

R-5

IN THE HIGH COURT OF DELHI AT NEW DELHI

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CRL.A.No.3/2001

SMT. ARISA BEGUM Petitioner
Through : Mr.K.B. Andley, Sr. Advocate with
Mr.M.L. Yadav, Advocate.

Versus

THE STATE Respondent
Through : Mr.Lovkesh Sawhney, APP for State.

ORDER
12.01.2009

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI

1. Whether reporters of local papers may be allowed to see the Judgment ?
2. To be referred to the Reporter or not? **Yes**
3. Whether the Judgment should be reported in the Digest?

G.S. SISTANI, J. (ORAL):

1. The present appeal has been filed against the judgment dated 5.12.2000 by virtue of which the appellant has been convicted and held guilty, and against the order of sentence dated 6.12.2000 by virtue of which the appellant has been awarded sentence to undergo Rigorous Imprisonment for ten years and further to pay a fine of Rs.1.0 lac and in default of payment of fine appellant has been ordered to undergo Rigorous Imprisonment for a further period of one year.

2. Brief facts of the case as noticed by the Court below are that on 27.8.1997 pursuant to a tip off, SI Akshay Kumar organized a raiding party consisting of Mr.J.K. Sharma, SHO, HC Jai Parkash, HC Devi Lal, Lady constable Saroj, constable Ram Singh and Mrs.Neena Sharma, a public witness. The members of the raiding party arrived at D-144, New Seemapuri, Delhi. The appellant was found sitting in her house. The informant pointed out towards her and at about 11:30 a.m. an attempt on behalf of the appellant to go inside her house was foiled. The appellant was apprised of the fact that the secret information had been received against her and if she so desired she could be searched in the presence of Gazetted Officer or a Magistrate. A written notice in this context under Section 50 of the The Narcotic Drugs and Psychotropic Substances Act, 1985, (hereinafter referred to as “NDPS Act”) (Ex.PW-1/A) was given to the appellant. The appellant is stated to have refused the offer so made. Mr.Ramesh Kapoor, ACP also arrived at the spot. ACP introduced himself to the accused and directed public witness Mrs. Neena Sharma to conduct the search of the lady constable (Saroj). The public witness conducted the search of the lady constable vide memo Ex. PW-1/B. Thereafter ACP directed the lady constable to conduct the search of the appellant. On the search being conducted on the appellant, a small bag (*thelli*) of cloth tied with the string of her salwar was found. The said *thelli* contained 32 pudias of paper wrapped in a handkerchief. The *pudias* were found to contain smack /heroin.

The heroine of all those *pudias* was put together and the same weighed to be 4 gms. A sample weighing 2 gms. was separated from the recovered heroine and the remaining was kept in a separate white paper. The sample and the remaining heroine were packed separately and sealed with the seal of AK belonging to the I.O. The Investigating Officer, S.I. Akshay Kumar is stated to have prepared the Rukka Ex.PW-9/A and sent the same to the police station through constable Ram Singh. I.O. gave notice (Ex.PW-1/D) to the appellant under Section 52 of the NDPS Act, and wherein the grounds of her arrest were mentioned. I.O. is also stated to have sent the report under Section 57 of the NDPS Act and handed over the same to reader of SHO for its onwards transmission to higher authorities. On receipt of CFSL report, the appellant was arrested and challaned for an offence punishable under Sections 21/61/85 of the NDPS Act. The statement of the appellant was recorded under Section 313 of the Cr.P.C. The appellant simply denied her involvement in the matter.

3. The prosecution has examined eleven (11) witnesses and two (2) witnesses have been produced by the defence as well. Learned counsel for the appellant has strongly urged before this Court that the appellant would be governed by the amended provisions of the NDPS Act. By virtue of the said amendments (Section 21(a) of the NDPS Act) and taking into consideration that from the appellant only four (4) gms. of heroine was recovered, the maximum sentence that could have been awarded to the appellant is only six

months whereas the appellant has already been incarcerated for more than one and a half year.

4. It is next contended by learned counsel for the appellant that the provisions of Section 42(2) and Section 50 of the NDPS Act have not been complied with and thus on this ground alone the judgment and order of conviction is bound to be set aside. Section 42 and Section 50 of the amended NDPS Act read as under:

42. Power of entry, search, seizure and arrest without warrant or authorisation. (1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government or of the Border Security Force as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing, that any narcotic drug, or psychotropic substance, in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed in any building, conveyance or enclosed place, may, between sunrise and sunset,--

- (a) enter into and search any such building, conveyance or place;
- (b) in case of resistance, break open any door and remove any obstacle to such entry;
- (c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under Chapter IV relating to such drug or substance:

(d) detain and search, and if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

Provided that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior."

