

NON-REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 611 OF 2012

[Arising out of Special Leave Petition (Crl.) No.6774 of 2011]

MYLA VENKATESWARLU

...

APPELLANT

Vs.

THE STATE OF ANDHRA PRADESH ...

RESPONDENTS

JUDGMENT

(SMT.) RANJANA PRAKASH DESAI, J.

1. Leave granted.

2. The challenge in this appeal, by special leave, is to the judgment of a learned Single Judge of the Andhra Pradesh High Court dismissing the criminal appeal filed by the appellant questioning the correctness of the judgment and order passed by the Ist Additional Sessions Judge, Guntur. By the said judgment, the appellant (original accused 3) and

two others viz. Myla Rambabu and Myla Muralikrishna (original accused 1 and 2 respectively and for convenience, referred to as “A1” and “A2” respectively) were convicted for offences punishable under Section 8(c) read with Section 20(b) (i) of the Narcotic Drugs and Psychotropic Substances Act, 1985, (for short, “**the NDPS Act**”) and sentenced to undergo rigorous imprisonment for six months each and to pay a fine of Rs.5,000/- each. In default of payment of fine, they were directed to undergo simple imprisonment for six months each.

3. According to the prosecution, on 5/1/2001, PW-3 CI Koteswara Rao on receiving reliable information about illegal sale of Ganja at Koneru Bazar, Chenchupeta, Tenali, proceeded to Koneru Bazar along with PW-1 PC Shaik Khasim, PW-2 SI Nageswara Rao and one other constable. They noticed the appellant, A1 and A2 sitting under a bridge. On seeing them, the appellant, A1 and A2 tried to run away. PW-3 CI Koteswara Rao and his team apprehended them. The prosecution story further goes on to say that the appellant, A1 and A2 revealed their names. On questioning, they stated that

they were carrying Ganja packets in their pockets. It is further the case of the prosecution that PW-3 CI Koteswara Rao asked them whether they wanted any other gazetted officer for their search and seizure in addition to him to which they replied that they did not want any other gazetted officer and checking by the Circle Inspector of Police was sufficient. In the search, five Ganja packets were recovered from A1, six Ganja packets were recovered from A2 and four Ganja packets were recovered from the appellant. A1, A2 and the appellant are stated to have confessed to the crime. They were then put under arrest. After completion of the investigation, they were charged for the offence under Sections 8(c) read with Section 20(b)(i) of the NDPS Act. The appellant pleaded not guilty to the charge. The evidence led by the prosecution found favour with the trial court and it convicted the appellant, A1 and A2 as aforesaid. The appeal carried from the said judgment was dismissed by the High Court. Hence, this appeal. It must be noted here that A1 and A2 have not challenged the impugned judgment and order and, hence, they are not before us.

4. We have heard, at some length, learned counsel appearing for the appellant and learned counsel appearing for the State of Andhra Pradesh, who has made a valiant effort to support the impugned judgment and order.

5. Though several points were raised by learned counsel for the appellant, it is not necessary for us to deal with them because his contention that in this case there is a violation of procedure contemplated under Section 50 of the NDPS Act appeals to us. Section 50 of the NDPS Act, so far as it is relevant, reads 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 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) xxx xxx xxx”

A careful perusal of Section 50 indicates that when any authorized officer is about to search any person under the provisions of Sections 41, 42 or 43 of the NDPS Act, if such person requires, he has to 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. In short, the suspect can insist that his search be conducted before a gazetted officer or a Magistrate. Needless to say that a suspect may insist on the presence of a gazetted officer or a Magistrate so as to introduce transparency in the search.

6. In **State of Punjab v. Baldev Singh**¹ the Constitution Bench of this court was considering the question whether compliance of Section 50 of the NDPS Act was mandatory and

¹ (1999) 6 SCC 172

if it is so, what is the effect in case of breach thereof. After considering the relevant judgments on the point, the Constitution Bench drew the following conclusions.

“(1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the concerned person of his right under Sub-section (1) of Section 50 of being taken to the nearest Gazetted Officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing;

(2) That failure to inform the concerned person about the existence of his right to be searched before a Gazetted Officer or a Magistrate would cause prejudice to an accused;

(3) That a search made, by an empowered officer, on prior information, without informing the person of his right that if he so requires, he shall be taken before a Gazetted Officer or a Magistrate for search 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 his person, during a search conducted in violation of the provisions of Section 50 of the Act;

xxx

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(5) That whether or not the safeguards provided in Section 50 have been duly observed would have to be determined by the Court on the basis of evidence

led at the trial. Finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of Section 50, and particularly the safeguards provided therein were duly complied with, it would not be permissible to cut-short a criminal trial;

(6) That in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Section 50 are mandatory or directory, but, hold that failure to inform the concerned person of his right as emanating from Sub-section (1) of Section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law;

(7) That an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search.”

