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Court : Patna

Decided On : Mar-29-1996

Judge : Prasun Kumar Deb and Surindra Swaroop, JJ.

Appeal No. : Criminal Appeal No. 24 and 38 of 1994 (R)

Appellant : Rajendra Kumar Alias Tunnu and ors.

Respondent : State of Bihar

Prior history : Prasun Kumar Deb, J. 1. These two appeals are taken up together for disposal as both arise out of the same judgment of conviction and sentence dated 21st January, 1994 passed by Shri S.K. Murari, 6th Additional Judicial Commissioner, Ranchi in R.C. Case No.3 of 1992 (R)/T.R. No. 133 of 1992, convicting the accused-appellants under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter to be referred to as 'the Act') and sentenced to under go rigorous imprisonment f

Judgement :

Prasun Kumar Deb, J.

1. These two appeals are taken up together for disposal as both arise out of the same judgment of conviction and sentence dated 21st January, 1994 passed by Shri S.K. Murari, 6th Additional Judicial Commissioner, Ranchi in R.C. Case No.3 of 1992 (R)/T.R. No. 133 of 1992, convicting the accused-appellants under Section

20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter to be referred to as 'the Act') and sentenced to under go rigorous imprisonment for 12 years each and also to pay a fine of Rs. 1,00,000/- (Rupees one lac) each and in default thereon, to under go simple imprisonment for a period of two years each.

2. The case of the prosecution in brief is that the Central Bureau of Investigation (for 'short 'C.B.I.') on a Decree information to the effect that the accused-appellant Rajendra Kumar was doing illegal business of selling narcotic drugs in his shop No. G/120 and residing in H.E.C. Quarter No. Dt/1415, Dhurwa, with his other associates. A raiding party was formed consisting of Shri N. Jha, Deputy Superintendent of Police (P.W. 5), Shri Sharwan Kumar, Deputy Superintendent of Police (P.W. 6) and other C.B.I. won, Ranchiy at the instance of Superintendent of Police, C.B.I. Ranchi. Two independent witnesses, namely, Ratneshwar Sharma (P.W. 1), Head Security Guard and Shudeo Prasad Harandi (P.W. 4), Security Guard of C.C.L. were produced and were, assaulted with the raiding party. They went to J.P. Market, Dhurwa, On 16.2.1992 at about 11 A.M. As per the plan, P.W. 6 would contact the accused appellant Rajendra Kumar as prospective buyer of Narcotic drugs, namely, Hasin (Charee) (and other members of the party were instructed to be vigilant and keep a constant watch over the movement of P.W. 6. It was further designed that in the event Hasis or other Narcotic drugs could be found in the possession of Rajendra Kumar, then P.W. 6 would were his hands and wipe his head to give signals to the other members of the party. Accordingly, P.W. 6, visited shop No. G/120 of the accused-appellant Rajendra Kumar in J.P. Market at Dhurwa. He posed himself to be the prospective purchaser of some general articles and in the midst of conversation, he could be in a position to influence Rajendra Kumar and develop intimacy with him. P.W. 6 then posed himself to be buyer if Narcotic drugs and informed the accursed-appellant' Rajendra Kumar that he was in search of such drugs. Accused-appellant Rajendra Kumar at the beginning had some hesitation but ultimately be sat impressed by P.W. 6's behaviour and then he agreed to arrange Charas (Hasis) for him. After bargaining, the price was fixed at Rs. 20.000/- per Kilograms. It was further agreed that Rajendra Kumar or his would make delivery of Charas in an auto-rickshaw. It was agreed that P.W. 6 would pay the money at auto-rickshaw at the time of delivery. For some time Rajendra Kumar left his shop and reappeared with other

