

Mohd. Rahis Khan Vs. State

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Court : Delhi

Decided On : Nov-26-2013

Judge : G. S. Sistani

Appellant : Mohd. Rahis Khan

Respondent : State

Judgement :

\$~ 27 * IN THE HIGH COURT OF DELHI AT NEW DELHI + CRL.A. 134/2005
Judgment dated 26th November, 2013 % MOHD. RAHIS KHAN Appellant
Through: Ms.Charu Verma, Amicus Curiae versus STATE Through:
Respondent Mr.Feroz Khan Ghazi, Adv. for State CORAM: HON'BLE MR.
JUSTICE G.S.SISTANI G.S.SISTANI, J.

(ORAL) 1. None is present on behalf of the appellant. Ms.Charu Verma, Advocate, who is present in court, is appointed as an Amicus Curiae in the matter.

2. The present appeal under section 374 of the Code of Criminal Procedure is directed against the judgment dated 7.8.2004 and the order on sentence dated 9.8.2004 by which the appellant was sentenced to undergo rigorous imprisonment for four years and to pay fine of Rs.40,000/-, and in case of default of payment of fine to further undergo S.I. for four months.

3. The appellant was stated to be in illegal possession of 100 grams of smack; and for the aforesaid offence, case was sent up for trial under sections 21/61/85 NDPS

Act. As per the prosecution on 27.6.2001 while S.I. Narender Kumar was present for anti pick pocket pocketing checking at Shyam Giri Mandir Red Light, GT Road with police party consisting of Constable Om Prakash, Constable Devender Kumar, Constable Rajbir and Constable Pradeep Kumar at about 6.00 a.m. appellant was seen coming from the side of Seelampur and he took a sudden turn on seeing the police party; on suspicion he was apprehended, his search was conducted and from the left side pocket of his pant smack, packed in a polythene, was recovered. Notice under section 50 of the NDPS Act was issued to the appellant; 4-5 persons were requested to join the proceedings, but none agreed to the request. The recovered substance was weighed and it was found to be 100 grams; one sample was taken; the seizure proceedings were conducted; and FIR was got registered. The appellant was then arrested under Section 21 of the NDPS Act; ten witnesses were examined by the prosecution, however, no evidence was led by the defence.

4. Counsel for the appellant submits that the judgment of the trial court is liable to be set aside as the prosecution has not been able to prove its case beyond reasonable doubt. It is submitted that not a single witness was associated at the time of arrest, or search or at any point subsequently. It has been strenuously argued by Ms.Charu Verma, learned Amicus Curiae that the mandatory provision of Section 50 of the NDPS Act, has not been complied with and on this ground alone the appeal is liable to be allowed.

5. Counsel for the State submits that the prosecution has been able to establish its case beyond any reasonable doubt. apprehended at the spot. The appellant was As per the testimony of the PW-8, no independent witness had agreed to participate in the proceedings. Counsel for the State further submits that a notice under Section 50 of the NDPS Act was issued to the appellant, however, he declined to be searched in the presence of a gazetted officer or a Magistrate. It is also submitted that as the mandatory requirement has been complied with, thus the appeal should be dismissed.

6. I have heard counsel for the parties and considered their rival submissions. The first argument which has been raised by Ms.Charu Verma, learned Amicus Curiae

is that the mandatory requirement of Section 50 has not been complied with. Section 50 of the NDPS Act, reads as under:

50. Conditions under which search of persons shall be conducted. (1) When any officer duly authorized under section 42 is about to search any person under the provisions of section 41, section 42 or sections 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. [(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.].

7. Ms.Charu Verma, has placed strong reliance on State of Delhi Vs. Ram Avtar @ Rama reported at 2011 (7) SCALE428 wherein the only issue which was considered by the Apex Court was whether there was compliance of the provisions of Section 50 of the Act or not. The Apex Court referred to various precedents on the issue of the principles applicable to Section 50 of the Act. Relevant portions of the judgment are reproduced below:

6. One of the earliest and significant judgments of this Court, on the issue before us is the case of State of Punjab v. Balbir Singh: (1994) 3 SCC299 where the Court

considered an important question i.e., whether failure by the empowered or authorized officer to comply with the conditions laid down in Section 50 of the Act while conducting the search, affects the prosecution case. In para 16 of the said judgment, after referring to the words "if the person to be searched so desires", the Court came to the conclusion that a valuable right has been given to the person, to be searched in the presence of the Gazetted Officer or Magistrate if he so desires. Such a search would impart much more authenticity and creditworthiness to the proceedings, while equally providing an important safeguard to the accused. It was also held that to afford this opportunity to the person to be searched, such person must be fully aware of his right under Section 50 of the Act and that can be achieved only by the authorized officer explicitly informing him of the same. The statutory language is clear, and the provisions implicitly make it obligatory on the authorized officer to inform the person to be searched of this right. Recording its conclusion in para 25 of the judgment, the Court clearly held that noncompliance with Section 50 of the Act, which is mandatory, would affect the prosecution case and vitiate the trial. It also noticed that after being so informed, whether such person opted for exercising his right or not would be a question of fact, which obviously is to be determined on the facts of each case.

