

Amarjit Singh and anr. Vs. State (Delhi Administration)

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Court : Delhi

Decided On : Dec-02-1994

Reported in : 1994IVAD(Delhi)1171; 1995CriLJ1623; 1995(1)Crimes777; 1995(32)DRJ110

Judge : P.K. Bahri and; S.D. Pandit, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 293; [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 20

Appeal No. : Criminal Appeal No. 91 of 1992

Appellant : Amarjit Singh and anr.

Respondent : State (Delhi Administration)

Advocate for Pet/Ap. : S.K. Agarwal,; Jatinder Sarin,; L.R. Luthra and;

Judgement :

P.K. Bahri, J.

(1) The appellants - Amarjit Singh and Prem Prakash have been convicted of offences punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act vide judgment dated May 25, 1992, by an Additional Sessions Judge, Delhi, and Amarjit Singh has been sentenced to undergo rigorous imprisonment for a period of twenty years and to pay a fine of Rs. 2,00,000.00 and

in default to undergo simple imprisonment for a period of two years more. The appellant- Prem Prakash, however, has been sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.1,00,000.00 and in default to undergo simple imprisonment for one year more. They have filed the present appeal challenging their convictions and sentences.

(2) Facts leading to the prosecution of the appellants, in brief, are that a secret informer on May 8, 1987, had given the information to the Special Staff of Morris Nagar area that a Sikh gentleman would be bringing contraband in a Jonga Jeep of gray colour on outer ring road for going to Mukherjee Nagar. A raiding party was organized by the Special Staff which comprised of Sub-Inspectors Data Ram, Jagram, Mohan Singh, Asstt. Sub-Inspectors Sujan Singh, Hari Singh, Head Constables Ramesh Kumar, Sarup Singh, Dalel Singh and Constables Nichhiter Singh, Dharamvir Singh, Karan Singh, Ranbir Singh and Brahm Pal Singh. The raiding party was headed by Inspector Raghubansh Singh Dhaiya. After joining a public witness Ashok Kumar the raiding party laid a picket at about 1.30 Pm near Pumping Station Najafgarh Lane in Mukherjee Marg. At about 2.30 Pm a Jonga Jeep was found coming which bore the registration No.DHD 5004 and was being driven by Amarjit Singh while Prem Prakash was sitting in the said Jeep and the said Jeep was apprehended and an offer was made to both the appellants that if they wanted the search of the jeep as well as of the persons of the appellants could be carried out in presence of a gazetted officer and on the appellants declining the said offer, the Jeep was searched and it was found to contain nine polythene bags of white colour containing charas concealed in the cavity * under the floor of the Jeep and on weighment the bags were found to contain 90 kgs of charas. Samples were taken from each of the nine bags. The samples as well as the remaining charas were converted into separate parcels and they were duly sealed with the seals of the Sho as well as of the Sub- Inspector Mohan Singh. The case was registered against the appellants and the case property was deposited in the Malkhana and thereafter samples were sent to Central Forensic Science Laboratory (for short 'CFSL') and on receipt of the report from the Cfsi showing that the samples were of charas, the case was brought in court against the appellants.

(3) The learned counsel for the appellants has vehemently contended that no evidence has been led by the prosecution to prove beyond shadow of reasonable doubts that the samples which were allegedly taken at the spot and were duly sealed were the same samples which had been got analysed from the expert of the CFSL. He has urged that there is no evidence to show that Cfsi form which was alleged to have been filled in at the spot on which the specimen of the two seals were affixed had been at all deposited in the Malkhana and had at any time been taken by the constable who took the samples to the Cfsi for handing over the same to the Experts of Cfsi to enable them to tally the seals affixed on the particular Cfsi form with the seals appearing on the parcels of samples. So, it is urged that there is no evidence of the prosecution to show that the commodity recovered from the appellants was, in fact, Charas. He has urged that possibility of the samples being tampered with in the present case cannot be completely overlooked inasmuch as the link evidence which could complete the chain that the samples were duly sealed at the spot and that the same had reached the Malkhana of the Police Station and had also reached unhampered the Experts of CFSL.

