

Ahmed

Vs

State of Gujarat

Criminal Appeal No. 701 of 2000

(G.B.Pattanaik and U.C.Banerjee, JJ.)

25.08.2000

JUDGMENT

Pattanaik, J.:— Leave granted.

2. The appellant was tried by the learned Additional Sessions, Judge, Mahsana in the State of Gujarat, for the offence under Section 20-B(2) of the Narcotic Drugs and Psychotropic Substance Act, 1985 (hereinafter referred to as 'the Act'), as he was found in possession of 9 gms. of Charas on 10.5.1992, which he was selling outside his house. The learned Add. Sessions Judge, on consideration of the prosecution evidence, came to the conclusion that prosecution has been able to establish beyond reasonable doubt that Charas was found from the pocket of the trouser of the accused, which weigh about 9 gms. and as such the accused must be held to have committed the offence under Section 20(B)(2) of the Act. He accordingly, convicted the accused of the said offence and sentenced him to undergo rigorous imprisonment for 10 years and a fine of rupees one lakh. One appeal by the accused, the High Court affirmed the conviction and sentence and hence the present appeal.

3. The prosecution case in nutshell is that on receipt of certain information that the accused is dealing with narcotics the empowered officer called the panch witnesses and raided the house of the accused. While the accused was sitting on a cot, the person of the accused was searched and from his pant pocket, 9 gms. of Charas. The factum of recovery of Charas from the pant of the accused is established through the panch witness PW1 and the seizure list Exh. 6 and Exh. 17 but the said witness PW1 in cross-examination, candidly stated that the accused himself had requested for being taken to the Magistrate for being searched but the Police had declared that it was not necessary. PW2, the senior Police Officer, also was examined in this case and he gave out the details about the raid and seizure as well as drawing of the Panchnama. In assailing the conviction, the learned counsel for the appellant contended that the mandatory requirements of Section 50 of the NDPS Act have not been complied with inasmuch as notwithstanding the fact that the accused himself requested for being taken to the Magistrate for the purpose of search, the Police did not accede to the same and, therefore, the conviction is null and void.

4. The learned counsel appearing for the respondent, on the other hand contended that in the case in hand, the search itself having been made by a Gazetted Officer namely PW2, it cannot be said that there has been an infraction of Section 50 of the Act, and, therefore, the conviction cannot be held to be invalid. The question for consideration,

therefore is whether when a search is made by gazetted officer, is it obligatory for the prosecution to inform the accused of his right to be searched before a gazetted officer or before a Magistrate, as provided under Section 50 of the Act? According to the learned counsel for the respondent, it is only when a search is made by an authorised officer under Section 41(2) of the Act, it is only then, the provisions of Section 50 can be attracted but when a search is made by an officer of gazetted rank of the department of Central Excise, who is empowered under sub-section (2) of Section 41, then the provisions of Section 50 are not required to be complied with inasmuch the empowered officer himself is a gazetted officer. According to the learned counsel for the accused appellant, however the provisions of Section 50 are required to be complied with irrespective of the fact whether the search is being made by the empowered officer, who may be an officer of the gazetted rank or by an officer duly authorised by the empowered officer under Section 42 of the Act. To ensure fairness in the search itself and for compliance of Section 50 of the Act, no differentiation can be made whether the search is being made by the empowered officer, who obviously is an officer of a gazetted rank or the authorised officer, who may be a subordinate officer to whom the empowered officer authorises. To appreciate the point in issue, it is necessary to extract the provisions 41, 42 and 50 of the Act:—

5. Section 41. Power to issue warrant and authorisation - (1) A Metropolitan Magistrate or a Magistrate of the first class or any Magistrate of the second class specially empowered by the State Government in this behalf, may issue a warrant for the arrest of any person whom he has reason to believe to have committed any offence punishable under Chapter IV, or for the search, whether by day or by night, of any building, conveyance or place in which he has reason to believe any narcotic drug or psychotropic substance in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed.

(2) Any such officer of gazetted rank of the departments of central excise, narcotics customs, revenue intelligence or any other department of the Central Government or of the Border Security Force as is empowered in this behalf by general or special order by the Central Government, or any such officer of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken in writing that any person has committed an offence punishable under Chapter IV or that any narcotic drug, or psychotropic substance in respect of which any offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence has been kept or concealed in any building, conveyance or place, may authorise any officer subordinate to him but superior in rank to a peon, sepoy, or a constable, to arrest such a person or search a building, conveyance or place whether by day or by night or himself arrest a person or search a building, conveyance or place.

