-4.

8. Formal proof of prosecution papers have been admitted by the accused.

9. Appellant was examined under Section 313 of Code of Criminal Procedure, 1973, (in short 'Code') wherein he stated that he had been falsely implicated due to enmity.

10. Learned trial Court, after going through the evidence available on record as well as after due hearing the learned counsel for both the parties, convicted and sentenced the appellant for three months imprisonment for the offence under Section 8/18/21 of NDPS Act alongwith fine of Rs.2,000/-.

11. Aggrieved by the aforesaid judgment and order, the appellant has filed this appeal.

12. Learned counsel for the appellant argued that Section 50 of the N.D.P.S. Act is a mandatory provision. The arresting officer has not complied with that provision. As such, the recovery is illegal which vitiates the trial. Learned counsel further submitted that the alleged place of recovery is public place but no effort to invite the public witness at the time of recovery was made by the police party. Learned trial Court without proper appreciation of the evidence

available on record has illegally convicted the appellant vide impugned judgment and order which is liable to be set aside as the prosecution has miserably failed to prove its case beyond reasonable doubt. In support of his argument learned counsel for the appellant has placed reliance on law laid down by Hon'ble Supreme Court in *Vijaysinh Chandubha Jadeja Vs. State of Gujarat, 2010 (2) EFR 755* and *State of Rajasthan Vs. Parmanand and another, (2014) 2 SCC (Cri) 563*.

13. Learned A.G.A. vehemently opposed the submission of learned counsel for the appellant and submitted that there is no illegality in the impugned judgment and order as it is settled provision of law that only on the solitary testimony of witness, conviction can be maintained and statement of police witness cannot be rejected on the ground that he is a police witness. Learned A.G.A. further submitted that impugned judgment and order, passed by trial Court, is well reasoned, well discussed and appeal is liable to be dismissed.

14. After considering the arguments advanced by learned counsel for the parties and after perusal of record, this Court finds that the prosecution case is based on oral testimony of police personnel. It is settled principle of law that only on account of the fact that prosecution case is based on testimony of police witness, it cannot be thrown out, if the evidence of such witness is wholly reliable.

15. Severe punishment has been provided in the N.D.P.S. Act to check the misuse of this Act by the police personnel or officers and certain safeguards particularly Section 50 of N.D.P.S. Act has been incorporated in this Act that search of the suspected person must be done before the Magistrate or Gazetted Officer. Similarly Section 55 and 57 of N.D.P.S. Act provides that seized contraband article be kept by Station House Officer in safe custody and report of arrest

and seizure be sent immediately to immediate Superior Officer within 48 hours.

16. Hon'ble Supreme Court in *Vijaysinh Chandubha Jadeja Vs. State of Gujarat, 2010 (2) EFR 755*, while discussing the importance and relevancy of section 50 of N.D.P.S. Act, in para-22, has opined as under:-

"22. 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 sub-section (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. As observed in Re Presidential Poll (1974) 2 SCC 33, 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." We are of the opinion that the concept of "substantial compliance" with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said Section in Joseph Fernandez (supra) and Prabha Shankar Dubey (supra) is neither borne out from the language of sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in Baldev Singh's case (supra). Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf. We also feel that though Section 50 gives an option to the empowered officer to take such person (suspect) either before the nearest gazetted officer or the Magistrate but in order to impart authenticity, transparency and creditworthiness to the entire proceedings, in the first instance, an endeavour should be to produce the suspect before the nearest Magistrate, who enjoys more confidence of the common man compared to any other officer. It would not only add legitimacy to the search proceedings, it may verily strengthen the prosecution as well."

