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Shri Ram Vs. State of U.P.

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Court : Allahabad

Decided On : Aug-10-1999

Reported in : 2000CriLJ510

Judge : B.K. Sharma, J.

Acts : Narcotic Drugs and Psychotropic Substances Act, 1985 - Sections 21, 22, 41(2), 42 and 50; Code of Criminal Procedure (CrPC) - Sections 313

Appeal No. : Criminal Appeal No. 1421 of 1996

Appellant : Shri Ram

Respondent : State of U.P.

Advocate for Def. : A.G.A.

Advocate for Pet/Ap. : Vidya Kant Tewari, Adv.

Disposition : Appeal allowed

Judgement :
ORDER

B.K. Sharma, J.

1. This is an appeal against the judgment and order dated 22nd December, 1994 passed by Sri N. L. Agrawal, the then I Additional Sessions Judge, Banda in

Special Case No. 22 of 1994, State v. Shri Ram, Police Station Atarra, Dist. Banda whereby he convicted the accused-appellant Shri Ram of the offence under Section 21/22, N.D.P.S. Act and sentenced him to undergo rigorous imprisonment for a period of ten years and also to pay a fine of Rs. 1,00,000/- and in default of payment of fine, to suffer further rigorous imprisonment for two and half years as part of his substantive sentence.

2. The prosecution case, in brief, was that on 18-3-1994, S.I. Vijai Kumar Arya, In-charge of Out Post G.R.P., Karvi (PW2), along with Constable Sant Ram (P.W. 1) and other constables, was on train checking and crime prevention duty at Railway Station, Karvi and they were present on platform No. 1, that on the platform Vijai Kumar Arya S.I. received an information that one person was sitting on a bench possessing narcotic drugs near water tank towards west of canteen on the platform, that on this information, the police party came near the canteen at the railway station; that the informer pointed out towards that person sitting on a bench alone; that the police party took personal search of each other and then came near the water-tank in the west of the canteen; that on seeing the police party, that person got up and started moving towards the west whereupon the police party surrounded and arrested him on the spot at a distance of 20 paces from there on the said platform (platform No. 1); that it was 4.15 P.M.; that the person arrested was the accused-appellant Shri Ram. The prosecution case further was that Vijai Kumar Arya S.I. told the accused-appellant to get himself searched before a Gazetted Officer whereupon he (accused-appellant) said that he has full confidence in him; that thereupon Vijai Kumar S.I. took a search of his body and found a strip of 8 tablets seripax wrapped in white paper from the left pocket of his shirt and a packet of biscuits bearing Parle 'G' brand name which was found having some slightly pink and yellow intoxicating substance glued on it, that he demanded the licence from the accused-appellant for keeping this but he did not produce any, that he prepared the recovery memo of the recovered materials and then went to the police station and lodged the accused-appellant in the lock-up of the police station and a case was registered.

3. The recovered material was sent to the Forensic Science Laboratory, Agra for chemical examination. The Joint Director of Laboratory found that these articles

contained Oxizeepam. Consequently a charge-sheet was submitted.

4. At the trial, the prosecution examined Sant Ram Constable (P.W.1), Vrjai Kumar Arya, then the S.I. (now Dy.S.P.) as P.W. 2. The necessary link evidence was placed on record and the Investigating Officer was also examined. The accused made the denial of the recovery. The learned Additional Sessions Judge believed the prosecution story and consequently convicted and sentence the accused-appellant as aforesaid.

5. Heard counsel for the parties.

6. Before this Court, apart from challenging the finding of the learned Additional Sessions Judge on merits, the learned counsel for the accused-appellant argued that there was violation of the mandatory provision of Section 50 of the N.D.P.S. Act and consequently the alleged recovery of the contraband articles aforesaid cannot be used to sustain the conviction of the accused-appellant. The learned A.G.A., on the other hand, laid great emphasis on the ocular evidence against the accused-appellant by pointing out that the police officer and the raiding party had absolutely no enmity against the accused-appellant; that the prosecution evidence was consistent throughout; that while in the cross-examination of Constable Sant Ram (P.W. 1), the defence claim was that the accused-appellant was arrested from his house from Atarra and was falsely implicated planting articles which were said to have been recovered, the defence case in the statement of the accused-appellant under Section 313, Cr.P.C. was that he was arrested because he did not have any ticket with him and was falsely implicated. It is argued that the accused-appellant, thus admitted his arrest at the platform on the date, time and place set up by the prosecution. He also claimed that there was compliance of the provision of Section 50 of the N.D.P.S. Act. He further argued that even if there was any irregularity in the matter of search, the recovery as such cannot be held vitiated and that the recovery being established beyond any shadow of doubt, the conviction of the accused-appellant ought to be maintained.