7. This view was followed by another Bench of this Court in the case of *Ali Mustaffa Abdul Rahman Moosa v. State of Kerala* (1994) 6 SCC569 wherein the Court stated that the searching officer was obliged to inform the person to be searched of his rights. Further, the contraband seized in an illegal manner could hardly be relied on, to the advantage of the prosecution. Unlawful possession of the contraband is the sine qua non for conviction under the NDPS Act, and that factor has to be established beyond any reasonable doubt. The Court further indicated that articles recovered may be used for other purposes, but cannot be made a ground for a valid conviction under this Act.

8. In the case of *Saiyad Mohd. Saiyad Umar Saiyad v. State of Gujarat* (1995) 3 SCC510 the Court followed the principles stated in *Balbir Singh's* case (supra) and also clarified that the prosecution must prove that the accused was not only made aware of his right but also that the accused did not choose to be searched before a Gazetted Officer or a Magistrate.

9. Then the matter was examined by a Constitution Bench of this Court, in the case of *State of Punjab v. Baldev Singh* (1999) 6 SCC172 where the Court, after detailed discussion on various cases, including the cases referred by us above, recorded its conclusion in para 57 of the judgment. The relevant portions of this conclusion are as under:

57. On the basis of the reasoning and discussion above, the following conclusions arise: (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. XXXX (4) That there is indeed need to protect society from criminals. The societal intent in safety will suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it does not exist. The answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously inviting action against the official concerned so that the laxity on the part of the investigating authority is curbed. In every case the end result is important but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of the judicial process may come under a cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for the law and may have the effect of unconscionably compromising the administration of justice. That cannot be permitted. An accused is entitled to a fair trial. A conviction resulting from an unfair trial is contrary to our concept of justice. The use of evidence collected in breach of the safeguards provided by Section 50 at the trial, would render the trial unfair. XXXX (6) That in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Section 50 are mandatory or directory, but hold that failure to inform the person concerned of his right as emanating from Sub-section (1) of Section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law.

10. Still in the case of Ahmed v. State of Gujarat (2000) 7 SCC477 a Bench of this Court followed the above cases including Baldev Singh's case (supra) and held that even where search is made by empowered officer who may be a Gazetted Officer, it remains obligatory for the prosecution to inform the person to be searched about his right to be taken to the nearest Gazetted Officer or Magistrate before search. In this case, the Court also noticed at sub-para (e) at page 482 of the judgment that the provisions of Section 50 of the Act, which afford minimum safeguard to the accused, provide that when a search is about to be made of a person under Section 41 or Section 42 or Section 43 of the Act, and if the person so requires, then the said person has to be taken to the nearest Gazetted Officer of any department mentioned in Section 42 of the Act or to the nearest Magistrate.

11. In the case of K. Mohanan v. State of Kerala (2010) 10 SCC222 another Bench of this Court while following Baldev Singh's case (supra) stated in unambiguous terms that merely asking the accused whether he wished to be searched before a Gazetted Officer or a Magistrate, without informing him that he enjoyed a right under law in this behalf, would not satisfy the requirements of Section 50 of the Act.

12. We may also notice here that some precedents hold that though a right of the person to be searched existed under Section 50 of the Act, these provisions are capable of substantial compliance and compliance in absolute terms is not a requirement under law. Reference in this regard can be made to Joseph Fernandez v. State of Goa (2000) 1 SCC707 Prabha Shankar Dubey v. State of Madhya Pradesh: (2004) 2 SCC56, Krishna Kanwar v. State of Rajasthan: (2004) 2 SCC608 Manohar Lal v. State of Rajasthan (1996) 11 SCC391 Karnail Singh v. State of Haryana (2009) 8 SCC539 In the case of Prabha Shankar Dubey(supra), this Court while referring to Baldev Singh's case (supra) took the view that Section 50 of the Act in reality provides additional safeguards which are not elsewhere provided by the statute. As the stress is on the adoption of reasonable, fair and just procedure, no specific words are necessary to be used to convey the existence of this right. The notice served, in that case, upon the person to be searched was as follows: 'By way of this notice you are informed that we have received information that you are illegally carrying opium with you, therefore, we

are required to search your scooter and you for this purpose. You would like to give me search or you would like to be searched by any gazetted officer or by a Magistrate?.' Keeping the aforereferred language in mind, the Court applied the principle of substantial compliance, and held that the plea of noncompliance with the requirements of Section 50 of the Act was without merit on the facts of that case. The Court held as under:

