

ibrahim Ansari Vs. State of Bihar

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Court : Patna

Decided On : Jan-19-2001

Judge : P.K. Deb and D.P.S. Choudhary, JJ.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 20, 23, 50 and 54; Code of Criminal Procedure (CrPC) - Sections 313

Appeal No. : Cri. Appeal (DB) No. 258 of 1999

Appellant : ibrahim Ansari

Respondent : State of Bihar

Advocate for Def. : Lal Kailash Bihari Prasad, APP

Advocate for Pet/Ap. : Ganesh Pd. Singh, Sr. Adv., Sanjay Kumar and Srikant Pandey, Advs.Chakradhari S. Singh, Addl. C.G.S.C.

Disposition : Appeal dismissed

Judgement :

D.P.S. Choudhary, J.

1. This appeal arises out of the judgment and order of conviction under Sections 20(b)(II) and 23 of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as the 'N.D.P.S. Act') passed by Shri Ramesh Kumar

Rateyar, Additional Sessions Judge III, Patna vide judgment and order dated 25-5-1999 in Special Case No. 31 of 1997 convicting the appellant and sentencing him to undergo rigorous imprisonment for 14 years and to pay a fine of Rs. 1,50,000/- on each count and in default of payment of fine further R.I. of three years. The sentences are to run concurrently.

The prosecution case in brief is that the complainant D. K. Verma (P.W. 1), Superintendent, Narcotic Control Bureau, Varanasi, filed a complaint on the basis of which the case was registered. It is alleged that he received a secret information that a person is coming from Nepal via, Padroma with Charas and on 12-9-1997 he will deliver the said Charas to a customer at Gandhi Maidan at Patna. He reduced the said information into writing and the same was submitted to the Deputy Commissioner, Preventive and Vigilance, Central Excise, Patna. Accordingly a raiding party consisting of Central Excise Officers, namely, Lokesh Sharma (P.W. 2), Rajiv Kapoor (P.W. 3), Jaideep Kumar (P.W. 4) and M.Q. Hayat was organised. The said party along with Sepoy and Driver reached at Gandhi Maidan, Patna on 12-9-1999 at about 19 hours and collected two independent witnesses, namely, Dharmendra Kumar (P.W. 6) and Shailendra Kumar (P.W. 5). The raiding party noticed that a person carrying a polythene bag was coming towards Gandhi Maidan near Gandhi Murti, who was identified by the informant. He was intercepted by the raiding party and the party disclosed their identity. The said person disclosed his name as Ibrahim Ansari (accused-appellant). The raiding party headed by the abovenamed officers gave their introduction to the suspect and disclosed that they had intention to search the bag possessed by him in order to verify their information. The search was conducted by the officers of the raiding party in presence of above named two independent witnesses (P.Ws. 5 and 6) and contraband goods suspected to be charas was recovered from his possession. The Custom officials brought the accused-appellant to Central Revenue Building, Central Excise, Patna for completing the seizure and other legal formalities as there was insufficient light in Gandhi Maidan. The seizure memo was prepared in the office after weightment of the seized articles (Ext. 7). It is alleged that two samples weighing 25-grams each were drawn from the seized charas and the remaining Charas were wrapped with white clothes and were sealed after observing necessary formalities in presence of the witnesses. The

total quantity of the seized Charas was 4 kg. and 150 grams net. It is alleged that a Panchanama (Ext. 8) was prepared and on being reasonably satisfied that a prima facie case of illicit traffic against the accused is made out, he was arrested by giving him grounds of arrest. He was produced before the Court on 13-9-1997 and detailed report regarding search and seizure and arrest was submitted to the Zonal Director, N.C.B., Varanasi on 15-9-1997.

The sample drawn from the seized articles were sent to General Manager, Government O.P.M. Alkaloide Works, Gazipur along with test memo affixing specimen of the seal for analysis and report. The Chemical Examiner sent his report dated 20-9-1997 and confirmed the seized substance as Charas (vide Ext. 5). It is also alleged that accused in his statement before the Custom Officers admitted his guilt. On the basis of the above materials on record cognizance of the case was taken by the Special Judge on 11-12-1997 and the trial proceeded. The accused pleaded not guilty and claimed to be tried.

