

# SUPREME COURT OF INDIA

State of Punjab

Vs.

Makhan Chand

Crl.A.No.714 of 1997

(B.N.Srikrishna and K.G.Balakrishnan JJ.)

27.02.2004

## JUDGMENT

### **B.N.Srikrishna, J.**

1. This appeal by the State of Punjab is directed against a judgment of the High Court of Punjab and Haryana acquitting the respondent of the charge framed against him under Section 18 read with Section 21 of the *Narcotic Drugs and Psychotropic Substances Act, 1985* (hereinafter referred to as "the Act").

2. The relevant facts necessary for disposal of this appeal are as under:

“On 28-7-1993, SI Karam Chand (PW 2), who was working as the Station House Officer, Police Station Kotwali, Barnala along with ASI Bhupinder Singh, Head Constable Nishan Singh and some other police officers was carrying out patrolling near the bus-stand, Barnala. When the police party came near the bypass of Chowk Bajakhana, they saw the respondent-accused alighting from a bus with a tin box in his hand. The movements of the accused aroused the suspicion of the police party who then apprehended the respondent-accused. They told him that they suspected him of committing an offence under the Act and told him that if he so desired, the search would be carried out in the presence of a gazetted officer or a Magistrate. The respondent-accused, however, declined the offer, as a result of which, the tin box carried by him was searched by the police party. The search yielded a plastic envelope containing brown-coloured tablets and one plastic box containing some inscriptions. In all, there were 37, 000 such tablets recovered. Two samples of 500 tablets each, were separated and sealed according to the procedure. The remaining bulk of 36, 000 tablets along with the plastic box was also sealed by following the due procedure. The sample tablets were forwarded to the Office of the Chemical Examiner, Chandigarh, who opined that the tablets contained meconic acid and morphine to the extent of 1.08%. The respondent-accused was charged with the contravention of Sections 18 and 21 of the Act and was put up for trial. The Additional Sessions Judge, Barnala convicted him of the charges levelled against him.

The respondent-accused carried an appeal to the High Court against his conviction. The first question urged before the High Court was whether there was a contravention of Section 50 of the Act inasmuch as the offer made to the accused for searching his person in the presence of a Magistrate or a gazetted officer and his declining the offer of the same, was not corroborated by any independent witnesses. The High Court was of the view that, since the respondent-accused was apprehended in a public place, there was no dearth of witnesses available at the time and place where the search was made. It is an admitted fact that no independent witnesses were joined in this case and also that there was nothing in the statements of PW 1 and PW 2 suggesting that there was any difficulty in joining independent witnesses. Hence, the High Court came to the conclusion that non-joining of independent witnesses would indicate a contravention of Section 50. On this reasoning, the High Court set aside the judgment of the Additional Sessions Judge and acquitted the respondent. Being aggrieved, the State is in appeal.”

3. It appears to us that, the only question which appealed to the High Court, has been wrongly decided. As to the circumstances when the provisions of Section 50 of the Act would apply, the issue is no longer *res integra*. A Constitution Bench of this Court in *State of Punjab v. Baldev Singh* (:), says this:

"12. On its plain reading, Section 50 would come into play only in the case of a search of a person as distinguished from search of any premises etc. However, if the empowered officer, without any prior information as contemplated by Section 42 of the Act makes a search or causes arrest of a person during the normal course of investigation into an offence or suspected offence and on completion of that search, a contraband under the NDPS Act is also recovered, the requirements of Section 50 of the Act are not attracted."

4. Following this judgment, another Bench of this Court in *Bharatbhai Bhagwanjibhai v. State of Gujarat* ( 3 : 3) took the view that Section 50 categorically lays down that if the search is to be conducted by an officer duly authorised under Section 42 and the search is about to be conducted under the provisions of Sections 41, 42 or 43, the officer concerned does owe a duty to intimate the person to be searched that he has the option to be taken to the nearest gazetted officer/Magistrate for the purpose of carrying out the search. But in the event of a situation otherwise, there is no such obligation. It was pointed out that, if an accused person, on seeing a patrolling police party, starts running, which excites the suspicion of the police party, as a result of which, he is apprehended and searched, the question of compliance with the safeguards prescribed under Section 50 of the Act would not arise.

