

**Lalman Vs. State**

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**Court :** Delhi

**Decided On :** Aug-21-1998

**Reported in :** 1998VIIAD(Delhi)693; 1999(1)Crimes484; 75(1998)DLT224; 1998(47)DRJ121

**Judge :** J.B. Goel, J.

**Acts :** [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 18 and 50; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 173

**Appeal No. :** Crl. Appeal No. 188 of 1992

**Appellant :** Lalman

**Respondent :** State

**Advocate for Def. :** Mr. M.S. Butalia, Adv.

**Advocate for Pet/Ap. :** Mr. Siddarth Luthra, amices Curia

**Judgement :**

**J.B. Goel, J.**

1. This appeal is directed against the judgment of conviction and order of sentence both dated 6.8.1992 passed by the learned Additional Sessions Judge, Delhi in FIR No.84/90, P.S. Paschim Vihar whereby the appellant has been convicted for

an offence under Section 18 of the NDPS Act (for short 'the Act') and sentenced to undergo rigorous imprisonment for a period of 10 years and a fine of Rs. One lakh and in default of payment of fine further simple imprisonment for one year.

2. The appellant was provided an amicus Curiae. Learned amicus Curiae has contended that the conviction is invalid and unjustified on the material available on record. He has raised several legal pleas besides challenging the reliance placed by the Trial Court on the oral testimony.

3. Briefly the facts are that a police party led by Ran Singh, Sub-Inspector posted at Crime Branch, Dev Nagar Along with police officials, namely, Gurmeet Singh, Sub-Inspector, Sandeep Kumar, Sub-Inspector, Jai Bhagwan and Gita Ram, Head Constables and some other constables was on patrolling duty in the area on 5.3.1990 when at about 6.30 p.m. at Peera Garhi Crossing a secret informer gave information about the accused going ahead being in possession of opium. He organized a search party and also joined one Lal Singh, a public witness from there and at about 6.40 p.m. they intercepted the accused near Gautam Filling Station, Rohtak Road on the pointing out of the informer. The accused was informed that he was suspected to be having opium and if he desired, he could be produced before a Gazetted Officer or a Magistrate for conducting his search; he opted to be searched in the presence of a Gazetted Officer Shri S.D. Sharma, ACP posted at Crime Branch was called on telephone, he came at about 7.30 p.m. and introduced himself to the accused that he was an ACP and a Gazetted Officer and in his presence search of the accused was conducted; on search it was found that the accused was wearing a jacket having two hooks on upper portion and four strips on the lower portion. On opening the jacket it was found to contain opium weighing 2.200 Kgs. wrapped in a polythene paper. 20 gms. sample was taken from it. The sample and the remaining opium were separately packed and sealed with the seal of RSK of SI Ran Singh. After preparing seizure memos the case property was seized; a report Rukka was drawn; the Rukka, the case property and a CFSL form with the seal RSK were sent to the SHO, Inspector Mahesh Sharma who also put his own seal of MCS on the case property and CFSL form and deposited the same in the Malkhana. The sample was sent to the CFSL and its report Ex. P.W.7/B gave positive test opium with 4.9 percentage of morphine. The

accused was prosecuted. During the trial, prosecution examined Lal Singh, public witness as P.W. 3, Shri S.D. Sharma, ACP as P.W.5, SHO, Shri Mahesh Sharma as P.W. 6, ASI Siri Kishan as P.W.2 had registered the FIR, Constable Hari Singh as P.W. 1 who had taken the sample of opium to CFSL on 13.3.1990, ASI Zile Singh P.W. 4 who was the Moharar Malkhana who proved relevant entry Ex. PW4/A and about the deposit of the case property, Constable Resham Pal Singh P.W.8 as a member of the raiding party who had taken the case property and Rukka to the SHO, though his name was not included Along with the charge-sheet nor he was examined under Section 161, Cr.P.C. and S.I. Ran Singh P.W. 7 who was leading the raiding party and is the I.O. of the case. The accused in his statement under Section 313 Cr.P.C. denied the recovery and alleged false implication. He took the plea that 'Quarrel had taken place at the tea shop at Mangol Puri. I Along with 3/4 persons were taken to the P.S. and I was false implicated in this case'. He did not lead any evidence. The Trial Court on the material available convicted and sentenced the appellant as aforesaid.

4. The learned Counsel for the appellant has assailed the findings of conviction on various legal points. His first contention is that Section 50 of the Act is mandatory but its compliance has not been made inasmuch as the appellant was not given option for his search being made in the presence of a Gazetted Officer Magistrate and this has vitiated the whole trial.

