

Rajinder Kumar Vs. State

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Court : Delhi

Decided On : Aug-05-1996

Reported in : 1996IVAD(Delhi)42; 63(1996)DLT721

Judge : N.G. Nandi, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 18

Appeal No. : Criminal Appeal No. 147 of 1991

Appellant : Rajinder Kumar

Respondent : State

Advocate for Pet/Ap. : Sandeep Sethi and; M.S. Butalia, Advs

Judgement :

N.G. Nandi, J.

(1) This appeal is directed against the conviction and sentence recorded under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, , 1985 (hereinafter referred to as 'the Act') in Fir No. 43/87, Police Station Chandni Mahal, Delhi by the learned Additional Sessions Judge, Delhi in Sessions Case No. 38/87 sentencing the appellant to undergo R.I. for 10 years and fine of Rs. 1.00 lakh and in default to under go Ri for a further period of two yea Rs.

(2) The prosecution case, as revealed from the record, is that on the basis of the secret information received on 3.3.1987 that one person having raxine bag of cream colour proceeding towards Sita Ram Bazar via Asaf Ali Road is in possession of opium, whereupon watch was arranged behind Mother Dairy Booth; that at about 2.30 p.m., a person came from Asaf Ali Road side having cream colour raxine bag; that the informer identified and pointed out that person possessing the contraband was intercepted and was informed that he is to be searched and whether he would like to be searched in presence of the Gazetted Officer or the Magistrate; that the person declined and on search he was found to possess 3 packets of polythene paper, each containing 1Kg. of opium; that after completing the requirements of seizure and the recover of the Mudda Mal and on completion of the investigation, charge sheet was filed against the accused for the offence u/Section 18 of the Act. The learned Additional Sessions Judge, appreciating the prosecution evidence, oral as well as documentary and the defense, found the accused guilty and convict him for the offence charged and sentenced him, as aforestated. It is this order of conviction and sentence, which is assailed in this appeal by the appellant-accused.

(3) One of the argument advanced on behalf of the appellant is that the mandatory requirements of Scc : 50 are not complied with inasmuch as there is ' partial offer made to the accused as regards option to be searched in presence of Gazetted Officer or Magistrate.

(4) Section 50 of the Act deals with the conditions under which search of persons shall be conducted. In order to appreciate the submission advanced by the Counsel for the appellant, I would reproduce Section 50 of the Act, which reads as follows:

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 the 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 in Subsection (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) It is submitted by the Counsel for the appellant that the requirements of Section 50 are mandatory in nature and that there is no compliance with the mandatory requirements of Sub-section (1) inasmuch as the appellant was not told of the option that he has, whether to be searched in presence of Gazetted Officer or the Magistrate since there is no evidence on record to suggest that the accused was given the option of search before Gazetted Officer or Magistrate; that the evidence of PW3 suggests that option was with regard to the search before Acp or a Magistrate, the evidence of PW4 is regarding option for search before the Magistrate and evidence of PW6 is regarding option for being searched before ACP; that the evidence of PW3 regarding the option deposed by him is not corroborated by either PW4 or PW6.

(6) In the case of Saiyad Mohd. Saiyad Umar Saiyad and Others v. State of Gujarat, : 1995 CriLJ2662 , it is held by the Supreme Court that 'the officer conducting the search is required to inform the accused of his right to choose to be searched in the presence of a Gazetted Officer or a Magistrate'. This requirement under Sections 50, 54 and 20 are held mandatory. It is further held that 'prosecution must prove that the accused was made aware of his right but he did not choose to be searched before a Gazetted Officer or a Magistrate and if no evidence to this effect given. Court must assume that the accused was not informed of his right and must find that the possession of the illicit articles was not established'. In plethora of judgments, with regard to the compliance with the requirement of Section 50 of the Act, it has been held that the requirements of Section 50 of the Act are mandatory.

(7) In the instant case, the contention by the Counsel for the appellant is that the option given to the accused under Section 50 of the Act with regard to the search, was a partial offer and not the complete offer as required under Section 50 of the Act.

