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Court : Punjab and Haryana

Decided On : Sep-24-1996

Reported in : 1997(57)ECC240

Judge : K.K. Srivastava, J.

Appeal No. : Criminal Appeal No. 670-SB of 1995

Appellant : Narain

Respondent : State of Haryana

Disposition : Appeal allowed

Judgement :

K.K. Srivastava, J.

1. This is an appeal filed by Narain, son of Ganesh, Caste Nagar, resident of village Kohni, Police Station Kawai, District Bahra, State of Rajasthan against his conviction under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short N.D.P.S. Act), Police Station G.R.P. Ambala Cantt., vide judgment dated 6.10.1995 passed by Shri Raj Kumar Bishnoi, Additional Sessions Judge, Ambala in Sessions case No. 38 of 1993/1995. Appellant Narain was sentenced to suffer 10 years rigorous imprisonment and ordered to pay a fine of Rs. 1 lac and in default of payment of fine he was directed to undergo further

rigorous imprisonment for a period of two years. The occurrence of this case is said to have taken place on 17.7.1992 at the railway platform No. 2 of Ambala Cantt. near the Railway overhead Bridge at about 9.00 pm. Vijender Singh, Inspector, G.I.A. G.R.P. Ambala Cantt. along with A.S.I. Joginder Singh, A.S.I. Harbans Lal, Head Constables Rakam Singh, Avtar Singh, and constables Balbir Singh and Hukam Singh left the police station in connection with the general checking. They were present at platform No. 2 when they noticed Narain carrying a bag on his shoulder and standing near the cigarette shop. Accused Narain was hesitant on seeing the police personnel and he was about to leave the place when he was apprehended on suspicion. On enquiry he disclosed his identity. The Inspector Vijender Singh told him about his suspicion that he might be carrying some narcotic/intoxicant substances. The Inspector also apprised him that if he liked he could be searched in the presence of a Gazetted Officer or a Magistrate. However, in the meantime Shri Suraj Parkash Kalra, Deputy Superintendent of Police arrived at platform No. 2 and he was told about this incidence. The accused Narain was produced before Shri Kalra and his search was then conducted by the aforesaid Dy. S.P. The accused was found carrying IV2 kilograms of opium in the bag. Two samples weighing 20 grams each were taken out and duly sealed into parcels by using the seal of 'HL'. The parcels were taken into police possession vide seizure memo Exhibit PC. The remaining quantity of the opium was separately sealed and taken into police possession vide memo aforesaid. The seal was entrusted for safe custody with Ruqa. Exhibit PB in this regard was prepared and sent to the police station where formal FIR Exhibit PB/1 was prepared on its basis. The site plan of the place of recovery of the opium was also prepared which is Exhibit PE. Thereafter the accused, along with case property and the witnesses was produced before S.H.O. of Police station G.R.P. Ambala Cantt, namely, Shri Ijjat Singh who after making an enquiry re-sealed the parcels with his own seal 'ISK'. The case property was deposited with MHC. The accused was locked in the lock-up. The case was investigated. The statements of the witnesses were recorded by the Investigating Officer who got the samples sent to the Office of Director, Forensic Science Laboratory, Madhuban from where report Exhibit PH was received indicating the sample to be that of opium. After completion of the investigation challan was submitted under Section 173, Cr. PC against the

accused. The case of the accused was committed to the Court of Sessions at Ambala by the learned Ulaqa Magistrate. The learned Additional Sessions Judge framed charge against the accused under Section 18 of the N.D.P.S. Act. The charge was read over and explained to the accused in Hindi who pleaded not guilty to the charge and claimed to be tried.

2. At the trial, the prosecution examined Om Parkash PW1, Ijjat Singh PW2, Constable Bharti Lal PW3, Constable Pala Singh PW4, ASI Joginder Singh PW5, Inspector Vijender Singh PW6, Harish Chander PW7 and Suraj Parkash Kalra, retired D.S.P. PW8. The report of the Forensic Science Laboratory Exhibit PZ was tendered in evidence and the case of the prosecution was closed by the Public Prosecutor on 13.9.1995.

3. Statement of the accused under Section 313, Cr. PC was recorded by the learned Additional Sessions Judge, Ambala on 13.9.1995 itself. The accused denied the prosecution evidence led against him and stated that he has been falsely implicated in the case due to a scuffle with the G.R.P. personnel. The witnesses deposed against him falsely. He stated that he was innocent. He was asked to lead evidence in defence and he replied in the affirmative. However, on the date fixed for recording defence evidence, i.e., on 5.10.1995 the accused stated that he did not want to lead evidence in defence and closed the same.

4. The learned trial Judge heard the arguments of the learned Counsel for the accused and the learned Public Prosecutor and found the accused guilty of the offence punishable under Section 18 of the N.D.P.S. Act, convicted him thereunder and sentenced him to the minimum period prescribed under Section 18 of the N.D.P.S. Act, i.e., to suffer 10 years rigorous imprisonment and to pay a fine of Rs. 1 lac and in default to suffer further rigorous imprisonment for two years. Accused Narain felt aggrieved against his conviction and sentence ordered by the learned Additional Sessions Judge, Ambala and he has filed this appeal.

