

SUPREME COURT OF INDIA

Krishan Kumar

Vs.

State of Haryana

CrI.A.No.1563 of 2010

(B.S.Chauhan and A.K.Sikri JJ.)

23.05.2014

JUDGMENT

A.K. SIKRI, J.

1. That the present statutory appeal is directed against the impugned order dated 23.3.2010 whereby the High Court has convicted the appellant by reversing the judgment of the Trial Court, which had acquitted the appellant of the charges under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the 'Act').

2. As per the case of the prosecution, on 15.9.1992 the appellant was spotted by the police party headed by Sub-Inspector, Mohinder Singh at Bus Stand Ratta Khera. At that time, the appellant was having a plastic bag in his hand. On seeing the police party, appellant had tried to conceal his presence by sitting near the water tank on the pretext of passing urine. The appellant was apprehended on suspicion and notice (Ext. P-A) under Section 50 of the Act was served upon him seeking his consent as to whether he wanted his search to be made in the presence of a Gazetted Officer or a Magistrate. The reply of the appellant to the notice is Ex. P-A/1 whereby he desired that the plastic bag, which he was carrying, be searched in the presence of a Magistrate. Thereupon Chet Ram, Tehsildar (PW-2) was summoned to the place of recovery and in his presence the search of the bag of the appellant was conducted. Opium weighing 5 Kgs. was found in the bag which was in possession of the

appellant. After separating a sample weighing 50 grams, the sample and the remaining opium were separately sealed with the seal bearing impression 'MS', which was entrusted to Khema Ram, Chaukidar, who had joined in the police party from Bus Stand, Ratta, Khera.

3. After the trial, the appellant was convicted of the charge under Section 18 of the Act vide judgment dated 08.6.1995 passed by the Trial Court.

4. The appellant appealed against his conviction. The appeal was decided on 29.1.1999 by the High Court. The conviction was set aside on a technical ground and the matter was remitted back to the Trial Court. It will be pertinent to mention here that the said appeal was allowed primarily on the ground that it was not clear as to whether Chet Ram, Tehsildar in whose presence the search of the bag of the appellant was conducted, was discharging the duties of a Magistrate as well or not. As pointed out above, when the appellant was served with notice under Section 50 of the Act seeking his consent about his search he had desired that he be searched in the presence of a Magistrate. It is on this request that Chet Ram, Tehsildar was summoned. The contention of the appellant before the High Court was that Chet Ram was not discharging the duties of a Magistrate and, therefore, there was violation of Section 50 of the Act. Since this aspect was not examined while convicting the appellant of the aforesaid offence, the appeal was allowed and the matter was remitted back. This is clear from the following order passed by the High Court:

Resultantly, the appeal is allowed. The judgment and order of the Trial Court stand set aside and directions are given to the Trial Court to recall Chet Ram and get an elucidation from him as to whether he was discharging the duties of a Magistrate on the date of the recovery of opium or not. Prosecution will also be at liberty to lead such evidence in support of their case in order to show that Chet Ram was bestowed with powers of Magistracy. The accused will also have the liberty to lead such evidence to rebut the case of the prosecution.

5. After the remand, the statement of Chet Ram (PW-2) was recorded afresh by the Trial Court. The opportunity was given to the prosecution as well as the appellant to produce additional evidence. In support of its case that Chet Ram was conferred with the duties of an Executive Magistrate as well, the prosecution produced photostat copy of the Haryana Government Notification No. 21/39/78-JJ(4) Part II published on

16.6.1982 (Ex. P-X) whereby all the Tehsildars in the State of Haryana were appointed as Executive Magistrates and affidavit of Chet Ram, Tehsildar-cum-Executive Magistrate dated 25.6.1999 was placed on record.

6. The Trial Court after recording the additional evidence as aforesaid, considered the matter again and this time it passed judgment dated 14.12.1999 acquitting the appellant. The reason for acquittal was that the prosecution could not prove that Chet Ram was discharging the duties as a Magistrate on the date of recovery of opium. The photocopy of Gazette Notification dated 16.6.1982 (Ex. P-X) was not acted upon by the Trial Court on the ground that the original Notification was not produced for perusal.

7. The State filed an appeal against the aforesaid judgment. The High Court vide impugned judgment has rejected the contention of the appellant and reversed the finding of the Trial Court, holding that it was not right for the Trial Court to discard the said Notification only on the ground that original was not produced, when there was no reason for the Trial Court to doubt the authenticity of the said Notification. It was, more so, when Chet Ram had even filed his affidavit dated 25.6.1999 stating that he had been promoted from the post of Naib Tehsildar to the post of Tehsildar in May, 1983.

