

Badshah Vs. State

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Court : Delhi

Decided On : Jan-18-2000

Reported in : 2000IIIAD(Delhi)668; 2000CriLJ2119; 84(2000)DLT652; 2000(53)DRJ487; 2000(69)ECC615

Judge : Dalveer Bhandari, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 50

Appeal No. : Crl. Appeal No. 57 of 1992

Appellant : Badshah

Respondent : State

Advocate for Def. : Mr. Pawan Bahl, Adv.

Advocate for Pet/Ap. : Mr. Manoj D. Taneja, amices Curia

Judgement :

ORDER

Dalveer Bhandari, J.

1. This appeal has been on board for a long time. No one is appearing for the appellant. thereforee, in the interest of justice, Mr. Manoj D. Taneja, Advocate, is appointed amices Curiae in this case.

2. This appeal is filed against the judgment of the learned Additional Sessions Judge dated 6.2.1992 whereby the appellant was convicted and sentenced to 10 years rigorous imprisonment and imposed fine of Rs.1 lakh under Section 21 of the NDPS Act. The brief facts which are necessary for disposal of this appeal are recapitulated as under.

3. As per the prosecution on 24.8.1989 Ved Parkash, ASI, Investigating Officer in this case, was on patrolling duty Along with Rejinder Singh, Head Constable Virender Singh, Constable, Om Pal Singh, Constable and Sher Singh, Constable at police booth within the bounds of Police Station, Partap Nagar, Delhi. On being tipped off, that one person wearing grey coloured pants and a yellow coloured shirt would come from Andha Mughal Road for going to Subzi Mandi Railway Station at Gali No. 6, with smack, the I.O. organized a raiding party. The public witness Jagdish Narain was also joined in the raiding party. At about 2.30 p.m. accused Badshah was nabbed at corner of Gali No. 6 at the pointing of the informer. The accused was informed about the contents of the information. He was also informed that if he so desired he could be produced before ACP Subzi Mandi for conducting his search. The accused refused the said proposal. In the meantime, Inspector Gyan Chand, SHO also arrived at the spot. He directed the Investigating Officer to search the accused. The search resulted in recovery of one polythene packet containing five grams of smack. Out of the recovered smack one gram was separated as a sample. The sample and the remaining smack were separately packed and sealed with the seal bearing the initials of VP belonging to the SHO. CFSL Form was filled in and both the seals were affixed thereon. Both the seals after use were handed over to PW Jagdish Narain. Both the packets were seized vide recovery memo Ex. PW 3/A. Ruqqa PW 1/a was sent for registration of the case through Constable Om Pal Singh. Raj Pal Singh Head Constable P.W.1 registered the instant case. CFSL result Ex. PW 6/B revealed that the sample sent to CFSL had given positive test for heroin. In view of the above facts the accused was challenged and tried for an offence punishable under Section 21 of the NDPS Act.

4. Learned Additional Sessions Judge convicted the accused and sentenced him to 10 years rigorous imprisonment and imposed a fine of Rs.1 lakh. Mr. Taneja,

learned amices Curiae, pointedly argued that there is no compliance of Section 50 of the NDPS Act and consequently the conviction is unsustainable in law. Section 50 of the NDPS Act reads as under:-

50. Conditions under which search of persons shall be conducted._ (1) When any office duly authorised under Section 42 is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall, if such person 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 anyone excepting a female.

5. Mr. Taneja submitted that according to this section and the settled position of law the accused is entitled to be produced before a Gazetted Officer or a Magistrate. The prosecution is under an obligation to give comprehensive options to the accused. In the instant case, partial option has been given to the accused. The learned Additional Sessions Judge has taken the view that the law requires that the person to be searched should be produced either before a Gazetted Officer or a Magistrate and the choice of the officer lay with the police officer and not with the accused. The relevant findings of the learned Additional Sessions Judge are in paras 10 and 11 of the judgment under appeal. The said paras 10 and 11 are reproduced below :-

'10. It is thus crystal clear that in this case no option to the accused for getting his search conducted in the presence of the Magistrate was given. It must be borne in mind that section 50 lays down condition under which the search of a person is to be conducted. The law requires that the person to be searched should be

produced either before a Gazetted Officer or a magistrate. Choice of the officer lies with the police officer and not with the accused. The requirement of law stands fulfilled the moment the accused is told that he can be produced before a Gazetted Officer. The before a Gazetted Officer. The Investigating Officer need not take further steps once the accused spills beans about the alleged crime.

