

**Rajinder Kumar @ Pappu Vs. State**

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**Court :** Delhi

**Decided On :** Aug-24-2001

**Reported in :** 2001CriLJ4580; 94(2001)DLT201; 2001(60)DRJ111;  
2001(78)ECC37

**Judge :** Mr. K.S. Gupta, J.

**Acts :** Narcotice Drugs and Psychotropic Substances Act, 1985 - Sections 21, 42, 42(1) and (2), 50 and 50(1); [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 313

**Appeal No. :** Crl. A. No. 517/2000

**Appellant :** Rajinder Kumar @ Pappu

**Respondent :** State

**Advocate for Def. :** Sh. Sunil K. Kapoor, Adv.

**Advocate for Pet/Ap. :** Sh. K.B. Andley, Sr. Adv. and; Sh. Roopesh Sharma, Adv

**Disposition :** Appeal allowed

**Judgement :**

ORDER

**K.S. Gupta, J.**

1. This appeal is directed against the judgment dated 17th August, 2000 and order dated 19th August, 2000 of an Addl. Sessions Judge convicting the appellant under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short the 'Act') and sentencing him to undergo RI for 10 years and pay a fine of Rs. 1 lac. In default of payment of fine, the appellant is to further undergo RI for one year.

2. Case of the prosecution, in brief, is that on 22nd June, 1998 at about 11.40 AM, SI Joginder Singh received secret information that around 2.15 PM two boys possessing Opium/Smack - one having dark complexion and another whitish complexion and both wearing pants of black colour, after alighting at Khazuri Khas bus stand would go to Jai Prakash Nagar via Yamuna Pushta. This information was recorded by SI Joginder Singh in the DD at Seriall No. 10-A. Thereafter, he organized a raiding party and included therein SI Sanjay Sharma, HC Satyaveer Singh, Constables Birender Singh, Nawal Singh and Sanat Kumar. All of them left for Yamuna Pushta road. Around 2.00 PM, nakabandi was made near Khazuri red light and in the meantime SHO Ranbir Singh reached there. It is alleged that at about 2.10 PM, two boys going from Khazuri bus stand towards Yamuna Pushta road were apprehended on the pointing out of informer. One of them was the appellant. He was holding polythene bag of black colour in his right hand. He was apprised about the secret information by SI Joginder Singh. In the meantime, ACP Chander Mohan, too reached there and he after making enquiry from the appellant, asked SI Joginder Singh to give notice to him under Section 50 of the Act. Appellant refused to be searched in the presence of a Gazetted Officer or a Magistrate. Polythene bag held by the appellant on checking was found to be containing powder which was suspected to be Smack. On weighing, substance was found to be 650 gms. out of which 50 gms. was separated as sample. Remaining and sample substance were converted into separate parcels and sealed CFSL form was filled in. Both the parcels and CFSL, Chandigarh for analysis. Result of analysis which had been received after the filling of charge sheet, indicates that sample contained Diacetylmorphine (heroin).

3. To bring home the charge under Section 21 of the Act, the prosecution examined 9 witnesses in all. After scrutinising the statements of PWs. as also the

defense set up by the appellant in his statement under Section 313 Cr.P.C., he was convicted and sentenced in the manner stated above.

4. Submission advanced by Sh. K.B. Andley for appellant was that in terms of alleged notice under Section 50, Ex. PW-2/A, the appellant was only asked whether he desired to be searched in the presence of a Gazetted Officer or a Magistrate instead of being apprised that he had a right under law to be searched so and, thus, there was total non-compliance of Section 50 of the Act. In support of the submission, strong reliance was placed on the decision in *K. Mohanan v. State of Kerala*, 2000 SCC (Cri) 1228.

5. Aforesaid notice Ex. PW-2/A which is in vernacular and contents whereof are material, is reproduced below:-

'Aap Rajender @ Pappu s/o Shiv Narayan R/o H.No.6144? Shiv Mandir, Naya Bans Fetej Pur, Delhi bajariye notice haza suchit kiya jata hal ki police party ko suchna hai ki aapke pass najayaj smack ya afeem hai. Agar aap chahein to aap apni talashi kisi magistrate ya rajpatrit अधिकारी द्वारा लि जा सक्ते हain. Aur unmein se kisi ko mauke par bulane ka intazam kiya ja sakta hai.'