2. On behalf of the prosecution P.W. 1 (D. K. Verma) who is the complainant, has deposed to the effect that the confidential information received by him was sent to the Deputy Commissioner, Preventive and Vigilance under his signature (vide Ext. 1). Thereafter, the raiding party was constituted consisting of P.Ws. 2, 3, 4 and

7. One of the member of the party M.Q. Hayat has not been examined. The raiding party along with Sepoy and Driver reached at the Gandhi Maidan and on the identification of the informer he along with the raiding party intercepted the accused-appellant in Gandhi Maidan with a polythene bag. He disclosed his identity and of the raiding party to the accused. Two independent witnesses (P.Ws. 5 and

6) were called upon. The accused was told that he is a Gazetted Officer of the department and he intend to search him on the basis of his information which, the accused volunteered to be searched.' Accordingly the search was conducted in presence of the independent witnesses and alleged charas were found in the said bag. The accused confessed that he was carrying charas brought from Nepal to be handed over to some person at Gandhi Maidan. It became dark, hence the custom officials along with two independent witnesses brought the accused to the

Central Excise Office where other formalities were completed. On weightment 4 K. G. and 150 grams net Charas were found in possession of the accused. Two samples of 25 grams each out of the recovered Charas were taken out and sealed in the envelop over which the officers of the department, the independent witnesses and the accused put their signatures. The envelop is marked Ext.

2. By test memo (Ext.

3) he sent the samples to Chemical Examiner along with the forwarding letter (Ext.

4). The report of the Chemical Examiner was subsequently received (Ext. 5/1) and the said report was sent to the Government O.P.M. Alkolied Works, Gazipur vide Ext.

6. He has also proved the seizure memo (Ext.

7) and the Panchnama (Ext. 8). The confessional statement of the accused is Ext.

9. The accused has put his signature on the arrest memo (marked Ext. 11 and 11/1) and thereafter, he filed the complaint, which is marked Ext.

12. In the Court P.W. 1 had identified the accused-appellant in the dock and stated that from his possession the said Charas was recovered on 12-9-1997. He further stated that the seized article was kept in Malkhana after the entry being made in the register.

3. The evidence of P.W. 1 is corroborated by P.W. 2 (Lokesh Sharma) who assisted P.W. 1 in the alleged recovery of Charas from the possession of the accused. He is an Inspector of Central Excise. He stated that P.W. 1 disclosed his identity to the accused that he was a Gazetted Officer of Custom Department and thereafter, the accused consented to be searched by him. He has put his signature on Ext. 1 which is the envelop containing sample of the seized charas. He further stated that accused made his confession in presence of P.W. 1 and other officials, which was put in writing (Ext. 9) over which he also signed (Ext. 13/8). P.W. 3 (Rajeev Kapoor) is also Officer in the Custom Department who has corroborated, the evidence of P.Ws. 1 and 2. He stated that in his presence the Charas was recovered from the possession of the accused-appellant. He also put his signature

on Ext. 9 which is the statement of the accused, marked Ext. 14. This witness could not identify the accused in the dock on the date of examination in the Court. P.W. 4 (Jaideep Kumar), an Inspector of the department, has corroborated the evidence of abovementioned P.Ws. on all material points but he admitted that at the time of seizure he was standing near the jeep and after the seizure and arrest, the accused was brought near the jeep. In his presence the accused made confessional statement and he has put his signature on Ext. 9 (marked Ext. 15). He claimed to identify the accused but on the date of his examination the accused represented through lawyer.

4. P.W. 5 (Shailendra Kumar Pandit) is a seizure-list witness. He stated that at the time of seizure he was passing through Gandhi Maidan and he was asked by the Excise Officials that he may like to be a witness on the point of search and seizure of the accused, which he gladly accepted. He stated that in his presence the accused was searched. P.W. 6 (Dharmendra Kumar) was also called at the time of search. Both of them stated that about 4 K. G. of Charas in three packets was recovered from the possession of the accused. P.W. 5 could not identify the accused in the dock on the date of his deposition. In cross-examination he admitted that he is a Casual Worker in the Central Revenue Office. They admitted their signature on the seizure memo and Panchnama (Ext. 16 series). P.W. 6 failed to identify the accused in the dock. He also admitted that he is a Casual Worker in the Custom Department. P.W. 7 (Rajeev Kumar) is another Inspector of the department, who supported the evidence of P.Ws. 1, 2 and 3 in entirety. He was member of the raiding party and in his presence search was conducted and the alleged Charas were recovered. He has proved the signature of the accused on the material exhibit (sample of the Charas marked Ext. 18). He has proved the samples which has kept in the office, marked material Ext. II and his signature on material exhibit is Ext. 7/5. He claimed to identify the accused in the Court but the accused was not produced from the jail custody.

The accused-appellant but Ext. A has been brought on record on his behalf. In his examination under Section 313. Cr. P. C. of the Code of Criminal Procedure he admitted his signature on the seizure memo, material exhibit and his statement but stated that they were obtained by the Custom Officials under threat.