5. Respondent-State was served with a notice of the appeal and put in appearance through the learned AAG, Haryana Mr. S.K. Hooda. The appellant was duly represented by his counsel Mrs. K.B. Jain, Advocate.

6. I have heard learned Counsel for the appellant and learned AAG for the State of Haryana-respondent. I have been taken through the evidence on record and also through the judgment of the learned trial judge.

7. The learned Counsel for the appellant submitted that in this case there has been no due compliance of the provisions of Section 50 of N.D.P.S. Act. It has been pointed out that the statements of the witnesses ASI Joginder Singh PW5 and Inspector Vajinder Singh PW6 will go to show that there was only partial compliance and that too was not reduced into writing. The accused was not given a chance to exercise his option to have his search made in the presence of a Gazetted Officer or a Magistrate. A perusal of the statement of Joginder Singh PW5 will go to show that the Investigating Officer Inspector Vajinder Singh gave the option to the accused for his search before a Gazetted Officer. In the meantime D.S.P. Suraj Parkash Kalra came to the spot. The accused was searched in the presence of said D.S.P. It is evident from the statement of Joginder Singh PW5 that the offer was partial inasmuch as the accused was told that if he liked he could be searched before a Gazetted Officer. He was not apprised of his right to have the search in the presence of the Gazetted Officer or a Magistrate. The statement of the witness PW5 clearly shows that the reply of the accused was not heard as in the meantime the D.S.P. had arrived at the place of occurrence and the accused was searched in his presence. The evidence of this witness further shows that the offer was not made in writing and the reply of the accused-appellant was also not noted in writing. The statement of Inspector Vajinder Singh PW6, on the other hand, is to the effect that the accused was given an option to be searched before a Gazetted Officer or a Magistrate. In the meantime D.S.P. Suraj Parkash of Railway came to the spot. All the facts were explained to the D.S.P, who gave the direction for the search of the accused which was being carried by him. Statement of PW6 improves upon the evidence of ASI Joginder Singh inasmuch as he has added the word 'Magistrate' in the offer but his statement clearly shows that the reply of the accused was not awaited because in the meantime the D.S.P. Mr. Kalra had arrived there and under his instructions the accused was searched. The learned Counsel for the appellant cited the judgment of the Supreme Court in the case of State of Punjab v. Labh Singh : 1996 CriLJ3996 wherein it has been held that the accused has valuable right to be

informed of his right to be searched in the presence of a Gazetted Officer, the search officer invariably would conduct the search subserving the salutary right given under Section 50. It was held that each case depends upon its own factual scenario and no exhaustive or mathematical formula of universal application can be laid down. The Courts has to consider each case on its own setting. In view of the absence of any writing from the accused to the effect that the accused was informed of his right and that the same was waived by the officer who conducted the search and seized the contraband, it was held that the provisions of Section 50 of the Act were not complied with.

8. In the case of *State of Punjab v. Balbir Singh* : 1994 CriLJ3702 the Apex Court pointed out that it would be open to the search Officer to inform this aspect, at the time of search that he is entitled to be searched in the presence of the Gazetted Officer and also to take in writing from the accused that he has been so informed and that the accused has waived that right. Thus, it would form part of the record as contemporaneous evidence. Thereafter, it may not be open to the accused to take the plea of non-compliance of Section 50. It would be for the Court to consider, at the trial, whether the officer who conducted the search, had, as a fact, informed the accused of that right and whether the accused had waived that right of being searched only in the presence of a Gazetted Officer.

9. In the case of *Manohar Lal v. State of Rajasthan* 1996 (1) RCR 659 the case of *Saiyad Mohd. Saiyad Umar Saiyad v. State of Gujarat* 1995 (2) RCR 388 was noticed by the Hon'ble Supreme Court and the Apex Court said:

It is sufficient to say that in the present case, the High Court has gone into this question and recorded a clear finding that there was compliance of Section 50 of N.D.P.S. Act inasmuch as the accused was given the option specified in the provision and on exercise of that option by him, he was searched in the presence of a Gazetted Officer.

10. The Apex Court held further in the case of *Manohar Lal* (supra) that the provision only requires the option to be given to the accused to -say whether he would like to be searched in the presence of a Gazetted Officer or a Magistrate; and on exercise of that option by the accused, it is for the Officer concerned to

have the search made in the presence of the nearest Gazetted Officer or the nearest Magistrate whosoever is conveniently available for the purpose in order to avoid undue delay in completion of that exercise. It was further held that it is clear from Section 50 of the N.D.P.S. Act that the option given thereby to the accused 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. 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.