6. As is manifest from para No. 4 of the decision in *K. Mohan's case* (supra), before search of appellant/accused was taken, he was asked by PW-1 whether he required to be searched before a gazetted officer or a Magistrate for the purpose of search and he answered in negative. While dealing with the argument canvassed on behalf of appellant that mandatory requirement of Section 50 had not been complied with, it was held in paras 5, 6 & 7 (pages 1229 & 1230) of the decision:-

'5. The Constitution Bench of this Court in *State of Punjab v. Baldev Singh* has considered various aspects of the compliance with Section 50 of the Act. The Bench has laid down the propositions of law of which the first and second are extracted below: (SCC pp. 208-09, para 57)

'57.(1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the

person concerned of this right under sub-section (1) of Section 50 of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.

(2) That failure to inform the person concerned about the existence of his right to be searched before a gazetted officer or a Magistrate would cause prejudice to an accused.'

6. If the accused, who was subjected to search was merely asked whether he required to be searched in the presence of a gazetted officer or a Magistrate it cannot be treated as communicating to him that he had a right under law to be searched so. What PW1 has done in this case was to seek the opinion of the accused whether he wanted it or not. If he was told that he had a right under law to have it (sic himself) searched what would have been the answer given by the accused cannot be gauged by us at this distance of time. This is particularly so when the main defense adopted by the appellant at all stages was that Section 50 of the Act was not complied with.

7. We, therefore, hold that there was non-compliance with Section 50 of the Act and consequently the evidence of search spoken to by PW1 cannot be acted upon in the absence of any other independent evidence to show that the appellant was in possession of the contraband article.'

7. Contents of said notice Ex.PW-2/A are by and large identical to that served on the accused in K. Mohanan's case (supra). Obviously, there was no-compliance of the provisions of Section 50 of the Act as urged on behalf of appellant.

8. It was next contended on behalf of appellant that there was also non-compliance of mandatory provision of Section 42(2) in as much as copy of DD No. 10-A, Ex.PW-8/A was not sent by Joginder Singh IO (PW-8) to his immediate superior official. Reliance was placed on the decision in Abdul Rashid Ibrahim v. State of Gujarat, 2000 SCC (Cri.) 496. While dealing with similar issue in this decision, it was held in paras No. 17 & 18:-

'17. A two-Judge Bench of this Court has considered the said question Along with other questions in State of Punjab v. Balbir Singh. In para 25 of that judgment the conclusions were laid down, of which what is relevant for this case regarding Section 42(1) is the following: (SCC p.321, para 25)

'25. (2-C) Under Section 42(1) the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc. he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.

To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.

(3) Under Section 42(2) such empowered officer who takes down any Information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same affect the prosecution case. To that extent it is mandatory. But if there is delay wither it was undue or whether the same has been explained or not, will be a question of fact in each case.'

18. When the same decision considered the impact of non-compliance with Section 50 it was held that 'it would affect the prosecution case and vitiate the trial'. But the Constitution Bench has settled the legal position concerning that aspect in State of Punjab v. Baldev Singh the relevant portion of which has been extracted by us earlier. We do not think that a different approach is warranted regarding non-compliance with Section 42 also. If that be so, the position must be the following:

If the officer has reason to believe from personal knowledge or prior information received from any person that any narcotic drug or psychotropic substance (in

respect of which an offence has been committed) is kept or concealed in any building, conveyance or enclosed place, it is imperative that the officer should take it down in writing and he shall forthwith send a copy thereof to his immediate official superior. The action of the officer, who claims to have exercised it on the strength of such unrecorded information, would become suspect, though the trial may not vitiate on that score alone. Nonetheless the resultant position would be none of causing prejudice to the accused.'

9. Adverting to the evidence, SI Joginder Singh, PW-8 has deposed that secreter informer informed him on telephone around 11.40 AM that at about 2.15 PM two boys having Opium/Smack would go towards Jai Prakash Nagar by alighting at bus stand Khazuri via Yamuna Pushta road and this information was recorded in DD at Serial No.10-A. Ex.PW-8/A is the copy of DD No. 10-A. While leaving for the spot, he left a message with the duty officer to convey about the secret information to the SHO as and when he reaches the police station. SHO Ranbir Singh, PW-9 has stated that the duty officer informed him on telephone regarding secret information on phone. He conveyed this information to ACP Chander Mohan on phone. It is in the deposition of ACP Chander Mohan, PW-3 that he was told about secret information by inspector Ranbir Singh on telephone on 22nd June, 1998. Thus, as per the admission of PWs. 8, 9 & 3, copy of Ex. PW-8/A was not sent to immediate official superior by SI Joginder Singh, PW-8. So, there was again violation of provision of Section 42(2) of the Act causing prejudice to the appellant. Considering the ratio of both the aforesaid decisions of the Apex Court, the appellant deserves to be acquitted on account of breach of provisions of both the said Sections.

10. For the foregoing discussion, while allowing the appeal, judgment and order under appeal are set aside and appellant is acquitted of the charge under Section 21 of the Act.