8. In the aforesaid backdrop, the High Court analysed the testimony of Chet Ram and other witnesses to come to the conclusion that recovery of the contraband from the bag of the appellant was proved by the prosecution. This analysis is summed up by the High Court in the following manner:-

In this case, Assistant Sub-Inspector Guriya Ram (PW1), Chet Ram, Tehsildar-cum-Executive Magistrate (PW2) and Sub-Inspector Mohinder Singh (PW3) had appeared in support of the prosecution case. No ill will or animosity is attributed on the part of any of the three witnesses examined by the prosecution qua the accused. The recovery was effected by the police officials in the discharge of their official duties and they had no axe to grind against the accused. There was no reason for the police to plant 5 Kgs. of opium upon the accused. Under the circumstances, the non-examination of Chaukidar Khema Ram, who had joined in the police party, does not in any manner render the prosecution case unworthy of credit. The statements of the official witnesses

cannot be rejected merely because of their official status. In fact, no discrepancy worth the name was noticed in the statements of Assistant Sub-Inspector Guriya Ram (PW1), Tehsildar-cum- Executive Magistrate Chet Ram (PW2) and Sub Inspector Mohinder Singh (PW3).

9. Resultantly, the High Court allowed the appeal of the State and convicted the appellant under Section 18 of the Act, sentencing him to undergo rigorous imprisonment of 10 years and to pay fine of Rs. 1 lakh. It is also directed that in default of payment of fine, the appellant shall undergo further rigorous imprisonment for 1 year.

10. Mr. Tripurari Rai, learned Counsel appearing for the appellant tried to persuade us to restore the findings of the Trial Court holding that the prosecution could not prove that Chet Ram was discharging the duties of Executive Magistrate as well. Referring to the provisions of Section 50 of the Act his submission was that these provisions were mandatory in nature. In the instant case, when the appellant had specifically chosen to get himself searched in the presence of the Magistrate and the search was not conducted in the presence of the Magistrate, mandatory requirement of Section 50 of the Act had been violated and it should have resulted in the acquittal of the appellant.

11. We are of the opinion that entire argument is misdirected. In fact, the exercise undertaken by the Courts below viz. whether Chet Ram was discharging the duties of Executive Magistrate or not was totally irrelevant as Section 50 of the Act has no application in the present case. Section 50 of the Act, which is the sheet anchor of the appellant's defence reads as under:

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 the search be made.

(4) No female shall be searched by anyone except a female.

(5) When an officer duly authorised under Section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under Section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

6. After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy two hours send a copy thereof to his immediate official superior.

12. It is clear from the reading of the aforesaid provision that it is applicable only where search of a person is involved. It is not made applicable in those cases where no search of a person is to be conducted. In the instant case the appellant was carrying a bag which was to be searched and on his request Chet Ram was summoned in whose presence search was conducted which pertained to a bag. In *Ajmer Singh v. State of Haryana*; (2010) 3 SCC 746 this aspect is specifically considered and dealt with. Following earlier Constitution Bench judgment, the Court held that when search and recovery from a bag, brief case, container etc. is to be made, provisions of Section 50 of the Act are not attracted. It is so stated in the following manner:

14. The object, purpose and scope of Section 50 of the Act was the subject-matter of discussion in a number of decisions of this Court. The Constitution Bench of five Judges of this Court in *State of Punjab v. Baldev Singh*; (1999) 6 SCC 172 after exhaustive consideration of the decisions of this Court in *Ali Mustaffa Abdul Rahman Moosa v. State of Kerala*; (1994) 6 SCC 569 and

Pooran Mal v. Director of Inspection (Investigation); (1974) 1 SCC 345 have concluded in para 57:

(I) When search and seizure is to be conducted under the provisions of the Act, it is imperative for him to inform the person concerned of his right of being taken to the nearest gazetted officer or the nearest Magistrate for making search.

(II) Failure to inform the accused of such right would cause prejudice to an accused.

(III) That a search made by an empowered officer, on prior information, without informing the accused of such a right may not vitiate trial, but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction is [pic]solely based on the possession of the illicit article recovered from his person, during such search.

(IV) The investigating agency must follow the procedure as envisaged by the statute scrupulously and failure to do so would lead to unfair trial contrary to the concept of justice.

