

**Rasheed Vs. State of Kerala**

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**Court :** Kerala

**Decided On :** Aug-20-1999

**Reported in :** 1999CriLJ4746

**Judge :** K.A. Mohamed Shafi, J.

**Acts :** [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 20, 41, 42, 43, 50, 50(1) and 57; Code of Criminal Procedure (CrPC) - Sections 313

**Appeal No. :** Crl. A. No. 63 of 1999

**Appellant :** Rasheed

**Respondent :** State of Kerala

**Advocate for Def. :** P.N. Sukumaran, Public Prosecutor

**Advocate for Pet/Ap. :** P.B. Suresh Kumar, Adv.

**Judgement :**

**K.A. Mohamed Shafi, J.**

1. This appeal is directed against the judgment dated 20-1-1999 passed by the Sessions Court, Kollam, in S.C. No. 168/96. The accused is the appellant.
2. The appellant was indicted for the offence punishable under Section 20(b)(i) of the Narcotic Drugs and Psychotropic Substances' Act, 1985 (for short 'the Act') in

crime No. 177/96 registered by Kilikolloor Police. It is alleged that on 6-8-1996 at about 11-25 a.m. at the by lane proceeding from Palkulangara railway cross to Capex junction in Kilikolloor Village the appellant was found in illegal possession of 16 grams of ganja in 11 small packets for the purpose of sale in contravention of the provisions of the Act and as such he has committed the offence punishable under Section 20(b)(i) of the Act.

3. Since the appellant pleaded not guilty of the charge, the prosecution adduced evidence. P.Ws. 1 to 7 were examined and Exts: P1 to P7 and M:Os. 1 to 4 were marked. After the closure of the prosecution evidence, the appellant was questioned under Section 313 of the Code of Criminal Procedure regarding the incriminating circumstances brought out in evidence in this case. No defence evidence was adduced. After hearing both sides and evaluating the evidence on record, the lower Court found the appellant guilty of the offences punishable under Section 20(b)(i) of the Act, convicted and sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rs. 2000/- in default of payment to undergo simple imprisonment for one week. Hence this appeal is preferred by the appellant before this Court.

4. The learned counsel for the appellant submitted that only the police officials supported the prosecution case and the independent witnesses cited have turned hostile and they did not support the prosecution case and therefore, it is not safe to rely upon the evidence of P.Ws. 4, 5 and 7, the police officials, to find the appellant guilty in this case. The lower Court found the evidence of P.Ws. 4, 5 and 7 is credit-worthy and] can be relied upon to find the guilt of the accused though P.Ws. 2 and 3, the independent witnesses examined in this case, have turned hostile to the prosecution. On perusal of the evidence of P.Ws. 4, 5 and 7, I also find that their evidence is acceptable and nothing is brought out in the cross-examination to discredit their veracity. Therefore, the contention of the appellant that the evidence of P.Ws. 4,5 and 7 is insufficient to find the guilt of the appellant in this case is not sustainable.

5. The appellant has contended that the search and seizure as well as the entire proceedings in this case are' vitiated for non-compliance of the mandatory

provisions of Section 50 of the Act. The counsel for the appellant submitted that even if the entire prosecution case is accepted, there is only partial compliance of the mandatory requirements of Section 50 of the Act since the case of the prosecution is that P.W. 7, the detecting officer, has only informed the appellant that he is entitled to be searched before a Gazetted Officer and he has not stated that the appellant is entitled to be searched in the presence of a Gazetted Officer or the nearest Magistrate. Therefore, according to him, the search is vitiated for partial compliance of Section 50 of the Act.

