

Marakkar Vs. State of Kerala

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Court : Kerala

Decided On : Sep-28-2001

Reported in : 2002(1)ALT(Cri)443; 2002CriLJ456; 2002(81)ECC653

Judge : J.B. Koshy and; K. Padmanabhan Nair, JJ.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 8, 21, 41, 41(2), 42, 43, 50, 50(1) and 54; Evidence Act

Appeal No. : Crl. A. No. 385 of 1999

Appellant : Marakkar

Respondent : State of Kerala

Advocate for Def. : K.G. Bhaskaran, Public Prosecutor

Advocate for Pet/Ap. : P. Vijaya Bhanu and; S.R. Manoj, Advs.

Disposition : Appeal dismissed

Judgement :

J.B. Koshy, J.

1. This criminal appeal is referred to the Division Bench by Justice M.R. Hariharan Nair noticing divergent views taken by two learned Single Judges of this court in Main v. State of Kerala (Crl. A. 127/99) and Rasheed v. State of Kerala (1999 (3)

KLT 133). The only question to be resolved in this case is whether mandate of Section 50 of the [Narcotic Drugs and Psychotropic Substances Act, 1985](#) (hereinafter referred to as 'the NDPS Act') is satisfied if accused is informed of and offered his legal right to be searched in the presence of a Gazetted Officer without mentioning about the right to be searched before a Magistrate or vice versa as Constitution Bench of the Apex Court in *State of Punjab v. Baldev Singh* (AIR 1999 SC 2378) held that before conducting search of a person under Section 42 or 43 of the NDPS Act, empowered officer shall inform him that he has got a right to be searched in the presence of the nearest Magistrate or Gazetted Officer and failure to inform him about such right is violation of Section 50 of the NDPS Act? We have to consider whether substantive compliance of requirements of Section 50 is enough in the absence of likelihood of prejudice to the accused in the procedure adopted in each case to answer the main question.

2. Before considering the question of law, we may look into the facts of the case. The case of the prosecution is that on 8.5.1996 at about 7.15 p.m. accused was found to be in possession of 2.950 gms. of brown sugar on the southern road side on the south west corner of Puthiyara Bridge in contravention of the provisions of the Act and thereby committed an offence punishable under Section 21 of the Act. PW1, detecting officer, on getting information that accused was selling brown sugar near Puthiyara fish market, reached the spot alongwith other police constables after complying with the legal formalities. On seeing the policy party, the accused suddenly started moving towards south. A search was conducted by PW1 and a plastic cover with brown sugar was found out from the pocket of the shirt of the accused. The brown sugar including the cover was found to be weighing 2.950 gms. Since accused was found to have possession of brown sugar against the provisions of Section 8(c) of the Act, he was convicted and sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs. One lakh and in default to undergo rigorous imprisonment for one more year under Section 21 of the NDPS Act.

3. The only contention raised before us is that the search was conducted violating the mandatory provisions in Section 50 of the NDPS Act. It is contended that the officer who conducted the search did not ask the accused whether he would like to

be searched in the presence of a Magistrate and he was also not informed of such right. The judgment challenged in appeal proceeds on the basis that such a question was asked. The lower court summarised the deposition of PW1, detecting officer, in paragraph 6 of the judgment wherein it is stated that he asked the accused whether he wanted to have the search in the presence of a Gazetted Officer or a Magistrate and he replied in the negative. On going through the deposition, we find that the above is not correct. It is not the case of the prosecution that the right of the accused to be searched either in the presence of a Gazetted Officer or a Magistrate was given to him in writing. But, it is the case of the detecting officer or that he orally informed him about his right to be searched in the presence of a Gazetted Officer only. He has no case that his right to be searched in the presence of a magistrate was conveyed to him. PW1, during deposition, has stated as follows:

Ext. P1 is the seizure mahazar. There also, it is stated similarly that accused was informed of about his right to be searched in the presence of a Gazetted Officer. The word 'Magistrate' is not mentioned in Ext. P1 seizure mahazar. PW3 is the attesting witness. He denied the contents of the mahazar even though he admitted the signature. Ext. P1 was marked as his statement. There also, only the word 'Gazetted Officer' is mentioned. In the F.I.R. (Ext. P3) also, it is mentioned that the accused was informed about his right to be searched in the presence of a Gazetted Officer. The word 'Magistrate' was not mentioned. A reading of the evidence would show that accused was asked by the searching officer only whether he would like to be searched in the presence of a Gazetted Officer as he has got a right to be searched before a Magistrate. Since he answered in the negative, accused was searched by the searching officer. It is clear that searching officer did not inform the accused that he has got a right to be searched in the presence of a Gazetted Officer or a magistrate. Only one option was given to the accused.