(4) He has further pointed out that in the present case, this material evidence being not led by the prosecution makes the prosecution case more doubtful when it has come out in evidence that although according to the prosecution the case property was duly sealed and put in the Malkhana on May 8, 1987 itself yet there is cogent and convincing evidence led on the record by the appellants to prove that as a matter of fact the case property did not remain intact in the Malkhana of the Police Station and rather on the following day May 9, 1987, the case property was opened and Along with the case property, the vehicle in question were allowed to be photographed by the press reporters which would show that the case property did not remain unhampered from the day it was seized and possibility of the same being changed cannot be overlooked completely in the present case.

(5) The learned counsel for the State, however, has argued that Cfsi report by itself shows that the expert had received the Cfsi form and had compared the seals appearing on the samples with the specimen seals appearing on the Cfsi

form and found them to be tallying and thus, there could be no occasion for the samples to have been tampered with from the day the samples were duly sealed till they were examined by the expert of the CFSL. She has also urged that mere fact that some case property has been photographed Along with a particular vehicle by the press reporter on May 9, 1987, would not show that what is appearing in the photographs is the same case property which was seized from the appellants' vehicle on May 8, 1987.

(6) As far as the evidence led by the prosecution in the present case is concerned, PW1 Head Constable Ved Singh, who was in charge of the Malkhana, Police Station Kingsway Camp at the relevant time, had proved on record a copy of the entries made in the Malkhana Register. A perusal of the said copy of the entries made in the Malkhana Register Ex.PW1/A1 to PW1/A8 does not show that any CfsI form filled in respect of the case in question had been deposited in the Malkhana Along with the case property. In court also Head Constable Ved Singh did not say anything about the CfsI form. Constable Brahm Pal Singh PW8 is stated to have been handed over the nine sealed parcels containing the samples on May 12, 1987 which he is stated to have deposited intact with the office of the CfsI and he deposed that the samples remained unhampered but he does not say on oath that any CfsI form had been handed over to him containing the' specimen seals Along with the said sealed parcels or he had handed over any such CfsI form at the office of the CfsI at any time. So, we do not know exactly from the evidence led by the prosecution that the CfsI form which finds mention in the report of the CfsI Ex.PA was the same CfsI form or not which is stated to have been filled in by the Investigating Officer at the time the samples were converted into sealed parcels and the specimen of the two seals used on the said parcels had been affixed on such CfsI form.

(7) The learned counsel for the State has cited Bennehard j. Framous @ Or'tege Francis Vs State, : 48(1992)DLT370 where one of us (Bahri, J.) has held that in case an entry from the Malkhana Register shows that CfsI form had been sent Along with the constable to the CfsI with the samples then it cannot be urged that there has taken place any tampering of the samples or the CfsI form had not been sent Along with the samples. So, he has urged that as it is mentioned in the report

Ex.PA that the specimen seals appearing on the CfsI form stand tallied with the seals affixed .on the samples, the court should hold that the same CfsI form had been sent on which specimen seals had been affixed at the time of taking of the samples.

(8) We are afraid that such an inference cannot be drawn in the present case from the contents of the entries in the Malkhana Register. In the entry proved from the said Register there is no mention that either the CfsI form has been deposited or the same has been sent to CfsI Along with samples. So, the case of Francis (supra) is distinguishable on facts. It was for the prosecution to prove that not only the case property was duly sealed with particular seals and was duly deposited in the Malkhana unhampered but it was also incumbent upon the prosecution to show that the samples which had been duly sealed remained intact till they reached the office of the CFSL. In proving these facts it was necessary for the prosecution to prove that the CfsI form containing the specimen seals which WaS duly filled at the time of taking of the samples also remained intact and it reached the office of the CfsI Along with the samples. Unfortunately for the prosecution, there is not an iota of evidence to show that the CfsI form, which was allegedly filled in at the time of taking of the samples, was sent in the same condition to the office of the CFSL. We do not know as to where the said particular CfsI form remained during all this period.

(9) It is also significant to mention that although the seal used on the case property by the Sho remained with the Sho and the seal used by the Investigating Officer is stated to have been given to Ashok Kumar, a public witness, yet neither Ashok Kumar nor the Investigating Officer in their statements in court disclosed as to what happened to the seal which was handed over to Ashok Kumar. The Investigating Officer does not say that the said seal had not been taken back by him before the samples were sent to the office of the CFSL.