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 authorized 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.

(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 a seventy-two hours send a copy thereof to his immediate official superior.

5. Learned counsel for the appellant has drawn attention of the Court to the evidence of PW-9, S.I. Akshay Kumar, to canvass his argument that the provisions of Section 50 were not complied with. The relevant portion of the evidence of PW-9 is reproduced below:

“3. Accused Arisha Begum, present in court, was sitting outside her house. The informer pointed out towards her. She made an attempt to go inside the house but she was stopped outside at about 11:30 a.m. I told the accused that there was information against her that she was in possession of smack and if she wishes her search can be conducted in the presence of a G.O. or a Magistrate and arrangement can be made for the same. I gave a written notice U/s.50 NDPS Act mentioning the aforesaid offer of being searched before a Magistrate or a G.O. The accused replied that she does not want to give search in the presence of a G.O. or a Magistrate. I recorded reply of accused at point excircle X on Ex.PW1/A. Accused affixed her thumb impression below her reply on Ex.PW1/A. I also obtained the signatures of witnesses on notice Ex.PW1/A.”

6. Learned counsel for the appellant submits that the manner in which the appellant was informed that the search can be conducted in the presence of the Magistrate or a Gazetted Officer, was a mere formality. What is submitted before the Court is that in fact the I.O. was duty bound to explain to the appellant that as a matter of right the search could be conducted in the presence of a Gazetted Officer or a Magistrate.
7. It is next contended that in terms of Section 42(2), once the secret information has been received, I.O. was bound to send information of the same to the senior officer forthwith (As per Section 42 of the Old NDPS Act) and has relied upon Ex.PW-6/B wherein it has been mentioned that the SHO was informed only orally. Learned counsel for the appellant relies upon the case of **Beckodan Abdul**

Rahiman Vs. State of Kerala, reported at 2002 SCC (Cri.) 791

and more particularly paragraphs 4, 5 and 6 of the same, which are reproduced herein below:-

4. In *State of Punjab V. Balbir Singh*¹ it was held that under Section 42(2) the empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is a total non-compliance with the provisions the same affects the prosecution case. To that extent it is mandatory.....
5. In this case the violation of the mandatory provisions is writ large as is evident from the statement of K.R. Premchandran (PW-1). After recording the information, the witnesses are not shown to have complied with the mandate of sub-section (2) of Section 42 of the Act. Similarly the provisions of Section 50 have not been complied with as the accused has not been given any option as to whether he wanted to be searched in the presence of a gazetted officer or the Magistrate. The compliance with Section 50 is held to have been fulfilled on his (PW-1) asking the accused "whether I should search him in the presence of senior officers or a gazetted officer". The accused was required to be apprised of his right conferred under Section 50 giving him the option to search being made in the presence of a gazetted officer or the Magistrate. The accused is not shown to have been apprised of his right nor any option offered to him for search being conducted in the presence of the Magistrate.
6. We are of the firm opinion that the provisions of sub-section (2) of Section 42 and the mandate of Section 50 were not complied with by the prosecution, which rendered the case as not established. In view of the violation of the mandatory provisions of the Act, the appellant was entitled to be acquitted. Both the trial court as well as the High Court have failed to consider this aspect of the matter which warrants the setting aside of the impugned judgment.

Learned counsel for the appellant submits that in view of above, present appeal should be allowed.

8. Learned APP for the State has submitted that the prosecution has been able to prove its case beyond any shadow of doubt. Based on

¹ (1999) 6 SCC 172

receipt of secret information, the search was carried out upon the appellant in the presence of a public witness and four (4) gms. of heroine was found. On the basis of evidence of various witnesses, the learned Court below has come to a categorical finding against the appellant and she has rightly been found guilty.

9. Learned APP for the State also submits that the appellant cannot be given the benefit of amendments incorporated in the NDPS Act in the year 2001. Learned counsel for the appellant has drawn my attention to Appendix I, the Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2001, Section 41 of which reads as under:

41. Application of this Act to pending cases-(1) Notwithstanding anything contained in sub-section (2) of Section 1, all cases pending before the Courts or under investigation at the commencement of this Act shall be disposed of in accordance with the provisions of the principal Act as amended by this Act and accordingly, any person found guilty of any offence punishable under the principal Act, as it stood immediately before such commencement, shall be liable for a punishment which is lesser than the punishment for which he is otherwise liable at the date of the commission of such offence:

Provided that nothing in this section shall apply to cases pending in appeal.