6. In Ext. P5 seizure mahazar prepared by P.W. 7, it is only stated that before search P.W. 7 informed the appellant that he is entitled to be searched in the presence of a Gazetted Officer and he has waived that right. P.W. 7, the detecting officer, has also deposed that he has only stated that the appellant is entitled to be searched in the presence of a Gazetted Officer. P.W.4 the A.S.I, who was present along with P.W. 7 at the time of search and seizure, has deposed that P.W. 7 informed the appellant that he is entitled to be searched in the presence of a Gazetted Officer. He has further deposed that he did not hear P.W. 7 telling the appellant that he is entitled to be searched before a Magistrate. P.W. 5, the Head Constable who was also present along with P. Ws. 4 and 7, has deposed that P.W. 7 only asked the appellant as to whether he should be searched in the presence of a Gazetted Officer. Therefore, it is clear from the evidence of P.Ws. 4,5 and 7 and Ext. P5 seizure mahazar that P.W. 7 has only informed the appellant that he is entitled to be searched in the presence of a Gazetted Officer and he has not stated that the appellant is also entitled to be searched in the presence of the nearest Magistrate.

7. Section 50(1) of the Act mandates that when any authorised officer under Section 42 of the Act is about to search any person under the provisions of Section 41, 42 or 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. Therefore, Section 50 of the Act gives an option to the suspect to be searched either before a Gazetted Officer or the nearest Magistrate. It is well settled that non-compliance of the provisions of Section 50 of the Act will vitiate the conviction if not the trial by authoritative

pronouncement of a five Judges Bench of the Apex Court in the decision reported in the State of Punjab v. Baldev Singh (1999) 4 JT (SC) 595 : (1999 Cri LJ 3672).

8. Therefore, the question to be considered is whether the failure on the part of the searching officer to mention to the suspect that he is entitled to be searched in the presence of a Gazetted Officer or a nearest Magistrate will vitiate the search and seizure and the conviction. The counsel for the appellant submitted that if there is only partial compliance of the provision of Section 50 of the Act by the detecting officer in so far as he mentioned to the suspect only that he is entitled to be searched before a Gazetted Officer alone or before the Magistrate alone without informing that he is entitled to be searched either before a Gazetted Officer or the Magistrate, the search and seizure will be vitiated.

9. In support of this argument, the counsel for the appellant relied upon a decision reported in Mukesh v. The State (Delhi Administration) (1994) 3 Crimes 337. In that case a single Judge of the Delhi High Court held that since there was only partial compliance of Section 50 of the Act, as the SHO only made partial offer to the accused limiting his choice that he is entitled to be searched before a Gazetted Officer alone and denied his alternative choice to be searched before the Magistrate, the mandatory provision of Section 50 of the Act is violated entitling the accused to get acquittal for this partial offer. He also relied upon another decision reported in Gopal Reddy v. State (1995) 2 Crimes 155 wherein a single Judge of the Orissa High Court has held that both the alternative choices should be indicated to the person who is to be searched and the indication of one of the alternative choices does not conform to the mandatory requirements of Section 50 of the Act and the partial compliance with the requirements will not meet the mandate prescribed by Section 50 of the Act. In that case it was only informed the accused that he is entitled to be searched before a nearest Gazetted Officer and it is not stated that he is entitled to be searched before the nearest Magistrate also.

10. The counsel for the appellant also submitted that apart from Delhi and Orissa High Courts referred to above, several High Courts also have held that the partial compliance or partial offer regarding the right of the suspect to be searched without indicating the two alternative choices to be searched before a Gazetted

Officer or the Magistrate is not in conformity with the mandatory provisions of Section 50 of the Act and it will vitiate the entire search, seizure, trial and conviction of the accused.

11. Even after bestowing my serious attention to the judgments of the Delhi High Court and the Orissa High Court, referred to above and the other High Courts expressing the same view with regard to the partial compliance of Section 50 of the Act, I am unable to persuade myself to subscribe to the view expressed in those judgments. The provisions of Section 50(1) of the Act makes it clear that the suspect is entitled to be searched either before a Gazetted Officer of any of the departments mentioned in Section 42 or before the nearest Magistrate. The option of selection of either the Gazetted Officer or the nearest Magistrate is with the suspect. It is well established that the authorised officer, who is to conduct the search, has to inform the suspect that he is entitled to be searched in the presence of a Gazetted Officer or the Magistrate and his failure to inform the suspect of his right to be searched in the presence of a Gazetted Officer or the Magistrate vitiates the conviction if not search and seizure of the contraband article from the suspect.