(10) In Anoop Joshi Vs State, 1992 (2) C.C.C 314, the prosecution had failed to lead evidence to show as to where the CfsI form containing the specimen seals had remained till the case property was examined by the expert of the CFSL. The court keeping in view this particular piece of evidence and also other evidence

appearing in that case came to the conclusion that perhaps the samples sent to the Cfsi did not remain unhampered. Same view has been expressed in the case of Mool Chand Vs State, 1993 (1) C.C.C 564, by a Single Bench of this Court.

(11) In order to prove that the case property did not remain duly sealed as averred by the prosecution, the defense has examined DW1 from the office of Hindustan Times and proved on record copy of the newspaper dated May 10, 1987, which contains not only the news item pertaining to the recovery made in this case but also a photograph showing Asi Hari Singh and Head Constable Dalel Singh handling the nine parcels being taken Out from the Jonga Jeep and those parcels are open and charas is shown to be taken out from some of the parcels. DW2 Sharad Saxena, who was working as Photo Journalist with the Times of India at the relevant time, has deposed that on May 9, 1987, he had gone to Police Station , Morris Nagar and had taken the photographs of the case property in question and the negatives of which are Exs.PW2/1 to PW2/25 and the positives are Exs.DW2/26 to PW2/50 and one of the enlarged photograph is Ex.DW2/51 which was published in the Times of India newspaper dated May 10, 1987. Copy of the said newspaper is Ex.DW2/52. DW3 is Rahul Dutta DW3, a Reporter of the Hindustan Times, who had given the report pertaining to the recovery of charas from the appellants in newspaper dated May 10, 1987, copy of which is Ex.DA. He had attended the Press Conference addressed by Smt.Kiran Bedi, the then Deputy Commissioner of Police of the area in whose jurisdiction the Police Station Kingsway Camp came.

(12) If we go through the report given in these newspapers, as given out by Smt.Kiran Bedi, it becomes evident that the story put forth by the prosecution with regard to the Jeep in question being apprehended while in possession of the appellants is not correct because what is mentioned in.. the newspaper reports based on the information given by Smt.Kiran Bedi is that Amarjit Singh-appellant was coming on a two- wheeler scooter who abandoned the scooter and then was apprehended whereas the prosecution case is that he was driving the said Jonga Jeep. It is true that normally the newspaper reports are not to be given any importance unless it is shown that they are based on some direct evidence, such reports are otherwise merely hearsay evidence.

(13) However, the fact that Asi Hari Singh and Head Constable Dalel Singh were the members of the raiding party in question stands evident from the Fir of this case and Si Mohan Singh, the Investigating Officer of this case, who had effected the recovery from the appellants, admits in his cross-examination that photograph in question shows Asi Hari Singh at point X and Head Constable Dalel Singh at point Y. He also identified the said Jonga Jeep in question in the said photograph. In case the Jonga Jeep in question had remained in Malkhana of Police Station Kingsway Camp after it was seized on May 8, 1987, it is not understood how the same could be got photographed on May 9, 1987, Along with with Asi Hari Singh and Head Constable Dalel Singh in Morris Nagar from the press photographers. None of the police witnesses, particularly the Sho and Si Mohan Singh had given any clarification as to how 'this Jonga Jeep in question came to be taken out from the Malkhana of Kingsway Camp Police Station and came to be photographed Along with Asi Hari Singh and Head Constable Dalel Singh.

(14) This photograph had appeared in the newspapers dated May 10, 1987. That should have induced the Investigating Officer to further investigate the matter as to how this photograph showing not only the 'Jeep in question but also the nine parcels and charas being taken out from those parcels by Asi Hari Nagar and Head Constable Dalel Singh came to be taken. The Sub Inspector ought to have investigated this aspect before filing the challan in the case and ought to have given some Explanationn in the challan itself as to how this photograph came to be taken on May 9, 1987.