(2) For the removal of doubts, it is hereby declared that no Act or omission on the part of any person shall be punishable as an offence which would not have been so punishable if this Act has not come into force.

10. I have heard learned counsel for the parties, who have taken me through the record of this case. The arguments of learned counsel for the appellant can be summed up as under:-

- i. The appellant would be governed by the amended provisions of the NDPS Act and by virtue of which the maximum punishment that could have been imposed on the appellant is six months, whereas the appellant has already served more than 18 months.
 - ii. Judgment of the lower court is bad in law as provisions of Section 42(2) and Section 50 of the NDPS Act have not been complied with.
11. Having regard to Section 41 of the Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2001, (quoted above) wherein it has been specifically mentioned that the amended provisions would not apply to cases pending in appeal; I find no force in the argument of learned senior counsel for the appellant that the present appeal would be governed by the amendments. I also find no force in the argument of learned senior counsel for the appellant that the provisions of Section 42(2) of the old NDPS Act were not complied with. Section 42(2) of the old NDPS Act reads as under:-

“Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within forthwith send a copy thereof to his immediate official superior.”

In Ex. PW-6/B it has been mentioned that secret information has been received and the SHO has been informed orally, but simultaneously it has also been recorded that the DD

entry has been made and which shows that the SHO was duly informed.

12. I find sufficient force in the submission of learned counsel for the appellant that the notice which was issued to the appellant under section 50 of the NDPS Act, was a mere formality. I have seen the notice in original. The language of the notice suggests that the appellant was simply given an option and not apprised that as matter of fact it was her right to get herself searched in the presence of a Gazetted Officer or a Magistrate, if she so wanted. In the case of ***State of Punjab v. Baldev Singh*** reported at ***(1999) 6 SCC 172*** it was held:

“57. On the basis of the reasoning and discussion above, the following conclusions arise:

(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 person concerned 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 person concerned about the existence of his right to be searched before a gazetted officer or a Magistrate would cause prejudice to an accused.

(6) failure to inform the person concerned 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.” (Emphasis supplied)

Furthermore in the case of ***K. Mohanan v. State of Kerala*** reported at **(2000) 10 SCC 222**, the Apex Court observed:

“6. If the accused, who was subjected to search was merely asked whether he required to be searched in the presence of a gazetted officer or a Magistrate it cannot be treated as communicating to him that he had a right under law to be searched so. What PW 1 has done in this case was to seek the opinion of the accused whether he wanted it or not. If he was told that he had a right under law to have it (sic himself) searched what would have been the answer given by the accused cannot be gauged by us at this distance of time. This is particularly so when the main defence adopted by the appellant at all stages was that Section 50 of the Act was not complied with.”

13. The deposition of PW- 1, Smt Neena Sharma and PW-9, SI Akshay Kumar also fortify me in my opinion that the appellant was not apprised of her right. The relevant portion of the deposition of PW-9 is reproduced hereunder:

“I told the accused that there was information against her that she was in possession of smack and if she wishes her search can be conducted in the presence of a G.O. or a Magistrate and arrangement can be made for the same. I gave a written notice U/s. 50 NDPS Act mentioning the aforesaid offer of being searched before a Magistrate or a G.O. the accused replied that she does not want to give search in the presence of a G.O. or a Magistrate. I recorded reply of accused at point encircle X on Ex. PW1/A. Accused affixed her thumb impression below her reply on Ex. PW1/A. I also obtained the signatures of witnesses on notice Ex. PW1/A.”

The relevant portion of the deposition of PW-1 is:

“...a notice was given to the accused and she was also told that there was information against her and that if she wants her search can be conducted before a Magistrate or/any other. The accused kept mum and after that she denied the option.....”

14. Having regard to the language of the notice, the stand taken by the appellant and after analyzing the evidence of PW-1 and PW-9; I am of the considered view that the appellant was merely informed without being explained that as a matter of right she could have availed to depose before a Gazetted Officer or a Magistrate. Thus the mandatory provisions of section 50 of the NDPS Act were not complied with by the respondents. In view of the observations of the Apex Court in the case of **Beckodan Abdul Rahman** (*supra*); **Baldev Singh** (*supra*); and **K. Mohanan** (*supra*), the present appeal is allowed. The respondents having failed to comply with the mandate of section 50 of the NDPS Act in letter and spirit, the appellant is entitled to be acquitted. Accordingly, the judgment of conviction dated 5.12.2000 and order of sentence dated 6.12.2000 are set aside. Bail bond and surety already furnished, stand discharged.
15. Appeal is allowed.

G.S. SISTANI, J.

January 12, 2009
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