4. In Mani v. State of Kerala (Crl. A. No. 127/99) it is held as follows:

'The question arising for consideration is whether the accused is entitled to an acquittal on account of the non-compliance of the provisions of Section 50 of the

Act. Though PW1 has asserted in his evidence that the accused was asked whether he required the presence of a Gazetted Officer, there is nothing in Ext. P1 mahazar prepared at the spot to indicate that the accused was given an option to be searched in the presence of a Gazetted Officer or Magistrate? Even if it is assumed that PW1 had asked whether he required the presence of a Gazetted Officer, there is partial non-compliance of the provisions of Section 50 of the Act.'

The accused was acquitted following the above finding.

5. A learned Single Judge of this Court in *Rasheed v. State of Kerala* (1999 (3) KLT 133) had earlier taken a contrary view. In paragraph 12 of this decision it was held as follows:

'Even though it is incumbent upon the searching officer to inform the suspect that he is entitled to be searched either before a Gazetted Officer or the nearest Magistrate, it cannot be said that the failure of the searching officer to inform the suspect that he is entitled to choose in between the two alternatives for his search and if only one of the alternatives is mentioned to the suspect, it will be only partial compliance violating the mandatory provisions of Section 50 of the Act. Even though considering the fact that the allegation of offence punishable under the Act entails in severe sentence, it will be appropriate or ideal for the detecting officer to mention about both the alternatives to the suspect affording him an opportunity to choose in between the two alternatives, merely because of the fact that the searching officer omitted to mention about one of the alternatives either with regard to the Gazetted Officer or with regard to the nearest Magistrate, it cannot be held that it will vitiate the search for partial compliance of Section 50 of the Act. The mention to the suspect that he is entitled to be searched before a Gazetted Officer alone or the nearest Magistrate alone will be proper substantial and adequate compliance of the mandatory provisions of Section 50 of the Act unless and until it is established that due to the failure of the searching officer to mention about both the alternatives to the suspect prejudice is caused to him.'

The judgment was not brought to the notice of the Court while deciding Mani's case.

6. For considering the question of law referred to us, we may first look into the section itself. Section 50 of the NDPS act provides 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 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 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.'

7. In *State of Punjab v. Balbir Singh* ((1994) 3 SCC 299), the effect of Section 50 of the NDPS Act was considered by the Supreme Court in detail. The Supreme Court held as follows:

'16.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.'

'25. (5). On prior information the empowered officer or authorised officer while acting under Sections 41(2) or 42 should comply with the provisions of Section 50 before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a Gazetted Officer or a Magistrate as provided thereunder. It is obligatory on the part of such officer to inform the person to be searched. Failure to inform the person to be searched and if such person so requires, failure to take him to the Gazetted Officer or the Magistrate, would amount to non-compliance of Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial. After being so informed whether such person opted for such a course or not would be a question of fact.'

The above decision of the Supreme Court was accepted and followed in the subsequent decisions also. (see: *Ali Mustaffa Abdul Rahman Moosa v. State of Kerala* ((1994) 6 SCC 569); *Saiyad Mohd. Saiyad Umar Saiyad and Ors. v. State of Gujarat* ((1995) 3 SCC 610); and *Mohinder Kumar v. State, Panaji, Goa* ((1988) 8 SCC 655).

8. In *State of Himachal Pradesh v. Pirthi Chand and Anr.* ((1996) 2 SCC 37), a two-member Bench of the Supreme Court held that evidence collected in a search conducted in violation of Section 50 does not become inadmissible in evidence under the Evidence Act. The matter was finally referred to the Constitution bench and the Constitution Bench in *State of Punjab v. Baldev Singh* (AIR 1999 SC 2378 = III (1999) CCR 109) held that failure to inform the concerned person of his right as emanating from Sub-section (1) of Section 50 may render the recovery of the contraband suspect and the conviction and sentence of an accused is bad and unsustainable in law. In paragraph 55, the Supreme Court summarised the position as follows:

'55. On the basis of the reasoning and discussion above, the following conclusions arise:

(1) That when an empowered officer or a duly authorised officer acting in prior information is about to search a person, it is imperative for him to inform the concerned person of his right under Sub-section (1) of Section 50 of being taken to the nearest Gazetted Officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing;

(2) That failure to inform the concerned person about the existence of his right to be searched before a Gazetted Officer or a Magistrate would cause prejudice to an accused;

(3) That search made, by an empowered officer, on prior information, without informing the person of his right that if he so requires, he shall be taken before a Gazetted Officer or a Magistrate for search and in case he so opts, failure to conduct his search before a Gazetted Officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused where the conviction has been recorded only on the basis of the possession of the illicit article recovered from his person, during search conducted in violation of the provisions of Section 50 of the Act....."

