

Ram Chander Sharma @ Pandit Vs. the State

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Court : Delhi

Decided On : Feb-22-2008

Reported in : 149(2008)DLT326

Judge : P.K. Bhasin, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 18, 21, 41 to 44, 50, 52, 52(3), 53, 55 and 57; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 100 and 313

Appeal No. : Criminal Appeal No. 221 of 1997

Appellant : Ram Chander Sharma @ Pandit

Respondent : The State

Advocate for Def. : M.N. Dudeja, APP

Advocate for Pet/Ap. : Bahar U. Barqi, Adv

Disposition : Appeal dismissed

Judgement :

P.K. Bhasin, J.

1. This appeal arises out of the judgment and order dated 27.02.1997 delivered by the learned Additional Sessions Judge, Delhi (Designated Court under [Narcotic](#)

[Drugs and Psychotropic Substances Act, 1985](#)) in Sessions Case No. 128/95 whereby the appellant has been convicted under Section 21 of the NDPS Act, and sentenced to undergo rigorous imprisonment for 12 years and also to pay a fine of Rs. 1,00,000 and to further undergo one year rigorous imprisonment in case of default of payment of fine.

2. The case set-forth by the prosecution against the appellant is that an eye was being kept on the persons meeting the terrorists detained in Tihar Jail by the officials of Operation Cell of Delhi Police and during the surveillance it was revealed that some jail warders were engaged in the sale of drugs inside jail to the inmates. On 15.07.95 at 5.00 p.m. secret informer gave an information on telephone to Inspector Surender Singh (PW-8) posted in the Operation Cell and who was deputed for the purpose of keeping a vigil at the movements of terrorists in the Jail, that one jail warden Ram Chander Sharma, appellant herein, had gone to get 'smack' from somewhere and would come to Hari Nagar Bus Depot after about 2 1/2 hours with huge quantity of 'smack'. ACP P.P. Singh(PW-9) was informed of that secret information which was recorded as DD No. 25 at the Operation Cell. A raiding party was then organized under the supervision of Insp. Surender Kumar (PW-10) who then along with other police officials reached Hari Nagar Bus Depot at 6.15 p.m. where the secret informer was present there. Anuj Kumar (PW-3), a public person, agreed to become a witness and so was joined in the raid team. ACP P.P. Singh(PW-9) also arrived at that place at 7.00 p.m. and at about 7.30 p.m. the appellant got down from the bus and started proceeding towards the jail on Jail Road. He was apprehended at the instance of the informer. It is the further case of the prosecution that that the appellant was informed in writing vide notice Ex. PW-8/A, as required under Section 50 of the NDPS Act, that the police had information that he was having smack in his possession and he was to be searched and in case he wanted his search to be conducted in the presence of a Magistrate or some Gazetted Officer necessary arrangement could be made to arrange the presence of a Magistrate or a Gazetted Officer as it was his legal right. The appellant, however, did not exercise the option of search either before a Magistrate or a Gazetted Officer and signed the notice under Section 50 declining the aforesaid offer made to him by the police officer PW-10 SI Surender Kumar. PW-10 then offered himself to the appellant to be searched before his search. The

appellant searched PW-10 and did not find anything in his possession. Then person of the appellant was searched by PW 10 SI Surender Kumar upon which he was found to be in possession of 500 gms of 'smack' concealed in a polythene bag 'thaili' tied to his waist. Out of that smack 10 gms of smack was taken and sealed in a pullanda with the seal of 'SS' and the remaining quantity of smack was sealed in a separate parcel which was also sealed with the seal of 'SS'. CFSL form was also filled up on the spot and on that form ACP P.P. Singh affixed his seal 'PP'. The seal after use was handed over to the public witness Anuj (PW-3). A rukka was then prepared by SI Surender Kumar and sent to Police Station Hari Nagar through ASI Nand Ram along with the sealed pullandas and CFSL form which were kept with the SHO (PW-6) for safe custody and the SHO put his own seal also on the pullandas. FIR No. 470/95 (Ex. PW-1/A) was registered at Hari Nagar Police Station for the offence punishable under Section 21 of the Act. During investigation the sealed packet containing 10 grams of the powder recovered from the possession of the appellant was sent to CFSL for analysis and on examination that powder was found to be 'heroin'. CFSL report (Ex. PX) to that effect was obtained. After completion of investigation the appellant was charged-sheeted and in due course he was tried by the designated Court under the NDPS Act for the offence under Section 21 of the NDPS Act.