(8) On the point of search and offer of option to the accused under Section 50, three witnesses have been examined by the prosecution in course of the trial. PW3 Excise Sub Inspector Ranbir Singh stated in his examination-in-chief that along with others, he was in watch from 2 p.m. on 3.3.1987 pursuant to the secret information received, along with Esi Mohinder Singh and four Excise Constables behind Angoori Ghatta, Asaf Ali Road, near milk booth No. 401 of Mother Diary with a cordon laid and at about 2.30 p.m. one person came from Asaf Ali Road side. that the said person was accused who was identified in the Court; that he was stopped on being pointed out by the informer and he was having raxine bag in his right hand; that it was informed by Esi Pritpal Singh that he was suspected to be in possession of opium and if he so wanted, his search could be taken in presence of 'ACP' or before a Magistrate. PW4 Hc Chander Bhan stated that on 3.3.87 along with Constable Baldev Singh, he was on patrolling duty Along with Pritpal Singh and at about 2 p.m. a secret information was received that one person having opium in possession would come from the side of Asaf Ali Road and would proceed to Sita Ram Bazar; that a watch was arranged, cordon was laid and at about 2.30 p.m. accused Rajinder Kumar Gupta came from the side of Asaf Ali Road and was apprehended at the pointing out of the informer. Si Pritpal told the accused about the secret information and that if he wanted, his search would be taken before a Magistrate. PW6 Inspector Pritpal Singh stated that the person coming from the Asaf Ali Road side was stopped near Mother Diary Booth No. 401 at 2.30 p.m. on 3.3.87 and that the witness was at the watch at this place on the basis of the information; that at 2.30 p.m. a person came at the place having one raxine bag who was stopped at the instance of the informer and was told that he is suspected to be possessing opium and if he wanted, he would be produced before the Acp for search, but he declined.

(9) As far as the option under Section 50 of the Act, as regards the search in presence of the Gazetted Officer or the Magistrate, the only evidence is that of

PWs 3,4 and 6 as reproduced above. It is suggested from the evidence of PW3 that option given was regarding search before Acp or Magistrate, the evidence of PW4 is to the effect that option was given for search before the Magistrate, whereas the offence of PW6 is that the option was given for search before the ACP. It will be seen that only PW3 speaks about the option of search before the Acp or Magistrate, whereas PWs 4 & 6 only speak about the option for search before Magistrate and Acp respectively. Neither PW4 nor PW6 corroborate PW3 as regards the complete offer for search before the Gazetted Officer or the Magistrate as deposed by PW3. It is pertinent to note that PW1, who was also present at the place of incident, where the accused is stated to have been stopped, possessing opium, does not depose about the option either complete or partial. There is no public/independent witness examined in this case. Sub-Section (1) of Section 50 speaks of option to be given for search before Gazetted Officer or Magistrate. What is intended by Sub-Section (1) of Section 50 is that the person suspected and apprehended/to be searched, must know the options available to him under the law for search. In the case of *Chameli Devi v. State*, : 50(1993)DLT439 , while considering the compliance with the mandatory requirement of Section 50 of the Act it has been held by this Court that 'the partial offer to the accused with regard to her search by a Gazetted Officer and that she was not informed that in the alternative, she could also be taken to Magistrate for search, was held violative of Section 50 of the Act'. In the case of *Jagdish Prasad v. State*, reported in : 54(1994)DLT424 , it has been held by this Court that 'the offer made to the appellant before his search that if he so wish, she could be produced before a Gazetted Officer for search but no offer to get him searched in presence of a Magistrate, this partial offer is violative of Section 50'. In the case of *Emmanuel Murd Aiseleph v. The State*, reported in 1995 (4) Ad (Del) 1000, the learned Single Judge of this Court held that 'limited option of being searched before Gazetted Officer was a non-compliance of mandatory provisions of the Act.'