The Supreme Court also held in the above case that whether or not the safeguards provided in Section 50 have been duly observed would have to be determined by the Court on the basis of evidence led at the trial. Finding on that issue, one way or other, would be relevant for recording an order of acquittal. Then the Supreme Court held as follows:

'55. (6). That in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Section 50 are mandatory or directory, but, hold that failure to inform the concerned person of his right as emanating from Sub-section (1) of Section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law;'

It was held that the view expressed in Pirthi Chand's case (supra) is not correct and it affirmed the view taken in Ali Mustaffa's case (supra).

9. In *Kalayath Nassar v. State of Kerala* (2000 CrL. L.J. 817), the Supreme Court held that the fact that accused did not make a request on his own does not dispense with the requirement of compliance with Section 50. In *Ahmed v. State of Gujarat* (2000 CrL. L.J. 4008), the Supreme Court has made it clear that it is not enough that empowered officer or searching officer is a Gazetted Officer. Accused should be told that he has got a right to be searched in the presence of another Gazetted Officer as provided under law or before a Magistrate. Therefore, it is not enough that the empowered searching officer is a Gazetted Officer. The directions of the Supreme Court in *Baldev Singh's* case has to be complied with. In *C. Ali v. State of Kerala* (2000 CrL. L.J. 3181), it was held that there is no presumption that the detenu was informed of his right to be searched in the presence of a Gazetted Officer or a Magistrate. Evidence has to be adduced. Here, in this case, evidence adduced is only to show that the accused was informed of his right to be searched in the presence of a Gazetted Officer.

10. In *K. Mohanan v. State of Kerala* (2000) 10 SCC 222, it was held that it is not enough that the accused was offered to be produced before a Gazetted Officer or a Magistrate for the purpose of the search. But, he should be informed that he has got a legal right. In paragraph 6 of the above judgment dated 27.10.1999 it is stated as follows:

'6. If the accused, who was subjected to search was merely asked whether he required to be searched in the presence of a Gazetted Officer or a Magistrate it cannot be treated as communicating to him that he had a right under law to be searched so. What PW1 has done in this case was to seek the opinion of the accused whether he wanted it or not. If he was told that he had a right under law to have it (sic himself) searched what would have been the answer given by the accused cannot be gauged by us at this distance of time. This is particularly so when the main defence adopted by the appellant at all stages was that Section 50 of the Act was not complied with.'

However, the above decision did not refer to a three-member Bench decision of the Supreme Court in *Joseph Fernandez v. State of Goa* (2000 CrL J. 3485). In that case, the accused was informed by the Intelligence Officer that if he wished, he could be searched in the presence of the Gazetted Officer or Magistrate. But, he was not told that he has got such a legal right. We quote the observations of the Supreme Court in the above judgment dated 5.10.1999:

'2.Even then the searching officer informed him that 'if you wish you may be searched in the presence of Gazetted Officer or a Magistrate'. This according to us is in substantial compliance with the requirement of Section 50. We do not agree with the contention that there was non-compliance with the mandatory provision contained in Section 50 of the Act.'

According to the Supreme Court, no prejudice is caused when there is substantial compliance of Section 50.

11. In view of the aforesaid decisions, it is very clear that accused should be told that he has got a legal right to be searched either in the presence of a Gazetted Officer or a Magistrate even though such right need not be communicated to him in writing and such a right cannot be presumed; but, should be proved and the above legal requirement is complied with substantially so as to avoid any likelihood of prejudice. It was also held that the above requirement will not be satisfied merely because searching officer himself is a Gazetted Officer.

12. There was a view taken by certain High Courts that once the accused exercised option to be searched either in the presence of a Magistrate or a Gazetted Officer, the searching officer is bound to produce the accused to such officer as opted by the accused. This view was held to be wrong and the matter was finally settled by the Supreme Court in *Manohar Lal v. State of Rajasthan* (AIR 1996 SC 2880). There, the Supreme Court held that choice of the nearest Gazetted Officer or the nearest Magistrate has to be exercised by the officer making the search and not by the accused. The Supreme Court held as follows:

'2.It is clear from Section 50 of the NDPS Act that the option given thereby to the accused is only to choose whether he would like to be searched by the officer

taking the search or in the presence of the nearest available Magistrate. The choice of the nearest Gazetted Officer or the nearest Magistrate has to be exercised by the officer making the search and not by the accused/'

