

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.579 of 2011

(Against the judgment of conviction and order of sentence dated 28th of April, 2011 passed by the learned 1st Additional Sessions Judge, Motihari, East Champaran in N.D.P.S. Case no.52 of 1984 of 2003/2010.)

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Mojamil Baitha, S/o Daulat Baitha, R/o Vill-Purandra Tola, Parsa, P.S.-Palanwa, Distt-East Champaran.

.... Appellant/s

Versus

1. The State Of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Ram Adya Singh-Advocate

Mr. Pramod Ranjan-Advocate

For the Respondent/s : Mr. S. A. Ahmad-A.P.P.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date: 12-08-2015

Sole appellant Mojamil Baitha, who has been found guilty of an offence punishable under Section 23(C) read with Section 29 of the N.D.P.S. Act and directed to undergo R.I. for ten years as well as fined Rs.1,00,000/- in default thereof, to undergo S.I. for six months additionally by the 1st Additional Sessions Judge-Cum-Special Judge, N.D.P.S., East Champaran at Motihari vide judgment of conviction and sentence dated 28.04.2011 in N.D.P.S. Case no.52 of 1984, had challenged the same by way of instant appeal.

2. On 16.07.2003, Durga Bahadur Sonar (PW-6) filed written report stating therein that on the same day while patrolling was going on at Village-Pantoka near pillar no.393, a bicycle ridden passenger came from Nepal, crossed the border and accordingly, was interrogated by the patrolling party after signaling to stop. Being suspicious, his body was searched and eight packets of Charas each containing 500gm was found fitted with his body. On interrogation,



he had disclosed that he happens to be carrier for Krishna Yadav. The seized material along with accused was produced before the O/c of Raxaul P. S. whereupon production-cum-seizure list was prepared. Raxaul P. S. Case no.81 of 2003 was registered under Sections 20, 23 of the N.D.P.S. Act and investigation was taken up which ultimately ended by way of submission of chargesheet whereupon the trial commenced and concluded after cognizance, the subject matter of instant appeal.

3. Defence as has been pleaded by way of suggestion as well as statement recorded under Section 313 of the Cr.P.C. is of innocence as well as false implication.

4. In order to substantiate its case, prosecution had examined altogether nine PWs, out of whom, PW-1 Moti Khamchu, PW-2 Sotso Kri, PW-3 Nayak Bapa Ama, PW-4 Mukut Sonwal, PW-5 Ganesh Sonwal, PW-6 Durga Bahadur Sonar, PW-7 Lampap Bo, PW-8 Ajowang Pan and PW-9 Udhawji Singh as well as had also exhibited the document including the material exhibit as Exhibit-1, 1/C and 1/B signature of witnesses on seizure list, Exhibit-1/a formal F.I.R., Exhibit-2 second copy of written report of informant, Exhibit-3 formal F.I.R., Exhibit-4 Petition of Udhav Singh to Special Judge, Exhibit-5 carbon copy of format of petition for seized material inquiry, Exhibit-6 Malkhana register, Exhibit-7 attested photo copy with objection of chemical report, Exhibit-5/1 Receiving of F.S.L. Report of Charas, Exhibit-M Plastic Thaila, Exhibit-M-1 to M-VIII eight packet of plastic covered Charas.

5. Gone through the evidence available on the record wherefrom it is apparent that apprehension was made by the patrolling party, who happens to be Sepoy, Nayak, a non-gazetted officer. It is also apparent that at the spot, no seizure list was prepared. The patrolling party brought the accused before Durga



Bahadur Sonar, informant, who happens to be Assistant Commandant, 13 Battalion of S.S.B., who completed the paraphernalia simply by way of submitting written report as well as producing the appellant along with recovered Charas. Neither the I.O. (PW-9) nor any of the witnesses have stated that there was compliance at their end relating to mandatory provisions, more particularly, Section 42(2) as well as 57 of the N.D.P.S. Act. In likewise manner, happens to be a story of sampling. The Charas was produced on 16.07.2003 while filed petition for preparing sample on 05.08.2003 and sample was made on 11.08.2003. However, after going through the requisition an exhibit, it is apparent that sampling was not made from all the eight packets which has been found from conscious possession of the appellant as alleged.

