

Ajim Khan Vs. State

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Court : Delhi

Decided On : Mar-18-1996

Reported in : 1996CriLJ3140; 1996(37)DRJ694

Judge : Jaspal Singh, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 18;
[Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 100

Appeal No. : Criminal Appeal No. 61 of 1994

Appellant : Ajim Khan

Respondent : State

Judgement :

Jaspal Singh, J.

(1) Here is yet another case under Section 18 of the [Narcotic Drugs and Psychotropic Substances Act, 1985](#) which meets its Waterloo on account of non-compliance of section 50 of the Act.

(2) Let me first provide a thumb nail description of the case as set up by the State. We are told that on October 7, 1990 on receipt of secret information that the appellant was having opium in his possession and was standing at the bus stand Vikas Kunj. Outer Ring Road, a raiding party was formed, the appellant was

nabbed and subsequent to his refusal to get himself searched in the presence of a Gazetted Officer or a Magistrate, one kilogram opium was recovered from his possession.

(3) As we all know by now, Section 50 of the Act requires that the person to be searched has to be informed whether he would like to be searched before a Gazetted Officer or a Magistrate. Though the Counsel for the appellant insists that his option must necessarily be given in writing. I do not agree. However, the question still remains: Can it be said, on the basis of the evidence led by the prosecution, that the mandatory requirements of section 50 were followed I feel, the answer must be that they were not. Let me show why.

(4) Public Witness 2 Head Constable Subhash Chand states that the information given to the accused was only to the effect that if he wanted he could be searched before a Gazetted Officer. Public Witness 5 Constable Satish Chander too has deposed that the offer was only confined to a Gazetted Officer. Thus, if both these witnesses are to be believed the offer was partial. True, the Investigating Officer Public Witness -9 Asi .Santokh Singh says that he had informed the accused of his right to be searched before the Gazetted Officer or a Magistrate but then, as already noticed above, his statement neither finds support nor corroboration from either Head Constable Subhash Chand or Constable Satish Chander. Rather, both of them believe him. I am, therefore, not inclined to believe that the offer was not partial. And, this Court has repeatedly held that partial offer violates the letter and spirit of Section 50.

(5) It is contended by Ms. Neelam Grover who appears for the state, that even if it be assumed that Section 50 of the Act had not been complied with, it would neither vitiate the trial nor would it in itself be sufficient to invite an order of acquittal. In support, she relies upon a judgment of the Supreme Court in State of Punjab v. Jasbir Singh and Ors. 1 (1996) Ccr 51 (SC) wherein it was observed:

'(T)HE evidence collected in breach of mandatory requirement does not become inadmissible. It is settled law that evidence collected during investigation in violation of the statutory provisions does not become inadmissible and the trial on the basis thereof does not get vitiated.'

(6) Undoubtedly evidence collected in consequence of a search conducted in violation of section 50, can be used as 'evidence' in proceedings against that party but then, with respect, the Supreme Court does not say that the contraband seized as a result of an illegal search can be used fasten the liability of unlawful possession of the contraband on the person from whom it is allegedly seized as a result of such search.

(7) That the provision of Section 50 are mandatory is not in dispute. I have already shown above that even if it is assumed that notice under Section 50 was given orally, the offer being only partial it did not comply with the requirements. In Ali Mustafa Abdal Rehman Moosa Vs . State of Kerala : AIR 1995 SC244 it was observed: 'Unlawful possession' of the contraband is the sine qua non for conviction under the Ndps Act and that factor has to be established by the prosecution beyond reasonable doubt. Indeed the sei/.cd contraband is evidence but in the absence of proof of possession of the same, an accused cannot be held guilty .under the Ndps Act.'

(8) It may be noticed that in Ali Mustafa Abdul Rehman Moosa's case, the Court held that as there had been violation of the provisions of Section 50 of the Act 'consequently' the conviction of the appellant could not be sustained.

(9) In Mohinder Kumar V. The State, Panaji Goa : 1995 CriLJ2074 it was. held that if the mandatory requirements were not adhered to, the accused would be 'entitled to be acquitted'. It was a judgment of a Bench presided over by three Judges.

(10) Reference may also be made to the case Saiyad Mohd. Saiyad Umar Saiyed and Ors. v. The State of Gujarat : 1995 CriLJ2662 wherein it is observed that if the procedure mandated by Section 50 is not followed the Court is 'duty bound' to conclude that, (a) the accused had not had the benefit of protection that Section 50 affords; that, therefore, (b) 'his possession of articles which are illicit under the Ndps Act is not established' that, (c) 'the pre-condition for his having to satisfactorily, accounted for such possession has not been met'; and (d) 'to acquit the accused:.

(11) Besides what has been noticed by me above, I do feel that the prosecution has even otherwise failed to prove its case beyond doubt. Although as per the prosecution the investigating officer had prior Secret information, there has been non-compliance with the requirements of section 42 of the Act. Moreover, no serious effort was made to join any witness from the public despite the fact that the Investigating Officer had all the time at his elbow and despite also the fact that the place of recovery was at a bus stand and near to a residential locality. This is not all. Though the station House Officer tells us that it was he who had deposited the parcels with the Moharar Malkhana, as per the Moharar Malkhana the parcels were deposited with him by the Investigating Officer. Last but not the least, the Moharar Malkhana, Head Constable Mahipal Singh (Public Witness S) has nowhere stated that so long as the parcels remained in his custody they were not tampered with.

(12) For the reason recorded above, I Accept the appeal. The judgment of eviction and the order of sentence stand set aside. The appellant be set free if not wanted in any other case.

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