(15) It has been recorded in the Rukka, the basis of the Fir, by Asi Mohan Singh that an official photographer had been summoned and he had taken photographs of the recovered charas on May 8, 1987, but no such photographs have been placed before the court Along with the challan and even official photographer has not been cited as a witness. The question is not whether any official photographer had taken any photographs on May 8, 1987, or not. The question is whether the press photographer DW2 Shri Sharad Saxena had taken the said photographs on May 9, 1987 or not in Morris Nagar. There is no reason for the court to disbelieve the testimony of DW2 Sharad Saxena which is duly supported by the negatives and photographs and also finds corroboration from the news reports appearing

Along with the said photographs in the newspapers mentioned above, particularly when Asi Mohan Singh has vouchsafed the correctness of the photograph by identifying Asi Hari Singh and Head Constable Dalel Singh in the aforesaid photograph and also the Jonga Jeep in question. If that is so, it becomes evident that the case property did not remain duly sealed as alleged by the prosecution from May 8, 1987, onwards.

(16) It appears that not only Asi Hari Singh and Head Constable Dalel Singh but also Smt.Kiran Bedi were out to enjoy the publicity in the press with regard to the present case. There has appeared no contradiction about the contents of the Press Conference appearing in the said two papers as given by Smt.Kiran Bedi at any point of time that the contents of the said newspapers are wrong. It would be better if while investigation in serious cases is in progress, the higher officers do not go for publicity in press unless they ensure that correct facts appear in the newspapers based on the information given by said higher officers. Sometime publicity hungry officers do spoil the case for the prosecution when the same undergoes a trial as it had happened in the present case. In order to derive cheap popularity through such publicity in the newspapers in getting themselves photographed with the case property, the prosecution case has been thrown overboard by such ill-advised acts of the police officials.

(17) Report of the Cfsi expert Ex.PA has been tendered in evidence in the present case without any objection being raised regarding mode of proof and the expert was not called in the witness box for proving the contents of the said report. The contention raised by the learned counsel for the appellants is that the expert, who has given the said report, does not fall in categories of the experts mentioned in Section 293 of the Code of Criminal Procedure (for short 'the Code'). Section 293 of the Code reads as follows:

'293.Reports of Certain Government scientific experts.- (1) Any document purporting to be a report under the hand of a Government scientific expert to whom this section applies, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may be used as evidence in any inquiry, trial or other proceeding under this

Code. (2) The Court may, if it thinks fit, summon and examine any such expert as to the subject-matter of his report. (3) Where any such expert is summoned by a Court and he is unable to attend personally, he may, unless the Court has expressly, directed him to appear personally, depute any responsible officer working with him to attend the Court, if such officer is conversant with the facts of the case and can satisfactorily depose in Court on his behalf. (4) This section applies to the following Government scientific experts, namely:- (a) any Chemical Examiner or Assistant Chemical Examiner to Government; (b) the Chief Inspector of Explosives; (c) the Director of the Finger Print Bureau; (d) the Director, Haffkeine Institute, Bombay; (e) the Director (Deputy Director or Assistant Director) of a Central Forensic Science Laboratory or a State Forensic Science Laboratory; (f) the Serologist to the Government.'

(18) This report is given by Sh.C.L.Bansal, Senior Scientific Assistant (Chemistry), Central Forensic Science Laboratory. The said officer is not designated Chemical Examiner or Asstt.Chemical Examiner to the Government. The reports of the certain officers of the Cfsi have been made admissible in evidence without the experts being examined in clause (e) referred above. They are Director and Deputy Director or Assistant Director. Shri Bansal is not shown to be anyone of them. It is, hence, evident that Section 293 was not applicable to this part. If that is so, his report could not have been proved without calling him as a witness. Various Single Bench decisions have been brought to our notice which have taken this view such as Heera Lal Vs State (Delhi), 1994 (2) C.C.C 300, Nizamuddin Vs The State, 1994 4 Ad 50,. Attar Singh Vs State (Delhi Admn.). 1994 3 AD 626, and Islam Vs The State (Delhi Admin.), 1994 3 Ad 1495; : 56(1994)DLT49 . It is true as held in these judgments that only the reports of the experts mentioned in Section 293 of the Code could be tendered in evidence without the experts being examined in court to prove such reports. However, if the report is of any other expert, it is evident that unless that expert appears in the witness box and proves his report, the same should not be allowed to be taken in evidence.

