

Maheer Mohd. Rafiq Vs. State

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Court : Delhi

Decided On : Jul-01-1995

Reported in : 1995IIIAD(Delhi)308; 1995CriLJ3590; 1995(3)Crimes477; 59(1995)DLT587; 1995(34)DRJ221

Judge : Dalveer Bhandari, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 80

Appeal No. : Criminal Appeal No. 257 of 1994

Appellant : Maheer Mohd. Rafiq

Respondent : State

Advocate for Pet/Ap. : Anup K. Sinha and; O.P. Faizi, Advs

Judgement :

Dalveer Bhandari, J.

(1) This appeal arises out of the judgment dated 5th May, 1994 delivered by the learned Additional Sessions judge in Sessions case No. 24/94. By this judgment the appellant has been convicted under Section 21 of the Ndps Act and has been sentenced to undergo rigorous imprisonment of 10 years and to pay a fine of Rs.1,00,000.00 and in default of payment of fine, the appellant has been further directed to undergo the rigorous imprisonment of one-year.

(2) The case of the prosecution against the appellant is that on 29th September, 1993 the Sub- Inspector Dalip Singh of the Anti Auto Theft Squad received a secret information that a foreigner carrying heroine would come at G.T. Road in one white gypsy vehicle carrying heroine. The information was reduced into writing and was given to the A.C.P.(Head Quarter) and in the meantime raiding party was organized by joining police officials and thereafter the raiding party reached at the spot. One public person was joined in the raiding party by the prosecution. In the meanwhile the A.C.P.(HQ) also reached the spot. The road was blocked by putting drums on the road and white gypsy No. DL-3C B 5521 was seen coming from I.S.B.T. side and it was signaled to stop and at about 9.15 p.m. driver of the gypsy stopped the vehicle, and on search from right side socks of the accused, one packet containing 35 grams of Heroin was recovered. After completing necessary formalities, the accused was arrested and challaned.

(3) The learned Metropolitan Magistrate committed the case for trial to the Court of Sessions. The charge was framed by the learned Additional Sessions Judge on 5th May, 1994 under Section 21 of the N.D.P.S. Act to which the accused pleaded not guilty and claimed trial. The prosecution examined nine witnesses in support of its case. On the basis of the testimony of the prosecution witnesses, the trial Court arrived at the conclusion that the appellant is guilty of the offence under Section 21 of the N.D.P.S. Act and consequently convicted and sentenced him.

(4) The appellant aggrieved by the judgment of the learned Additional Sessions Judge has filed appeal before this Court. The appellant challenged the judgment on various grounds. The threshold submission of the learned counsel appearing for the appellant is that there is no compliance of Section 50 of the N.D.P.S. Act which is mandatory in nature. thereforee, the conviction of the appellant is bad on this count and the judgment of the trial court needs to be set aside only on this short ground alone.

(5) The learned counsel also submitted that there is no compliance of Section 53,55 and 57 of the Ndps Act and conviction of the appellant is liable to be set aside on this ground also. on that account also.

(6) The learned counsel also submitted that the C.F.S.L. form was not deposited in the Malkhana. The learned counsel has cited number of judgments in which it is laid down that non-deposit of C.F.S.L. form in the malkhana is vital to the prosecution case and conviction cannot be sustained in these cases where there is non compliance of this vital requirement.

(7) The learned counsel for the appellant has also argued that there is no compliance of Section 42 and 43 of the Ndps Act and conviction ought to be set aside on this account also.

(8) The counsel for the appellant also submitted that seal was admittedly retained by the S.H.O. and not handed over to the independent witness and because of this lacuna in the prosecution version, the appellant is entitled to be acquitted. The learned counsel for the appellant also submitted that there are material discrepancies in the statements of the prosecution version and on the basis of such evidence no conviction can be maintained.

(9) I deem it appropriate to first deal with the threshold submission of the appellant. It has been submitted that the appellant was only informed about the presence of the A.C.P. and it was not clarified to him as to what G.O.'s mean and whether it means a gazetted officer. Assuming G.O. could be imagined as a gazetted officer by the appellant, still he was not given an offer that he could be searched before a Magistrate. therefore, at most there has been partial compliance and not full compliance of the mandatory Section 50 of the N.D.P.S. Act.

(10) The Supreme Court in Balbir Singh Vs State of Punjab Air 1994 Sc 108, has clearly laid down that Section 50 of the Ndps Act is mandatory in character. According to the learned counsel for the appellant, it is imperative duty of the investigating officer to appraise the accused of his right as enunciated in the Act under section 50 of the Ndps Act. The accused has to be clearly informed that he has an option either to be searched before a Magistrate or a Gazetted Officer. The accused must be given right to exercise his option as envisaged in the Act. In the instant case apart from the fact that the appellant was not appraised of his rights and he was also not given an option of being searched before a Magistrate as

envisaged in the Act. thereforee, in view of the clear enunciation of the Supreme Court in Balbir Singh's case the conviction of the appellant has to be set aside.

(11) The learned counsel for the appellant has invited the attention of this Court to that part of the impugned judgment in which the appellant has raised this specific contention but the same has been erroneously negated by the Additional Sessions Judge. The learned Additional Sessions Judge has observed that Section 50 of the Ndps Act has been complied with by the prosecution. The A.C.P. happens to be a Gazetted Officer so in the .opinion of the learned Additional Sessions Judge there has been compliance of Section 50 of the Ndps Act, because he was given option to be searched by the Gazetted officer and the search was in fact one by the Gazetted Officer. thereforee, there is compliance of Section 50 in the instant case.

(12) Sailing the impugned judgment, the learned Counsel submitted that the trial court has not followed the verdict of the Supreme Court and of this Court in correct perspective. The Division Bench of this Court in Amarjit Singh & Another vs State, 1995 Jcc 91, has clearly taken the view and observed as under:

'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.'

(13) The learned counsel has also cited other judgments of this Court where this Court has taken the view that partial offer given to the accused is not the compliance of Section 50 of the Ndps Act.

(14) In Jagdish Prashad vs State 1994 2 Ccr 1413, it is held that a mere offer to get the person searched in the presence of a Gazetted Officer is a partial offer limiting the choice and that it is incumbent upon the officer concerned, to offer alternative choice also and that such a partial offer would vitiate an order of acquittal.

(15) Similar view has been taken by this Court in Satish vs State 1991 Jcc 617. In Mukesh Vs State 1994 Jcc 638, and in Narender Kumar vs State 1995 (2) A.D. Delhi 114, decided by this Court.

(16) In view of the clear enunciation of law by the Supreme Court and this Court, the conclusion becomes irresistible that in the instant case, there is no compliance of Section 50 of the Ndps Act. The Section 50 of Ndps Act envisages a total compliance and in case of partial compliance, the conviction has to be set aside. Admittedly in the instant case there has been only partial compliance of Section 50. Consequently, the conviction of the appellant is accordingly set aside and the appellant/ accused is acquitted of the aforesaid charge and he should be released forthwith. The appellant was granted bail by this Court during the pendency of appeal. Consequently, now he need not surrender to the bail bonds in this case. Since the appellant succeeds on this threshold ground, therefore, it is not necessary to discuss his other submissions.

(17) The appeal is accordingly allowed and disposed of.

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