SUPREME COURT OF INDIA

State of Rajasthan

Vs.

Bhanwar Lal

Crl.A.No.145 of 2003

(Dr. Arijit Pasayat and Asok Kumar Ganguly JJ.)

03.03.2009

JUDGEMENT

Dr.Arijit Pasayat, J.

1. Challenge in this appeal by the State of Rajasthan is to a judgment of the learned single Judge of the Rajashtan High Court directing acquittal of the respondents - Bhanwar Lal and Mohan Lal. Both these accused persons faced trial for alleged commission of offences punishable under Sections 8 and 18 of the Narcotic Drugs ad Psychotropic Substances Act, 1985 (in short `NDPS Act'). The accused Mohan Lal was convicted in terms of Sections 8 read with Sec.18 and awarded ten years R.I. along with fine of Rs.1,00,000/- (rupees one lakh) with default stipulation.

2. The appellant Bhanwar Lal was convicted under Sections 8 and 18 of the NDPS Act and awarded 12 years R.I. along with fine of Rs.2,00,000/- (Rupees two lakhs). He was also convicted for the offences under Section 8 read with Sec.20 of the NDPS Act and, therefore, separately awarded two years R.I. with fine of Rs.2,000/- with default stipulation.

3. The trial court found that the evidence led by the prosecution is credible and cogent and recorded conviction as noted above. The High Court found that there was non-compliance with the requirements of Sec.50 of the Act and directed acquittal.

4. It is brought to our notice by learned counsel that the accused Bhanwar Lal has died on 12/10/2003 and therefore the appeal does not survive so far as he is concerned.

5. Coming to the case of the accused Mohan Lal, learned counsel for the appellant State submitted that the High Court went on discarding the evidence of the Dy. Superintendent of Police PW.16 on the ground of alleged variation in testimony vis.a.vis. PW.12. It is pointed out that while PW.16 stated that he asked the accused as to whether they wanted to be searched by Gazetted Officer, or Magistrate in the sense that he himself was a Gazetted Officer. PW.12 stated that the accused persons were asked whether they wanted to be

searched in the presence of PW.16 himself or Magistrate. This according to the learned counsel for the appellant-State is not a proper way of reading the evidences.

6. Learned counsel for the respondent on the other hand submitted that the quantity seized was below 25 grams. Reference is made to a Notification No. G.O. 327E dated 16/7/1996 of the Central Government issued in exercise of power under Section 27 of the Act which provides that if an accused is found in possession upto 25 grams of opium then such accused can be awarded such sentence as meant for "small quantities". According to him, the quantity of 20 grams was meant for the respondent's personal use. It is also pointed out that the recovery was made on 23/12/1996 and it was sent to the office of the Superintendent of Police where allegedly the same was not accepted and was sent back to the police station. What prompted this action, according to the learned counsel for the respondent has not been clarified by the prosecution.

7. A reading of the evidences of PW 12 and 16 shows no material contradiction regarding information given to the accused to exercise the option to be examined in the presence of Gazetted Officer or a Magistrate. The High Court was not justified in drawing that inference. The version of PW.1`6 is in line with what is stated in Ext.P.8. It was observed as follows at para 13 in 2005 (5) SCC 151.

> "Section 50 does not involve any self-incrimination. It is only a procedure required to protect the rights of an accused (suspect) being made aware of the existence of his right to be searched if so required by him before any of the specified officers. The object seems to be to ensure that at a later stage the accused (suspect) does not take a plea that the articles were planted on him or that those were not recovered from him. To put it differently, fair play and transparency in the process of search has been given primacy. In Raghbir Singh vs. State of Haryana the true essence of Section 50 was highlighted in the following manner: (SCC pp.204-05, paras 8-11)"

8. The very question that is referred to us came to be considered by a Bench of two learned Judges on 22-1-1996 in Manohar Lal vs. State of Rajashtan. One of us (Verma, J.), speaking for the Bench, held:

> `It is clear from Section 50 of the NDPS Act that the option given thereby to the accused is only to choose whether he would like to be searched by the officer making the search or in the presence of the nearest available gazetted officer or the nearest available Magistrate.
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> The choice of the nearest gazetted officer or the nearest Magistrate has to exercised by the officer making the search and not by the accused."

9. We concur with the view taken in Manohar Lal case.

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."

> "Therefore, the acquittal as recorded was not justified. However, as rightly contended by learned counsel for the respondent Mohan Lal that the quantity seized was less than 25 grams. That being so, Section 27 of the Act has application in terms of the Notification referred above. It is stated that he is in custody for more than two years and 7 months. That being so it will be appropriate to restrict the sentence to the period already undergone. The appeal is allowed to the aforesaid extent."