(19) Under Section 45 of the Indian Evidence Act, an opinion of an expert on science or art etc. is relevant piece of evidence. Sh.Bansal although not falling in categories of the officers enumerated in Section 293 of the Code yet he is an

expert in science being Senior Scientist in Chemistry and thus, his opinion would be relevant piece of evidence in view of Section 45 of the Indian Evidence Act. It is to be emphasized here that this report Ex.PA was allowed to be tendered in evidence without any objection being raised by the defense with regard to the mode of proof. In such a situation the question arises when a particular document has been allowed to be proved and exhibited without objection being raised by the defense, can the court entertain any such objection regarding mode of, proof at any later stage of the case? We are of the view that such an objection ought to be raised by the defense at the time the document is sought to be tendered in evidence and such an objection regarding mode of proof cannot be allowed to be raised by the defense at any later stage of the trial and more particularly in appeal.

(20) In the case of Attar Singh (Supra), an argument was raised on behalf of the State that once a document has been allowed to be tendered in evidence without any objection regarding mode of proof, then such a document cannot be rejected as being not proved by calling the expert to prove the same at any later stage of the case and reliance was placed on the case of Phool Kumar Vs Delhi Administration, : [1975]3SCR917 . but the learned Single Judge had distinguished the aforesaid judgment mentioning that said observation is made keeping in view the old provisions of Section 510 of the Code and there has taken place certain vital amendments in the corresponding Section 293 of the new Code. The reason given by the learned Single Judge in distinguishing the said judgment of the Supreme Court with respect does not appear to be valid. In Section 510 of the Code it has been provided that on application being moved either by the State or by the defense the expert could be called for purposes of cross- examination with regard to his report which could be tendered in evidence under the provisions of Section 510 of the Code but in Section 293 the discretion has been given to the court only that the court may in any case call the expert as a witness even though report of such an expert witness can be tendered in evidence without calling the expert under Section 293 of the Code. Now there has been conferred no right on the defense or on State to call the expert in witness box for cross-examination purposes.

(21) However, in the case of Phool Kumar(supra) the law laid down was that if the report has been accepted without any objection regarding the mode of proof the same cannot be objected to at the later stage of the trial. This ratio laid down by the Supreme Court is in consonance with the ratio laid earlier in P.C.Purushothama Reddiar Vs S.Perumal, : [1972]2SCR646 , Bhagat Ram Vs Khetu Ram & Another, Air 1929 Pc 110,and K.Latchayya Subudhi Vs V.Seetammayya & Others, Air 1925 Mad 257. The Calcutta High Court, the Madras High Court and Orissa High Court have also taken similar view in the cases of Goswami Malti Vahuji Maharaj Vs Purushottam Lal Poddar, : AIR1984 Cal297 , A.V'.S.Perumal Vs Vadivelu Asari, : AIR1986 Mad341 , and Sailendra Kishore Patnaik Vs Harekrushna Satpathy & Others, : AIR1978 Ori125 . These judgments were not brought to the notice of the court in the case of Attar Singh(supra). The learned counsel for the appellants, however, sought some support from some observation made in para 13 in the case of Chaman Lal Vs State of Punjab, : 1970 CriLJ1266 , and urged that such an objection regarding mode of proof can be raised at any stage:

'THE appellant cannot rely on Exhibit D.B. dated 27th August, 1962 to establish good faith in writing the letter dated 1st August, ' 1962. Furthermore, Exhibit D.B. which is alleged to have been written"by the residents of Sunajpur was not proved by calling persons who are alleged to have signed. Documents do not prove themselves. Exhibit D.B. was not proved by the persons 'who are alleged to have signed the same nor was the truth of statements contained in Exhibit D.B. proved. The enquiry made by the Civil Surgeon on 27th .August 1962, was found by the High Court to have been engineered by the private animus of the appellant against the respondent by sending some residents to the place of enquiry. This finding not only disproves good faith but establishes total lack of care and prudence on the part of the appellant.'

(22) We do not understand how any thing said above supports the contention of the learned counsel. The facts mentioned in that case do not show that documents were exhibited without any objection being raised. The court rather held that there is no proof regarding veracity of the contents of document.

(23) So, we hold that the aforesaid judgments given by various Single Benches of these Courts allowing such an objection to be raised subsequently at the stage of appeal are not laying down the correct law. The ratio laid down in the aforesaid cases on this point is over-ruled.