(3) The officer to whom a warrant under sub-section (1) is addressed and the officer who authorised the arrest or search or the officer who is so authorised under sub-section (2) shall have all the powers of an officer acting under section 42.

6. Section 42. Power of entry, search, seizure and arrest without warrant or authorisation:— (1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government or of the Border Security Force as is empowered in this behalf by general or special order by the Central Government, or any such officer by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing, that any narcotic drug, or psychotropic substance, in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed in any building, conveyance or enclosed place, may, between sunrise and sunset -

- (a) enter into and search any such building, conveyance or place;
- (b) in case of resistance, break open any door and remove any obstacle to such entry;
- (c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under Chapter IV relating to such drug or substance; and
- (d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under Chapter IV relating to such drug or substance.

7. Provided that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sun set and sun rise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto he shall forthwith send a copy thereof to his immediate official superior.

8. Section 50. 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".

9. An analysis of the aforesaid provisions, unequivocally indicate that under sub-section (2) of Section 41, an officer of a gazetted rank of the department of Central Excise, narcotics, customs, revenue intelligence or any other department of the Central Government or the Border Security Force, can be empowered by a general or special order by the Central Government, conferring the power to arrest a person or search a building, conveyance or place, if he has reason to believe from personal knowledge or information that the person concerned has committed an offence punishable under Chapter IV or that any narcotic drug or psychotropic substance, in respect of which any offence, punishable under Chapter IV, has been committed or any document or other article which may furnish evidence of the commission of such offence, has been kept or concealed in any building, conveyance or place. Sub-section (2) of Section 41 further enables the State Government to empower any officer of the gazetted rank of the revenue, drug control, excise, police or any other department by a general or special order to perform the said function. The said sub-section also confers power on such empowered gazetted officer to authorise any officer, subordinate to him but superior in rank to a peon, sepoy or a constable to perform the said function, for which the general or special order has empowered him. Section 42 is the power of entry, search, seizure and arrest without any warrant or authorisation. Section 50, which is supposed to be the minimum safeguard afforded to an accused, provides that when a search is about to be made of a person under Section 41 or Section 42 or Section 43, and if the person so requires, then the said person of whom, search is about to be made has to be taken to the nearest gazetted officer of any of the departments mentioned in Section 42 or to the nearest Magistrate. The argument of the learned counsel for the respondent is based upon the expression used in Section 50 to the effect "any person duly authorised under Section 42" and, therefore, a distinction is sought to be made in case of a search between an empowered officer and a search made by an authorised officer. But the said argument is devoid of any substance, since Section 42 itself also speaks of search to be made by an officer, as is empowered by a general or special order by the Central Government or as is empowered by a general or special order by the State Government. A combined reading of the provisions of Section 42 and Section 50 would make it crystal clear that whenever a search of a person is about to be made on the basis of personal knowledge or information received in that behalf, then if the person to be searched requires to be taken to a gazetted officer or the nearest Magistrate, the same must be complied with and failure to compliance of the same would constitute an infraction of the requirements of the provision of Section 50, which would ultimately vitiate the conviction. For the purpose of complying with the provisions of Section 50, no differentiation can be made on a plain reading of the language used in Section 50, depending upon the officer who is going to search the person concerned. In our considered opinion, since the search is about to be effected on the basis of any prior information or personal knowledge, which the person going to search has the reasons to believe that an offence under the Act is being committed, then for the sanctity of the search itself, the person to be searched has been afforded the minimum right to be searched before another gazetted officer or the Magistrate and that right cannot be taken away, merely because the officer going to search happens to be a gazetted officer, who has been empowered either by the Central Government or by the State Government by a general or special order. In fact the legislature has enacted the safeguard contained in Section 50 to