7. On account of divergence of opinion between the two decisions of this court with regard to the dictum laid down by the Constitution Bench in **Baldev Singh**, another

Constitution Bench in **Vijaysingh Chandubha Jadeja v. State of Gujarat**² considered the question whether Section 50 of the NDPS Act casts a duty on the empowered officer to inform the suspect of his right to be searched in the presence of a gazetted officer or a Magistrate, if he so desires or whether a mere enquiry by the said officer as to whether the suspect would like to be searched in the presence of a Magistrate or a gazetted officer can be said to be due compliance with the mandate of the said section. The Constitution Bench held that although **Baldev Singh** 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 makes it imperative for the empowered officer to inform the person concerned 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,

² (2011) 1 SCC 609

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 Constitution Bench noted that in **Baldev Singh**, it was clarified 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. The Constitution Bench reiterated the principles laid down by this court in **Baldev Singh** and added that the concept of substantial compliance with the requirement of Section 50 of the NDPS Act is neither borne out from the language of Section 50(1) nor it is in consonance with the dictum laid down in **Baldev Singh**. Thus, it is no longer in dispute that strict compliance with the provisions of Section 50(1) of the NDPS Act is necessary. We need to see whether evidence adduced in this case establishes

that there was strict compliance of Section 50(1) of the NDPS Act.

8. PW-1 PC Shaik Khasim, who was, at the relevant time, attached to the Tenali-III Town Police Station had apprehended the appellant, A1 and A2 on 5/1/2001. He stated that on 5/1/2001 at 6.15 p.m., Circle Inspector of Police took him in a jeep along with other police personnel to Chenchupeta Railway Over Bridge. They saw three persons sitting under the bridge. On seeing them, the said three persons started running away. They apprehended them and brought them to the Circle Inspector of Police. According to him, the appellant, A1 and A2 confessed that they were having Ganja packets in their pockets. He has further stated that the Circle Inspector of Police asked them whether they wanted any other gazetted officer for their search and seizure in addition to him to which they replied that they did not want any other gazetted officer and the checking by the Circle Inspector of Police was sufficient for them. Thereafter, the Circle Inspector of Police checked their pockets and recovered Ganja packets.

In the cross-examination also, this witness has maintained the same story.

9. PW-2 SI Nageswara Rao was, at the relevant time, working as Sub-Inspector of Police at Tanali-III Town Police Station. He was in the police party which apprehended the appellant, A1 and A2. He has corroborated PW-1 PC Shaik Khasim as regards the apprehension of the appellant, A1 and A2. He has stated that before conducting the search, the Circle Inspector of Police asked the appellant, A1 and A2 “about the intention to have another gazetted officer and they replied that they do not want any other gazetted officer for their search and seizure”. According to this witness, thereafter, the search was conducted and Ganja packets were recovered from their possession. From the evidence of PW-1 and PW-2, it is clear that the appellant, A1 and A2 were not communicated their right to have search conducted in the presence of a Magistrate or a gazetted officer.

10. At the relevant time, PW-3 CI Koteswara Rao was working as Inspector of Police. It is this witness who had received information about the illegal sale of Ganja at Koneru Bazar. On receiving the information, he proceeded to Koneru Bazar along with PW-1, PW-2 and another police constable. He has corroborated PW-1 and PW-2 as regards the apprehension of the appellant, A1 and A2. He has stated that the appellant, A1 and A2 revealed their names and identity. According to him, A1 produced packets containing Ganja. Then he told him that if he wanted another gazetted officer, he will bring him. So far as A2 and the appellant are concerned, he has stated that they produced packets containing Ganja. Thereafter, he revealed to them that they have a right to have another gazetted officer in addition to him to which they replied that his presence was sufficient. PW-3 has thus come out with a new story viz. the appellant, A1 and A2 took out the Ganja packets from their pockets and, thereafter, he told the appellant, A1 and A2 that they had a right to have another gazetted officer in addition to him. This story that the accused themselves took out the Ganja packets from their pockets

runs contrary to the version of PW-1 and PW-2 and, therefore, it does not inspire confidence. If the accused voluntarily took out Ganja packets, there was no question of conducting search in the presence of a gazetted officer or a Magistrate. But, assuming that this right can be communicated to a suspect after the seizure and assuming the evidence of this witness to be true, it still does not indicate that the requirement of Section 50(1) of the NDPS Act was fulfilled. There is no clear communication to the accused that they had a right to be searched in the presence of a gazetted officer or a Magistrate. As we have already noted, the concept of substantial compliance cannot be read into the provisions of Section 50(1) of the NDPS Act. We, therefore, have no hesitation in concluding that in this case, there is a breach of Section 50(1) of the NDPS Act. Since the conviction of the appellant is solely based on possession of Ganja recovered from him, it will have to be set aside.

11. A1 and A2 are not before us. However, the conclusion drawn by us applies to their case as well. This court in **Ashok**

@ **Dangra Jaiswal v. State of Madhya Pradesh**³, dealt with a somewhat similar fact situation. Out of the three accused convicted under Sections 8(c) and 20(b)(i) of the NDPS Act, only one accused had appealed to this court. The other two were in jail. This court set aside the conviction and sentence of the appellant therein and observed that the lapses which had weighed with it for setting aside the conviction of the appellant therein apply equally to the case of the accused who had not appealed and, therefore, it would be unjust to let them rot in jail even while allowing the appeal preferred by the appellant therein. We are respectfully inclined to follow the same course. In the circumstances, the impugned judgment and order convicting and sentencing the appellant, A1-Myla Rambabu and A2-Myla Muralikrishna is quashed and set aside. The appellant, A1-Myla Rambabu and A2-Myla Muralikrishna are acquitted of the charge under Section 8(c) read with Section 20(b)(i) of the NDPS Act.

12. The appeal is disposed of in the aforesaid terms.

³ 2011 (4) SCALE 273

.....J.
(AFTAB ALAM)

.....J.
(RANJANA PRAKASH DESAI)

NEW DELHI,
APRIL 04, 2012.