12. The use of the expression "substantial compliance" was made in the background that the searching officer had Section 50 in mind and it was unaided by the interpretation placed on it by the Constitution Bench in Baldev Singh case. A line or a word in a judgment cannot be read in isolation or as if interpreting a statutory provision, to impute a different meaning to the observations.

13. Above being the position, we find no substance in the plea that there was noncompliance with the requirements of Section 50 of the Act.

13. Similarly, in Manohar Lal's case (supra) the option provided to the accused, not to go to a Magistrate if so desired, was considered to imply requirement of mere substantial compliance; and that strict compliance was not necessary.

14. In the case of Union of India v. Satrohan (2008) 8 SCC313 though the Court was not directly concerned with the interpretation of the provisions of Section 50 of the Act, the Court held that Section 42(2) of the Act was mandatory. It also held that search under Section 41(1) of the Act would not attract compliance to the provisions of Section 50 of the Act. To that extent this judgment was taking a view different from that taken by the equi-Bench in Ahmed's case (supra). This question to some extent has been dealt with by the Constitution Bench in the case of Vijaysinh Chandubha Jadeja v. State of Gujarat (2011) 1 SCC609 (hereinafter referred to as 'Vijaysinh Chandubha Jadeja'). As this question does not arise for consideration before us in the present case, we do not consider it necessary to deliberate on this aspect in any further detail.

15. In the case of Vijaysinh Chandubha Jadeja v. State of Gujarat (2007) 1 SCC433 a three Judge Bench of this Court had taken the view that the accused must be informed of his right to be searched in presence of a Magistrate and/or a

Gazetted Officer, but in light of some of the judgments we have mentioned above, a reference to the larger bench was made, resulting.

16. Accordingly, a Constitution Bench was constituted and in the case of *Vijaysinh Chandubha Jadeja* (supra) of this Court, referring to the language of Section 50 of the Act, and after discussing the above-mentioned judgments of this Court, took the view that there was a right given to the person to be searched, which he may exercise at his option. The Bench further held that substantial compliance is not applicable to Section 50 of the Act as its requirements were imperative. The Court, however, refrained from specifically deciding whether the provisions were directory or mandatory. It will be useful to refer the relevant parts of the Constitution Bench in *Vijaysinh Chandubha Jadeja* (supra). In para 23, the Court said 'In the above background, we shall now advert to the controversy at hand. For this purpose, it would be necessary to recapitulate the conclusions, arrived at by the Constitution Bench in *Baldev Singh* case'. After further referring to the conclusions arrived at by the Constitution Bench in *Baldev Singh's* case (supra) (which have been referred by us in para 9 of this judgment) and reiterating the same the Constitution Bench in *Vijaysinh Chandubha Jadeja* (supra) this case concluded as under:

31. We are of the opinion that the concept of "substantial compliance" with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said section in *Joseph Fernandez and Prabha Shankar Dubey* is neither borne out from the language of Sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in *Baldev Singh* case. Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf.

18. In the present case, we are concerned with the provisions of Section 50 of the Act as it was, prior to amendments made by Amending Act 9 of 2001 w.e.f. 2.10.2001. In terms of the provisions, in force at the relevant time, the Petitioner had a right to be informed of the choice available to him; making him aware of the existence of such a right was an obligation on the part of the searching officer. This duty cast upon the officer is imperative and failure to provide such an option,

in accordance with the provisions of the Act, would render the recovery of the contraband or illicit substance illegal. Satisfaction of the requirements in terms of Section 50 of the Act is sine qua non prior to prosecution for possession of an unlawful narcotic substance.

19. In fact, the Constitution Bench in the case of *Vijaysinh Chandubha Jadeja* (supra), in para 25, has even taken a view that after the amendment to Section 50 of the Act and the insertion of Sub-Section 5, the mandate of Section 50(2) of the Act has not been nullified, and the obligation upon the searching officer to inform the person searched of his rights still remains. In other words, offering the option to take the person to be searched before a Gazetted Officer or a Magistrate as contemplated under the provisions of this Act, should be unambiguous and definite and should inform the suspect of his statutory safeguards.

