

Ragbir Singh

Vs

State of Haryana

Criminal Appeal No. 92 1996

(J. S. Verma, S. P. Bharucha, Mrs. Sujata V. Manohar JJ)

29.01.1996

JUDGEMENT

BHARUCHA, J. :-

1. Leave granted.

2. This appeal impugns the judgment and order of the High Court of Punjab & Haryana. It comes to be heard by a bench of three Judges by reason of the fact that an order was made on 8th January, 1996, in that behalf, having regard to the fact that the question was found to be of importance, namely, whether a person to be searched under Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the Act') has a right to be given an option of being searched either by a Gazetted Officer or by a Magistrate.

3. On 1st May, 1991, a police party, led by the Station House Officer, Jakhal, upon information received, conducted a raid on the harvesting floor of the accused near village Puran Majra. The accused was found holding a bag in his hand. He was given the option of being searched by the said police officer or before a Gazetted Officer. The accused opted to be searched before a Gazetted Officer. He was then searched in the presence of a Gazetted Officer and the bag he was carrying was found to contain opium. He was charged with an offence punishable under the Act and tried. The evidence of the prosecution was accepted. The trial judge convicted the accused of the offence punishable under Section 18 of the said Act and he was sentenced to undergo rigorous imprisonment for a term of ten years. The High Court, by the order that is impugned before us, upheld the conviction and sentence. It noted that the appellant had contended that the provisions of Section 50 had not been complied with, but it found that the evidence showed that he had been asked whether he wanted to be searched before a Gazetted Officer and, when he expressed that desire, he was so searched. The conviction and sentence was affirmed.

4. The only argument which is advanced on behalf of the appellant before us is that indicated in the referral order.

5. Section 50 reads thus :-

"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.

6. It is submitted on behalf of the appellant that an accused may be willing to be searched by a police officer duly authorised under Section 42, but if he is not, he must be given the option of being searched either before a Gazetted Officer or before a Magistrate. If the accused is not told that he can opt to be searched before a Gazetted Officer or before a Magistrate, the provisions of Section 50 are not satisfied.

7. Reliance was placed by learned counsel for the appellant upon the decision in Saiyad Mohd. Saiyad Umar Saiyed v. State of Gujarat, (1995) 3 SCC 610 ; (1995 AIR SCW 1852), (which was delivered by one of us, Bharucha, J., on behalf of a Bench of three Judges). It was submitted that the observations therein supported the aforesaid submission. In paragraph 7 of the judgments this was said :

"Having regard to the object for which the provisions of Section 50 have been introduced into the NDPS Act and when the language thereof obliges the officer concerned to inform the person to be searched of his right to be searched in the presence of a Gazetted Officer or a Magistrate, there is no room for drawing a presumption under Section 114, Illustration (e) of the Indian Evidence Act, 1872... Very relevant in this behalf is the testimony of the officer conducting the search that he had informed the person to be searched that he was entitled to demand that the search be carried out in the presence of a Gazetted Officer or a Magistrate and that the person had not chosen to so demand. If no evidence to this effect is given the Court must assume that the person to be searched was not informed of the protection the law gave him and must find that the possession of illicit articles under the NDPS Act was not established".

Emphasis was laid by learned counsel for the appellant upon paragraph 10 wherein it was said :-

"Courts dealing with offences under the NDPS Act should be very careful to see that it is established to their satisfaction that the accused has been informed by the officer concerned that he had a right of choose to be searched before a Gazetted Officer or a Magistrate. It need hardly be emphasised that the accused must be made aware of this right or protection granted by the status and unless cogent evidence is produced to show that he was made aware of such right or protection, there would be no question of presuming that the requirements of Section 50 were complied with".

8. The very question that is referred to us came to be considered by a Bench of two learned Judges on 22nd January, 1996 in Criminal M.P. 138 of 1996 in S.L.P. (Crl.) No.184 of 1996, Manohar Lal

v. State of Rajasthan, (reported in 1996 AIR SCW 530). One of us (Verma, J.), speaking for the Bench, held (para 2) :

"It is clear from Section 50 of the N.D.P.S. Act that the option given thereby to be accused is only to choose whether he would like to be searched by the officer taking the search or in the presence of the nearest available Gazetted Officer or the nearest available Magistrate. The choice of the nearest Gazetted Officer or the nearest Magistrate has to be exercised by the officer making the search and not by the accused".

9. We concur with the view taken in Manohar, Lal's case, (1996 AIR SCW 530).

10. Finding a person to be in possession of articles which are illicit under the provisions of the Act has the consequence of requiring him to prove that he was not in contravention of its provisions and it renders him liable to severe punishment. It is, therefore, that the Act affords the person to be searched a safeguard. He may require the search to be conducted in the presence of a senior officer. The senior officer may be a Gazetted Officer or a Magistrate, depending upon who is conveniently available".

11. The option under Section 50 of the Act, as it plainly reads, is only of being searched in the presence of such senior officer. There is no further option of being searched in the presence of either a Gazetted Officer or of being searched in the presence of a Magistrate. The use of the word 'nearest' in Section 50 is relevant. The search has to be conducted at the earliest and, once the person to be searched opts to be searched in the presence of such senior officer, it is for the police officer who is to conduct the search to conduct it in the presence of whoever is the most conveniently available Gazetted Officer or Magistrate.

12. In the result, we find no substance in the only argument advanced before us on behalf of the appellant.

13. The appeal is dismissed. There shall be no order as to costs. Appeal dismissed.