T. HAMZA

v.

STATE OF KERALA

AUGUST 11, 1999

[K.T. THOMAS AND D.P. MOHAPATRA, JJ.]

Criminal Law:

Narcotic Drugs and Psychotropic Substances Act, 1985:

Section 50(1)—Non-compliance of—Before search and seizure—Accused found in possession of contraband article as a result of search of his person—Provisions of S.50(1) not complied with—No other evidence in support of the charge—Effect—Held, in the circumstances of the case, judgment and order of conviction, clearly unsustainable.

The appellant-accused was convicted under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 by the Sessions Court. The High Court upheld the conviction. Hence this appeal.

According to the prosecution, having received the information that the appellant-accused was selling brown sugar, Police went to the scene of occurrence and on searching the accused found brown sugar in his possession.

On behalf of the accused it was contended that the mandatory requirements prescribed under Section 50(1) of the Act were not complied with and, therefore, the conviction of the accused is unsustainable.

Allowing the appeal, this Court

HELD : 1. The Narcotic Drugs and Psychotropic Substances Act, 1985 provides a reasonable safeguard to the accused before a search of his person is made by an officer authorised under Section 42 to make it. The provision is also intended to avoid criticism of arbitrary and high handed action against authorised officers. The Legislature in its wisdom considered it necessary to provide such a statutory safeguard to lend credibility to the procedure keeping in view the severe punishment prescribed in the statute.

[344-E; 346-A-B]

2. There was no compliance of the provisions of Section 50(1) of the

Act before the search and seizure in this case were effected. Therefore, the search and seizure thus effected cannot be relied upon by the prosecution. The prosecution case of illegal possession of the contraband article is based entirely on the search of the person of the accused leading to recovery of the article and there is no other evidence in support of the charge. Therefore, the judgment and order of conviction against the appellant by the Sessions Court, which was confirmed by the High Court, is clearly unsustainable.
[350-B-D]

State of Punjab **v.** *Baldev Singh,* **JT (1999) 4 SC 595, followed.**

State of Punjab **v.** *Balbir Singh,* **JT (1994) 2 SC 108, held inapplicable.**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 798 of 1997.

From the Judgment and Order dated 1.9.95 of the Kerala High Court in Crl. A. No. 243 or 1993.

Somnath Mukherjee, (A. C.) for the Appellant.

K.M.K. Nair for the Respondent.

The Judgment of the Court was delivered by

D.P. MOHAPATRA, J. This appeal filed by the accused in Sessions case No. 100/90 of the Court of Sessions Kozhikode Division, is directed against the Judgment and order of conviction and sentence u/s 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short ' the NDPS Act'), and sentence of 10 years R.I. and a fine of Rs. 1 lakh, which was confirmed in 'appeal by the High Court of Kerala with slight modification regarding the default sentence which was reduced from 2 years to 1 year R.I.

The charge against the appellant was that on 18.7.1990 at 6.05 P.M. he was found in possession of 1750 milligram of brown sugar at AKG Memorial over-bridge at Francis Road in, Nagaram, in violation of the provisions of the NDPS Act and thereby committed an offence punishable u/s 21 of the NDPS Act.

The case of the prosecution, shortly stated is that the sub-inspector of police, Chemmangad Police Station, having received information that the accused was selling brown sugar went along with two constables PW2 and CW2 to the scene of occurrence. On searching the accused nine small poly-

thene bags containing brown sugar were found in his possession. The articles were seized. The articles were found on weighing as 1750 milligram. After completing the procedural paraphernalia a sample was sent for chemical analysis. The sample which was sent for chemical analysis was found to be diacetyl morphine (Heroin) commonly known as brown sugar.

The prosecution mainly relied on the evidence of Shri T. Raman PW I, the police officer, who effected the search and seizure and other witnesses to establish the charge of illegal possession of brown sugar. The Courts below on appreciation of the evidence on record accepted the prosecution case and passed the order of conviction and sentence as noted earlier.

The main thrust of the arguments of Shri Somnath Mukherjee, learned sounsel for the appellant was that the Courts below erred in placing reliance on the recovery of the brown sugar from the appellant since the mandatory requirements prescribed u/s 50 of the NDPS Act had not been followed by the police officer before making the search which led to the seizure of the articles.

The contention of Shri K.M.K.Nair, learned counsel for the respondent on the other hand was that there was substantial compliance with the provisions of Section 50 of the NDPS Act, inasmuch as the police officer (PWI) had asked the accused whether he would like to be produced before a Magistrate or a Gazetted Officer to which he replied in the negative.

The question that falls for determination is whether on the facts and in the circumstances of the case as revealed from the evidence on record the search of the person of the accused and the recovery of the packets of brown sugar from his possession was vitiated on account of non-compliance with the requirements of section 50 of the NDPS Act. From the discussions in the impugned judgments it appears that the contention did not find favour with the courts.

Sub-section(1) of Section 50 which is the relevant provision in this regard reads thus :

> "50 Conditions under which search of person 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

A departments mentioned in Section 42 or to the nearest Magistrate."

