

*** "REPORTABLE"**
*** HIGH COURT OF DELHI AT NEW DELHI**

% Date of decision : February 06, 2009

+ CRL. APPL. No. 520/2004

REKHA Appellant
! Through : Ms. Ritu Gauba, Adv.

Versus

\$ THE STATE NCT OF DELHI Respondent
^ Through : Mr. O.P. Saxena, APP

AND

+ CRL. APPL. No. 527/2004

SALEEM @ NAWAB Appellant
! Through : Mr. Sumeet Verma, Adv.

Versus

\$ STATE Respondent
^ Through : Mr. O.P. Saxena, APP

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CORAM:
HON'BLE MS. JUSTICE ARUNA SURESH

- (1) Whether reporters of local paper 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 ? Yes

J U D G M E N T

ARUNA SURESH, J.

1. The prosecution swung into action when a secret information was received on 1.8.2000 at about 10.45 AM at Police Station Narcotics Branch that Salim and Rekha who were indulged in the trade of supplying smack at Delhi after procuring it from Madhya Pradesh would be coming in between 12.00 to 1.00 PM for supplying smack in Sector 16, Rohini. They would be carrying huge quantity of smack with them. On this information DD No. 5 dated 1.8.2000 was recorded at Police Station Narcotics Branch, Delhi. Inspector Chandra Prabha, SHO, Narcotics Branch, was accordingly informed who in turn informed Mr. M.S. Chikara, ACP on telephone. Mr. M.S. Chikara instructed her to carry out immediate raid. Copy of the DD was also sent to the senior officers by post.
2. SI Attar Singh organized a raiding party consisting of himself, Inspector Chandra Prabha, HC Paramjeet, Const. Naresh, Const. Dilawar, Const.

Ravinder, Const. Virender and two drivers namely Const. Vijay and Const. Surat Singh. Efforts to join public persons in the raiding party failed. Nakabandi was made in front of Petrol Pump near Police Post Sector 16, Rohini. At about 12.15 PM both the appellants, Rekha and Salim were apprehended on the pointing out of the secret informer. The appellants were conveyed of information with the raiding party and were also informed that their search was to be conducted and if they desired their search could be conducted either before a gazetted officer or a magistrate to which appellants refused. A notice under Section 50 of The Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as Act) was also served upon them. The appellants refused to exercise the option. In the meantime, ACP M.S. Chikara also reached at the spot. On his directions Inspector Chandra Prabha recovered the suitcase from the right hand of Rekha and on checking the suitcase, besides clothes, it was found to contain smack weighing 1 kg concealed in

between the two lids at the bottom of the suitcase. SI Attar Singh recovered black colour cloth bag from the right hand of appellant Saleem which on checking also found contained smack among cloths weighing 1 kg. Thereafter ACP M.S. Chikara left the spot.

3. Two samples weighing 10 grams each were taken out from the smack recovered from the possession of the appellant Rikha and appellant Salim respectively. The samples and the remaining recovered smack were sealed and FSL form were filled in for both the recoveries. The samples and recovered smack and FSL form were sealed with the seal of CP by Inspector Chandra Prabha. Seal was also affixed on the FSL forms. The recovered smack and the samples were seized. Inspector Chandra Prabha prepared rukka and sent it through Const. Virender for registration of the FIR to Police Station Narcotics Branch. FIR No. 28/2000 dated 1.8.2000 was registered for offences under Section 21 of the Act. Thereafter investigation was transferred to SI Dharampal. The

samples were sent to FSL and FSL report Ex. PW1/A was received which gave positive test and the contents were found to be diacetylmorphine (heroin).

4. Both the appellants were convicted for offence under Section 21 of the Act and were sentenced to undergo rigorous imprisonment for 10 years and a fine of Rs. 1 lac in default of payment of fine simple imprisonment for two years each. Benefit under Section 428 Cr.P.C. was also given to both the appellants.
5. Two separate appeals have been filed by the appellants. Since both the appeals arise out of the same judgment of conviction and order on sentence, they are being disposed of by this common judgment.
6. Ms. Ritu Gauba learned counsel for the appellants has argued that all the witnesses for the prosecution are police officers and no public person was joined in the raiding party despite the fact that information was received at about 10.45 AM and the raid was conducted at about 12.15 PM and the

investigating officer had sufficient time to join the persons from the public in the raiding party. She has urged that in the absence of public witness the testimony of the police witnesses is clouded and is not trustworthy. It is further argued by the learned counsel that provisions of Section 55 of the Act have also not been complied with in this case as the SHO did not affix her own seal on the recovered articles. It is also argued that provisions of Section 42 and 50 of the Act have also not been complied with. Compliance of above said Sections is mandatory and non compliance therefore entitled the appellants to acquittal.

