

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Reserved on: 15th December, 2022

Pronounced on: 22nd December, 2022

+ **CRL.L.P. 241/2020**

STATE Petitioner

Through: Mr. Narinderjit Singh Bawa,
APP for the State with Mr.
Shivesh Kaushik, Advocate
with SI Vishan Kumar, PS
Crime Branch.

versus

DENIS JAUREGUL MENDIZABAL Respondent

Through: Mr. Kaushal Jeet Kait, Mr.
Kritagya Kumar Kait and Mr.
Rishav Kashyap, Advocates.

CORAM:

HON'BLE MR. JUSTICE ANISH DAYAL

JUDGMENT

1. This petition has been moved by the State seeking leave to appeal against the impugned judgment passed by the Special Judge, NDPS Act (Central District), Tis Hazari Courts, Delhi in FIR No.115/2013 under section 22, 23 read with section 28 and 29 of NDPS Act. Learned APP for the State has submitted that the basis of accusation is that the accused-respondent was Spanish National who was staying in some hotel at Paharganj and was indulging in procuring and export of Ketamine, a psychotropic substance to foreign countries through courier. Pursuant to raid based on secret information, the accused was apprehended and 4 kgs of Ketamine recovered from the

rucksack being carried by him. Vide the impugned judgment, the Ld. Special Judge has concluded that the prosecution has been able to establish that 4 kgs of Ketamine from the conscious possession of the accused, however the recovery stands vitiated for non compliance of mandatory procedural safeguards laid down in Section 50 of the Act. As a consequence thereof, the accused was acquitted of all the charges against him in the said case.

2. It is stated by the counsel for the respondent-accused that the said accused is a foreign national and was arrested in 2013 and since then, he remained in incarceration till his acquittal in 2019 and is unable to go back to his home-country due to pendency of this petition. A perusal of impugned order would show that the principal basis of acquittal was lack of compliance of section 50 of NDPS Act by the investigating authorities, which is extracted as under for reference:

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.]

3. The Ld. Special Judge in the impugned judgment extracted the law, including decisions of Hon'ble Supreme Court which hold that section 50 of the Act is mandatory and not directory. The following judgments are *inter alia* referred to in the impugned judgment : *State of Punjab v. Balbir Singh* (1994) 3 SCC 299; *State of Himachal Pradesh v. Prithi Chand* (1966) 2 SCC 37; *State of Punjab v. Baldev Singh* (1999) 6 SCC 172 (CB); *Vijay Sinh Chandubha Jadeja v. State of Gujarat* (2011) 1 SCC 609; *Arif Khan @ Agha v. State of Uttrakhand* CrI.A. 273/2007 decided on 27th April, 2018 by the Hon'ble Supreme Court ; *Dharmabir v. State* CrI. 658/2017 decided on 13th November, 2018 by this Court; *Gulzar Sheikh @ Sonu & Ors. v. State* CrI. 1235/2014 decided on 22nd February, 2019 by this Court.

4. As per the following extract from *Arif Khan @ Agha v. State of Uttrakhand* (2018) 18 SCC 380, it is evident that the Hon'ble

Supreme Court has stressed not only on ‘substantial compliance’ but full compliance of procedures enumerated in Section 50 of the Act:

“24.1. 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.

24.2. 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.

24.3. 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.

24.4. 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.

25. 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.

26. 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.

27. In the light of the foregoing discussion, the appeal succeeds and is allowed. The 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.”

(emphasis supplied)

5. Ld. Special Judge has then narrated the fact that SI Sunil Jain himself had made the deposition that before taking over the bag from the accused, a cursory search of the person was carried out and nothing incriminating was recovered from the personal search. This is where strict compliance of Section 50 of the Act arises. As per SI Sunil Jain, the empowered officer, he had mentioned to the accused that it was his legal right to conduct his search in presence of a Gazetted Officer or a Magistrate by either calling such Magistrate / Gazetted Officer or by taking him before them; if so desired. As per the IO, he had explained the legal rights to the accused and handed over copy of notice under Section 50 of the Act. The accused said that he did not want to be searched in presence of a Gazetted Officer or a Magistrate.

6. What prevailed with the Ld. Special Judge was that the accused was a Spanish national on a temporary tourist visa and since he was informed of his rights in English, he would have not been able to understand the scope of his legal rights in any other language than Spanish. The accused had, in his statement recorded under section 313 Cr.P.C, denied knowing any other language than Spanish. Further, no

independent witness was joined when the legal rights were explained to him. A perusal of Ex. PW-5/B (notice under Section 50 NDPS Act) shows that there was no fluency / proficiency on the part of the accused and that the writing was clumsy and contrived. Also Ex. PW-5/B alluded to notice under section 50 NDPS Act as under section 550 NDPS Act, an error in all probability capable of being made when a pre-written portion is being copied as it is. The refusal of his legal rights under Section 50 was therefore, not on his conscious volition but lack of understanding the scope of his rights under the statute. Further, Ld. Special Judge has noted that there was no effort discernible at any stage on part of the empowered officer to secure presence of any Gazetted Officer or a Magistrate and chose to rely upon the written refusal of the accused rendered in English language. This according to Ld. Special Judge does not comply with the mandate of the law as has been held in various decisions of the Hon'ble Supreme Court and this Court.