3. Prosecution had examined 11 witnesses to prove the guilt of the appellant. At the time of recording of the statement under Section 313 Cr.P.C. the appellant had taken a plea that he had been taken away from his house on 12.07.95 by Inspector Surender Singh of Operation Cell and there he was kept up to 15.07.95 and then falsely implicated in this case. In defense, he examined one police official from Hari Nagar Police Station who proved on DD No. 6A dated 15.07.95 which was an information given to the police by the son of the appellant that the appellant was missing from 12.07.95. During the trial, Anuj Kumar (PW-3), who was joined as an independent witness to the search conducted on the person of the appellant, had turned hostile. However, the learned trial Court relied upon the testimony of police officials and on the basis of the testimony of those witnesses of recovery of smack from the appellant found the appellant guilty. Feeling aggrieved by the judgment of the trial Court holding him guilty, the appellant filed this appeal.

4. Learned Counsel for the appellant had submitted that there was gross violation of the provisions of Sections 50, 52, 55 and 57 of the NDPS Act and so the conviction of the appellant cannot be sustained.

5. Learned APP for the State, on the other hand, submitted that there was no infirmity in the judgment passed by the learned trial Court and this appeal deserved to be dismissed.

6. I shall now consider the submission of the learned Counsel for the appellant regarding non-compliance of the provisions of Section 50 of NDPS Act.

Section 50 of NDPS Act reads as under:

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 persons 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 any one excepting a female.

5) When an officer duly authorized under Section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under Section 100 of the Code of Criminal Procedure, 1973(2 of 1974).

6) After a search is conducted under Sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.

7. In this case the appellant was searched by PW-10 SI Surender Kumar. Section 43 of NDPS Act provides that any officer of any of the departments mentioned in Section 42 can detain and search any person whom he has reason to believe to have committed an offence punishable under the said Act. Police department is one of the departments specified in Section 42 whose officers above the rank of a constable can detain any person and conduct his search if there is a reason to believe that he has committed an offence punishable under the NDPS Act. As far as the plea of non-compliance of the provisions of Section 50 of the NDPS Act is concerned, the submission of learned Counsel was that in this case the appellant was not informed by the police officer (PW-10) who had conducted his search that he had a right to be searched in the presence of a Magistrate or a Gazetted Officer but all that was told to him was that if he wanted to be searched in the presence of a Magistrate or a Gazetted Officer arrangement could be made to ensure presence of a Magistrate or a Gazetted Officer but that offer, according to the learned Counsel, did not satisfy the requirement of law. Reliance in this regard was placed on a Constitution Bench decision of Hon'ble Supreme Court in ' State of Punjab v. Baldev Singh' : (1999)6SCC172 and also on a latter judgment in 'K. Mohanan v. State of Kerala' (2000) SCC Cri 1228. An earlier judgment of the Apex Court reported as : 1996 CriLJ3996 , 'State of Punjab v. Labh Singh etc.' was also cited. In these decisions it was no doubt held by the Hon'ble Supreme Court that if a person suspected of being in possession of some narcotic substance, like, smack etc. is to be searched he has to be informed by the officer who is to conduct the search before searching him that he has a right to be searched in the presence of a Magistrate or a Gazetted Officer. Now, in the present case the appellant was told in writing by the search officer PW-10 Sub-Inspector Surender Kumar vide notice Ex.PW-8/A, purporting to be a notice under Section 50 of the NDPS Act that it was being suspected that he was in possession of smack and he was to be searched and he was also asked whether he desired to be searched in the presence of a Magistrate or a Gazetted Officer. The appellant declined to avail of that offer and his statement to that effect was also recorded. All this was

deposed to by PW-10 Sub-Inspector Surender Kumar, who had conducted his search, as well as PW-8 Inspector Surender Singh, PW-9 ACP P.P. Singh and PW-11 ASI Nand Ram who were also members of the raid party. No attempt was made before this Court by the learned Counsel for the appellant to discredit the evidence of these witnesses on this aspect of the matter. Even before the trial Court in their cross-examination it was not suggested that the appellant was not given the notice Ex.PW-8/A or that the appellant had not declined the offer given to him.