6. Mr. Ganesh Prasad Singh, learned Senior Counsel appearing on behalf of the appellant submitted that there was non-compliance of the mandatory provision of search and seizure as contained in Section 50 of the N.D.P.S. Act. This provision of the N.D.P.S. Act is stringent one and law requires its strict compliance. The requirement on the part of the searching officer to inform the accused of his right to choose to be searched in presence of a Gazetted Officer or a Magistrate is a mandatory provision. Non-compliance of this provision in strict sense will result in the conviction of the accused, as void, and on this ground alone is entitled for the acquittal. In the case of State of Punjab v. Balbir Singh, reported in (1994) 3 SCC 299 : 1994 Cri LJ 3702 and in several other decisions, the Apex Court has held that this provision is mandatory and obligatory on the part of the empowered or the authorised officers to inform the suspect that, if so required, he would be produced before a Gazetted Officer or a Magistrate and search would be conducted in his presence. It was imperative on the part of the officers to inform the person of the above right and if he failed to do the same, it amounted to violation of the requirement of Section 50 of the Act. The learned lawyer further referred to a decision, reported in 1996 SCC (Cri) 210 : 1996 Cri LJ 1354, State of Himachal Pradesh v. Pirthi Chand and submitted that at the time of search the person who was searched, must have been aware of his right and it could be done only if the authorised or empowered officers informed him of same. It is the obligation on the part of the Authorised Officer to inform the person to be searched, of his right to information that he could be searched in presence of the Gazetted Officer or the Magistrate. In Saiyad Md. Saiyad Umar Saiyad v. State of Gujarat (1995) 3 SCC 610 : 1995 Cri LJ 2662 a three Judge Bench of the Apex Court has reiterated the above view and held that having regard to the creation consequences that might entail the possession of illicit article under the Act, viz. the shifting of the onus to the accused and severe punishment to which he became liable, the legislature have enacted safeguards contained in Section 50. Compliance of the safeguard in Section 50 is a mandatory obliging the officer concerned to inform the person to be searched of his right to demand that search could be conducted in presence of a Gazetted Officer or a Magistrate. The officer who conducts such search must state in his evidence that he has informed the accused of his right to demand that while he is searched in presence of a Gazetted Officer or a Magistrate and the accused

had not chosen to so demand. The Apex Court has held that if no evidence to that effect is given, the Court must presume that the person searched was not informed of the protection the law gives him and must find that possession of illicit article was not established. It is also the duty of the Court to carefully scrutinise the evidence and satisfied that the accused had been informed by the officer concerned, that he had a right to be searched before a Gazetted Officer or a Magistrate and that the person had not chosen to so demand. In support of the above contention the learned appellant's lawyer also placed reliance on the decision, reported in AIR 1999 SC 3861, Babu v. State of Kerala and submitted that in a Constitutional Bench of the Supreme Court this view was reiterated (State of Punjab v. Baldeo Singh 1999 AIR SCW 2494 : 1999 Cri LJ 3672. On the basis of the above decision the learned lawyer submitted that contraband seized during search cannot be by itself be used as evidence of proof of unlawful possession of the contraband. Presumption under Section 50 from possession of illicit article cannot be raised. A presumption under Section 54 of the Act only be raised after the prosecution has established that the accused was found to be in possession of the contraband in a search conducted in accordance with the mandate of Section 50 and illegal search cannot entitle the prosecution to raise a presumption under Section 54 of the Act.

7. In reply to the above contention the learned lawyer appearing on behalf of the Union of India submitted that there has been compliance of the provisions contained in Section 50 of the Act in this case, The Apex Court in a decision, reported in (1996) 6 SCC 172 (sic) has held that search before a Gazetted Officer or a Magistrate, if the suspect so requires, is a valuable right which the legislature has given to the person concerned. The safeguard of protection to be searched in presence of a Gazetted Officer or a Magistrate has been incorporated to ensure that persons are only searched with a good cause and also with a view to maintain the veracity of evidence derived from such search. The duty to inform the suspect of his right to be searched in presence of a Gazetted Officer or a Magistrate is a necessary sequence for enabling the person concerned to exercise that right under Section 50 of the Act. The Apex Court further held that the question whether or not the safeguards provided in Section 50 were observed would have, however, to be determined by the Court on the basis of the evidence led at the time and the

finding of that issue, one way or the other, would be relevant for recording an order of conviction or acquittal.