6. That apart, from the evidence of PW-1 to PW-8 along with written report, it happens to be consistent version of the prosecution that body of appellant was searched and eight packets of Charas were seized having wrapped with the body of the appellant. None of the witnesses had spoken regarding compliance of Section 50 of the N.D.P.S. Act. Its violation has seriously been viewed and more recently in a case ***Gurjant Singh @ Janta Versus State of Punjab reported in (2014) 13 SCC 603***, it has been observed:-

12. When we refer to the decision of this Court in Balbir Singh (supra), what has been held therein as a broad principle in paragraph 25(1), is as under:

“25. The questions considered above arise frequently before the trial courts. Therefore we find it necessary to set out our conclusions which are as follows:



(1) If a police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offences as provided under the provisions of CrPC and when such search is completed at that stage Section 50 of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act."

13. The said principle clearly postulates a situation where a police officer in the normal course of investigation of an offence or suspected offences as provided under the provisions of Cr.P.C. and in the course of such investigation when a search is completed and in that process happens to stumble upon possession of a narcotic drug or psychotropic substance, the question of



invoking Section 50 would not arise. When that principle is examined carefully one can easily understand that without any prior information as to possession of any narcotic drug and psychotropic substance, a police officer might have held a search in the course of discharge of his duties as contemplated under the provisions of Cr.P.C and, therefore, it would well neigh impossible to state that even under such a situation, the application of Section 50 would get attracted.

14. In fact, if we examine the facts involved in Balbir Singh (supra), as per the contention of learned counsel for the State, in that decision the police officer effected the arrest, search and seizure on reasonable suspicion that a cognizable offence was committed and not based on any prior information that any offence punishable under NDPS Act was committed and, therefore, it was argued that complying with the provisions of the NDPS Act at the time of the said arrest, search and seizure did not arise in as much as such arrest, search and seizure was substantially in accordance with the provisions of the Cr.P.C. It was, therefore, contended that such arrest, search and seizure cannot be declared as illegal. While examining the contention in the said background, principle no.1 in paragraph 25 came to be rendered.

15. However, while analyzing the importance of Section 50 of the NDPS Act in that very decision, this Court has held as under in paragraph 20: (*State of Punjab v. Balbir Singh*, (1994) 3 SCC 299.

“20. In *Miranda v. Arizona* 16 L Ed 2d 694 the Court, considering the question whether the accused be apprised of his right not to answer and keep silent while being interrogated by the police, observed thus:

“At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent. For those unaware of the privilege, the warning is needed simply to make them aware of it — the threshold requirement for an intelligent decision as to its exercise. More important, such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere.”

It was further observed thus:

“The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of foregoing it. It is only through an awareness of these consequences that

there can be any assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system — that he is not in the presence of persons acting solely in his interest.”

When such is the importance of a right given to an accused person in custody in general, the right by way of safeguard conferred under Section 50 in the context is all the more important and valuable. Therefore it is to be taken as an imperative requirement on the part of the officer intending to search to inform the person to be searched of his right that if he so chooses, he will be searched in the presence of a Gazetted Officer or a Magistrate. Thus the provisions of Section 50 are mandatory.”

21. *In the Constitution Bench decision of this Court in Baldev Singh (supra), the importance of due compliance of Section 50 has been mainly set out in paragraphs 28, 32 and 33 which are as under:*

“28.....The argument that keeping in view the growing drug menace, an insistence on compliance with all the safeguards contained in Section 50 may result in more acquittals does not appeal to us. If the empowered officer fails to



comply with the requirements of Section 50 and an order or acquittal is recorded on that ground, the prosecution must thank itself for its lapses. Indeed in every case the end result is important but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of the judicial process may come under a cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for the law and may have the effect of unconscionably compromising the administration of justice. That cannot be permitted.”