A three-member Bench of the Supreme Court considered the matter again in *Raghubir Singh v. State of Haryana* (AIR 1996 SC 2926). The Supreme Court, after considering the decision in *Saiyad Mohd. Saiyad Umar Saiyad and Ors. v. State of Gujarat* (1995) 3 SCC 610) that the right of the accused is either to be searched in the presence of a nearest Gazetted Officer or nearest Magistrate, held in the above case as follows:

'11. The option under Section 50 of the Act, as it plainly reads, is only of being searched in the presence of such senior officer. There is no further option of being searched in the presence of either a Gazetted Officer or of being searched in the presence of a Magistrate. The use of the word 'nearest' in Section 50 is relevant. The search has to be conducted at the earliest and, once the person to be searched opts to be searched in the presence of such senior officer, it is for the police officer who is to conduct the search to conduct it in the presence of whoever is the most conveniently available Gazetted Officer or Magistrate.'

The Supreme Court observed that the right is to be searched by an independent senior officer and it is for the searching officer to produce the accused before the nearest officer available to avoid delay when the accused has no option to choose between a Gazetted Officer or a Magistrate.

13. Till the decisions in *Manohar Lal's* case and *Raghubir Singh's* case were rendered, various high Courts held that if the accused is not informed that he has got a legal right to be searched either in front of a Magistrate or a Gazetted Officer, the search is illegal. In other words, if the accused is only told that he has got a right to be searched in front of a Gazetted Officer, there is no compliance of the mandatory requirement of Section 50(1) of the NDPS Act. (See: *Laxman Jena v. State of Orissa* (1995 CrL. L.J. 2993 - Orissa High Court); *Aswini alia Asoka Kumar Behera v. State of Orissa* (1996 CrL. L.J. 900 - Orissa High Court); *Manak Chand Jain v. State* (1995 CrL. L.J. 3146 - Delhi High Court); *Maher Mohd. Rafiq v. State* (1995 CrL. L.J. 3590 - Delhi High Court); *Nishan Singh v. State of UP* (1995 CrL.

L.J. 3893 - Allahabad High Court); Sardar Singh v. State of Rajasthan (1996 CrL. L.J. 3186 - Rajasthan High Court); Hamidkhan v. State of Maharashtra (1996 CrL. L.J. 2722 Bombay High Court) and Narenchu Kumar. v. State (1996 (1) RCR 451 - Punjab and Haryana High Court). It was held in these decisions that right to be searched in the presence of a Gazetted Officer or a Magistrate should be informed to the accused and if only one of the option was mentioned, search will be illegal.

14. In the decision reported in Rasheed v. State of Kerala (1999 (3) KLT 133), even though decisions in Manohar Lal's and Raghbir Singh's case were not noticed, the learned Single Judge of this Court held that partial compliance is enough and if accused is told that he has got a right to be searched in the presence of a Gazetted Officer, search will not be illegal merely because he was not informed about his right to be searched in the presence of a Magistrate. Without noticing the decision of the Supreme Court in Manohar Lal's and Raghbir Singh's case (supra) as well as the decision in Rasheed's case (supra) another learned Single Judge in CrL. Appeal No. 127/99, in Mani's case decided that if the accused was not informed that he has got a right to be searched in the presence of a Gazetted Officer or a Magistrate and only one option is given, the search will be illegal. Thereafter, in Hamza v. State of Kerala (II (2000) CCR 425) Justice R. Rajendra Babu followed Rasheed's case (supra) in view of the Apex Court decision reported in Raghbir Singh's case (supra) and held that informing the accused about the search either in the presence of a Gazetted Officer or a Magistrate is enough and there is proper and adequate compliance of Section 50 of the NDPS Act.

15. Plethora of decisions of various High Courts were quoted by the learned counsel for the accused to argue the point that if the accused is informed of the right to be searched only in the presence of a Gazetted Officer it is illegal. In those cases, the decisions in Manohar Lal's case and Raghbir Singh's case were not considered these decisions. (See: J. Prakash v. State - 1998 CrL. L.J. 3108 Andhra Pradesh High Court; Sukhdev Singh v. State of Haryana - IV (1998) CCR 230 Punjab and Haryana High Court; Gulzar Singh v. State of Haryana - I (1999) CCR 17); Surinder Singh v. State (Delhi Admn.) - I (1998) CCR 35 Delhi High Court; and Sadruddin Mohamed Husein Jundah Shah v. DCB CID, Narcotic Cell, Azad