(24) After we have heard the arguments and reserved the judgment we have come across a judgment given in Criminal Appeal No-188/94, Shankaria @ Shankar Vs The State (Delhi Admn.) : 56(1994)DLT662 , decided on November 23, 1994, by a Single Judge of this Court which has referred to all the relevant judgments on the subject and has laid down that once a document is properly admitted the contents of the documents would stand admitted in evidence and if no objection has been raised with regard to its mode of proof at the stage of tendering in evidence such a document, no such objection could be allowed to be raised at any later stage of the case or in appeal. We endorse this position of law.

(25) Another point raised in the present case is that there has been no compliance of mandatory provisions of Section 50 of the Act.

(26) In the case. of State of Punjab Vs Balbir Singh, : 1994 CriLJ3702 , the Supreme Court has in para 27 of the judgment has laid down one of the propositions with regard to the provisions of the Act as follows:-

'If a police officer without any prior information as contemplated under the provisions of the Ndps Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offence as provided under the provisions of Cr.P.C. and when such search is completed at that stage Section 50 of the Ndps Act would not be attracted and the question of complying with the requirements there under would not arise. If during such search or arrest there is a chance recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the Ndps Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the Ndps Act.'

It is also laid down by the Supreme Court in para 27(5) as follows:

'ON prior information, the empowered officer or authorised officer while acting under Sections 41(2) or 42 should comply with the provisions of Section 50 before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a gazetted officer or a magistrate as provided there under. It is obligatory on the part of such officer to inform the person to be searched. 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 noncompliance of Section 50 which is mandatory and thus, it would affect the prosecution case and vitiate the trial. After being so informed, whether such person opted for such a course or not would be a question of fact.'

(27) In the present case, admittedly there was a prior information available with the Special Staff which constituted the raiding party and thus, Section 50 of the Act was mandatory provision which was required to be complied with by the said police officers. In the Rukka which is the basis of the Fir it has been mentioned that appellants were apprised of their right to get their search being effected from a gazetted officer. It is not mentioned in the Fir that they were told that they have a right to get their search effected before a Magistrate. So, the strict and mandatory provisions of Section 50 of the Act have not been complied with as per the contents of the Fir itself. In the present case, the Investigating Officer and the Sho who was leading the police raiding party have deposed that in fact, the option was given to the appellants that their search could be effected not only in presence of a gazetted officer but if they so desired, in presence of a Magistrate as well. It is true that witnesses have not been cross-examined by the defense on this aspect of the case but this evidence given in court by the police officers is in contradiction as to what has been mentioned in the FIR.'This is a clear case of improvement being made. Even if there is no cross-examination of the police officers with regard to this part of the case, yet the court can scrutinise their statements with regard to this part of the case keeping in view the glaring omission appearing in the Fir showing that no option was given to the appellants that their search could be carried out if they choose, in presence of a Magistrate. Such an omission of vital effect in the Fir can be kept in view by the court while judging the prosecution

case.

(28) In Ram Kumar Pande Vs The State of Madhya Pradesh, : 1975 CriLJ870 , ' it has been held by the Supreme Court that no doubt, an Fir is a previous statement which can, strictly speaking, be only used to corroborate or contradict the maker of it, but omissions of important facts, affecting the probabilities of the case, are relevant under Section 11 of the Evidence Act in judging the veracity of the prosecution case. So, we hold that the Additional Sessions Judge was not right in holding that in the present case the prosecution has been able to prove that mandatory provisions of Section 50 of the Act have been complied with.

(29) The learned counsel for the State has, however, argued that as the recovery of the contraband has been effected from the vehicle there was no necessity of the police officials to have complied with the provisions of Section 50 of the Act as the said provisions only contemplated of giving an offer to the accused for being searched before a gazetted officer or a Magistrate if his personal search was to be effected. She has argued that in the present case, no personal search of the appellants was to be carried out for making any recovery of the contraband and thus, there was no violation of mandatory provisions of Section 50 of the Act. The provisions of Section 50 of the Act have been introduced by the Parliament keeping in view the heavy penalties and imprisonments provided in the statute for the offenders in possession of drugs mentioned in the said statute. It is a salutary provision made in Section 50 to show that recoveries to be effected from the accused under the provisions of the Act are not suspicious in any manner, so it has been provided that before effecting any such recovery having prior information the accused should be provided with an opportunity of being searched before a gazetted officer or a Magistrate. If the accused is not carrying any contraband on his person i.e. on his physical body, could it be said that although such an accused may be having in his possession the contraband, may be in a bag or may be in a vehicle of which he is in an exclusive possession, the said provisions of Section 50 of the Act would not apply?