8. There is no doubt that the appellant was not specifically told before his search that 'he had a right' to be searched in the presence of a Magistrate or a Gazetted Officer but the question is whether the failure of the search officer to inform the appellant specifically, either orally or in writing, that he had such a right would amount to non-compliance of the provisions of Section 50 of the NDPS Act. In this regard, learned APP had cited a recent judgment of the Hon'ble Supreme Court in 'Prabha Shankar Dubey v. State of Madhya Pradesh' AIR 2004 Supreme Court 486, wherein also an exactly similar notice, as in the present case, i.e. Ex.PW-8/A, was served upon the accused of that case before his search by the search officer. An argument was advanced on behalf of the accused of that case, who had been convicted under Section 18 of the NDPS Act, that the search of the accused was conducted without informing him of his right to have search conducted in the presence of a Magistrate or a Gazetted Officer and so there was non-compliance of the requirements of Section 50 of the NDPS Act and in support of this argument the Constitution Bench judgment in Baldev Singh's case (supra), which has been cited before me also, was relied upon. Hon'ble Supreme Court after considering the observations in the said Constitution Bench decision repelled the argument of non-compliance of Section 50. This is how the Hon'ble Supreme Court dealt with this ground of attack in para nos. 7 to 13 of its judgment:

7. It is not disputed that there is no specific form prescribed or intended for conveying the information required to be given under Section 50. What is necessary is that the accused(suspect) should be made aware of the existence of his right to be searched in presence of one of the officers named in the section itself. Since no specific mode or manner is prescribed or intended, the Court has

to see the substance and not the form of intimation. Whether the requirements of Section 50 have been met is a question which is to be decided on the facts of each case and there cannot be any sweeping generalization and/or strait-jacket formula.

8. Section 50 does not involve any self-incrimination. It is only a procedure required to protect the rights of an accused(suspect) being made aware of the existence of his right to be searched if so required by him before any of the specified officers. The object seems to be to ensure that at a later stage the accused(suspect) does not take a plea that the articles were planted on him or that those were not recovered from him. To put it differently, fair play and transparency in the process of search has been given the primacy. In *Raghubir Singh v. State of Haryana* : 1996 CriLJ1694 , the true essence of Section 50 was highlighted in the following manner:

8. The very question that is referred to us came to be considered by a Bench of two learned Judges on 22-1-1996 in *Manohar Lal v. State of Rajasthan* (Crl. MP No. 138/96) in SLP (Crl.) No. 184/1996). One of us (Verma, J.), speaking for the Bench, held:

It is clear from Section 50 of the NDPS Act that the option given thereby to the accused is only to choose whether he would like to be searched by the officer making 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.9. We concur with the view taken in *Manohar Lal's* case(supra).

10. Finding a person to be in possession of articles which are illicit under the provisions of the Act has the consequence of requiring him to prove that he was not in contravention of its provisions and it renders him liable to severe punishment. It is, therefore, that the Act affords the person to be searched a safeguard. He may require the search to be conducted in the presence of a senior officer. The senior officer may be a Gazetted Officer or a Magistrate, depending upon who is conveniently available.

11. The option under Section 50 of the Act, as it plainly reads, is only of being searched in the presence of such senior officer. There is no further option of being searched in the presence of either a Gazetted Officer or of being searched in the presence of a Magistrate. The use of the word 'nearest' in Section 50 is relevant. The search has to be conducted at the earliest and, once the person to be searched opts to be searched in the presence of such senior officer, it is for the police officer who is to conduct the search to conduct it in the presence of whoever is the most conveniently available Gazetted Officer or Magistrate.

9. As has been highlighted in Baldev Singh's case (supra) it has to be seen and gauged whether the requirements of Section 50 have been met. Section 50 in reality provides for additional safeguards which are not specifically provided by the statute. The stress is on the adoption of a reasonable, fair and just procedure. No specific words are necessary to be used to convey existence of the right. In the case at hand the information was conveyed in the following manner:

By way of this notice you are informed that we have received information that you are illegally carrying opium with you, therefore, we are required to search your scooter and you for this purpose. You would like to give me search or you would like to be searched by any Gazetted Officer or by a Magistrate. In response to the aforesaid intimation each of the accused gave in writing as follows:

Sir, I have no objection if you search me or my scooter.

Sd/- Sd/- Sd/-Ram Vilas Prabhashankar Thana Shahjaibadat 14.20 p.m. 3-11-1995 3-11-98 at 14.25 p.m. Thana Shahjaibad10. The notice in the presence case has great similarity with what has conveyed to the accused in Joseph Fernandez v. State of Goa : 2000 CriLJ3485 . It was inter alias held in the said case as follows:

2. Learned Counsel tried to highlight a point that Section 50 of the Act has not strictly been complied with by P.W.8, the officer who conducted the search. According to the learned Counsel for the appellant the searching officer should have told the person who was subjected to search that he had a right to be searched in the presence of a Gazetted Officer or a Magistrate. In this case P.W.8

has deposed that she told the appellant that if he wished he could be searched in the presence of the Gazetted Officer or a Magistrate to which the appellant had no favorably reciprocated. According to us the said offer is a communication about the information that the appellant has a right to be searched so. It must be remembered that the searching officer had only Section 50 of the Act then in mind unaided by the interpretation placed on it by the Constitution Bench. Even then the searching officer informed him that 'if you wish you may be searched in the presence of a Gazetted Officer or a Magistrate.' This according to us is in substantial compliance with the requirement of Section 50. We do not agree with the contention that there was non-compliance with the mandatory provision contained in Section 50 of the Act. Though, learned Counsel for the appellants submitted that this was a case where the Court erroneously held that substantial compliance would be sufficient, we find that the underlined portion is what was held by the Court to be information of the right. The offer in the present case is almost a replica of what was said in that case.

11. Though there cannot be any quarrel with the general principle highlighted by learned Counsel for the appellants that if a thing is required to be done in a particular way it should be done in that way, the position here is different in view of our conclusions that the requirements of Section 50 of the Act were sufficiently complied with. The general principle as noted has been stated illuminatingly in *Nazir Ahmad v. King-Emperor*, and later by this Court in *State of Uttar Pradesh v. Singhara Singh and Ors.* 1964 (4) SCC 485. What the concerned officer is required to do is to convey about the choice the accused had. The accused(suspect) has to be told in a way that he becomes aware that the choice is his and not of the concerned officer, even though there is no specific form. The use of the word 'right' at relevant places in the decision of Baldev Singh's case(supra) seems to be to lay effective emphasis that it is not by the grace of the officer the choice has to be given but more by way of a right in the 'suspect' at that stage to be given such a choice and the inevitable consequences that have to follow by transgressing it.

12. The use of the expression 'substantial compliance' was made in the background that the searching officer had Section 50 in mind and it was unaided

by the interpretation placed on it by the Constitution Bench in Baldev Singh's case (supra). A line or a word in a judgment cannot be read in isolation or as if interpreting a statutory provision, to impute a different meaning to the observations.

13. Above being the position, we find no substance in the plea that there was non-compliance with the requirements of Section 50 of the Act.

In my view, this decision of the Supreme Court applies on all fours to the facts of the case in hand and in view thereof the argument of non-compliance of the requirements of Section 50 is rejected since in the present case the search officer had complied with the requirement of Section 50 when he gave the written notice Ex. PW-8/A to the appellant. And since the appellant himself had waived his right to have the search conducted in the presence of a Gazetted Officer or a Magistrate he could not be permitted to contend during his trial that there was non-compliance of Section 50.

9. Learned Counsel for the appellant had also submitted that there is non-compliance of Sections 52 and 57 also of the NDPS Act and conviction ought to be set aside on this ground also. Section 52 reads as under:

(1) Any officer arresting a person under Section 41, Section 42, Section 43 or Section 44 shall ,as soon as may be, inform him of the grounds of such arrest.

(2) Every person arrested and article seized under warrant issued under Sub-section (1) of Section 41 shall be forwarded without unnecessary delay to the Magistrate by whom the warrant was issued.

(3) Every person arrested and article seized under Sub-section (2) of Section 41, Section 42, Section 43 or Section 44 shall be forwarded without unnecessary delay to -

(a) the officer-in-charge of the nearest police station, or

(b) the officer empowered under Section 53.

(4) The authority or officer to whom any person or article is forwarded under Sub-section (2) or Sub-section(3) shall, with all convenient dispatch, take such measures as may be necessary for the disposal according to law of such person or article.

Section 57 reads as under:

Whenever any person makes any arrest or seizure under this Act, he shall, within forty eight hours next after such arrest or seizure, make a full report of all the particulars of such arrest of seizure to his immediate official superior.

Before I proceed further I would like to mention here that the requirements envisaged under Sections 52 and 57 of the NDPS Act are not mandatory in nature and are only directory. This was held to be so by the Apex Court in 'State of Punjab v. Balbir Singh' : 1994 CriLJ3702 . Para 25 of the said judgment deals with this aspect and the same is reproduced here under:

(6) The provisions of Sections 52 and 57 which deal with the steps to be taken by the officers after making arrest or seizure under Sections 41 to 44 are by themselves not mandatory. If there is non-compliance or if there are lapses like delay etc. then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case.