(10) As pointed out above, in the instant case, there is no corroboration to the say of PW3 either by PW1, PW4 or PW6, who is the author of Rukka Ex.PW-2/A, as regards the complete offer for search before the Gazetted Officer or the Magistrate, as required u/Section 50 of the Act. Even PW6, as aforesaid, does not say that the option for search was complete offer inasmuch as the offer was for

search before the Gazetted Officer or Magistrate. It would be a repetition to state here that PW6 in his evidence has deposed about the option for search before the Acp only. As held by the Supreme Court in the judgment (supra), it is necessary for the officer conducting search to inform the accused of his right to choose to be searched in the presence of a Gazetted Officer or the Magistrate and this requirement being mandatory, it was necessary for PW6 to inform the accused of his right to be searched in presence of a Gazetted Officer or a Magistrate.

(11) Another limb of argument of learned Counsel for the appellant is that provisions of Sub-Section (1) & (2) of Section 50 of the Act,, is not complied with inasmuch as no written notice is given to the accused before his search was taken at the place of occurrence. Sub-section (2) as reproduced above, suggests that requisition for search has to be made by the Officer conducting the search giving option for being searched in presence of Gazetted Officer or the Magistrate. It is clear from Sub-section (2) that it is only on requisition made under Sub-section (1), that the officer conducting search may detain the person until he can bring him before the Gazetted Officer or the Magistrate, referred to in Sub-section (1). None of the prosecution witnesses have stated that any written notice/requisition under Sub-section (1) was given. This would suggest noncompliance with the requirements of written notice requisition to the person who is to be searched under Sub-section (1) of Section 50. Thus, apart from the offer for search being partial or complete, there is no compliance with the requirement of written notice/requisition as contemplated under Sub-section (1) of Section 50 of the Act.

(12) It is submitted on behalf of the appellant that CfsI Form was not filled in at the place of occurrence and taken to CfsI along with case property. It is pertinent to note that the evidence of prosecution witnesses do not suggest CfsI Form having been deposited with Moharrar Malkhana nor there is any evidence to suggest that CfsI Form was taken to CFSL. It is pertinent to note that in the instant case, the Moharrar Malkhana is not examined by the prosecution. The prosecution, at the same time, have produced the entries of Malkhana register at Ex. PW8/A but the same do not refer to CfsI Form. CfsI report Ex. PW1 / B does not suggest the CfsI Form having accompanied the case property Mudda Mal Articles. Admittedly, there is no recovery/seizure of the case property (opium) in the presence of any

public witness/Panchas. PW5 Constable Ishwar Singh has stated in his evidence that on 9.3.87 he was posted at P.S. Chandni Mahal and on that day, he collected three packets from Moharrar Malkhana, duly sealed with the seal of Msy and Pp in case Fir No. 43/ 87 and deposited the same at CfsI Office vide Rc No. 1721 and so long as the case property remained with him, nobody tempered with the same. It is pertinent to note that this witness has not stated that he was also given CfsI Form along with 3 sealed packets from Moharrar Malkhana. The evidence of this witness does not suggest that along with the three sealed packets in Fir No. 43/87, CfsI Form was deposited in the CFSL. All that the witness says is that he was given 3 sealed packets which he carried to CfsI and deposited the same in the same condition with the CfsI and that the case property remained intemperate so long as the same was with the witness. It is pertinent to note that PW2 Asi Puran Giri, who was duty officer at P.S. Chandni Mahal at the relevant time does not refer to any CfsI Form. He only speaks of one Rukka Ex. PW2/1 sent by PW6 Asi Pritpal Singh 'through Const. Baldev Singh. The evidence of PW1 Insp. Mohinder Singh, only states that from accused Rajinder Kumar three polythene packets containing opium were recovered and produced before this witness which he got weighed and each packed found to contain 1 Kg. of opium. 5 gms. opium was taken out from each of the three packets and sample of opium and remaining three packets of opium were converted into six packets and sealed with the seal of Pp belonging to Pritpal Singh and the seal of witness MSY. Form CfsI was completed and specimen seals Pp and Msy were also affixed. The seal of Pp was given to Si Ranbir Singh after use while the witness took back his seal. 10 sent Rukka to police station for registration of case. All that this witness deposes is that CfsI Form was completed and nothing further. PW6 has . stated that Form CfsI was also filled in at the spot. PW8 who has proved entry No. 492 Ex. PW8/1 from Moharrar Malkhana has stated that six parcels sealed with the seal of Pp and Msy were deposited, on 9.3.87 vide Rc No. 1721 through Constable Ishwar Singh and on 16.4.1987, the same was received back. This witness does not say anything about CfsI Form.