32. However, the question whether the provisions of Section 50 are mandatory or directory and, if mandatory, to what extent and the consequences of non-compliance with it does not strictly speaking arise in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched. Therefore, without expressing any opinion as to whether the provisions of Section 50 are mandatory or not, but bearing in mind the purpose for which the safeguard has been made, we hold that the provisions of Section 50 of the Act implicitly make it imperative and obligatory and cast a duty of the investigating officer (empowered



officer) to ensure that search of the person (suspect) concerned is conducted in the manner prescribed by Section 50, by intimating to 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 and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate would cause prejudice to the accused and render the recovery of the illicit article suspect and vitiate the conviction and sentence of the accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered during a search conducted in violation of the provisions of Section 50 of the Act. The omission may not vitiate the trial as such, but because of the inherent prejudice which would be caused to an accused by the omission to be informed of the existence of his right, it would render his conviction and sentence unsustainable. The protection provided in the section to an accused to be intimated that he has the right to have his personal search conducted before a gazetted officer or a Magistrate, if he so requires, is sacrosanct and indefeasible —it cannot be disregarded by the prosecution except at its own peril.

33. The question whether or not the safeguards provided in Section 50 were observed



would have, however, to be determined by the court on the basis of the evidence led at the trial and the 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 in that section were complied with, it would not be advisable to cut short a criminal trial.”

22. In Pawan Kumar (*supra*) wherein the Constitution Bench decision was referred to and was reiterated as under in paragraph 26: “26.....Otherwise, there would be no distinction between recovery of illicit drugs, etc. seized during a search conducted after following the provisions of Section 50 of the Act and a seizure made during a search conducted in breach of the provisions of Section 50. Having regard to the scheme and the language used a very strict view of Section 50 of the Act was taken and it was held that 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 sentence of an accused bad and unsustainable in law. As a corollary, there is no warrant or justification for giving an extended meaning to the word “person” occurring in the

same provision so as to include even some bag, article or container or some other baggage being carried by him.”

23. The aforesaid observations of the above Constitution Bench decision in Baldev Singh (supra) and the three Judge Bench decision in Pawan Kumar (supra), clearly highlight the legal requirement of compliance of Section 50 in its true spirit. It will have to be stated that such compliance of the requirement under Section 50 of holding of a search and seizure in the presence of Gazetted officer or a Magistrate, cannot be an empty formality. In other words, the offer to the person to be searched in the presence of a Gazetted officer or a Magistrate, should really serve the purpose of ensuring that there was every bona fide effort taken by the prosecution to bring forth the grave offence of possession of narcotic substance and proceed against the person by way of prosecution and thereby establish the truth before the appropriate judicial forum. In the same breath such a course of compliance of Section 50 would also enable the person accused of such a grave offence to be convinced that the presence of such an independent Gazetted officer or a Magistrate would also enable the person proceeded against to demonstrate that there was no necessity for holding any search on him and

thereby persuade the concerned Gazetted officer or Magistrate to protect his fundamental right of freedom, from being unlawfully proceeded against.

24. In other words, the purpose of Section 50 was to ensure that on the one hand, the holding of a search and seizure was not a farce of an exercise in order to falsely implicate a person by unscrupulous police authorities, while on the other hand to prevent an accused from committing an offence of a serious nature against the society, warranting appropriate criminal proceedings to be launched and in the event of establishing such offence, conviction and sentence to be imposed in accordance with law. Therefore, such a dual requirement of law prescribed under Section 50 cannot be dealt with lightly by the Courts dealing with the trial of such offences brought before it.

25. Keeping the above principles in mind, when we examine the manner in which the trial Court dealt with the case of the prosecution as well as the defence pleaded, we find that the trial Court committed a serious flaw in holding that Sections 42 and 50 were not attracted to the case on hand, which we have found in the earlier paragraph was a total misreading of the provision as well as the decision relied upon by it. That apart, when admittedly Section 50 was invoked by

offering the presence of a Gazetted officer or a Magistrate to the appellant and at the request of P.W.6, P.W.3, who was stated to be the D.S.P. at that point of time, was summoned and in whose presence the search and seizure was stated to have been made, the trial Court failed to appreciate whether such a search or seizure was really held in accordance with Sections 42 and 50 of the NDPS Act.

7. Consequent thereupon, the judgment of conviction and sentence recorded by the learned lower Court is set aside. Appeal is allowed. Appellant is under custody. Hence, he is directed to be released forthwith if not wanted in any other case.

(Aditya Kumar Trivedi, J)

Patna High Court,
Dated-12.08.2015
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