11. In the instant case, the compliance of Section 50 of the N.D.P.S. Act has not been shown to have been made inasmuch as the accused was not apprised of his option to have his search made in the presence of a Gazetted Officer or a Magistrate. The offer was not given in writing nor his reply was obtained in writing. Apart from it, it is quite evident from the evidence of the two Inspectors Joginder Singh PW5 and Vajinder Singh PW6 that the reply of the accused was not at all noted because when the offer was being made, the D.S.P. appeared on the scene and directed the accused to be searched. Therefore, in the instant case the prosecution failed to show that the accused was given the offer before his search that if he wished he could be searched in the presence of a Gazetted Officer or a Magistrate and he was not given time to exercise his option and as a matter of fact the accused-appellant did not exercise his option in having the search made by the Inspector himself or in the presence of Gazetted Officer or a Magistrate. The Apex Court in the State of Punjab v. Balbir Singh (supra) held that:

This is a valuable right given to the person to be searched in the presence of a Gazetted Officer or a Magistrate if he so requires, since such a search would impart much more authenticity and creditworthiness to the proceedings while equally providing an important safeguard to the accused. To afford such an opportunity to the person to be searched, he must be aware of his right and that can be done only by the authorised officer informing him. The language is clear and the provision implicitly makes it obligatory on its authorised officer to inform the person to be searched of his right.

It was further held that '...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....

12. The prosecution evidence in the shape of the statements of two Inspectors ASI Joginder Singh and Inspector Vajinder Singh at best shows that the accused was being told that he can be searched if he so liked, in the presence of a Gazetted Officer when the D.S.P. Suraj Parkash, a Gazetted Police Officer arrived at the place of occurrence and before the accused-appellant Narain could exercise his option given to him under Section 50 of the N.D.P.S. Act, Mr. Kalra aforesaid directed the accused to be searched. This cannot be held to be the due compliance of Section 50 of the N.D.P.S. Act. It is noteworthy that the statements of the two Inspectors regarding the accused being apprised of the option are discrepant while according to Inspector Joginder Singh PW5 the offer indicated the search being made in the presence of a Gazetted Officer. The Inspector Vajinder Singh stated that the accused was apprised of his right of being searched in the presence of a Gazetted Officer or a Magistrate. It appears that the deficiency regarding the offer being partial was attempted to be overcome by the statement of Inspector Singh PW6. Under these circumstances, their statements being discrepant, are not worthy of being relied upon. In any view of the matter, the accused was not given the right to exercise his option and before he could exercise his right of option to have his search made in the presence of a Gazetted Officer or a Magistrate or by the Inspector, he was searched under the directions of the D.S.P. Mr. Kalra. There is, thus, no room for doubt that the prosecution failed to lead cogent and reliable evidence to show that there has been due compliance of Section 50 of the N.D.P.S. Act. Hence, there is considerable force in the arguments advanced by the learned Counsel for the appellant that there has been no compliance of the mandatory provisions of Section 50 of the N.D.P.S. Act.

13. The next point argued by the learned Counsel for the appellant was that in the instant case the occurrence took place on 17.7.1992 at 9.00 p.m. and the sample for analysis was handed over at the Forensic Science Laboratory on 28.7.1992 after a lapse of 10 days. In this connection, the learned Counsel for the appellant

relied on the judgment of a learned Single Judge of this Court delivered in the case of Khuba Ram @ Khuba v. State of Haryana 1995 (3) RCR 316 wherein it was held that unexplained delay in sending the property for analysis to the laboratory caused a dent in the prosecution story. In that case there was delay of 15 days in sending the property for analysis to the laboratory. In the case in hand also there is no explanation whatsoever for the delay of 10 days in sending the sample for analysis to the Forensic Science Laboratory, Madhuban. Apart from it, the prosecution evidence mainly comprises of the police officers. Only one witness of public, namely, Harish Chander PW7 was included in the police party despite the fact that the occurrence took place on a crowded railway platform where several independent of public could be included in the raiding police party. Harish Chander PW7 turned hostile and did not support the prosecution case. The statement of PW7 who is in service of the Railway Department categorically denied about the recovery of the opium from the possession of the accused in his presence. He was serving as a fitter in the Railway Department and serving under his immediate controlling Officer Shri. S.S. Sharma, Superintending Engineer (Mechanical). He denied the suggestion that he was deposing falsely having been won over by the accused in order to help him. It may be noticed that the accused-appellant Narain is resident of State of Rajasthan, whereas this witness is a railway employee working at Ambala Cantt.

14. In view of the foregoing discussion, the prosecution has, thus, failed to establish the charge under Section 18 of the N.D.P.S. Act against the accused-appellant. The non-compliance of the mandatory provisions of Section 50 of the Act goes to the root of the case and it would affect the prosecution case and vitiate the trial. The appeal has considerable force and is allowed. The conviction and sentence passed on the appellant Narain by the learned Additional Sessions Judge, Ambala under Section 18 of the N.D.P.S. Act are set aside. The appellant is acquitted of the charge levelled against him.