obviate any doubt of the illicit articles under the NDPS Act, namely the shifting of the onus to the accused and the severe punishment to which he becomes liable. It is in this connection, it would be appropriate to extract the observations made by a Three Judge Bench of this Court in the case of **Saiyad Mohd. Saiyad Umar Saiyad and Ors. vs. State of Gujarat, 1995(3) SCC Page 610**: "It is to be noted that under the NDPS Act, punishment for contravention of its provisions can extend to rigorous imprisonment for a term which shall not be less than 10 years but which may extend to 20 years and also to fine which shall not be less than Rupees one lakhs but which may extend to Rupees two lakhs, and the Court is empowered to impose a fine exceeding Rupees two lakhs for reasons to be recorded in its judgment. Section 54 of the NDPS Act shifts the onus of providing his innocence upon the accused. it states that in trials under the NDPS Act it may be presumed, unless and until the contrary is proved, that an accused has committed an offence under it in respect of the articles covered by it "for the possession of which he fails to account satisfactorily". Having regard to the grave consequences that may entail the possession of illicit articles under the NDPS Act, namely, the shifting of the onus to the accused and the severe punishment to which he becomes liable, the Legislature has enacted the safeguard contained in Section 50. To obviate any doubt as to the possession by the accused of illicit articles under the NDPS Act, the accused is authorised to require the search for such possession to be conducted in the presence of a Gazetted Officer or a Magistrate. We endorse the finding in Balbir Singh case that the provisions in this behalf are mandatory and the language thereof obliges the officer concerned to inform the person to be searched of his right to demand that the search be conducted in the presence of a Gazetted Officer or a Magistrate".

11. In the aforesaid judgment, not only the decision of this Court in **Balbir Singh's case** to the effect that the provisions of Section 50 are mandatory, has been endorsed but also, it further indicates that it obliges the officer concerned to inform the person to be searched of his right to demand that the search be conducted in the presence of a Gazetted Officer or a Magistrate. In the case in hand, the evidence of PW1 indicates that even though the obligation of the officer had not been discharged by way of informing the accused of his right to demand that the search be conducted in the presence of a gazetted officer or a Magistrate but the accused himself wanted to be searched before another gazetted officer or a Magistrate but that was not acceded to. It is not necessary to notice several decisions of this Court, holding the provisions of Section 50 to be mandatory and we would notice the recent Constitution Bench decision on the point. In the case of **State of Punjab vs. Baldev Singh, 1999(6) SCC, 172**, this question was considered and answered by the Constitution Bench by holding that it is an obligation of the empowered officer and his duty before conducting the search of the person of a suspect, on the basis of prior information, to inform the suspect that he has the right to require his search being conducted in the presence of a gazetted officer or a Magistrate and the failure to so inform the suspect of his right would render the search illegal because the suspect would not be able to avail of the protection which is inbuilt in Section 50. It was further held that if the person concerned requires, on being so informed by the empowered officer or otherwise, that his search be conducted in the presence of a gazetted officer or a Magistrate, the empowered officer is obliged to do so and failure on his part to do so would cause prejudice to the accused and also render the search illegal and the conviction and sentence of the accused based solely on recovery made during that search bad. This Court further held that bearing in mind the purpose for which the safeguard has been made, it is held that the provisions of Section 50 of the Act implicitly make it imperative and obligatory and cast a duty on 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. In paragraph 57 of the judgment in **Baldev Sigh's case**, the Constitution Bench held as follows:

"(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 person concerned of his right under sub-section (1) 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.

(2) That failure to inform the person concerned about the existence of his right to be searched before a gazetted officer or a Magistrate would cause prejudice to an accused.

(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 shall 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 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".

12. In view of the aforesaid conclusions of the Constitution Bench, the submission of Mr. M.N. Shroff, appearing for the State-respondent, that the requirement of compliance of Section 50 will not arise, if a search is going to be made by an empowered officer, who happens to be a gazetted officer, is devoid of any substance inasmuch as this Court in no uncertain terms has held 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 person concerned of his right under sub-section (1) of Section 50 of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. In view of the aforesaid position of law and in view of the evidence of PW1., as indicated in the earlier part of this judgment, the accused himself having wanted to be searched before a gazetted officer or a Magistrate and the same having been denied, there cannot be any doubt that failure on the part of the prosecution in complying with the provisions of Section 50, renders the recovery of illicit article suspect and vitiates the conviction and sentence of the accused, since the conviction in the case in hand is based solely on the alleged possession of Charas, which was recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act. In the aforesaid circumstances, the conviction and sentence is set aside and the accused be set at liberty forthwith, unless required in any other case. Fine amount, if has been paid, may be refunded to the accused.

Criminal Appeal is accordingly allowed.