7. Learned APP for the State while controverting the submissions of the learned counsel for the appellants has submitted that all these submissions have been dealt with by the trial court in detail. The Investigating Officer complied with the provisions of Sections 42 to 50 and SHO who herself was member of the raiding party had affixed her own seal on the samples and the remaining recovered contraband. The quantity

recovered from each of the appellants is 1 kg each and the quantity of diacetylmorphine is found to be 33% and therefore, the recovered heroin is of commercial quantity. It is further urged that the prosecution witnesses though, are all police officials, have fully supported the prosecution case and even if no person from the public was joined in the raiding party, the prosecution case does not fall as non joining of a public witness is only an irregularity and does not vitiate the trial.

8. Sections 42, 43 and 50 of the Act have been interpreted by me in ***Bail Application No. 2449/2008 titled Harish Joshi v. D.R.I*** dated 16.1.2009 as under:-

“Section 42 of the Act empowers such an officer to enter into, search, seize and arrest without warrant or authorization if he has reason to believe that search warrant or authorization cannot be obtained without affording opportunity of the concealment of evidence or facility for the escape of an offender, may enter and search such building, conveyance or place at any time between sunset and sunrise. Section 43 of the Act speaks of power of seizure and arrest in public place.

Section 50 of the Act lays down conditions under which search of a person has to be conducted. Provisions of Section 50 of the Act are mandatory in nature and therefore,

breach of the condition vitiates the trial, as non compliance would result non relevance of search and consequent seizure of goods. After a person is arrested and before a search is conducted, it is mandatory to inform the accused that he has a right to be searched in presence of a Gazetted officer or a Magistrate. Accused is entitled to benefit of acquittal if there is failure to comply with the provisions.

Section 50 of the Act which refers to conditions under which search of person shall be conducted, provides in its sub-Section (1) that when officer duly authorized under Section 42 is about to search a person under the provisions of Sections 41, 42 or 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Magistrate or Gazetted Officer. Sub-section (2) prescribes that if such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or Magistrate referred to in sub-section (1). It, thus follows that a mandate of the said provision is required to be strictly observed by the officer intending to search a suspect of possessing drugs by informing him of his right to be searched in the presence of the Gazetted Officer or a Magistrate.

(Narcotic Drugs and Psychotropic Substances in India, (Second Edition), by R.P. Kataria).

Bare reading of Section 50 of the Act therefore shows that it only applies in case of personal search of a person. It does not extend to search of a vehicle or container or bag or premises or luggage of such person because, luggage does not form part of a person. Wherein the luggage of the accused is a subject matter of search, provisions of Section 50 of the Act would not apply and in such like circumstances it is not legally required by an officer to make an offer to the accused for search in presence of a Gazetted

officer or a Magistrate.”

9. In the present case the search was conducted during day in a public place and the seizure of the contraband was also effected in a public place as the appellants were apprehended near Petrol Pump Police Post Sector 16, Rohini which, admittedly is a public place. Therefore, provisions of Section 42 of the Act which relate to search, seizure and arrest without warrant or authorization of a person between sunset and sunrise are not applicable to the fact and circumstances of this case. Besides, the information was received by SI Attar Singh and was reduced in writing in the form of DD No. 5 Ex. PW5/A. As per this DD information was sent to SHO Inspector Chandra Prabha. Chandra Prabha in evidence has proved that she had passed on this information to ACP M.S.Chikara on telephone. Perusal of DD No. 5 also indicates that copies of the daily diary were sent to the senior officers through post. Not only this, ACP M.S.Chikara himself reached the spot after receipt of the information and it was at his instance that search

was conducted from the person of both the appellants. Their personal search was also conducted in the presence of ACP M.S.Chikara.

10. Therefore, submissions of the learned counsel for the appellants that prosecution failed to prove compliance of Section 42 and 43 of the Act is without any basis. From the evidence adduced on record, which goes unrebutted, it is clearly proved that there was no violation of these provisions of law since recovery was made at a public place.
11. In ***Megha Singh v. State of Haryana - 1997 SCC (Cri.) 267*** the complaint was sent by the Investigating Officer himself on the basis of which a formal FIR was lodged. It was held that Investigating Officer who being the complainant could not have proceeded with the investigation of the case.
12. The facts of this case are different. Only DD No. 5 was recorded at the instance of SI Attar Singh. Rukka was sent by Inspector Chandra Prabha on the basis of which FIR was registered. Therefore, the complainant was Chandra Prabha and not SI

Attar Singh. Besides after registration of the FIR the investigation was transferred to SI Dharampal who carried out the investigation after the registration of the FIR.