20. Having stated the principles of law applicable to such cases, now we revert back to the facts of the case at hand. There is no dispute that the concerned officer had prior intimation, that the accused was carrying smack, and the same could be recovered if a raid was conducted. It is also undisputed that the police party consisting of ASI - Dasrath Singh, Head Constable- Narsingh, Constable - Manoj Kumar and lady constable-Nirmla had gone in a Government vehicle to conduct the raid. The vehicle was parked and the accused, who was coming on a scooter, had been stopped. He was informed of and a notice in writing was given to him of, the suspicions of the police, that he was carrying smack. They wanted to search him and, therefore, informed him of the option available to him in terms of Section 50 of the Act. The option was given to the accused and has been proved as Ex. PW-6/A, which is in vernacular. The High Court in the judgment under appeal has referred to it and we would prefer to reproduce the same, which reads as under: Musami Ram Avtar urf Rama S/o late Sh. Mangat Ram R/o 71/144, Prem Nagar, Choti Subzi Mandi, Janakpuri, Delhi, apko is notice ke tehat suchit kiya jata hai ki hamare pas itla hai ki apko kabje me smack hai aur apki talashi amal mein laye jati hai. Agar ap chahen to apki talashi ke liye kisi Gazetted officer ya Magistrate ka probandh kiya ja sakta hai.

21. The High Court while relying upon the judgment of this Court in the case of Baldev Singh (supra) and rejecting the theory of substantial compliance, which had been suggested in the case of Joseph Fernandez (supra), found that the intimation did not satisfy the provisions of Section 50 of the Act. The Court reasoned that the expression 'duly' used in Section 50 of the Act connotes not 'substantial' but 'exact and definite compliance'. Vide Ex. PW-6/A, the Appellant was informed that a Gazetted Officer or a Magistrate could be arranged for taking his search, if he so required. This intimation could not be treated as communicating to the Appellant that he had a right under law, to be searched before the said authorities. As the recovery itself was illegal, the conviction and sentence has to be set aside.

22. It is a settled canon of criminal jurisprudence that when a safeguard or a right is provided, favouring the accused, compliance thereto should be strictly construed. As already held by the Constitution Bench in the case of Vijaysinh Chandubha Jadeja (supra), the theory of 'substantial compliance' would not be applicable to such situations, particularly where the punishment provided is very harsh and is likely to cause serious prejudices against the suspect. The safeguard cannot be treated as a formality, but it must be construed in its proper perspective, compliance thereof must be ensured. The law has provided a right to the accused, and makes it obligatory upon the officer concerned to make the suspect aware of such right. The officer had prior information of the raid; thus, he was expected to be prepared for carrying out his duties of investigation in accordance with the provisions of Section 50 of the Act. While discharging the onus of Section 50 of the Act, the prosecution has to establish that information regarding the existence of such a right had been given to the suspect. If such information is incomplete and ambiguous, then it cannot be construed to satisfy the requirements of Section 50 of the Act. Noncompliance of the provisions of Section 50 of the Act would cause prejudice to the accused, and, therefore, amount to the denial of a fair trial. To secure a conviction under Section 21 of the Act, the possession of the illicit article is a sine qua non. Such contraband article should be recovered in accordance with the provisions of Section 50 of the Act, otherwise, the recovery itself shall stand vitiated in law. Whether the provisions of Section 50 of the Act were complied with or not, would normally be a matter to be determined on the basis of the evidence

produced by the prosecution. An illegal search cannot entitle the prosecution to raise a presumption of validity of evidence under Section 50 of the Act. As is obvious from the bare language of Ex.PW-6/A, the accused was not made aware of his right, that he could be searched in the presence of Gazetted Officer or a Magistrate, and that he could exercise such choice. The writing does not reflect this most essential requirement of Section 50 of the Act. Thus, we have no hesitation in holding that the judgment of the High Court does not suffer from any infirmity.

23. Now, we come to discuss the argument raised on behalf of the State, that in the present case, generally and as a proposition of law, even if there is apparent default in compliance with the provisions of Section 50 of the Act, a person may still be convicted if the recovery of the contraband can be proved by statements of independent witnesses or other responsible officers, in whose presence the recovery is effected. To us, this argument appears to be based upon not only a misconstruction of the provisions of Section 50 of the Act but also on the misconception of the principles applicable to criminal jurisprudence. Once the recovery itself is found to be illegal, being in violation to the provisions of Section 50 of the Act, it cannot, on the basis of the statement of the police officers, or even independent witnesses, form the foundation for conviction of the accused under Section 21 of the Act. Once the recovery is held to be illegal, that means the accused did not actually possess the illicit article or contraband and that no such illicit article was recovered from the possession of the accused such as to enable such conviction of a contraband article.