accused who also discussed about the price and place of delivery of charas. In pursuance of the agreement, accused appellant Haldhar Kumar Singh brought auto-rickshaw bearing registration No. HIN 9191 and kept the same near the shop of Rajendra Kumar. Then Haldar Kumar Singh went away for bringing Hasis and came back after ten minutes with air bag'. Haldar Kumar Singh handed over the air bag saying that it contained about 4 Kilograms of Charas, P.W. 6 was satisfied by taking small of the materials and all the three then sat in the auto rickshaw with the bag containing Hasis, Rajendra Kumar and Shrawan Kumar (P.W. 6) sat on the back seat holding the air bag in his hand. Haldar Kumar Singh sat along with tempo driver on the front seat. When the auto rickshaw was about to start, then as designed earlier, P.W. 6 gave signals thereupon the other members of the raiding party surrounded the auto rickshaw, Both the accused-appellants were challenged by N. Jha (P.W. 6) for being in possession of Charas. It is stated that both the accused persons admitted to be in possession of Charas. P.W.5 inspected the contents of air bag in presence of the witnesses namely Shudeo Prasad. Marandi and Ratneshwar Sharma. The bag contained three pieces of Charas in the form of cakes and 15 numbers of full length and 18 numbers of pieces of Charas in the form of sticks. As the challenge was made in the public place on the road, both the accused persons, namely, Rajendra Kumar and Haldar Kumar Singh was taken into custody along with the materials which were taken charge of by D.S.P. Shri M. Jha (P.W. 5) alone with auto rickshaw driver Ranjit Singh. The C.B.I. team brought both the accused persons, witnesses of the seizure and the auto rickshaw to the C.B.I. Office. Thus the materials in the air bag were weighed separately and on weight men in total 3,590 K.G. were found. All the samples were drawn separately such as cakes and stricks. There were kept separately sealed and marked with individual identity numbers. The three cakes and the sticks were packed duly sealed and signed by all persons present. A detail memorandum to the proceeding relating to seizure, arrest and taking of samples was prepared which was signed by all the members of the raiding party, the two independent witnesses and the driver of the auto rickshaw. The case was investigated by Shri Sarwan Kumar (P.W. 6). D.S.P., C.B.I, and during the course of investigation, seized packets if Gharas were rent to C.F.S.L., C.B.L. New Delhi for chemical test and report. On examination of the samples by Sri C.B. Bansal, senior Investigating Officer

(Chemistry) C.S.P. New Delhi, it was found that the samples gave positive test for Charas. After closure of investigation, charge sheet was submitted under Article 20 read with Rules 20 and 21 of the Act and also under Sections 29, 20 and 21 of the Act.

3. Consonance was taken by the Judicial Commissioner. Ranchi on 9.6.1992 and then the case sent to the court of the 5th Additional Judicial Commissioner Ranchi for trial. Charges were framed vide order Dated 4.8.1992 under Sections 29, 20 and 23 of the Act read with Rules 20 and 21 the Narcotic Drugs and Psychotropic Substances Rules.

4. In course of trial, in total six witnesses have been examined for and on behalf of the prosecution and one defence witness namely D.N. Mahendra Prasad was examined is a nearby shop keeper of that of Rajendra Kumar dealing in gold and silver. He denied of any occurrence as alleged by the prosecution on the date of occurrence on the shop and just outside the shop of Rajendra Kumar. After scrutinising the evidence on record, the learned court below by the impugned judgment found that the prosecution could be able to prove the guilt of both the accused persons under Section 20 of the Act and as such convicted and sentenced them, as mentioned above.

5. Mr. R.S. Mazumdar, appearing for and on behalf of the appellants have assailed the impugned judgment mainly on the points that Section 50 of the Act have not been complied with and as such whole seizure is not only bad but illegal in the eye of law. This was his main point in assailing the impugned judgment. Although he took other pleas such as there were no independent witnesses to the seizure, that one of the officers associated with the raiding party had investigated the case which suggest that there was no impartial investigation.

6. Mr. P.N. Roy, appearing for and on behalf of the C.B.I, has supported the judgment of conviction by stating that even if as held by the Supreme Court provision of Section 50 is mandatory. The said provision has been complied with as the person who seized was a D.S.P. of C.B.L. who himself is a gazetted officer and the same done in presence of another Gazetted Officer namely Srawan Kumar, D.S.P. (P.W. 6). He has further submitted that in the present case Section

50 of the Act is not applicable in its proper perspective as the persons of the accused-appellants have never been searched.

7. The point regarding non-compliance of Section 50 of the Act was raised before the court below also and it was held by the learned court below that as the seizing officer himself was a Gazetted Officer, no obligation remained with the seizing officer to comply with the direction as contained in Section 50 of the Act for having the option of the accused persons regarding their seizure in the presence of a gazetted officer or a nearby Magistrate. Section 50 of the Act runs as follows:

50. Condition under which search of person 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 Section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest gazetted Officer 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).

(2). 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.