5. Section 50 of the Act provides that before duly authorised person make a search under the provisions of Section 41,42 or 43, 'he shall if such person requires, take such person without unnecessary delay to the nearest Gazette Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate'.

6. This provision came for consideration in State of Punjab Vs . Balbir Singh, : 1994 CriLJ3702 where it was held that Section 50 confers a valuable right on the person to be searched in the presence of a Gazetted Officer or a Magistrate if he so requires. Such a search would impart much more authenticity and credit-writhing to the proceedings while equally providing an important safeguard to the accused. The authorised officer is obliged to inform the accused of this right of the

accused to afford him a proper opportunity to make option. This provision confers an important and valuable right and is intended to minimise the allegations of planting or fabricating by the prosecution and is mandatory. Its non compliance would affect the prosecution case and vitiate the trial.

7. Whether in the present case this provision has been complied or not?

8. There is no written notice under Section 50 given to the accused. P.W. 3 Lal Singh is a public witness who was joined in the raiding party. He has deposed that the accused was apprised of the contents of information and he was also told that if he wanted he could be produced before a Gazetted Officer or a Magistrate for conducting his search. The accused declined to avail that opportunity. He further stated that an ACP had come on being informed on telephone, who introduced himself as a Gazetted Officer and the search was taken in his presence.

9. P.W. 5 Shri S.D. Sharma was the ACP. He has deposed that on receipt of telephone call from S.I. Ran Singh, he reached the spot, disclosed his identity to the accused and search was taken in his presence. He has not attested the recovery report nor has appended a certificate about the search having been made in his presence.

10. P.W.8, Constable Resham Pal Singh has deposed that the option exercised was that he may be searched in the presence of a Gazetted Officer. He was neither cited as a witness in the report sent under Section 173 of the Code nor he was examined under Section 161 of the Code.

11. P.W. 7, S.I. Ran Singh, I.O. has stated that 'I also apprised the accused of the fact that if he so desired, he could be produced before a Gazetted Officer or a M.M. for his search. Accused offered for the same.' He has not stated if he had informed the accused that it was his right if he so desired that his search could be taken in the presence of a Gazetted Officer or a Magistrate. He has also made a very vague and unintelligible reply about the nature of option exercised by the accused. There is also inconsistency in the statements of P.W. 3, P.W. 7 and P.W. 8 regarding such option if exercised or not by the accused. Neither a written notice was given to the accused nor his option was obtained in writing in this respect.

The accused in his statement under Section 313 Cr.P.C. has denied as incorrect that any search was made or such option was given to or exercised by him. The ACP had also not stated about the nature of option given to and exercised by the accused.

12. Whether an option was given or not and if so, in what terms and what was the option exercised by the appellant could be proved if a written notice was served on the accused and duly acknowledged by him. The notice is mandatory and in my view, to serve its purpose of apprising him of his right of being searched in presence of a Gazetted Officer or a Magistrate and then asking him to exercise if he wanted the option in terms of Section 50 of the Act and to be a fair investigation such notice should have been witnessed by one or two witnesses especially by the independent witness available at the time of search. And when a Gazetted Officer or Magistrate is available, as in this case he should also verify and satisfy himself if such notice has been given and what was the nature of the option exercised by the accused that would lend credence to the whole process involved and gone into. In this case in his cross-examination the ACP (PW-5) has stated that no such notice was given. It shows that he himself had not satisfied about the nature of notice given and the option actually exercised by the accused. He has not appended his signatures on the recovery memos in token of the recovery having been made in his presence. This having not been done and the oral testimony of the witnesses examined in this respect being inconsistent, in my view, from this material it could not be said that a proper and valid notice under Section 50 of the Act was given to the accused before effecting his search. Non service of such a notice vitiates the trial as held in Balbir Singh's case (supra). The finding of the Trial Court is vitiated for this reason.

13. The other contention is that it is not proved that a CFSL form duly sealed with the specimen seals of the I.O. and S.H.O. was prepared and sent to CFSL Along with samples. This was necessary to ensure that the sample was intact at the time it was analysed by CFSL.

14. PW. 3 Lal Singh has stated that Form CFSL was filled in. PW. 7 has also stated that this Form was duly sealed with the seal of RSK and was handed over

to Const. Resham Pal Singh Along with Rukka and with two other sealed parcels. PW 2 has also so stated.