17. Hon'ble Supreme Court in ***State of Rajasthan Vs. Parmanand and another, (2014) 2 SCC (Cri) 563***, again in paragraph-17, has opined as under:-

"In our opinion, a joint communication of the right available under Section 50(1) of the NDPS Act to the accused would frustrate the very purport of Section 50. Communication of the said right to the person who is about to be searched is not an empty formality. It has a purpose. Most of the offences under the NDPS Act carry stringent punishment and, therefore, the prescribed procedure has to be meticulously followed. These are minimum safeguards available to an accused against the possibility of false involvement. The communication of this right has to be clear, unambiguous and individual. The accused must be made aware of the existence of such a right. This right would be of little significance if the beneficiary thereof is not able to exercise it for want of knowledge about its existence. A joint communication of the right may not be clear or unequivocal. It may create confusion. It may result in diluting the right. We are, therefore, of the view that the accused must be individually informed that under Section 50(1) of the NDPS Act, he has a right to be searched before a nearest gazetted officer or before a nearest Magistrate. Similar view taken by the Punjab & Haryana High Court in Paramjit Singh and the Bombay High Court in Dharamveer Lekhram Sharma meets with our approval."

18. Admittedly, the prosecution has not produced other independent eye-witnesses of the alleged recovery and even no explanation has been offered by the prosecution for their non-production. All the witnesses are police personnel. Non-production of independent eye witness is serious lacuna which has made the prosecution case very doubtful.

19. In addition to above, admittedly the appellant, prior to his search, was not produced before any Gazetted Officer or Magistrate, whereas according to prosecution before his search the police personnel were informed by the appellant that he was carrying the charas. Prosecution has also not produced any written consent of the appellant for his search. From perusal of testimony of prosecution witnesses, it does not transpire that any efforts were made by them to

produce the appellant before any Gazetted Officer or Magistrate, as required by Section 50 of N.D.P.S. Act, in view of law laid down by Apex Court in *Vijaysinh Chandubha Jadeja (Supra)*.

20. Further, it is also pertinent to note at this juncture that not only the manner in which the appellant was searched, is doubtful, the prosecution has also not prosecuted the case seriously, knowing that severe punishment has been provided in N.D.P.S. Act. It produced only four witnesses i.e S.I. Arvind Kumar as P.W.-1, Constable Hasan Afroz as P.W.-2, Sughar Singh as P.W.-3 and K.K. Yadav, S.I. as P.W.-4 and withheld other witness without any justification.

21. In the light of above discussion, it is clear that the prosecution has failed to prove the mandatory compliance of Section 50 N.D.P.S. Act. In absence of compliance of mandatory provision of Section 50 N.D.P.S Act, the prosecution case, based on testimony of police personnel i.e. S.I. Arvind Kumar as P.W.-1, Constable Hasan Afroz as P.W.-2, Sughar Singh as P.W.-3 and K.K. Yadav, S.I. as P.W.-4, whose statements are not wholly reliable, cannot be held as proved beyond reasonable doubt in view of the other illegalities and material irregularity committed by the witnesses as discussed above.

22. Thus this Court is of the view that prosecution has miserably failed to prove its case beyond reasonable doubt against the appellant. The trial Court has not properly discussed the evidence produced by the prosecution and has passed the impugned judgment and order against the settled principle of law including provisions of N.D.P.S. Act. This Court, therefore, unable to uphold the conviction and sentence of the appellant. The appellant is entitled to be acquitted. The impugned judgment and order is liable to be set aside and accordingly, appeal is liable to be allowed.

23. In view of the above, impugned judgment and order dated 13.07.2006 passed by learned Additional Sessions Judge, F.T.C.-VII,

Lucknow in Sessions Trial No.176 of 2002 arising out of Case Crime No.176 of 2002, under Sections 8/18/21 of N.D.P.S. Act, Police Station Alambagh, District Lucknow, is **set aside** and **reversed** and accused/appellant, namely, **Mohd.Yusuf** is **acquitted** of the charges levelled against him. Consequently, the appeal is **allowed**. His personal bond and surety bonds are canceled and sureties are discharged.

24. Let a copy of this judgment alongwith the trial court record be sent immediately to the Trial Court concerned for necessary compliance.

25. No order as to the costs.

Order Date :- 24.07.2024

Piyush/-

(Shamim Ahmed, J.)