8. From the above, on plain reading of Sub-section (1) of Section 50 it appears that the option lies with the accused persons as to his search being conducted in the presence of nearest gazetted Officer or a nearby Magistrate. Whether the accused person is to apply that option voluntarily or the duty is cast upon the seizing officer to inform the accused about the provisions of the Act was a question before the Apex Court. Although it was held by a Full Bench of the Orissa High Court in the case of *Barnka Das and Ors. v. State of Orissa* 1993 Cr. L.J. 442 that there is no duty cast on the seizing officer to inform about the provision of law to the accused persons while seizure is being made under the Act. The Apex Court in the case of *State of Punjab v. Balbir Singh* : 1994 CriLJ3702, held that when wide powers were conferred on the officers and defendant sentences are provided for the offences under the Act, the Legislature felt it fit to provide some co-responding

safe guards to check the misuse of powers conferred on the officers, so that any harm to the innocent persons is avoided and to minimise the allegations of planting or fabricating by the prosecution and, as such, Section 50 was enacted. On the question regarding the wordings of the Section 'if the person to be searched so requires', it was held that duty is cast upon the officers to make search, to intimate such persons that if he so requires, he would be taken before the nearest Gazetted Officer or the nearest Magistrate for the purpose of making of search in their presence. It was further held that criminal jurisprudence always infers of innocence of the accused persons and such intricate protection or safe guards given under the Act may not be known to the rustic persons and as such although the wordings are towards the option of the accused persons but how he can apply his option can be done only when the seizing officer discloses that provision to the accused. It was held that Section 50 of the Act is mandatory and it is obligatory on the officers concerned to inform the accused that he has a right to claims for the search before a Gazetted Officer or a Magistrate. The same view was affirmed by the Apex Court in the case of Saiyad Mohd. Saiyad Umar Saiyad and Ors. v. The State of Gujrat 1995 (2) East Cr C 21 (SC), wherein it was held that there is no scope of any presumption under Section 114, illustration (e) of the Evidence Act that when searches were made by the officers concerned, then it cannot be presumed that he must have complied with all the provisions of the Act. When the Section is mandatory one then the obligation of the officer concerned to inform the accused about the right to be searched before a Gazetted Officer or a nearby Magistrate is a must and there is no scope of any presumption to this effect.

9. Now the question comes in, in none of both the cases before the Apex Court, the seizing officer was a gazetted officer. What would be the consequence if the gazetted officer himself searches the accused persons: whether the same obligation remains to the gazetted officer also to inform the accused about the provisions of the Act regarding search before the gazetted officer or a Magistrate? Mr. P.P.N. Roy, appearing for and on behalf of the C.B.I. has strenuously argued that provision of Section 50 of the Act has been well complied with when the search was made by the responsible gazetted officer of the C.B.I. and the safe guards given to the accused persons under that Section has been well complied

with and the interest of the accused persons have been well protected.

10. Mr. Mazumdar, appearing for and on behalf of the accused appellants refers to a decision of the Karnataka High Court in the case of Bau Rao v. State of Karnataka 1993 (1) Crimes 865, wherein it was held that even if the search is made in presence of the gazetted officer then also obligation remains with the searching officer to inform the person about his option. It was further held that merely because a police officer was present at the time of search was a gazetted officer, his mere presence would not validate the search unless the accused is informed of the provision of Section 50 of the Act. During the discussion of the said judgment in paragraph-11 it was observed in the following manner:

The words appearing in Section 50 make the condition mandatory. Under this section, the persons has a right to be taken to the nearest gazetted officer of any of the departments mentioned in Section 42 or to the nearest Magistrate. This is an important safeguard given to accused by the Legislature keeping in view of our criminal jurisprudence.

Therefore, after a person is arrested and before a search is conducted, it is mandatory on the part of the officer to inform him that he has a right to be searched in presence of the Gazetted officer or a Magistrate. In that case, search was made by a police officer in presence of the gazetted police officer. But in the present case, not only the search was conducted in presence of the gazetted C.B.I. Officer, but the search itself was also conducted by a Gazetted C.B.I. Officer. In the judgment of Karnataka High Court, it was held that mere presence of a gazetted officer cannot take away the mandatory provision of applying option of the person concerned as the person concerned had no scope to know that he was being searched in presence of a Gazetted officer.

11. In the present case from the evidence of Srawan Kumar (P.W. 6) at paragraph-36 it is clear that he disclosed his identity and the identity of other C.B.I. personnel while challenging the accused persons and then search was conducted. His evidence runs as follows:

Sri N. Jha, Dy. S.P. Neteb Rajendra Kumar aur Haldar Kumar Singh ko challenge kiya ke unke pass kuchh Narcoctic drugs hai. Sri Jha ne unkeya yaha bhi betaya kee way C.B.I, ke adhikari avam sadasya hein tatha gawaha bhi hein.