7. First we come to the question of compliance of Section 50 of the N.D.P.S. Act. In the case of State of Punjab v. Balbir Singh AIR 1994 SC 1872 : 1994 Cri LJ 3702 in Clause (5) of Para 26, the Apex Court said as under:--

(5) On prior information, the empowered officer or authorised officer while acting under Section 41(2) or 42, should comply with the provisions of Section 50 before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a Gazetted Officer or a Magistrate as provided thereunder. It is obligatory on the part of such officer to inform the person to be searched. Failure to inform the person to be searched and if such person so requires, failure to take him to the Gazetted Officer or the Magistrate, would amount to non-compliance of Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial. After being so informed whether such person opted for such a course or not would be a question of fact.

The case of Balbir Singh was followed in the case of Alimustaffa Abdul Rahman Moosa v. State of Kerala decided on September 28, 1994 and reported in 1995 Supreme Court Cases (Cri) 32 : AIR 1995 SC 244 and it was held that where there has been violation of Section 50 of N.D.P.S. Act, the conviction of the appellant cannot be sustained. The view in Balbir Singh's case was followed by the Apex Court consisting of three Hon'ble Judges in the case of Mohinder Kumar v. State, Panaji Goa, decided on 20-1-95 and reported in 1999 SCC (Cri) 79 : AIR 1995 SC 1157. In that case, the arresting officer did not comply with the provision of Section 50 of the N.D.P.S. Act and there were other infirmities also. The Apex Court consequently held the accused entitled to acquittal 1995 SCC (Cri) 1157 : 1996 Cri LJ 894. In the authority Mohd. Saiyad Umar Saiyed v. State of Gujarat decided on April 3, 1995, 1995 (32) ACC 512 : 1995 Cri LJ 2662, the judgment was rendered by three Hon'ble Judges of the Apex Court and the Apex Court endorsed the view in the case of Balbir Singh (supra) and observed that there is no room for such presumption that the accused had been informed of his right under Section 50 of the N.D.P.S. Act and that very relevant is the testimony of the officer conducting the search that he had informed the person to be searched that he was entitled to demand that the search be carried out in the presence of Gazetted Officer or a Magistrate and that the person had not chosen to so demand. In that case, there was no evidence to show that the arresting officer had informed the accused-appellants of their right to be searched in presence of a Gazetted Officer or a Magistrate and the Apex Court consequently set aside the conviction and sentence of the accused-appellants under the N.D.P.S. Act.

8. The learned A.G.A. has relied on certain authorities. In the authority State of H.P. v. Pirthi Chand 1996 SCC (Cri) 210 : AIR 1996 SC 977 : 1996 Cri LJ 1354, decided on November 30, 1995 by a Bench consisting of two Hon'ble Judges, it was held that the evidence collected by search in violation of law does not become inadmissible and that the Panchnama would be admissible at the trial and that, therefore, at the stage of filing of charge-sheet, it cannot be said that there is no evidence and the Magistrate or the Sessions Judge would be committing illegality to discharge the accused on the ground that the mandatory requirements of Section 50 of the N.D.P.S. Act or other provisions have not been complied with. In this authority, the Apex Court itself said that at the trial an opportunity would be available to the prosecution to prove that the search was conducted in accordance with law and that even if search was found to be in violation of law, what weight should be given to the evidence collected is yet another question to be gone into. In that case, the Apex Court was dealing with the question whether the F.I.R. or charge-sheet or the complaint should be quashed or not and so these observations have to be considered in that back-ground.

9. The learned A.G.A. has then relied on the authority State of Punjab v. Jasvir Singh, decided on Nov. 28, 1995 and reported in 1996 SCC (Cri) 1. In that authority also, it was observed by the Apex Court that it is settled law that the evidence which collected during investigation in violation of mandatory provision does not become inadmissible and the trial in that event does not get vitiated and that each case is to be considered on its own backdrop. This judgment was also rendered by a Bench of two Hon'ble Judges of the Apex Court.

10. The learned A.G.A. has further relied on the authority Namid Francis Nwazor v. Union of India 1999 SCC (Cri) 81, decided on Feb. 2, 1996. By this authority, the question that was referred to the larger bench was whether the provision of Section 50 of N.D.P.S. Act would apply in the matter of search of articles or premises. With that matter we are not concerned here.