(V) That the question as to whether the safeguards provided in Section 50 of the Act have been duly observed would have to be determined by the court on the basis of the evidence at the trial and without giving an opportunity to the prosecution to establish the compliance of Section 50 of the Act would not be permissible as it would cut short a criminal trial.

(VI) That the non-compliance of the procedure i.e. informing the accused of the right under sub-section (1) of Section 50 may render the recovery of contraband suspect and conviction and sentence of an accused bad and unsustainable in law.

(VII) The illicit article seized from the person of an accused during search conducted without complying with the procedure under Section 50, cannot be relied upon as evidence for proving the unlawful possession of the contraband.

15. The learned counsel for the appellant contended that the provision of

Section 50 of the Act would also apply, while searching the bag, briefcase, etc. carried by the person and its non-compliance would be fatal to the proceedings initiated under the Act. We find no merit in the contention of the learned counsel. It requires to be noticed that the question of compliance or non-compliance with Section 50 of the NDPS Act is relevant only where search of a person is involved and the said section is not applicable nor attracted where no search of a person is involved. Search and recovery from a bag, briefcase, container, etc. does not come within the ambit of Section 50 of the NDPS Act, because firstly, Section 50 expressly speaks of search of person only. Secondly, the section speaks of taking of the person to be searched by the gazetted officer or a Magistrate for the purpose of search. Thirdly, this issue in our considered opinion is no more *res integra* in view of the observations made by this Court in *Madan Lal v. State of H.P.*; (2003) 7 SCC 465. The Court has observed:

16. A bare reading of Section 50 shows that it only applies in case of personal search of a person. It does not extend to search of a vehicle or a container or a bag or premises (see *Kalema Tumba v. State of Maharashtra*; (1999) 8 SCC 257, *State of Punjab v. Baldev Singh*; (1999) 6 SCC 172 and *Gurbax Singh v. State of Haryana*; (2001) 3 SCC 28. The language of Section 50 is implicitly clear that the search has to be in relation to a person as contrasted to search of premises, vehicles or articles. This position was settled beyond doubt by the Constitution Bench in *Baldev Singh* case. Above being the position, [pic]the contention regarding non-compliance with Section 50 of the Act is also without any substance.

16. In *State of H.P. v. Pawan Kumar*; (2005) 4 SCC 350 this Court has stated:

11. A bag, briefcase or any such article or container, etc. can, under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body of a human being. Depending upon the physical capacity of a person, he may carry any number of items like a bag, a briefcase, a suitcase, a tin box, a thaila, a jhola, a gathri, a holdall, a carton, etc. of varying size, dimension or weight. However, while carrying or moving along with them, some extra effort or energy would be required. They would have to be carried either by the hand or hung on the shoulder or back or placed on the head. In

common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore, it is not possible to include these articles within the ambit of the word 'person' occurring in Section 50 of the Act.

(emphasis in original)

17. After discussion on the interpretation of the word 'person', this Court concluded:

14. that the provisions of Section 50 will come into play only in the case of personal search of the accused and not of some baggage like a bag, article or container, etc. which [the accused] may be carrying.

The Court further observed:

27. In view of the discussion made earlier, Section 50 of the Act can have no application on the facts and circumstances of the present case as opium was allegedly recovered from the bag which was being carried by the accused.

13. Moreover, even if we proceed on the basis that Section 50 applies, we find that the requirement of Section 50 is the search by Gazetted Officer or nearest Magistrate. It was not disputed by the learned Counsel for the appellant, at the time of arguments, that Chet Ram was a Gazetted Officer. Therefore, even otherwise we find that the requirement of Section 50 was fulfilled.

14. Half hearted attempt was made by Mr. Rai to dig loopholes in the prosecution story. He argued that though Chaukidar was also present at the time of search, he was not produced as a witness; the prosecution did not join any independent witness at the time of seizure of opium from the appellant even when witnesses were present near the spot; and that there was an inordinate delay in sending the sample to Forensic Science Laboratory. After going through the record, we find that there is no merit in any of these submissions which are adequately taken care of by the Courts below. We may re-emphasise that the appellant was convicted by the Trial Court in the first instance. However, the matter was remanded back by the High Court to the Trial Court only to find out as to whether Chet Ram was Executive Magistrate or not. Therefore,

this was the limited inquiry which was to be conducted. On that aspect, we have already straightened the legal position which goes against the appellant. On merits, we find that the prosecution has established the guilt of the appellant by leading cogent evidence and the guilt is proved beyond reasonable doubt. There is no scope of interference with the said findings.

15. We thus, do not find any merit in this appeal. The appeal is hereby dismissed.