7. Learned counsel for the accused has also drawn attention of this Court to the fact that it was recorded in impugned judgment that as per deposition of PW-5, the manager of the hotel was joined in the search however the said manager was not examined by the prosecution. Further the alleged courier agent was also not traced, neither the address nor the addressee were verified. Therefore, Ld. Special Judge held that section 22 and 23 r/w 28 and 30 of the NDPS Act remained unsubstantiated. It was further pointed out that as per the record of this Court (as per order dated 12th February, 2014) it was evident that the petitioner does not know English as this Court directed that he be supplied with an official translator who knows Hindi, English and

Spanish and it was thus evident that he was not familiar with the English language.

8. The ld. APP relied upon the testimonies of PW-5 HC Mukesh and PW-8 Insp. Sunil Jain, the IO, to contend that the IO had told the petitioner in English that he could take search of the police officials in the presence of a Gazetted Officer / Magistrate but he refused to exercise his legal rights. Thereafter, PW-8 prepared notice under Section 50 NDPS Act (Ex. PW-5/A) and a copy thereof was given to the accused and the IO obtained signatures of the accused on the original notice. As per PW-5, the accused stated that he could read and write English and had gone through the contents of the notice Ex. PW-5/A.

9. PW-8, the IO also stated that he had also informed the accused that he could avail option of conducting the search in the presence of a Gazetted Officer / Magistrate and he had told him meaning of the expressions “in the presence of a Gazetted Officer / Magistrate” and then prepared notice under Section 50 NDPS Act which he handed over to the accused. As per PW-8, accused after understating his legal rights said he did not want to be searched in presence of a Gazetted Officer.

10. The learned APP further relied upon a decision of this Court in *Innocent Uzoma v. State* CrI. A. 139/2017 where this Court has traversed the law relating to mandatory nature of Section 50 NDPS Act including the decision cited above. This Court has concluded that while the requirements of Section 50 NDPS Act are mandatory and not directory and that issue is no longer *res integra*, the words “if such

person so requires” used in Section 50 (1) NDPS Act makes it amply clear that the person to be searched would be taken before a Gazetted Officer or a Magistrate, only if he so requires. In that decision, the Court has focused on the aspect of the decision which has to be taken by the accused in this regard.

11. Having appreciated the contentions of the parties and on a perusal of record of this case, it is evident that the accused was not totally familiar with the English language. His writing on the notice under Section 50 NDPS Act is (as correctly noted by the Id. Trial Court) was clumsy and forced. As also the accused had subsequently requested for a translator before this Court, as noted above in the order dated 12th February, 2014. Further, it is also noted that even the recording of evidence before the Id. Trial Court has been read-over and explained to the accused through an interpreter.

12. The requirements of Section 50 NDPS Act being mandatory, as has been clearly held by the Hon'ble Supreme Court are in consonance with the right of the accused to know of his legal rights. The compliance of such requirements should therefore, be complete and not left in doubt. A mandatory requirement by definition, has to be complied with in *toto*, in its full letter and spirit, and not as a halfway measure or in a patchy, perfunctory manner or deficient manner. It is evident from the facts and circumstances stated above and as noted in the impugned order that the accused did not have the opportunity of a translator or an interpreter at a stage when he was accosted and the search was conducted and scope of his legal rights were attempted to be explained to him under the framework of Section 50 NDPS Act.

The so called alleged refusal by the accused to get a search conducted before a Gazetted Officer or a Magistrate would therefore, in the considered opinion of this Court, be vitiated on account of his part understanding/ misunderstanding/ mis-interpretation or even miscommunication of the questions put to him and/or his response.

13. The reliance by the State on this Court's decision in *Innocent Uzoma v. State* (supra) and on "if such person so requires" would not be applicable since that is predicated on the person himself/ herself being able to understand the question, the procedure and appreciate the conspectus of his /her legal rights. In this case, it is apparent that the accused was not in a position to understand the importance of what was being communicated and its impact on his life. Therefore, this Court finds no infirmity in the impugned order.

14. This petition is therefore dismissed.

15. Order be uploaded on website of this Court.

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ANISH DAYAL, J

DECEMBER 22, 2022/sm