10. It was submitted by the learned Counsel for the appellant that the testimony of Inspector Bharat Singh (PW-6) who was the S.H.O. of Hari Nagar Police Station those days shows that the appellant was not produced before him on 15.07.1995 and that only the case property was produced before him by ASI Nand Ram(PW-11). As regards violation of the provisions of Section 57 it was contended by the learned Counsel for the appellant that no report had been prepared as contemplated under Section 57 and submitted by the search officer to his superior officer. As far as contention regarding non-production of the accused before the SHO of Hari nagar is concerned, there is no doubt that the concerned SHO who was examined as PW-6 has not claimed in his evidence that the accused was

produced before him and has simply deposed about production of the case property before him by ASI Nand Ram of operation cell(PW-11) but for this reason the prosecution case cannot be viewed with suspicion. PW-11 ASI Nand Ram had deposed in his chief-examination that after arrest of the accused and preparation of rukka etc. he had gone to Hari Nagar Police Station along with the case property and there he had produce the sealed parcels, CFSL form, copy of seizure memo before the SHO. In cross-examination he was asked whether the accused was taken to the police station he had replied that after the arrest of the accused he was taken to the police station. Thereafter it was not suggested to him that the accused was not taken to the Hari Nagar police station as was being claimed by him. In these circumstances, just because the SHO did not depose that the accused was produced before him it cannot be said that there was non compliance of the provisions of Section 52(3) of the NDPS Act, as was the submission made by the learned Counsel for the appellant.

11. As far as the argument regarding non-compliance of Section 57 is concerned, the same is also liable to be rejected in view of the fact that when the appellant was apprehended and smack was recovered by SI Surender Kumar two of his superior officers, namely, PW-9 ACP P.P. Singh and PW-8 Inspector Surender Singh were present at the spot as members of the raid team and the documents prepared at the spot viz notice under Section 50 of the NDPS Act (Ex. PW-8/A) and seizure memo (Ex. PW-8/B) were signed by them also. So, there was no non compliance of Section 57 of the NDPS Act.

12. It was then contended by the learned Counsel for the appellant that in this case the public witness PW3 Anuj Kumar not having supported the prosecution case regarding recovery of smack from the possession of the appellant and his having claimed that he had simply been asked by the policemen to sign certain documents stating that some quarrel had taken place the evidence of police officials should be viewed with suspicion and so rejected. There is no doubt that this public witness joined at the time of raid claimed so before the trial Court but for this reason the evidence of police officials who have deposed about the recovery of smack from the possession of the appellant cannot be rejected. PW-3 had in his cross-examination by the public prosecutor had admitted his signatures on the

notice Ex.PW-8/A as well as on the seizure memos which clearly recite that smack was recovered from the possession of the appellant in his(PW-3's) possession. I have no reason to believe that the policemen would have obtained his signatures on blank papers without allowing him to go through the contents of the memos. It is apparent that this witness was not telling the truth before the Court. As far as the evidence of the witnesses of recovery of smack from the possession of the appellant, namely, PWs 8,9, 10 and 11, is concerned I have found the same to be quite reliable and during the course of arguments no infirmity in the evidence of any one of them was highlighted by the learned Counsel for the appellant. All of them had deposed consistently regarding the apprehension of the appellant, his search and recovery of smack from his possession, as is the case of the prosecution.

13. As far as the plea of the appellant-accused that he had been taken away from his house on 12.07.95 by SI Surender Kumar and kept at the Operation Cell, Lodhi Road till 15.07.95 is concerned the same has not even been attempted to be substantiated by the appellant-accused. If actually he had been taken away by the police illegally from his house he could have examined some member of his family but he has not done that. So it cannot be accepted that the appellant was confined illegally at the Operation Cell by the police from 12.07.95 to 15.07.95. The appellant did not examine his son who allegedly had lodged a missing report at the Hari Nagar Police Station on 15.07.95. So, even the missing report cannot be said to have been proved to have actually been lodged by son of the appellant. In any case, even in the missing report being relied upon by the appellant i.e. Ex. DW-1/1 it was not claimed that the appellant had been taken away by SI Surender Kumar and it was simply reported that the appellant had left his house on 12.07.95 but had not come back till 10 a.m. on 15.07.95. The learned Trial Court on this aspect of the matter has rightly observed that if the appellant had actually gone missing from his house on 12.07.95 the missing report would have been lodged on that day itself and not after three days. I am thereforee of the view that the appellant took a false plea before the Trial Court and that conduct of his adds further strength to the prosecution case.

14. Having rejected the contentions raised by the learned Counsel on behalf of the appellant I am inclined to hold that there is no infirmity in the judgment of the learned trial Court whereby the appellant was held guilty and convicted under Section 21 of the NDPS Act. This appeal being devoid of any merits is liable to be dismissed and is hereby dismissed.

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