

Mukesh Vs. the State (Delhi Administration)

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Court : Delhi

Decided On : Aug-30-1994

Reported in : 1994(3)Crimes337; 56(1994)DLT69

Judge : Dalveer Bhandari, J.

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

Appeal No. : Crl. Appeal No. 129 of 1990

Appellant : Mukesh

Respondent : The State (Delhi Administration)

Advocate for Pet/Ap. : Mr. Kalra

Disposition : Appeal allowed

Judgement :

Dalveer Bhandari, J.

1. This appeal is directed against the Judgment of Mr. S.L. Khanna, Additional Sessions Judge, New Delhi, dated 7th August, 1990. The learned Additional Sessions Judge convicted the appellant under Section 20 of the N.D.P.S. Act, and sentenced him to undergo rigorous imprisonment for 10 years and a fine of Rs. 1 lakh. In default of payment of fine, accused was directed to further undergo R.I. for

one year.

2. Brief facts necessary to dispose of this appeal are recapitulated as under;--

On 4.7.1986, Inspector Ishwar Singh (PW-5) who was a Sub Inspector at the relevant time, was present near Birla Mandir on patrol duty along with ASI Sri Kishan (PW-2), A.S.I. Shiv Nand Tyagi (PW-4) and some other constables. At about 9-10 p.m. he received a secret information that a person would come on a two wheeler scooter from the side of Gole Dak Khana via Kali Bari Marg and would go towards Mandir Marg and that he would be carrying smack (heroin).

3. Inspector Ishwar Singh on receipt of this information constituted a raiding party and requested 4-5 persons to join the raiding party but was able to persuade only Shri Brahm Shankar Sharma (PW-6) and he was associated in the investigation. Naqabandi was conducted at the corner of Kali Bari Marg and Mandir Marg. At about 9.30 p.m. accused Mukesh came from the side of Gol Dak Khana driving a scooter No. DEJ-2405. He was stopped and apprehended at the pointing out of the informer. Immediately thereafter, the S.H.O. of P.S. Mandir Marg reached there. In the presence of the S.H.O. secret information was disclosed to the accused and he was informed that he could be searched before a Gazetted Officer. On search, an envelope containing 15 grams of smack was recovered from the accused. On the strength of the prosecution evidence, the learned Additional Sessions Judge convicted the appellant under Section 21 of the N.D.P.S. Act.

4. Aggrieved by that judgment, the appellant has filed the present appeal. In this appeal, Mr. Kalra, learned Counsel for the appellant at the outset argued that there is no compliance of Section 50 of the N.D.P.S. Act because the appellant was given a limited option and not the option as envisaged by the Act.

Section 50, N.D.P.S. Act reads as under:

'50. Conditions under which search of persons shall be conducted.-- (1) When any officer 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 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 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. According to Section 50 of the Act, the accused must be told that if he so wishes, he can be searched before a Gazetted Officer or a nearest Magistrate. In the instant case, no formal notice in writing under Section 50 of the N.D.P.S. Act, was given to the accused. Learned Counsel has invited my attention to the statement of PW-5, Inspector Ishwar Singh about what in which he has mentioned to the accused and the relevant portion reads as under:

'I told the accused that in case he wanted, his search to be conducted before a Gazetted Officer, this could be done and a Gazetted Officer could be called.'

6. Similarly, PW-4, ASI Shiv Nand Tyagi has stated in his statement that the accused was told that he could be searched before a Gazetted Officer. S.I. Ishwar Singh also submitted that the accused could be searched before a Gazetted Officer whether the accused wanted to be searched before a Gazetted Officer. Similarly, PW-2 ASI Sri Kishan has mentioned in his statement that the facts of secret information were explained to the accused and he was asked whether he wanted his search before a Gazetted Officer which he declined.

7. Even in the F.I.R. it is mentioned that the accused could be searched before the Gazetted Officer.

8. According to the latest judgment of the Supreme Court in State of Punjab v. Balbir Singh, : 1994 CriLJ3702 , it has been held that it was imperative on the part

of the officer intending to search, to inform the person to be searched of his right that if he so chooses, he will be searched in the presence of a Gazetted Officer or a Magistrate. Thus, provisions of Section 50 are mandatory.

9. In *Satish (c) Bombaiya v. State*, : 44(1991)DLT561 , the accused was given a limited option of being produced before a Gazetted Officer. This Court held that there was non-compliance of mandatory provisions of the Act (Section 50 of the N.D.P.S. Act) and consequently conviction of the accused was set aside.

10. Similarly, in another judgment of this Court *Chameli Devi v. State*, 1993 (2) CCC 146, this Court has held that the accused was given option to be searched before a Gazetted Officer. She was not informed that in the alternative, she could be taken to a Magistrate for search. The Court found that this is a clear violation of Section 50 of the Act which requires that the accused person should be given option of being searched before a Gazetted Officer or a Magistrate.

11. Learned Counsel for the appellant also placed reliance on the judgment of this Court in *Jagdish Prashad v. State*, 1994 3 AD 113. In this case also, there was a partial compliance of Section 50 of the N.D.P.S. Act. Following the earlier judgments of this Court, the Court laid down that a mere offer to get a person searched in the presence of a Gazetted Officer is a partial offer limiting the choice and that it is incumbent on the officer concerned to offer alternative choice also and that such a partial offer would invite an order of acquittal.

12. In view of the judgment of the Hon'ble Supreme Court and various judgments of this High Court, the conclusion is irresistible that when there is no compliance of Section 50 of the N.D.P.S. Act, in that event, the conviction of the accused has to be set aside. In view of the aforesaid conclusion, the appeal consequently is allowed and the appellant is acquitted of the charges and he would be released forthwith if not required to be detained in any other case.