Maidan Unit, Bombay - 2000 CrL. L.J. 2329 Bombay High Court). The learned counsel for the appellant submitted that in *Neki Ram v. State of Haryana* (1998 CrL. L.J. 199), Punjab and Haryana High Court also considered Raghbir Singh's case and in spite of the above decision, the Court held that accused should be told before search that he has got a right to be searched either in the presence of a Gazetted Officer or in the presence of a Magistrate and if only one option is given, there is violation of Section 50. In the case considered by the Punjab and Haryana High Court, the only option given by the searching officer was to be searched in the presence of a senior officer of the police. A raiding party consisting of PW2 Inspector as well as PW3 DSP in another Government vehicle proceeded towards the house of the accused and they intercepted and apprehended the accused and the only option given is the following notice of search:

'NOTICE OF SEARCH'

'In the presence of the following witnesses accused Neki Ram aforesaid was apprehended on suspicion and a notice for search is being given to him directing, 'we suspect opium in possession for which his search is to be conducted and DSP Head Quarter, Sirsa is present with us.' In case you want your search to be conducted by DSP, the search can be as per your own will. Thereupon the accused desired to be searched by the DSP and signed on the notice for search and witness also signed the same. Notice of search has been reduced into writing.'

Therefore, it can be sent that the accused was not given the option to be searched in the presence of a Gazetted Officer other than the searching officer or a magistrate. None of the options were put to him. It is repeatedly held by the Supreme Court that the right to be searched in front of a Gazetted Officer or a Magistrate cannot be dispensed with on the ground that searching officer himself is a police Gazetted Officer. Apart from the searching officer, accused has got a right to be searched in the presence of another Gazetted Officer or a Magistrate. (See: *Ahmed v. State of Gujarat* supra). So, what was held by the Punjab and Haryana High Court was that restricting the right of the accused to be searched only by a senior police officer who is gazetted in rank is not enough. The Court did not consider the question whether there is compliance of Section 50 if the accused

is offered to be searched in the presence of only a Gazetted Officer or only a Magistrate, without giving both options? In Manohar Lal's case as well as Raghbir Singh's case, the Supreme Court clearly held that once option is exercised by the accused, it is for the empowered searching officer to decide whether he should be produced before a Magistrate or a Gazetted Officer and that Gazetted Officer should be other than the empowered searching officer. Once he exercises option, obligation of the searching officer is to bring the accused before the nearest Gazetted Officer or the nearest Magistrate. Therefore, if either of the option is made, there is substantial compliance of the section and there is no likelihood of prejudice to the accused unless it is shown that there is malafide.

16. In this case, no case is made out that nearest officer was the magistrate and not the Gazetted Officer and only with malafides option to be searched in the presence of a Magistrate was not made. Further, this contention was not raised before the lower court. It is also not contended in the appeal memorandum that since the appellant was informed only about his right to be searched in the presence of a Gazetted Officer and alternate right to be searched in the presence of a Magistrate was not mentioned, prejudice is caused and the search is illegal as violative of Section 50(1) of the NDPS Act. At the end of paragraph 22 of the judgment under attack, it is stated that 'there is no much challenge regarding the compliance under Section 50 of the NDPS Act in this case.' Paragraph 25 of the judgment opens with the statement that Section 50 has been complied with. Those are not challenged in the appeal memorandum. Even if the appellant is informed of his right that he has got a right to be searched either in the presence of a Gazetted Officer or a Magistrate, the officer has the option to produce him either before a Gazetted Officer or a Magistrate who is the nearest officer. Therefore, even if only one option is given, no prejudice will be caused and there will be substantial compliance. We agree with the view expressed by the learned Single Judge in the decision reported in Rasheed's case not because there was partial compliance but because there is substantial compliance of the requirement of Section 50 and in the absence of likelihood of prejudice to the accused on the facts of the case and affirm this. In view of the decision of the Supreme Court in Manohar Lal's and Raghbir Singh's case if accused is informed that he has got a right to be searched either in the presence of a Gazetted Officer or a Magistrate, there is substantial

compliance of the section in the absence of special circumstance to show that there is likelihood of prejudice and we agree with the view expressed by Justice R. Rajendra Babu in Hamza's case (supra) and we overrule the decision in Mani v. State of Kerala in Crl. Appeal No. 127/99 (unreported). We also agree with the view expressed by the learned Judge in Rasheed v. State of Kerala (1999 (3) KLT 133) although for different reasons.

17. Narcotic substance was found from the person of the accused and there is no illegality in the search. In the absence of any other contentions, presumption under Section 54 of NDPS Act was rightly draw. Therefore, we see no ground to interfere with the impugned judgment. Only minimum sentence is imposed. Therefore, the conviction and sentence is confirmed and the appeal is dismissed.

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