

Rakesh @ Shanker Vs. State

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Court : Delhi

Decided On : Jan-08-2014

Judge : V. K. Jain

Appellant : Rakesh @ Shanker

Respondent : State

Advocate for Def. : Mr. Satish Verma

Advocate for Pet/Ap. : Ms. Charu Verma

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI % Date of Decision:

08. 01.2014 + Crl. Appeal No.663 of 2010 RAKESH @ SHANKERAppellant
Through: Ms. Charu Verma, Adv. Versus STATE Through:Respondent Mr.
Satish Verma, APP for the State CORAM: HON'BLE MR. JUSTICE V.K.JAIN

JUDGMENT

V.K.JAIN, J.

(Oral) The case of the prosecution in nutshell is that on 21.9.2007, when the police officials were present at bus stand Punjabi Bagh, checking buses passing from there, the appellant before this Court got down from the bus. At that time he was carrying a box on his shoulders. An informer who was present on the spot,

informed Inspector Ishwar Singh, one of the police officials referred above, that the appellant was going to supply ganja in the jhuggies and the box being carried by him contained ganja. On search of the trunk being carried by the appellant, 21 kg of ganja is alleged to have been recovered. This is also the case of the prosecution that before searching the trunk being carried by the appellant, a notice under Section 50 of NDPS Act was given to the appellant, who stated that he did not want the evidence to be created against him by calling the Magistrate or a Gazetted Officer and, therefore, no such person should be called.

2. Since the appellant pleaded not guilty to the charged framed against him, the prosecution examined as many as eight witnesses. One witness was examined in defence.

3. The complainant Inspector Ishwar Singh came in the witness box as PW1 and inter alia stated that he informed the appellant about his legal right to be searched in presence of a Gazetted Officer or a Magistrate, but he refused to exercise his right. This witness also proved the notice Ex.PW1/A given to the appellant under Section 50 of the Act.

4. The learned trial Judge vide the impugned judgment and order dated 5.4.2010 and 13.4.2010 respectively convicted the appellant under Section 20 of the Act and sentenced him to undergo RI for a period of ten years and to pay a fine of Rs. One lac and in default of payment of fine to undergo RI for two months. Being aggrieved, the appellant is before this Court by way of this appeal.

5. The only contention made by the learned counsel for the appellant is that since the notice purporting to be under Section 50 of the Act was given to the appellant, the said notice ought to have complied with the requirements of Section by intimating the appellant that he had a right to be search in presence of a Magistrate or a Gazetted Officer, but, what he was actually told was that he had an option to get searched in presence of a Gazetted Officer or a Magistrate and, therefore, the appellant did not come to know that it was his legal right to be searched in the presence of a Magistrate or a Gazetted Officer. This is her contention that the aforesaid defect in the notice rendered the recovery to be illegal.

6. The notice given to the appellant is Ex.PW1/A. If translated in English, it would read as under:

You Rakesh @ Shanker son of Dev Narayan Sharma resident of Village Chiranjivpur PO Fateha, District Begusarai, Bihar are informed that the police party has an information that you have ganja with you in a steel trunk or box and you, therefore, are required to be search. If you so want, some Magistrate or a Gazetted Officer can be called for your search as well as of your box.

7. In State of Delhi versus Ram Avtar @ Rama [2011(7) Scale 428, the notice given to the respondent in that case reads as under:

Musami Ram Avtar urf Rama s/o late Shri 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.

The High Court, relying upon the decision of the Apex Court in State of Punjab versus Baldev Singh [(1994) 3 SCC299, held that the aforesaid intimation did not specify the provisions of Section 50 of the Act. It was held that the intimation given to the respondent could not be treated as communicating to him that he had a right under law to be search before the aforesaid authorities and since the recovery itself as illegal, the conviction and sentence had to be set aside. Being aggrieved from the order of this Court, an appeal was preferred by the State. Rejecting the appeal, the Apex Court, inter alia, held as under:

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.

It was urged on behalf of the State that even if there is an apparent default in compliance of the provisions of Section 50 of the Act, a person could be still be convicted if the recovery of the contraband could be proved by statement of an independent witness or other responsible officer in whose presence the recovery was effected. Rejecting the contention, the Apex Court held as under:

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 mis-conception 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.