On a bare reading of the provision it is clear that the statute provides a reasonable safeguard to the accused before a search of his person is made by an officer authorised under Section 42 to make it. The provision is also intended to avoid criticism of arbitrary and high handed action against B authorised officers. The Legislature in its wisdom considered it necessary to provide such a statutory safeguard to lend credibility to the procedure keeping in view the severe punishment prescribed in the statute. Various questions relating to interpretation of Section 50, obligatory character of the provisions therein and the consequence of non-compliance with the requirements have C been considered by a Constitution Bench of this Court in the case of *State of Punjab* v. *Baldev Singh* JT (1999) 4 SC 595. On a detailed discussion of the various contentions raised and the previous decisions of the Court in the matter this Court held as follows;

D "To be searched before a Gazetted Officer or a Magistrate, if the suspect so requires, is an extremely valuable right which the legislature has given to the concerned person having regard to the grave consequences that may entail the possession of illicit articles under the NDPS Act. It appears to have been incorporated in the Act keeping in view the severity of the punishment. The rationale behind E the provision is even otherwise manifest. The search before a Gazetted Officer or a Magistrate would impart much more authenticity and credit-worthiness to the search and seizure proceeding. It would also verily strengthen the prosecution case. There is, thus, no justification for the empowered officer, who goes to search the person, on prior information, to effect the search, of not informing the concerned F person of the existence of his right to have his search conducted before a Gazetted Officer or a Magistrate, so as to enable him to avail of that right. It is, however, not necessary to give the information to the person to be searched about his right in writing. It is sufficient if such information is communicated to the concerned person orally G and as far as possible in the presence of some independent and respectable persons witnessing the arrest and search. The prosecution must, however, at the trial, establish that the empowered officer had conveyed the information to the concerned person of his right of being searched in the presence of the Magistrate or a Gazetted Officer, at the time of the intended search. Courts have to be satisfied at the H trial of the case about due compliance with the requirements provided

in Section 50. No presumption under Section 54 of the Act can be raised against an accused, unless the prosecution establishes it to the satisfaction of the court, that the requirements of Section 50 were duly complied with." A

In para 55 of the judgment the conclusions arrived at by the Court have been summed up thus : B

"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 concerned person of his right under sub-section(l) 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; C

(2) That failure to inform the concerned person about the existence of his right to be searched before a Gazetted Officer or a Magistrate would cause prejudice to an accused; D

(3) That a search made, by an empowered officer, on prior information, without informing the person of his right that, if he so requires, he ahall be taken before a Gazetted Officer or a Magistrate for search and in case he so opts, failure to conduct his search before a Gazetted Officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act; E F

(4) That there is indeed need to protect society from criminals. The societal intent in safety will suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it does not exist. The answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously, and the failure to do so must be viewed by the higher authorities seriously inviting action against the concerned G H

official so that the laxity on the part of the investigating authority is curbed. 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 judicial process may come under 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 law and may have the effect of unconscionably compromising the administration of justice. That cannot be permitted. An accused is entitled to a fair trial. A conviction resulting from an unfair trial is contrary bo our concept of Justice. The use of evidence collected in breach of the safeguards provided by Section 50 at the trial, would render the trial unfair;

(5) That whether or not the safeguards provided in Section 50 have been duly observed would have to be determined by the Court on the basis of evidence led at the trial. 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 therein were duly complied with, it would not be permissible to cut-short a criminal trial;

(6) That in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Section 50 are mandatory or directory, but, hold that failure to inform the concerned person of his right as emanating from Sub-section (l) 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;

(8) A presumption under Section 54 of the Act can only be raised after the prosecution has established that the accused was found to be in possession of the contraband in a search conducted in accordance with the mandate of Section 50. An illegal search cannot entitle the prosecution to raise a presumption under Section 54 of the Act;

(9) That the judgment in Pooran Mal's case cannot be understood to have laid down that an illicit article seized during a search of a person, on prior information, conducted in violation of the provisions of Section 50 of the Act, can by itself be used as evidence of unlawful possession of the illicit article on the person from whom the contraband has been seized during the illegal search;

(10) That the judgment in All Mustaffa's case correctly interprets and distinguishes the judgment in Pooran Mal's case and the broad observations made in Pirthi Chand'o case and Jasbir Singh's case are not in tune with the correct exposition of law as laid down in *Pooran Mal's* case."

Testing the case in hand on the touchstone of the principles laid down in the aforementioned decision the conclusion is inevitable that the requirements of Section 50(1) of the NDPS Act were not complied before making the search of the person of the accused. The trial court in para 10 of its judgment while discussing the evidence of PWI observed that the witness admitted that before searching the accused he did not ask him whether he should be searched in presence of a Gazetted Officer. The Court further observed that the witness was not aware whether the inquiry about the Gazetted Officer should be made before the search was effected.

In paragraph 12 of the judgment referring to the evidence of PW 2 the Police Constable who accompanied PWI to the place of search, the Court observed that the witness admitted that before the search was made, no question was put to the accused whether he should be searched in presence of a Magistrate or a Gazetted Officer. In paragraph 6 of the judgment the Court observed that on seeing the police party the accused had attempted to escape but was apprehended; it was then that the accused was questioned by PW1 and he answered that he was having brown sugar; the accused had *taken out* the bags and the same were handed over to PW1 and it was then that the accused was asked as to whether the presence of a Gazetted Officer was

A required to which he answered in the negative,

The High Court placing reliance on the decision of the *State of Punjab* v. *Balbir Singh,* JT (1994) 2 SC 108 held that the search and seizure in the case has not been adversely effected by non-compliance with the provisions of Section 50(1) of the NDPS Act.

B

The position is clear and it was also not seriously disputed before us that there was no compliance of the provisions of Section 50(1) of the Act before the search and seizure in the case were effected. Therefore the search and seizure thus effected cannot be relied upon by the prosecution. The learned counsel for the State fairly accepted the position and in our view C rightly that the prosecution caae of illegal possession of the contraband article is based entirely on the search of the person of the accused leading to recovery of the article and there is no other evidence in support of the charge. It follows, therefore, that the judgment and order of conviction against the appellant by the Sessions Court which was confirmed by the High Court D is clearly unsustainable.

Accordingly, the appeal i.e. allowed. The impugned judgment of the High Court confirming the judgment and order of conviction of the Sessions Court is set aside. The appellant is acquitted. He shall be released forthwith unless his detention is required in any other case.

E

V.S.S. Appeal allowed.