5. In *State of Punjab v. Balbir Singh* this Court had the following to say about such a situation:

"It thus emerges that when the police, while acting under the provisions of CrPC as empowered therein and while exercising surveillance or investigating into other offences, had to carry out the arrests or searches they would be acting under the provisions of CrPC. At this stage if there is any non-compliance of the provisions of Section 100 or Section 165 CrPC that by itself cannot be a ground to reject the prosecution case outright. The effect of such non-compliance will have a bearing on the appreciation of evidence of the official witness and other material depending upon the facts and circumstances of each case. In carrying out such searches if they come across any substance covered by the NDPS Act the question of complying with the provisions of the said Act including Section 50 at that stage would not arise. When the contraband seized during such arrests or searches attracts the provisions of the NDPS Act then from that stage the remaining relevant provisions of the NDPS Act would be attracted and the further steps have to be taken in accordance with the provisions of the said Act."

6. Apart from the aforesaid question, we are also of the view that Section 50 of the Act would not apply to a situation where the search undertaken is not of the person of the accused but of something carried in his hand. See in this connection, the observations of the Constitution Bench of this Court in Baldev Singh case the judgment of this Court in Gurbax Singh v. State of Haryana ( 04 : 04), and in Kalema Tumba v. State of Maharashtra.

7. In the present case, for both the reasons discussed earlier, we are of the view that Section 50 does not apply at all. The mere fact that the officer concerned offered to have the search of the respondent-accused taken before a gazetted officer/Magistrate, or that there were no independent witnesses to evidence this offer, hardly makes any difference to the situation. In our view, therefore, the High Court erred in holding that the action of the police officers was contrary to Section 51 of the Act and giving the benefit of doubt to the respondent-accused when there was no scope for raising such a doubt at all.

8. Learned counsel for the respondent-accused relied on certain standing orders and standing instructions issued by the Central Government under Section 52-A(1) which require a particular procedure to be followed for drawing of samples and contended that since this procedure had not been followed, the entire trial was vitiated.

9. This contention too has no substance for two reasons. Firstly, Section 52-A, as the marginal note indicates, deals with "disposal of seized narcotic drugs and psychotropic substances". Under sub-section (1), the Central Government, by a notification in the Official Gazette, is empowered to specify certain narcotic drugs or psychotropic substances, having regard to the hazardous nature, vulnerability to theft, substitution, constraints of proper storage space and such other relevant considerations, so that even if they are material objects seized in a criminal case, they could be disposed of after following the procedure prescribed in sub-sections (2) and (3). If the procedure prescribed in sub-sections (2) and (3) of Section 52-A is complied with and upon an application, the Magistrate issues the certificate contemplated by sub-section (2), then sub-section (4) provides that, notwithstanding anything to the contrary contained in the *Indian Evidence Act, 1872* or the Code of Criminal

Procedure, 1973, such inventory, photographs of narcotic drugs or substances and any list of samples drawn under sub-section (2) of Section 52-A as certified by the Magistrate, would be treated as primary evidence in respect of the offence. Therefore, Section 52-A(1) does not empower the Central Government to lay down the procedure for search of an accused, but only deals with the disposal of seized narcotic drugs and psychotropic substances.

10. Secondly, when the very same Standing Orders came up for consideration in *Khet Singh v. Union of India* this Court took the view that they are merely intended to guide the officers to see that a fair procedure is adopted by the officer in charge of the investigation. It was also held that they were not inexorable rules as there could be circumstances in which it may not be possible for the seizing officer to prepare the mahazar at the spot, if it is a chance recovery, where the officer may not have the facility to prepare the seizure mahazar at the spot itself. Hence, we do not find any substance in this contention.

11. The respondent-accused also relied on a judgment of this Court in *Valsala v. State of Kerala*. Considering the evidence on record, no case of tampering with the seals was made out nor has the High Court made any finding in this regard in favour of the accused. The only contention which appealed to the High Court was with regard to the violation of Section 50 of the Act. This is no longer relevant since we are in disagreement therewith.

12. In the result, we set aside the judgment of the High Court and affirm the correctness of the judgment of the learned Additional Sessions Judge, Barnala.

13. The respondent-accused has been rightly convicted and sentenced by the trial court and, therefore, the learned Additional Sessions Judge, Barnala shall promptly take steps to apprehend the respondent-accused so that he may serve out the sentence imposed on him.