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. Once the recovery itself is made in an illegal manner, its character cannot be changed, so as to be admissible, on the strength of statement of witnesses. What cannot be done directly cannot be permitted to be done indirectly. If Ex.PW-6/A is not in conformity with the provisions of Section 50 of the Act, then there is patent violation of the provisions. Firstly, in the present case, there is no public witness to Ex.PW-6/A; and the recovery thereof; secondly, even the evidence of all the witnesses, who are police officers, does not improve the case of the prosecution. The defect in Ex.PW-6/A is incurable and incapable of being construed as compliance with the requirements of Section 50 of the Act on the strength of ocular statement.

8. It is contended by the learned APP for the State that since no notice under Section 50 of the Act was required to be given before searching the trunk being carried by the appellant, the defect in the notice given to him would not render the recovery illegal. His contention in other words is that if the recovery, without giving notice under Section 50 of the Act is illegal, any defect in the notice cannot render the recovery to be illegal. In *Gurjant Singh @ Janta versus State of Punjab* [2013 (13) Scale 295]., the case of the prosecution was that some police officers were present at T-Point in the area of Village Ugrahan in connection with Nakabandi when a tractor trolley was got stopped and was checked. Three gunny bags were found lying inside the trolley. The police officer informed the appellant before the Apex Court that he intended to search the gunny bags as he suspected some incriminating article in the said gunny bags. He further informed that if he so desired the search could be conducted in the presence of a Gazetted Officer or a Magistrate. This was also the case of the prosecution that the appellant before the Apex Court expressed his consent that the search could be conducted in the presence of some Gazetted officer or a Magistrate. After recording statement of the appellant and getting it signed from him, one DSP was called to the spot. The gunny bags were then searched and poppy husk was found in them. It was urged

before the Trial Court that there was violation of Section 42 and 50 of the Act in as many as search was not conducted in presence of a Gazetted Officer or a Magistrate since the DSP, who came to the spot was not a regularly promoted DSP, but was only an Inspector in the category of Own Rank Pay (ORP) and, therefore, could not be a Gazetted Officer. The Trial Court took the view that there was no necessity to comply with Section 50 of the Act and, therefore, did not go into the question as to whether PW-3 was competent in terms of Section 50 of the Act or not. The High Court having agreed with the Trial Court, the appellant approached the Apex Court. It was held by the Apex Court that reliance upon Baldev Singh (supra) was wholly misplaced since the principle laid down in the said case postulates a situation where a police officer in the normal course of investigation of an offence or suspected offences as provided under the provisions of Code of Criminal Procedure and in the course of such investigation when a search is completed and in that process happens to stumble upon possession of a narcotic drug or psychotropic substance, the question of invoking Section 50 would not arise. It was observed that in the absence of any prior information as to possession of any narcotic drug and psychotropic substance, a police officer might have held a search in the course of discharge of his duties as contemplated under the provisions of Code of Criminal Procedure and, therefore, it would be impossible to state that even under such a situation, the application of Section 50 would get attracted. The Apex Court noted that PW-6 having noticed that the three gunny bags lying in the tractor of the appellant took the view that before effecting search of gunny bags the necessity of affording an opportunity to the appellant to conduct the search in the presence of the Gazetted Officer or a Magistrate was imperative and, therefore, such search had to be necessarily conducted in accordance with the provisions of Section 50 of the Act. It was held that in these circumstances, the conclusion of the Trial Court holding that Section 42 and 50 were not applicable was a total misunderstanding of the legal provisions and in light of the notice placed before it and consequently the conclusion arrived at for convicting the appellant was wholly unjustified. During the course of judgment, the Apex Court highlighted the importance of notice under Section 50 of the Act and held as under:

It will have to be stated that such compliance of the requirement under Section 50 of holding of a search and seizure in the presence of Gazetted officer or a Magistrate, cannot be an empty formality. In other words, the offer to the person to be searched in the presence of a Gazetted officer or a Magistrate, should really serve the purpose of ensuring that there was every bona fide effort taken by the prosecution to bring forth the grave offence of possession of narcotic substance and proceed against the person by way of prosecution and thereby establish the truth before the appropriate judicial forum. In the same breath such a course of compliance of Section 50 would also enable the person accused of such a grave offence to be convinced that the presence of such an independent Gazetted officer or a Magistrate would also enable the person proceeded against to demonstrate that there was no necessity for holding any search on him and thereby persuade the concerned Gazetted officer or Magistrate to protect his fundamental right of freedom, from being unlawfully proceeded against. In other words, the purpose of Section 50 was to ensure that on the one hand, the holding of a search and seizure was not a farce or an exercise in order to falsely implicate a person by unscrupulous police authorities, while on the other hand to prevent an accused from committing an offence of a serious nature against the society, warranting appropriate criminal proceedings to be launched and in the event of establishing such offence, conviction and sentence to be imposed in accordance with law. Therefore, such a dual requirement of law prescribed under Section 50 cannot be dealt with lightly by the Courts dealing with the trial of such offences brought before it.

Noticing that there was no material to show that PW-3 was a regularly promoted DSP or that as per rules he could be equated to any other DSP, the Apex Court set aside the judgment of the Trial Court and High Court and acquitted the appellant.

9. In *Mantoon Kumar vs. State* CrI.A. No.174/2005 decided on 03.12.2013, the appellant before this Court was apprehended while carrying a bag in his right hand and on checking of the said bag 1 kg and 600 grams of ganja was alleged to have been recovered. The notice served upon the appellant in that case read as under:

You, Mantoon Kumar s/o. Chaturi Mandal r/o. Village Chuck, P.S. Chothan Distt. Khagaria Bihar, presently residing at Priya Darshni Jhuggi Colony, S.Bazar is hereby informed vide this notice that that police has an information that you are in possession of ganja (poppy husk) and a personal search has to be carried out on you and if you desire any gazetted officer or a Magistrate can be called on the spot, and before getting searched by police party, if you desire, you may search the police party.

The contention raised by the appellant before this Court was that no proper notice under Section 50 of the Act was given to him since he was only given an offer or option which would not meet the mandatory requirement of Section 50 of the Act. Relying upon the decision Gurjant Singh @ Janta (supra) a Coordinate Bench of this Court held that since a mere offer was made to the appellant that in case he so desired his search could be conducted in the presence of a Gazetted Officer or a Magistrate, that did not satisfy the mandatory ingredient of Section 50 of the Act. 10 The facts of this case are identical to the facts in Gurjant Singh @ Janta (supra). In Gurjant Singh @ Janta (supra) the police officers were present at the T Point in connection with nakabandi, whereas in the case before this Court the police officers were present at the bus stand for the purpose of checking the buses passing from there. In Gurjant Singh @ Janta (supra), the case of the prosecution was that poppy was found in gunny bags lying in the tractor being driven by the appellant. In the case before this Court, the case of the prosecution is that he was carrying the bag containing ganja on his shoulders. In view of the binding decision of the Apex Court in Gurjant Singh @ Janta (supra) it must necessarily be held that since the Investigating Officer of the case before this Court chose to give a notice under Section 50 of the Act to the appellant before searching the bag being carried by him on his shoulder, the said notice should have conformed to the requirement of Section 50 of the Act and if the notice did not conform to the said requirement, the recovery of ganja from him would be per se illegal.

11. It is quite clear from a perusal of the notice Ex.PW1/A that the appellant was not informed that he had a legal right to the effect that the bag being carried by him could be searched in the presence of a Magistrate or a Gazetted Officer. The appellant was only informed that if he so desired he and the bag being carried by

him could be searched in the presence of a Magistrate or a Gazetted Officer. This intimation would not amount to conveying to the appellant that he had a legal right to be searched in the presence of a Magistrate or a Gazetted Officer. It is quite possible that had the appellant been informed of such a legal right being available to him he would have chosen to exercise that right instead of allowing the police officers to search him. Since the aforesaid notice Ex.PW1/A does not meet the strict requirement of Section 50 of the Act, the recovery pursuant to the said notice cannot be said to be legal.

12. For the reasons stated hereinabove the impugned judgement and Order on Sentence are hereby set aside and the appellant is acquitted of the charge framed against him. The appellant shall be released from jail unless he is required to be detained in connection with some other case against him. One copy of this order be forthwith sent to the concerned Jail Superintendent to be delivered to the appellant, and for necessary action. LCR be sent back to the trial court along with a copy of this order. JANUARY08 2014/rd V.K. JAIN, J.

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