24. We are also unable to appreciate how the provisions of Section 50 of the Act can be read to support such a contention. The language of the provision is plain and simple and has to be applied on its plain reading as it relates to penal consequences. Section 50 of the Act states the conditions under which the search of a person shall be conducted. The significance of this right is clear from the language of Section 50(2) of the Act, where the officers have been given the power to detain the person until he is brought before a Gazetted Officer or Magistrate as referred to in Sub-section (1) of Section 50 of the Act. Obviously, the legislative intent is that compliance with these provisions is imperative and not

merely substantial compliance. Even in the case of Ali Mustaffa Abdul Rahman Moosa (supra), this Court clearly stated that contraband seized as a result of search made in contravention to Section 50 of the Act, cannot be used to fasten the liability of unlawful possession of contraband on the person from whom the contraband had allegedly been seized in an illegal manner. 'Unlawful possession' of the contraband is the sine qua non for conviction under the Act. In the case of Ali Mustaffa Abdul Rahman Moosa (supra), this Court had considered the observation made by a Bench of this Court, in an earlier judgment, in the case of Pooran Mal v. Director of Inspection (1974) 1 SCC345 which had stated that the evidence collected as a result of illegal search or seizure could be used as evidence in proceedings against the party under the Income Tax Act. The Court, while examining this principle, clearly held that even this judgment cannot be interpreted to lay down that contraband seized as a result of illegal search or seizure can be used to fasten the liability of unlawful possession of the contraband on the person from whom the contraband had allegedly been seized in an illegal manner. 'Unlawful possession' of the contraband, under the Act, is a factor that has to be established by the prosecution beyond any reasonable doubt. Indeed, the seized contraband is evidence, but in the absence of proof of possession of the same, an accused cannot be held guilty under the Act.

8. Applying the law laid down by the Apex Court to the facts of this case, it would be useful to reproduce the notice so issued to the appellant under Section 50 of the NDPS Act:

Notice u/s.50 NDPS Act You, Mohd. Raees Khan s/o. Mohd. Pyare Khan r/o. Village Mohanpur, P.S. Faridpur, Post Office Navada Bilsadi, District Bareilly, U.P. are hereby informed that we have suspicion that you have some more smack in your possession, therefore, we intend to search you. If you desire, your search may be carried out in front of a gazetted officer or a Magistrate, who can be requested to come to the spot and you can also carry out the search of the police party. (NARENDER KUMAR, S.I.) Special Staff /ME276.2001 Witnesses:

1. Ct.Devender Kumar 1120/NE2 Ct.Pradeep Kumar 897/NE Reply to notice u/s.50 NDPS Act Whatever smack I had in my possession you have already

seized. Now I do not have any more smack. I do not want that my search is carried out in the presence of a gazetted officer or a Magistrate, nor I want to carry out the search of the police party. (NARENDER KUMAR, S.I.) Special Staff /ME276.2001
Witnesses:

1. Ct.Devender Kumar 1120/NE2 9. Ct.Pradeep Kumar 897/NE A careful examination of this notice would show that an option was given to the appellant that if the appellant so desired the search could be conducted in the presence of a gazetted officer or a Magistrate, however, he had responded by saying that since smack had already been recovered, he has no further smack; he did not want his search to be carried out in the presence of a gazetted officer or a Magistrate. CRL.A. No.134/2005 Various decisions Page 14 of 15 rendered by the Apex Court have drawn a distinction between an option being given to a person that he may have the search conducted in the presence of a gazetted officer or a Magistrate and communicating to him in clear words that he has a right in law to be searched in the presence of a Magistrate or a gazetted officer.

10. In this case, a mere offer was made to the appellant that in case he so desires, his search may be conducted in front of a gazetted officer. Thus a mere offer would not satisfy the mandatory ingredients of section 50 of the NDPS Act. In my view the judgment in the case of Ram Avatar (Supra) is fully applicable to the facts of this case, as a similar offer was given to Ram Avtar and the Apex Court held that such an offer did not comply with the mandatory requirement of section 50 of the NDPS Act.

11. Having held that the mandatory requirement of Section 50 of the NDPS Act was not complied with, recovery itself would be illegal and consequent thereto the conviction and the order on sentence are liable to be set aside. Accordingly the present appeal is allowed. The order on conviction is set aside. Bail bonds of the appellant be cancelled.

12. Delhi High Court Legal Services Committee (DHCLSC) is directed to pay fee to the Amicus Curiae, as per rules. G.S.SISTANI, J NOVEMBER ssn CRL.A. No.134/2005