8. In the present case the search of the accused-appellant was made by a Gazetted Officer of the Custom Department, namely, D. K. Verma (P.W. 1), Superintendent, Narcotic Control Bureau, Varanasi, in presence of other officials of the Custom Department and two independent witnesses, namely, Shailendra Kumar (P.W. 5) and Dharmendra Kumar (P.W. 6), P.W. 1 stated that after disclosing his identity and of the raiding party he told the accused that they had intention to search the bag possessed by the accused in order to verify their information. P.W. 1 also informed the accused that he as himself a Gazetted Officer and if he likes, he may be searched in his presence, on which the accused-appellant volunteered to be searched by him (P.W. 1). This fact has been corroborated by other P.Ws., including P.Ws. 5 and 6, the two independent witnesses. The seizure list was prepared, thereafter, over which the accused has also signed (Ext. 7). The seized article was found to be Charas weighing 4 K. G. and 150 grams net. The sample of the seized article was sent for chemical examination for analysis and report. The chemical examiner sent his report (Ext. 5) and confirmed that seized substance was Charas. The accused appellant in his statement under Section 313, Cr. P. C. has admitted about his signature over the seizure memo. In the circumstances the provisions of Section 50 of the Act stood complied with and there was no question of giving any further option to the accused to get his search done in presence of another Gazetted Officer or a Magistrate. The learned A. P. P. also placed reliance on the decision of this Court, reported in (2000) 4 Pat LJR 487 (Jaan Mohammad v. Union of India) and submitted that a Division Bench of this Court has held that if the search of the accused-appellant was made by a Gazetted Custom Officer and in presence of independent witnesses then there was compliance of the provisions of Section 50 of the Act.

9. After considering the submissions made on behalf of the parties and the evidence on record, we are of the view that there has been compliance of the provisions of Section 50 of the Act because P. W. 1 who is Superintendent, Narcotic Control Bureau, a Gazetted Officer, stated that on receipt of the

confidential information a raiding party was constituted and the accused-appellant was intercepted at Gandhi Maidan, Patna in his presence. He stated that he disclosed his identity to the accused and asked him that he being himself a Gazetted Officer the accused may be searched in his presence. Thereafter, the accused volunteered to be searched by him and accordingly he was searched with. He admitted that the accused was not searched before any other Gazetted Officer or a Magistrate. At the time of search beside the members of the raiding party two other independent witnesses (P.Ws. 5 and 6) were also present. Therefore, there has been material compliance of the provisions of Section 50 of the Act. The fact of this case has got no application with the facts of the case of State of Punjab v. Baldeo Singh (supra) and Babu v. State of Kerala (supra). In these cases the officers who conducted the search have not informed the accused whether he likes to be searched before the officer concerned, who was a Gazetted Officer of the Custom Department. This opportunity was not given to the accused in both the cases. However, in this case as stated by P.W. 1, he disclosed his identity to the accused that he is a Gazetted Officer of the Custom Department and if he likes he may be searched in his presence on which the accused volunteered to be searched by him. Therefore, in substance there has been compliance of the provisions of Section 50 of the Act. A Division Bench of this Court in the case of Jan Mohammad v. Union of India (supra) held that such search by a Gazetted Officer of the Custom Department specifies the test of Section 50 of the Act. In the circumstances we do not find substance in the above contention made on behalf of the appellant.

10. The learned appellant's lawyer submitted that P.Ws. 5 and 6 are not independent witnesses but they are Casual Workers in the Custom Department. Therefore, there was no strict compliance of the provision that search should be made in presence of independent witnesses. The learned appellant's lawyer submitted that P.W. 5 (Shailendra Kumar Pandit) in paragraph 12 of his cross-examination admitted that he and P.W. 6 (Dharmendra Kumar) are Casual Workers in the Custom Department, for which they are paid daily wage. His evidence finds corroboration from the evidence of P.W. 6 (Dharmendra Kumar) in paragraph 8 of his cross-examination.

11. We have carefully scrutinised the evidence of P.Ws. 5 and 6 who have admitted that they are Casual Workers on daily wages in the Custom Department. Therefore, there is substance in this contention of the appellant that they are not independent witness in real sense. However, on this ground the entire prosecution case is not to be disbelieved when there are reliable and cogent evidence on record to show that there was recovery of Charas from the possession of the accused-appellant.