12. Thus it is round that in the present case, there was disclosure by one Gazetted officer of the C.I.B. in his presence. Thus in the present case,, not only search was made in presence of the Cassetted officer but search was also conducted by a Gazetted officer. In that way, the principles enunciated in Bebu Rao (supra) cannot be applied in the present case. One question may begin be raised that disclosure of P.W. 6 and 5 being the Deputy Superintendent of Police, C.B.I. would it mean that mush disclosure would make the accused persons understand that they were gazetted officer or not. It is found from the records that the accused persons are not rustio village people. They are running business in elite area and the Deputy Superintendent of Police Department or the C.B.I. is a gazetted officer which can be well understood by them that they are known to gazetted officer. Thus I find that although Section 50 of the N.D.P.S. Act is a mandatory cue, the same has been complied with in the present case.

13. Mr. P.P.N. Roy's submission that the persons of Rajendra Kumar and Haidar Kumar Singh were not searched rather the bag which was carried by accused Rajendra Kumar was being searched and as such the provision of Section 50 of the Act is not applicable in the case, referring to a decision of the Madras High Court in S. Rajan v. State Assistant Collector Custom Madurai 1995 Cr. LJ 1594. I do not find any force in this submission. Search of a person does not mean the search of his physique. Anything contained in his possession comes within the purview of search of a person concerned. Thus the first point raised by Mr. Mazumdar assailing the impugned judgment has no force as discussed above.

14. On the second point that there was no impartial investigation when D.S.P. Sarwan Kumar of C.B.I. (P.W. 6) who investigated the case was himself associated with the raiding party. It is true that he was the person who first went on negotiating with the accused persons in getting accused persons revealed about their business of Charas to but on that alone it cannot be said that there was no search he was present at the scene. Even if the earlier portions of his activities are

taken out then also from the time of search, he is attached with the proceedings and his mere presence at the time of search does not take away the scope of impartiality caused upon the Investigating Officer. On the second point also, I do not find any force.

15. It is also submitted for and on behalf of the appellant that there were so independent witnesses at the time of search. Sections 100 and 165 of the Code of Criminal Procedure had not been properly complied with as all the witnesses were already present along with the raiding party. Those independent witnesses namely, Rajendra Sharma (P.W. 1) and Bhudeo Prasad Marandi (P.W. 4) were not the personnel working under the C.B.I. but they were produced from other departments for the purpose of being witnesses to the seizure. This submission has also got no force.

16. At the time of argument, another point was raised to the effect that whether Deputy Superintendent of Police, C.B.I. had been empowered to conduct search or not and whether they come within the purview of Section 42 of the Act or not? From impugned judgment it is found that a notification of the Central Government was produced before the court below and the learned court below was established that Deputy Superintendent of Police of C.B.I. has also been included within the designated officer Section 42 of the Act.

17. Now coming to the individual allegations against the accused persons are concerned Charas in the air bag was found in the possession of Rajendra Kumar and it is stated that both the accused persons had admitted that they dealt with Charas but at the time of search, nothing could be found in possession of Haldar Kumar Singh. He was simply sitting in the auto rickshaw in the driving seat. It has been strenuously argued by Mr. P.P.N. Roy that this Haldar Kumar Singh had practically brought the air bag from hidden place and shown to the Investigating Officer at earliest stage and then it was handed over to the accused Rajendra Kumar but that portion about the statement of Sarwan Kumar as Investigating Officer and the Statement made by however accused before him perhaps cannot be made admissible in evidence. So when no Narcotic drugs could be found in possession of accused Haldar Kumar Singh on search his mere confession before

the C.B.I. (Personnel have got no bearing by implicating his for a conviction under Section 20 of the Act. Hence I find that the case could not be proved against accused-appellant Haldar Kumar Singh beyond all reasonable doubt and he is to get acquittal on benefit of doubt, but the case has been proved against the accused-appellant Rajendra Kumar Singh beyond all reasonable doubt and as such his conviction and sentences is upheld and confirmed.

18. As the result, Criminal Appeal No.24 of 1994 (R) is hereby rejected but the Criminal Appeal No. 38 of 1994 (R) is hereby allowed and file accused-appellant Haldar Kumar Singh being acquitted should be released forth with if not detained any other case.

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