

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
% Reserved on: 28th March, 2011
Decided on: 5th April, 2011

+ **CRL.A. 630/2001**
MAHINDER SINGH Appellant
Through Mr. Ankur Sharma, Advocate

versus

STATE Respondent
Through Pawan Kr. Bahl, APP

+ **CRL.A. 759/2001**
KAMAL @ SONU Appellant
Through Mr. Ankur Sharma, Advocate

versus

STATE Respondent
Through Pawan Kr. Bahl, APP

Coram:
HON'BLE MS. JUSTICE MUKTA GUPTA

1. Whether the Reporters of local papers may be allowed to see the judgment? Not Necessary
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

MUKTA GUPTA, J.

1. By the impugned judgment dated 24th August, 2001 passed by the learned Special Court, the Appellants in the above captioned two Appeals

have been convicted for the offences punishable under Sections 21 and 29 of NDPS Act and directed to undergo rigorous imprisonment for a period of ten years and a fine of ₹1 lakh for offence under Section 21 NDPS Act and rigorous Imprisonment for a period of ten years and fine of ₹1 lakh for offence punishable under Section 29 NDPS Act, and in default of payment of the amount of fine to further undergo simple imprisonment for one year in each of the offences under Section 21 and 29 NDPS Act.

2. Briefly the prosecution case is that on 7th February, 2000 at about 4.00 P.M. at PS Narcotic Branch, Kamla Market information was received with regard to Appellant Kamal resident of Multani Dhanda indulging in the business of narcotic (smack) supply in Gali No. 6, Near Multani Dhanda. This information was recorded vide DD No. 24 exhibited as Ex. PW9/A by PW9 SI Prem Chand. This information was conveyed to the SHO Inspector Sahib Singh who passed on the said information to ACP M.D. Mehta on telephone who directed to conduct the raid immediately. On the direction from the SHO, SI Prem Chand constituted a raiding party consisting of HC Nar Singh PW5, HC Bhagwat Dayal, Constable Luder Mani PW3, Constable Gajender and lady Constable Nirmala, which departed vide DD No. 25, Ex.PW9/B. On reaching Multani Dhanda PW9 requested 4/5 public persons to join the raiding party but none agreed. HC Sube Din and Constable Deepak

Tyagi of PS Nabi Karim who were on patrolling joined the raiding party and Nakabandi was done at Gali No. 6, Multani Dhanda. At about 5.10 p.m. at the pointing of secret informer, Appellant Kamal was apprehended from outside Talwar Jewellers, and thereafter SI Prem Chand informed the Appellant Kamal that they had a secret information that he was in possession of smack and for that purpose if he so desired his search could be conducted before a Magistrate or a Gazetted Officer and a notice under Section 50 of the NDPS Act was served on the Appellant. However he declined. SI Prem Chand offered the Appellant Kamal to take his search, which the Appellant declined. SI Prem Chand took search of Appellant Kamal and 10 small polythene packets containing brown coloured powder were recovered, which on checking were found to be smack. Contents of all the 10 polythenes were put together and on weighment the total weight came out to be 100 grams, out of which two samples of 10 grams each were separated and converted into two separate parcels marked 'A' and 'B' and the remaining smack and ten empty polythene were converted into separate parcel given the Mark 'C'. The said parcels were sealed with the seal of PCK and seal after use was handed over to PW5. Thereafter other proceedings of writing the seizure memos, filling of forms CFSL were conducted. On the disclosure statement made by the Appellant Kamal vide Ex.PW5/D, it was revealed that he used to purchase

smack from the Appellant Mahinder. He led the police party to House No. 8003, Gali No. 10, Multani Dhanda and on his pointing out the Appellant Mahinder was apprehended outside his house. Appellant Mahinder was apprised of the disclosure statement of accused Kamal and was served a notice under Section 50 of NDPS Act, Ex.PW5/H. SI Dasrath Singh gave him the option of being searched in presence of a Magistrate or a Gazetted Officer if he so desired. This option was declined by the Appellant. SI Dasrath before taking his search offered his own search which was also declined by the Appellant Mahinder and on the search conducted by SI Dasrath Singh from the right side pocket of his pant, 10 polythene packets containing brown coloured smack was recovered. Smack was taken out from those packets and weighed. The total weight came out to be 100 grams, out of which 2 samples of 10 grams each were separated and converted into different parcels; marked as 'D' and 'E'. The remaining smack with 10 empty polythenes, recovered from the accused, was converted into another parcel and marked as 'F'. The said parcels were sealed with the seal of DS. The witnesses were examined and the abovementioned notices and documents were exhibited where after both the Appellants have been convicted and sentenced as mentioned above.

3. Learned counsel for the Appellant contends that the Appellants are entitled to be acquitted on the short ground that the Section 50 notice served

on the Appellant is not in terms of the provisions of the Act and as per the law laid down by the Hon'ble Supreme Court. It is contended that in *K. Mohanan vs. State of Kerala, 2000 SCC (Cri) 1228* the Hon'ble Supreme Court has held that as per the mandate of Section 50 if the accused who is subjected to search is merely asked whether he is required to be searched in the presence of a Magistrate or a Gazetted Officer it cannot be treated to be communicating to him that he had a right under law to be searched so. It is contended that neither does the Section 50 notice nor the testimony of PW9 SI Prem Chand and PW11 SI Dasrath Singh who are the Investigating Officer suggests that the Appellants were informed of any such right.

4. Learned APP for the State on the other hand relying on *Prabha Shankar Dubey vs. State of Madhya Pradesh, 2004 (2) SCC 56* contends that under Section 50 of the NDPS Act no manner or mode is prescribed and the Court has not to see the manner but in essence the form and substance whether in fact, the accused had been informed of his right in terms of Section 50 of the NDPS Act.

5. I have heard learned counsel for the parties and perused the record. The issue whether the accused has to be informed that he can exercise his discretion to be searched in the presence of a Magistrate or a Gazetted Officer or he is to be informed that he has a right to be searched in the presence of a

Magistrate or a Gazetted Officer and if he so desires then the search would be taken in the presence of a Magistrate or a Gazetted Officer, has been laid to rest by the Hon'ble Supreme Court in *Vijaysinh Chandubha Jadeja vs. State of Gujarat*, (2011) 1 SCC 609 . The Constitution Bench in the above noted reference:

“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 minimize 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 authorized 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.”

6. Section 50 notices in the present case state that since there is an information as to the possession of heroin and the Appellants have been apprehended and are required to be searched, if they so desires they can first take the search of the Police party. On refusal, the Appellants were asked that if they so desire then their search can be taken before a Magistrate or a Gazetted Officer. This was also declined by the Appellants. A perusal of Ex. PW5/A and Ex. PW 5/H and testimony of PW11 and PW9 shows that, the notices under Section 50 of the NDPS Act and the witnesses informed only about the option and not about the right of being searched before a Magistrate or a Gazetted Officer. The Appellants are thus entitled to be acquitted.

7. The Appellants are acquitted of the charges framed under Section 21 and 29 of the NDPS Act. The bail bond and the surety bond of the Appellant Mahinder Singh are discharged. The Appellant Kamal @ Sonu is in custody.

The Superintendent Tihar jail is directed to release him forthwith if not required in any other case.

8. The Appeals are disposed of.

(MUKTA GUPTA)
JUDGE

APRIL 05, 2011
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