

Pushpa Devi Vs. State

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Court : Delhi

Decided On : Jul-01-1996

Reported in : 63(1996)DLT423; 1996(38)DRJ295

Judge : S.K. Mahajan, J.

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

Appeal No. : Criminal Appeal No. 53 of 1991

Appellant : Pushpa Devi

Respondent : State

Advocate for Pet/Ap. : A.K. Srivastava and; M.S. Butalia, Advs

Judgement :

S.K. Mahajan, J.

(1) On August 28, 1989 a secret information was received on telephone at Ps Mandir Marg that Charas was being sold in the Jhuggi of Radhey Shyam Pradhan and his wife was also involved in that trade. According to the information, one person was to come in their Jhuggi to take Charas. On receipt of this information, a raiding party was constituted which proceeded towards the Jhuggi of the Pradhan. On the way, the raiding party is alleged to have met the Sho at Gole Market who on being disclosed of the information also accompanied them. When

they reached near Mata Ka Mandir, Raja Bazar, two public witnesses were also asked to accompany them. Nakabandi of Jhuggi No.28 was effected. At about 8.45 p.m. they saw one Ram Baran coming out of Jhuggi No.28 with a bag of polythene. On being spotted by the informer, the said Ram Baran was apprehended. In the meantime, the appellant was seen coming out of Jhuggi No.28 and hurriedly tried to proceed towards East. She was also apprehended. Two separate challans were filed against Ram Baran and the present appellant Pushpa Devi. While Ram Baran has-been acquitted of the charge under Section 20/61/85 of Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as 'NDPS Act'), by the Court of Ms.Rekha Sharma, Additional Sessions Judge, Delhi by her order dated February 27, 1993, the present appellant has been convicted of the charge under Section 20(b)(ii) of the Ndps Act by the Court of the Additional Sessions Judge Mr.S.L.Khanna by his order dated 21st February, 1991 and sentenced to rigorous imprisonment of 10 years and fine of Rs.1 lakh.

(2) Being aggrieved by the said order, the present appeal has been filed by the appellant. The facts are not in dispute. Only two points have been urged by learned counsel for the appellant in support of his contention that there was no case for conviction of the appellant and she ought to have been acquitted. Besides relying upon the judgment in the case of Ram Baran whereby he had been acquitted by the Court of Additional Sessions Judge, learned counsel for the appellant has sought the acquittal of the appellant on the ground that i) neither the CfsI form was deposited in the malkhana nor there was any evidence as to where it has gone, and ii) that the provisions of Section 50 of Narcotic Drugs and Psychotropic Substances Act (in short referred to as 'NDPS Act') were not complied with at the time of search of the appellant.

(3) In support of his first contention learned counsel for the appellant has referred to the statement of Head Constable Ram Manohar, PW-4 who has nowhere stated that the CfsI form was also deposited in the malkhana or that he had handed over the same to Si Satpal on August 28, 1989 along with the samples when the same were being taken for analysis to the office of the CFSL. None of the witnesses who had appeared on behalf of the prosecution have said a single word about the CfsI form. The contention of learned counsel for the appellant, therefore, is that in

case CfsI form was neither deposited in the malkhana nor sent to CfsI along with the sample, it would entitle the accused to the benefit of doubt and consequent acquittal. Reliance for this has been placed upon the judgments reported as Jagdish Prasad Vs . State : 54(1994)DLT424 Chandigarh Criminal Cases 314 and another Division Bench judgment of this Court reported as Amarjeet Singh v. State (Delhi Administration) 1995 (32) Dlj 110. In all these judgments it has been held that in the absence of any evidence of the CfsI form having been deposited along with the sample in the malkhana, the accused would be entitled to benefit of doubt and acquittal. On perusal of the evidence and documents on record, I am satisfied that there is no evidence on record to show that the CfsI form was deposited with Moharrir, Malkhana or that the said form was sent with the sample to the Public Analyst. In the absence of any such evidence, the possibility of the sample being tampered with cannot be ruled out and consequently the same shall vitiate the trial and consequent conviction of the appellant.