13. Notice under Section 50 of the Act was duly given to the appellants by Inspector Chandra Prabha. These notices are Ex. PW5/B and Ex. PW5/C on the record. Both the appellants signed their respective notices in acknowledgement of the receipt of the notices. Both the appellants refused to get themselves searched in the presence of a Gazetted Officer or a Magistrate. Option of the appellants is recorded as Ex. PW5/D and PW5/E at the bottom of the notices themselves. Their refusal is also signed by the respective appellants.

14. While coming to a conclusion that there was compliance of Section 50 of the Act, the trial court did consider the fact that a suitcase was recovered from the right hand of Rekha and a black colour back was recovered from the right hand of Salim. It was on checking of the suitcase and the bag that smack weighing 1 kg each was recovered. Since

recovery was effected from the suitcase and the bag which were being carried by the appellants, no notices were required to be served upon the appellants under Section 50 of the Act. It is pertinent to state that the search was conducted in the presence of ACP M.S.Chikara who happened to be a Gazetted Officer.

15. The trial court adopted a right approach while rejecting the submissions of the appellants that Section 50 of the Act was not complied with in an appropriate manner, considering the facts and circumstances of this case and the manner in which the smack was recovered and seized from the appellants. Recovery from a luggage cannot be considered to be recovery from the person of an accused because such recovery is from luggage carried by the person from whom it is recovered does not form part of a person. In a case where luggage of accused is subject matter of search provisions of Section 50 of the Act do not apply.

16. In such like circumstances, the only legal requirement is that the Investigating Officer must

make an offer to the accused for search in the presence of a Gazetted Officer or a Magistrate. As discussed above, the Investigating Officer did comply with this requirement while giving written notices to the appellants thereby giving them option to be searched in the presence of a Gazetted Officer or a Magistrate. This option was declined by the appellants. Inspector Chandra Prabha had also orally informed the appellants of their right to be searched in the presence of a Gazetted Officer or a Magistrate.

17. In ***Bagru Ram v. State of Delhi - 2000 (3) C.C. Cases HC 430*** secret information was reduced into writing but copy of the substance reduced was not forwarded to a superior officer. It was held that information when not sent to the superior officer and the notice under Section 50 of the Act purportedly given to the accused was not on the record there was violation of mandatory provisions and the conviction and sentence was set aside.
18. In this case information was sent to the superior officers i.e. SHO Inspector Chandra Prabha and

ACP M.S.Chikara on telephone as well as by post as is evident from perusal of DD No. 5 itself. Therefore, this case is of no help to the appellants.

19. In ***Ahmed v. State of Gujarat - 2000 SCC (Cri) 1407*** the accused persons were not given the right to be searched before another Gazetted Officer or a Magistrate on the plea that the officer who conducted the search was himself a Gazetted Officer and was empowered by the Central Government or by the State Government by a general order.
20. In this case the information was received by SI Attar Singh. The search was conducted in the presence of the appellants who were informed by Inspector Chandra Prabha of their right to opt for their personal search in the presence of a Gazetted Officer or a Magistrate verbally as well as by a written notice served upon each of the appellants. However the appellants did not opt to exercise their right of being searched in the presence of any other Gazetted Officer or a Magistrate. Therefore, this case is also of no assistance to the appellants.

21. Under these circumstances, I do not find any illegality committed by the Investigating Officer while investigating this case. Inspector Chandra Prabha had affixed her own seal on the recovered smack pullandas as well as the sample pullandas which were prepared at the spot as well as on the FSL forms which were filled in at the spot itself. Therefore, there is no violation of Section 55 of the Act either.
22. From the evidence of the prosecution witnesses it is proved that though efforts were made by the Investigating Officer SI Attar Singh to join the persons from the public in the raiding party but none agreed. It is not unusual that the persons from the public avoid joining the investigation of a case though, they might gather at the spot and watch as to what was happening when a person was detained by the police in a public place. The recovery of contraband i.e. heroin is of high quantity and therefore possibility of false involvement of the appellants in this case is ruled out. Such a high quantity of heroine which

contained high percentage of diacetylmorphine i.e. 33 % cannot be planted on the appellants specially when there are no cogent reasons to falsely implicate them in this case.

23. In view of my discussion as above, I hold that prosecution had successfully proved its case against the appellants and met touch stone of proving the guilt of the appellants without any dent. I do not find any reason to interfere in the judgment of conviction dated 1.5.2004 and order on sentence dated 5.5.2004 of the trial court as the same is based on proper reasoning and appreciation of evidence as placed on record.
24. Hence, appeals being without any merits are hereby dismissed.
25. Trial court record be sent back.

**(ARUNA SURESH)
JUDGE**

**February 06, 2009
jk**