(30) The learned counsel for the State has referred to Ramji Duda Makwana Vs The State of Maharashtra, : (1994)96BOMLR808 , where it has been held by

Bombay High Court that Section 50 of the Act would apply only if the contraband is sought to be recovered from the body of the accused. In the said case the recover was sought to be effected from a polythene bag which was in the hand of the accused. However, the learned counsel for the appellants has brought to our notice a judgment of the Supreme Court in the case of Ali Mustaffa Abdul Rahman Moosa Vs State of Kerala, : AIR 1995 SC244 . In this case it is evident from the facts that the charas was found in a bag. The accused in that case was found sitting with a bag at a railway station. The Supreme Court has held that Section 50 of the Act was applicable and as the said mandatory provision was not complied with the conviction of the accused was held to be vitiated.

(31) In the present case, the prosecution case is that there was prior information available that the appellants would be coming in a Jeep and would be having the contraband. The appellants were found to be in possession of the Jeep and from the Jeep the contraband was recovered. The words 'personal search' appearing in Section 50 of the Act would, in our view, mean that if accused is in possession of the drug, may be on his body or may be on a particular vehicle in which he is found to be in possession or may be having the contraband in his bags which he may be carrying of which he was in physical possession at the relevant time, the provisions of Section 50 of the Act have to be complied with if there is prior information with the authorities with regard to possibility of a suspect being in possession of contraband drugs.

(32) The learned counsel for the State has drawn our attention to power of seizure, search pertaining to contraband concealed in any building, conveyance or enclosed place, contained in Section 42 of the Act and has contended that personal search contemplated in Section 50 of the Act would not be similar as the search being carried out of a building, conveyance or enclosed place. We fail to understand as to how Section 50 becomes inapplicable keeping in view the provisions of Section 42 of the Act.

(33) We are of the view that if a particular suspect or accused is physically present in a conveyance or in a house at the time of the search, in our view, the compliance of mandatory provisions of Section 50 of the Act must be made

because the purpose of introducing Section 50 is to ensure that fair investigation is being carried out and recovery being effected remains without any suspicion or doubt. Obviously, if accused in such a situation wants presence of a gazetted officer or a Magistrate before being searched and such a search is carried out in presence of a gazetted officer or a Magistrate and some contraband drug is recovered, that would strengthen the prosecution case and there would remain very less suspicion with regard to recovery being effected from a particular accused in such a situation. So, we hold that in the present case there has been non-compliance of the provisions of Section 50 of the Act. The law laid down by the Bombay High Court in this respect is not correct as in the case before the Supreme Court, cited above, the recovery was not effected from any physical body of the accused but was effected from a bag and still it was held by the Supreme Court that mandatory provisions of Section 50 of the Act were applicable. In view of the above discussion, we hold that the appellants deserve to be acquitted by giving them benefit of doubt.

(34) Before we part with this case we may like to emphasise that more efficient investigation on scientific lines by some experienced and trained police officers in the science and art of investigation is required to be carried out in more heinous and grave offences like the offences under the Ndps Act. This case reveals that the investigation has been, to say the least, shoddy. There has been lapses on very material aspects of the case which can not be looked with any equanimity. We have already highlighted the various lapses which had occurred in this case because of immature investigation carried out by the Investigating Officer. We think this is a fit case where the Commissioner of Police should institute a probe in order to take action against the defaulting officials. It is necessary for the Police Commissioner to find out as to how and why such grave lapses have taken place at the level of not only Investigating Officer but even at the level of Deputy Commissioner of Police which have unfortunately resulted in acquittal of the appellants who were allegedly found to be in possession of huge quantity of charas.

(35) In view of the above discussion, we hold that the convictions and sentences of the appellants in the present case cannot be sustained.

(36) We allow the appeal and set aside the judgment and order of the Additional Sessions Judge and also set aside the convictions and sentences of the appellants and we acquit the appellants of the charges and direct that they be set at liberty forthwith, if not required to be detained in any other case. We require that a copy of this judgment be sent to the Police Commissioner by name by the Registry at the earliest for his information and necessary action.

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