

Dinesh Kapar Vs. State of Bihar

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Court : Patna

Decided On : Jan-03-2005

Judge : I.P. Singh and Balkrishna Jha, JJ.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 23 and 50

Appeal No. : Criminal Appeal No. 102 of 2004 (DB)

Appellant : Dinesh Kapar

Respondent : State of Bihar

Advocate for Def. : Ashwini Kumar Sinha, APP

Advocate for Pet/Ap. : Arun Kumar Tripathi, Adv. (Amicus Curiae)

Prior history : I.P. Singh, J. 1. This appeal has been filed from jail. 2. The appellant has been convicted under Section 23 of the Narcotic Drugs and Psychotropic Substances Act, 1995 (in short 'the Act') and sentenced to undergo RI for 12 years with a fine of rupees one lakh twenty five thousand. In default of payment of fine, appellant has been further directed to undergo RI for three years. 3. The prosecution case in short is that acting on a tip off, the Customs Officials headed by Sri B.K. Srivastava,

Judgement :

I.P. Singh, J.

1. This appeal has been filed from jail.
2. The appellant has been convicted under Section 23 of the Narcotic Drugs and Psychotropic Substances Act, 1995 (in short 'the Act') and sentenced to undergo RI for 12 years with a fine of rupees one lakh twenty five thousand. In default of payment of fine, appellant has been further directed to undergo RI for three years.
3. The prosecution case in short is that acting on a tip off, the Customs Officials headed by Sri B.K. Srivastava, Custom Inspector raided the 'Sadbhawana Express' at Raxaul Railways Station. While search was being conducted by the Customs Officials, two passengers, namely, Bhutan Chaudhary and the appellant Dinesh Kapar started fleeing away from the place of occurrence who were apprehended after chase. They also disclosed the name of co-accused Raju Kurmi who was also arrested later .on. On search from the person of the appellant two kilograms of charas was recovered and seized. The complaint case was filed by the Customs Inspector and the case was thus registered. After investigation charge-sheet was submitted against all the three accuse persons including the appellant. Cognizance was taken and the case was committed to the Court of sessions for trial. After completion of trial, all the appellants including the present appellant were convicted and sentenced in the manner as described above.
4. The appellant pleaded not guilty and submitted that he has been falsely implicated in this case by the customs officials.
5. The prosecution, in support of its case examined altogether four witnesses including the complainant, Sri B.K. Srivastava, the Customs Inspector (PW 2). All other witnesses, PWs 1, 3 and 4 are also Customs Officials. The prosecution has also examined the report of the Government Opium Factory, Gazipur, Uttar Pradesh regarding charas alleged to have been recovered from the person of the appellant.
6. Learned counsel for the appellant submitted that while searching the appellant, the provision of Section 50 of the Act was not followed and he was not informed

about his available right to him to be searched before the Gazetted officer or a Magistrate. It has also been submitted that there are a number of decision holding Section 50 of the Act as mandatory in nature and non compliance of this provision would vitiate the conviction.

Section 50 of the Act reads as follows :-

'50. Conditions under which search of persons shall be conducted.-(1) When any officer duty 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 that search be made. (4) No female shall be searched by anyone excepting a female.'

7. It is now well settled that before a person is searched, the officer concerned must inform him of his right to be searched before the Gazetted officer or a Magistrate which, if not done, would vitiate the order of conviction as provisions of Section 50 of the Act are mandatory in nature.

8. Considering the submissions of learned counsel for the appellant and also the provision of Section 50 of the Act it is needless to go into details and to discuss the evidence of witnesses/From the evidence of the complainant, PW 2, Sri. B.K. Srivastav, Customs Inspector it appears that two kilograms of Charas was recovered from the body of the appellant Dinesh Kapar. It is also apparent that the appellant after arrest was taken to the office of the Customs department and then in presence of officials search was conducted. This fact is supported by the evidence of PW 3 Jai Narain Singh. Though the Customs Superintendent is a

Gazetted officer but simply making search in his presence cannot fulfill the requirement of Section 50 of the Act. It is evident from the provision of Section 50 of the Act that the search is to be done in presence of Gazetted officer or a Magistrate after asking the accused that in whose presence he wants to be searched.

9. Earlier this Court in appeal of Raju Kurmi and Bhulan Choudhary co-accused of this appellant had taken a view that provisions of Section 50 of the Act has not been complied with. The Cr. Appeal Nos. 270 and 363 of 1999 were' allowed on this sole ground. This appellant is similarly placed.

10. Accordingly, in this appeal also in view that Section 50 of the Act, Which is mandatory in nature has not complied with in this case, the conviction is fit to be set aside.

11. Accordingly conviction and sentence passed against him by the Court below is set aside. The appellant Dinesh Kapar is acquitted of the charges levelled against him. He is directed to be released on bail forthwith, if not required in any other case.

12. It appears that Mr. Arun Kumar Tripathi, advocate was appointed Amicus Curiae to assist the Court. He will be paid remuneration by the Legal Aid Committee of the Court.

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