15. PW. 6 has deposed that Resham Lal Constable had brought two packets sealed with the seal of RSK and CFSL form with seal of RSK and he had put his own seal of MCS on these two packets and CFSL form and had deposited the same with Moharar Malkhana.

16. PW. 7 SI Ran Singh has also stated that form CFSL duly sealed with his seal of RSK was handed over to Const. Resham Pal Singh Along with Rukka and two other sealed parcels.

17. PW. 4 Malkhana Moharar has also deposed that SI Ran Singh had deposited two pullandas duly sealed with the seal of RSK and MCS Along with CFSL form which he had entered at Sl. No. 346 in Register No. 19. He has proved its copy Ex. PW. 4/ A. He has further stated that on 13.3.90 he had sent the two samples and CFSL form to CFSL office through Const. Hari Singh vide Road Certificate No. 67/29. In cross-examination he has however admitted that there is no reference of CFSL form in the entry. He has not given any Explanationn for this omission. He has also not proved that CFSL form was received back from CFSL office.

18. PW-1 has deposed that he had taken one sample bearing seals of RSK and MCS to CFSL. Neither there is any mention of CFSL form in the register No. 19 nor PW. 1 Const. Hari Singh has stated that it was given to him for deposit in CFSL office. There is no Explanationn forthcoming as to where that form has gone if it was actually prepared and deposited in the Malkhana. Ex. PW-4/A and the testimony of PW. 1 has not corroborated the testimony of PW. 5, PW. 7, PW. 8 and PW. 4. In these circumstances their testimony does not inspire confidence. It thus is not proved that CFSL form was deposited in the Malkhana or from there it was sent to CFSL.

19. CFSL form is a valuable safeguard to ensure that the sealed sample is not tampered with till its analysis by the CFSL Analyst. The CFSL form should not only be prepared and sealed by the officer making the seizure at the place where the case property is seized from the accused, it should also be sealed by the SHO to

whom the sample and case property is handed over and the same should accompany the sample sent to the CFSL. The purpose of specimen seal is to compare the same with the seals on the sample parcels meant for analysis and report by CFSL to ensure that the samples are not tampered with. In the absence of CFSL form, it cannot be said that the purity of the sample remained intact. Benefit of its absence should go to the accused.

20. Similar view has also been taken in *Rajinder Kumar v. State*, 1996 (4) AD Delhi 42; *Pushpa Devi Vs . State*, : 63(1996)DLT423 *Adeseqren Jackson v. State*, 1997 JCC 159; *Chameli Devi Vs . State*, : 50(1993)DLT439 *Lachho Devi v. State*, 1990 (2) SCC 395; *Sham Lal Vs . State*, : 68(1997)DLT348 and *Abdul Gaffar v. State*, 1996 JCC 497.

21. Then it is contended that statement of PW-8 Const. Ram Pal Singh was not recorded nor he is cited as a witness in the report under Section 173 of the Code. His presence at the spot is doubtful and this also casts doubt on his testimony and also on the prosecution case.

22. This is a fact that this witness was neither examined during investigation nor cited as a witness. PW. 7 SI Ran Singh has deposed that he had handed over the Rukka, sealed parcels and CFSL form to him. In cross-examination he has admitted that statement of Resham Pal Singh was not recorded by him. No Explanationn is given by him for this.

23. Const. Resham Pal Singh appeared as PW-8. He has deposed that he had taken Rukka, Pullandas and form CFSL to the Police Station; SHO put his seal and Rukka was marked to the Duty Officer, and after registration of the FIR he came back to the spot and gave the FIR to the IO. In cross-examination he has stated that his statement was recorded at the spot.

24. His statement cannot be said to be reliable and trustworthy in view of the statement of the IO. It is not safe to rely on him. His presence at the time of alleged search and recovery also becomes doubtful. It also casts suspicion on the prosecution case.

25. PW. 3 Lal Singh is resident of Village Mundka. He is a chance witness and his presence at the spot at the time of the occurrence is not explained. Courts have held that the testimony of a chance witness, although not necessarily false, is proverbially unsafe.

26. He is already a witness in another case of the Crime Branch, the Prosecuting Agency. His presence at the time of the alleged search and recovery also in the circumstances is not above suspicion and it is not safe to place implicit reliance on his testimony.

27. For these reasons, the finding of conviction cannot be said to be proper, valid and justified and as such the same is liable to be set aside.

28. This appeal is accordingly allowed. The impugned judgment of conviction and order of sentence dated 6.8.1992 are set aside.

29. The appellant shall be released forthwith unless he is required in any other case.

Appeal is allowed and disposed of.

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