11. The legislature in its wisdom used the words 'Gazetted Officer' or 'a Magistrate'. The word 'Or' is significant. It is also notable that the words 'and' or 'Judicial' Magistrate' or 'a Metropolitan Magistrate' are conspicuous by their absence. This is for the convenience of the Investigating Agency and not the accused which is relevant. Much importance cannot be attached to the word 'Magistrate' because he too like any other Gazetted Officer is a Gazetted Officer.'

6. The interpretation given by the learned Additional Sessions Judge is contrary to the settled position of law. The Constitution Bench of the Supreme Court in the case State of Punjab v. Baldev Singh 1999 SCC 1080. observed that there has to be compliance of Section 50 of the Act. The relevant findings of the said judgment are reproduced as under:-

'25. To be searched before a Gazetted Officer or a Magistrate, if the suspect so requires, is an extremely valuable right which the legislature has given to the person concerned having regard to the grave consequences that may entail the possession of illicit articles under the NDPS Act. It appears to have been incorporated in the Act keeping in view the severity of the punishment. The rationale behind the provision is even otherwise manifest. The search before a Gazetted Officer or a Magistrate would impart much more authenticity and creditworthiness to the search and seizure proceeding. It would also verily strengthen the prosecution case. There is, thus, no justification for the empowered officer, who goes to search the person, on prior information, to effect the search, of not informing the person concerned of the existence of his right to have his search conducted before a Gazette Officers or a Magistrate, so as to enable him to avail of that right. It is however, not necessary to give the information to the person to be search about his right in writing. It is sufficient if such information is communicated to the person concerned orally and as far as possible in the

presence of some independent and respectable persons witnessing the arrest and search. The prosecution must, however at the trial establish that the empowered officer had conveyed the information to the person concerned of his right of being searched in the presence of a Magistrate or a Gazetted Officer, at the time of the intended search. Courts have to be satisfied at the trial of the case about due compliance with the requirements provided in Section 50. No presumption under Section 54 of the Act can be raised against an accused, unless the prosecution establishes it to the satisfaction of the court, that the requirements of Section 50 were duly complied with.'

7. In Babu v. State of Kerala 1999 3 A.D. (SC) 981 their Lordships of the Supreme Court observed as under:-

'It is the obligation of the Police Officer to inform the appellant of his right to be searched in presence of a Gazettes Officer or a Magistrate, if the person of the accused is to be searched. Admittedly, in this case brown sugar was recovered from the person of the accused and not from any other place. He was, thereforee, entitled to be informed about his right. Since that was not done, as rightly conceded, this is clearly a case of non-compliance of the requirement of Section 50 of the NDPS Act.'

8. Their Lordships of the Supreme Court in a recent judgment in T. Hamza v. State of Kerala 1999 3 A.D. SC 413 have taken the view that there has to be a full compliance of Section 50 of the NDPS Act and substantial or partial compliance would be vocative of Section 50 of the NDPS Act and the conviction is liable to be set aside.

9. On consideration of the settled position of law, the impugned judgment is set aside. Consequently, the appeal filed by the appellant is allowed. The appellant, who was released on bail, need not surrender. His bail bonds are cancelled.

10. Before parting with this case, I would like to placed on record my appreciation for the able assistance rendered to this Court by the learned amices Curiae, Mr.Manoj D.Taneja. I also place on record my appreciation for the fair approach adopted by the learned Counsel for the State, Mr. Pawan Bahl.

11. The appeal is accordingly disposed of.

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