(4) The second contention of the appellant is that under Section 50 of the Ndps Act, in case the police had prior information of a person possessing narcotic drug and psychotropic substance, the officer while making a search under Section 41 or 42 of the Act, should comply with the provisions of Section 50 before the search of the person is made. It is admitted case that in the case of the appellant, police had prior information of her being in possession of narcotic drug/psychotropic substance and it is, therefore, admitted case of the parties that provisions of Section 50 of the Ndps Act should have been complied with before the search of the person was made. In terms of Section 50 of the Ndps Act, the police before making the search must inform the person to be so searched that if he/she desires, he/she can be produced before a gazetted officer or a Magistrate and failure to inform the person to be so searched would amount to non-compliance of Section 50 of the Ndps Act which is mandatory. Reliance for this has been placed upon the judgment reported as State of Punjab Vs . Balbir Singh : 1994 CriLJ3702 .

(5) As held by the Supreme Court, the object of the Ndps Act was not only to make stringent provisions for control and regulation of operations relating to those drugs and substances but at the same time, it was also to avoid harm to the innocent

persons and to avoid abuse of provisions by the officers. With that end in view, certain safeguards have been provided which in the context have to be observed strictly. These provisions make it obligatory that such of those officers mentioned therein, on receiving an information, should reduce the same to writing and also record reasons for the belief while carrying out arrest or search as provided under the proviso to Section 42(1). To that extent, the provisions are mandatory. The failure to comply with those requirements thus affects the prosecution's case and vitiates the trial.

(6) The Supreme Court, while discussing the scope of Section 50 of the Act, has held :-

'ANY officer duly authorised under Section 42, who is about to search any person under the provisions of Sections 41, 42 and 43, shall, if such person so requires, take him without unnecessary delay to the nearest gazetted officer of any of the departments mentioned in Section 42 or to the nearest magistrate and if such requisition is made by the person to be searched, the concerned authorised officer can detain him until he can produce him before such gazetted officer or the magistrate. After such production, the gazetted officer or the magistrate, if sees no reasonable ground for search, may discharge the person. But otherwise he shall direct that search be made. To avoid humiliation to females, it is also provided that no female shall be searched by anyone except a female. The words 'If the person to be searched so desires' are important. One of the submissions is whether the person who is about to be searched should by himself make a request or whether it is obligatory on the part of the empowered or the authorised officer to inform such person that if he so requires, he would be produced before a gazetted officer or a magistrate and thereafter the search would be conducted. In the context in which this right has been conferred, it must naturally be presumed that it is imperative on the part of the officer to inform the person to be searched of his right that if he so requires to be searched before a gazetted officer or a magistrate. To us it appears that this is a valuable right given to the person to be searched in the presence of a gazetted officer or a magistrate if he so requires, since such a search would impart much more authenticity and creditworthiness to the proceedings while equally providing an important safeguard to the accused. To

afford such an opportunity to the person to be searched, he must be aware of his right and that can be done only by the authorised officer informing him. The language is clear and the provision implicitly makes it obligatory on the authorised officer to inform the person to be searched of his right.'

(7) Learned counsel for the State submits that the police officer who wanted to search the appellant had clearly informed her that in case she so desired she can be searched before a gazetted officer. It is an admitted case that no offer was given to the appellant about her desire to be searched before a Magistrate. I am, thereforee, unable to agree with the learned counsel that the provisions of Section 50 of the Act were fully complied with. The offer given to the appellant with regard to her search was only partial. There was no offer to get her searched in the presence of a Magistrate. A catena of judgment of this Court would go to show that this partial offer is a clear violation of Section 50 of the Ndps Act. A reference in this connection may be made to Jagdish Prasad Vs . State : 54(1994)DLT424 , Chameli Devi v. State 1993(2) Cha Cl C 146.

(8) I am, thereforee, satisfied that not only that there is no evidence on record to show that the CfsI form was deposited in the malkhana or sent to the CfsI along with the sample, but there was also no strict compliance of the provisions of Section 50 of the Ndps Act. The appellant is, thereforee, entitled to the benefit of doubt and the appeal deserves to be allowed.

(9) Consequently, I allow the appeal and acquit the appellant of the charges leveled against her. She is directed to be released forthwith.

(10) Copy of the judgment be sent immediately to Superintendent, Jail for information and necessary action at his end.

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