(13) Report of CfsI is Ex. PW6/B. All what is suggested is that three sealed parcels 'in connection with Fir No. 43 dated 3.3.1987 u/Section 18/61/85 Ndps Act were received as per messenger on 9.3.87. There is no reference to the receipt of CfsI

Form duly filled in and sent and received in laboratory.

(14) Thus it will be seen from the above evidence that except the oral say of PW1 and PW6 to the effect that CfsI Form was completed and specimen seals Pp and Msy were applied thereon, there is no other evidence to suggest that CfsI Form was filled in. There is no evidence as to what happened to that CfsI Form. Under the circumstances, it appears that no CfsI Form must have been prepared. At the same time, there is no evidence suggesting the seals affixed on the case property, namely, three packets containing opium remained intact right from the affixing of the same on the case property till the packets were delivered in CFSL. It need hardly be said that the prosecution has to prove by positive evidence that on the recovery of case property, necessary seals were affixed in presence of public witness and the said seals remained intact till the delivery of the case property to CFSL. There is no evidence on this point adduced by the prosecution. Thus it can not be said that the seals applied on the case property/articles at the time and place of seizure remained intact till the delivery of the same to the CfsI for necessary analysis and report.

(15) The above discussion would reveal that the mandatory requirements of Sub-section (1) of Section 50 of the Act have not been complied with inasmuch as no written notice/requisition has been given to the accused before his search intimating him the option available to him under the law. At the same time, there is no compliance with the mandatory requirement of Sub-section (1) of Section 50 of the Act that the accused was given the complete option of his search in presence of Gazetted Officer or the Magistrate, if he so desired. The evidence discloses partial offer made to the accused and not the complete offer as envisaged under Sub-section (1) of Section 50 of the Act.

(16) I am conscious that the accused is not entitled to the second option i.e. whether he would like to be searched in presence of Gazetted Officer or Magistrate. That second option would be available with the officer conducting the search and it would be for the officer to decide as to before whom the accused should be taken for search, say Gazetted Officer or the Magistrate. The accused has no alternative or choice to say that he shall be searched in presence of either

Gazetted Officer or the Magistrate. I wish it to be clear that the only option of the accused under Subsection (1) of Section 50 would be the intimation whether he would like to be searched in presence of Gazetted Officer or the Magistrate and this complete offer is required to be given to the accused by the officer. It is after giving this intimation to the accused, it would be the choice of the officer conducting search to decide as to before whom the accused should be taken for search, either Gazetted Officer or the Magistrate.

(17) Thus, it will be seen that the mandatory requirements of Sub-sections (1) and (2) of Section 50 of the Act have not been complied with. Moreover, there is no evidence to establish that CfsI Form was filled in at the place of occurrence at the time of recovery of case property. There is no evidence that CfsI Form reached the Malkhana Along with the case property. There is no evidence to suggest that CfsI Form accompanied three sealed packets of case property from Malkhana to CFSL. and there is no evidence to suggest that seals applied on packets of case property remained intact right from the place of occurrence till the delivery of the same to CfsI meaning thereby every person handling the case property deposing to the effect that so long as the case property remained with him, the seals on the packets remained intact.

(18) The above discussion will reveal that the appeal deserves to be allowed and the conviction recorded and sentence imposed liable to be set aside.

(19) The appeal is allowed. The judgment recording the conviction of the accused as also the order of sentence dated 23.9.1991 passed by the Trial Court in Fir No. 43/87, under Section 18 of the N.D.P.S. Act, P.S. Chandni Mahal, Delhi in Sc No. 38/87, are hereby set aside. The appellant shall be set free immediately, if not required in any other case.

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