12. On a careful scrutiny of the evidence on record it is crystal clear that P.W. 1 (D. K. Verma) who is complainant stated that on receipt of the information the raiding party was constituted consisting of P.W. 2 (Lokesh Sharma) P.W. 3 (Rajeev Kapoor), P.W. 4 (Jaideep Kumar), P.W. 7 (Rajeev Kumar) and M.Q. Hayat (not examined). According to him, when he reached Gandhi Maidan along with the raiding party the informant pointed out towards the accused who was coming inside the Gandhi Maidan. He along with his raiding party went near the accused and he disclosed his identity. Two independent witnesses (P.Ws. 5 and 6) were also present at that time. He disclosed that he is a Gazetted Officer of the Department and wants to search the accused, on which the accused volunteered to be searched by him. The bag of the accused was searched which contained Charas. The accused confessed before them that it was Charas brought from Nepal and also disclosed his identity as Ibrahim Ansari (Accused-appellant). Thereafter, he was brought to Central Excise Office because there was no light at that place of Gandhi Maidan. Other formalities were completed at the office where the seized article was weighed and it was found to be 4 K.G. and 150 grams. Two samples of the seized articles were sent for chemical examination and the report was received. The report (Ext. 5) disclosed that seized article was Charas. He stated that on the seizure-list the accused has made his signature. The confessional statement of the accused (Ext. 9) with his signature (Ext. 10) has been proved by this witness. The witness has identified the accused in the dock. He stated that seized articles were kept in the Malkhana with the entry made in the register. P.W. 7 is the Malkhana Incharge, who corroborated his evidence.

13. P.W. 2 (Lokesh Sharma) assisted P.W. 1 in the alleged search and recovery. He is Inspector in Central Excise Department. He supported P.W. 1 on all material

points and stated that in his presence, P.W. 1 has searched the accused. P.Ws. 5 and 6 were also present at that time. There was recovery of Charas like content from the possession (bag) of the accused. He deposed at length, how the seized articles were sealed and the samples of the seized articles were sent for chemical examination. Thus he has materially corroborated the evidence of P.W. 1. P.W. 3 (Rajeev Kapoor), another officer of the Custom Department assisted P.W. 1 in the search and corroborated the evidence of P.Ws. 1 and 2 on all material points. He stated that accused-appellant had admitted in their presence that seized article was Charas, which he has brought from Nepal. He put his signature on the Panchnama (Ext. 9). This witness could not identify the accused in the dock on the date of his deposition. P.W. 4 (Jaideep Kumar) is another Inspector of the Department, who assisted P.W. 1 at the time of search and recovery of Charas from the possession of the accused. He has corroborated the evidence of P.Ws. 1, 2 and 3 on material points. He has put his signature on Ext. 9. The accused was not present in Court when he was deposing but he claimed to identify the accused. P.W. 5 (Shailendra Kumar Pandit) and P.W. 6 (Dharmendra Kumar) have deposed as an independent witness and their evidence has been discussed earlier. P.W. 7 is another Rajeev Kumar, an Inspector of Custom Department, who has corroborated the evidence of abovementioned witnesses; including P.W. 1. He stated that in his presence the accused was searched and there was recovery of Charas from his possession. He also gave detail description how the seizure-list was prepared and the sample memo was sent for chemical examination. He has testified Ext. 9 as the voluntary statement of the accused on his deposition. His signature on Ext. 9 is marked Exts. 17 to 17/2. This witness has also proved the sample kept in the office, which has been marked material Ext. II and his signature over it Ext. 17/5.

14. From the evidence of P.Ws. 1 to 7 we came to the conclusion that prosecution has been able to prove beyond doubt that about 4 K.G. and 150 grams of Charas was recovered from the bag of the accused and on chemical examination it was found to be Charas. It is true that the above witnesses are of the Custom Department but the Apex Court has held that where the evidence of the Custom Officer, who led the trap is found entirely trustworthy, there was no need to seek any corroboration nor they should be discarded on the ground that they are

officials of the Custom Department. Even if the evidence of P.Ws. 5 and 6 are not treated as that of independent witnesses, then also, there are reliable and trustworthy evidence, discussed above, to come to the finding that there was recovery of Charas from the possession of accused-appellant. In every case it is not desirable to insist that the evidence of the officials of the Custom Department should be corroborated by the evidence of independent witnesses. In the facts and circumstances of this case we do not find any reason to disbelieve the evidence of above discussed witnesses, who have proved beyond all reasonable doubt that there was recovery of Charas from the possession of the accused-appellant. There is nothing on record to show that the Custom Department or the complainant (P.W. 1) or the members of the raiding party had any personal grievance against the accused. Therefore, the question of falsely implicating him does not arise.

15. In the facts and circumstances and after considering the evidence, we are of the view that conviction and sentence of the appellant is justified and it does not require any interference.

16. In the result, there is no merit in this appeal, which is accordingly dismissed.

P.K. Deb, J.

17. I agree.

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