11. There is an authority State of Punjab v. Baldeo Singh decided on 19th November, 1997 reported in 1998 ACC (Cri) 677, in which the question whether in case any search is made without complying the mandatory provision of Section

50(1) of N.D.P.S. Act the trial held in respect of any contraband article in pursuance of the said recovery would be void ab initio was referred by a Bench of three Hon'ble Judges of the Apex Court to a larger Bench. In my opinion, pending determination of the question by a larger Bench, the decision in earlier three Hon'ble Judge Bench authority Mohd. Saiyed Umar Saiyed (supra) and the authority of Mohinder Kumar (supra), another three Judges authority of the Apex Court, are to be followed.

12. There was a case of Manohar Lal v. State of Rajasthan reported in 1996 (33) ACC 257 : AIR 1996 SC 2880 : 1996 Cri LJ 1367. In that case, it was held that the option available to the accused under Section 50 of N.D.P.S. Act is only to choose whether he would like to be searched by the officer taking the search or in the presence of the nearest available Gazetted Officer or the nearest available Magistrate and that the choice of the nearest Gazetted Officer or the nearest Magistrate has to be exercised by the officer making the search and not by the accused. This authority has, however, no direct bearing on the facts of the present case.

13. The learned A.G.A. has relied on the authority Sayar Puri v. State of Rajasthan reported in 1998 ACC (337) 650 : AIR 1998 SC 3224 : 1998 Cri LJ 4589. In this authority, the Apex Court found that the compliance of Section 50 of N.D.P.S. Act was actually made by the searching officer and no breach of any particular condition had been pointed out. The Apex Court had accepted the evidence of the searching officer that he had informed the appellant about his rights and that the appellant had told him that he had no objection if he was searched by him. No law was laid down in ' this authority.

14. Consequently, if it is found as a fact that the compliance of Section 50 of N.D.P.S. Act has not been made by the searching officer, then his conviction cannot be sustained.

15. This takes up to the question whether the provisions of Section 50 of the N.D.P.S. Act were complied with by the arresting officer. The testimony of Vijai Kumar Arya S.I. (P.W. 2), (now Dy. S.P.), on this subject is important. He stated that the accused was searched as per procedure; that the recovery of seripax

tablets and biscuits was made from him. The relevant part of his statement may better be reproduced in his own words which are as under :--.Uske Kamiz Ke Banyee Jeb Se Seripax Ki Aath Goliyon Ka Patta Nikla Tha, Jo Safed Kagaj Me Lipta Tha Tatha Abhiyukt Ke Pant Ke Dahini Jeb Se Ak Biscuit Ka Packet Jisme Parle-G Likha Tha Tatha As Taraf Se Khula Tha Nikla Tha, Jisme Gulabi Wa Pile Rang Ka Padarth Lipta Tha, Baramad Huwa Jisko Nashila Padarth Hone Ke Karan Kisi Rajpatrit Adhikari Ke Smaksh Chalne Ko Kaha Tha. Talashi Lene Ke Pahile Maie Muljim Se Rajpatrit Adhikari Ke Smaksh Talashi Lene Ke Liye Kaha Tha To Usne Kaha Tha Ki Mujhe Aapke Uper Bishwas Hai.' It will appear from this statement that it was after the recovery that he had asked the accused-appellant to go before a Gazetted Officer and though he stated subsequently before the Court, that he had asked the accused for search in the presence of a Gazetted Officer before taking the search. There is no mention in this statement that he had told the accused of his legal right of being searched in the presence of a Gazetted Officer or a Magistrate. What he said was that he had asked i.e. commanded the accused-appellant to go before a Gazetted Officer because the recovered material has an intoxicating substance. In his cross-examination, he stated that he had called upon the accused-appellant to go before a Gazetted Officer for search to which he declined stating that he had full confidence in the raiding party. Asked further, he stated that it is wrong to say that the police has no right to take search of the person of accused apart from the immediate presence of Gazetted Officer. He further stated that the correct position is that the in-charge Sub-Inspector had a right to take search and that the search may be taken before a Gazetted Officer by way of preference in case he (Gazetted Officer) is present. In view of this statement of this police officer, about the legal position and the fact, he did not say that he apprised the accused-appellant of his legal right to be searched before a Gazetted Officer or Magistrate before proceeding to take his search assumes great significance. Against this background, the fact that in the recovery memo, claimed to have been prepared by him at the spot, he did not say that he told the accused-appellant that he had the legal right to be searched before a Gazetted Officer or a Magistrate also assumes significance, then in the recovery memo he has stated that Us Pakare Huye Byakti Se Mujh S.I. Ne Punchha Ki Tumhare Pas Nashili Dawai Rakhne Ki Suchna Hai Tumhe Talashi Hetu Mere Sath Kisi Rajpatrit

Adhikari Ke Smaksh Chalna Hoga Us Par Usne Razamandi Di Mujhe Aap Longo Par Vishwas Hai Aap Meri Jama Talashi Le Sakte Hai. These words also do not amount to telling the accused-appellant of his legal right to be searched before a Gazetted Officer or a Magistrate.

16. Sant Ram constable (P.W. 1), a member of the arresting party, stated that the arrested person was told that an informer has informed that he has intoxicating tablets, consequently he will have to go before a Gazetted Officer for his personal search being taken whereupon the accused-appellant gave the consent to his search stating that he has faith and that they (the police party) may take his search. So it is obvious that the mandate of law was not carried out on the own showing of the police officer making the arrest and the testimony of the accompanying constable Sant Ram (P.W. 1).

17. Here, it is also to be noted that neither the architect of the raiding party Vijai Kumar Arya (P.W. 2) nor Sant Ram (P.W. 1) stated anywhere in their testimony that the accused-appellant was given the option to exercise his right of being searched before a Gazetted Officer or a Magistrate. In this regard, the learned counsel for the accused-appellant has relied on the authority of Nishan Singh v. State reported in 1995 JIC 852 : 1995 (32) ACC 651. In this authority, the material indicated that the only offer that was made to the accused-appellant was that he could not get himself searched before a Gazetted Officer. The learned A.G.A. submitted before the learned single Judge that the Magistrate is a Gazetted Officer and the offer by the police officer to the accused to get himself searched before a Gazetted Officer must be deemed to mean that he could have well chosen a Magistrate even for search in his presence. Repelling this contention, the learned single Judge observed :--

This interpretation as given by the learned AGA, in my view, may not be acceptable as the Act itself gives two categories of persons before whom the search could have been made at the requisition of the accused and these two categories were Gazetted Officers mentioned in Section 42 and the nearest Magistrate. Had the Legislature desired that the term Gazetted Officer would cover a Magistrate as well, there was no necessity to mention the term Magistrate in

Section 50. Normally, one should not interpret any word in a legislation as superfluous. Moreover, it was not any Gazetted Officer that was meant under Section 50 and under the interpretation of the Supreme Court, the accused had a right to choose his forum of search and it was the duty of the police officer to inform him of his right indicating both the forums...in the case of Mukesh v. The State 1994 (3) Crimes 337, the Police Officer before making the search, had informed the accused that he could get himself searched before a Gazetted Officer and no mention of the Magistrate was there and it was held that the accused was not fully informed of his right and he was entitled to acquittal for the failure on the part of the police officer to protect the right of the accused.' In the authority of Balbir Singh's case (supra), the Apex Court interpreted the terms 'if the person to be searched so requires' and opined that these words did cast a duty upon the officer about to make the search to intimate the person to be searched that if he so required he would be taken to the nearest Gazetted Officer or the nearest Magistrate for the purpose of making search in their presence, and that this was a valuable right given to the person to be searched in the presence of Gazetted Officer or a Magistrate if he so required.

18. The observations in the case of Manohar Lal v. State of Rajasthan (supra) by the Apex Court dilute these two single Judge authorities to some extent. Nevertheless, in this case, it is obvious that the arresting officer has failed to apprise the arrested accused-appellant of the legal right available to him under Section 50 of N.D.P.S. Act of being searched before a Gazetted Officer or a Magistrate, if he so required which provides an important safeguard to the accused and, therefore, there is clear non-compliance of the mandatory provision of Section 50 of N.D.P.S. Act and it renders the search wholly illegal and no conviction can be based on the basis of the alleged recovery from the accused-appellant.

19. It is also to be noted in this case that the arresting officer Vijai Kumar Arya (P.W. 2) was not authorised to make search under N.D.P.S. Act. This further vitiates the trial. It was not a case where while making a raid and search, the police officer came across by chance a contraband article to which N.D.P.S. Act applied. Here the prosecution case is that the police officer received prior

information that the accused was carrying contraband material to which N.D.P.S. Act would apply.

20. For the reasons aforementioned, the appeal is allowed. Conviction of the accused-appellant for the offence under Section 21/22 of N.D.P.S. Act is set aside and he is acquitted of the offence. He is in jail custody. Let him be released forthwith unless he is required in connection with some other case or crime.

21. Let a copy of this judgment be sent by the Registry to the Additional Sessions Judge concerned at once for making compliance. The compliance report shall be submitted by the learned Additional Sessions Judge concerned to this Court within ten days from today. This appeal shall be listed before this Bench again on 20-8-1999 for orders along with the compliance report of the Additional Sessions Judge concerned.

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