12. The provisions of Section 50 of the Act is an inbuilt safeguard incorporated by the framers of the Statute to the suspected persons from unnecessary harassment and false accusation by the authorised officers and others who are competent to detect and register the very grave offence punishable under the Act and to afford credibility to the search and seizure effected in the N.D.P.S. cases. Therefore, the compliance of Section 50 is fundamental affecting the very search and seizure and vitiating the conviction of the accused in the NDPS case. It is clear from a plain reading of the provisions of Section 50(1) of the Act that the suspected person is given the right to choose either of the alternatives that he is entitled to be searched before a Gazetted Officer or the nearest Magistrate. 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 entitles 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 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. Therefore, the contention raised by the appellant in this case that as P.W. 7 failed to mention to the appellant that he is entitled to be searched either before a Gazetted Officer or the nearest Magistrate and the information given by him that the appellant is entitled to be searched in the presence of a Gazetted Officer alone is being partial compliance of Section 50 of the Act, the entire search and seizure of the contraband and the subsequent proceedings are vitiated in this case is not sustainable.

13. The counsel for the appellant argued that the prosecution is bad for non-compliance of Section 57 of the Act as P.W. 7 has not made a report regarding arrest and seizure of the contraband article from the appellant with all particulars to his immediate superior within forty-eight hours from the search, seizure and arrest in this case. It is well settled that Section 57 of the Act being a post search and seizure of the contraband measure is only directory and not mandatory and it has been held so in the decision reported in *State of Punjab v. Balbir Singh* AIR 1994 SC 1872: (1994 Cri LJ 3702). Even though the counsel for the appellant relying upon a subsequent judgment of the Supreme Court reported in *Mohinder Kumar v. State, Panaji* AIR 1995 SC 1157 : (1995 Cri LJ 2074) contended that the compliance of the provisions of Section 57 is mandatory, that contention is not acceptable. It is pertinent to note that in the *Balbir Singh's* case the Supreme Court has categorically held that the compliance of Section 57 of the Act is not

mandatory. But either by a typographical error or by printing mistake in the subsequent judgment reported in Mohinder Kumar v. State AIR 1995 SC 1157 : (1995 Cri LJ 2074) it is stated that in Balbir Singh's case the Supreme Court has held that the compliance of Section 57 of the Act is mandatory whereas in fact it has been categorically held in Balbir Singh's case that the compliance of Section 57 being post search and post seizure of the contraband act is not mandatory. Moreover, it is pertinent to note that the appellant has no case that due to the non-compliance of the provisions of Section 57 of the Act any prejudice is caused to him.

14. From what is stated above, it is clear that the contention of the appellant that the lower Court is not justified in finding him guilty in this case is not at all sustainable. The evidence on record established that the contraband article was seized by P.W. 7 from the appellant after complying with the provisions of the Act.

15. The counsel for the appellant submitted that only a small quantity of ganja is seized from the appellant and the sentence awarded by the lower Court is very harsh. As already noted, 16 grams of ganja in 11 small packets is seized from the appellant in this case. The mere possession of ganja in contravention of the provisions of the Act itself is an offence under the Act. The lower Court after finding him guilty of the offence punishable under Section 20(b)(i) of the Act, convicted and sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rs. 2000/- in default of payment to undergo simple imprisonment for one week. After hearing the counsel for the appellant and the Public Prosecutor with regard to the propriety of sentence awarded in this case, I feel that the sentence awarded by the lower Court is harsh and leniency with regard to the sentence can be shown to the appellant. I also find that the sentence to undergo rigorous imprisonment for one year by retaining the fine imposed by the lower Court will meet the ends of justice in this case.

Hence this appeal is allowed in part and the finding of guilt and conviction entered by the trial Court are confirmed. But the sentence awarded by the lower Court is modified and the appellant is directed to undergo rigorous imprisonment for one year. The sentence of fine awarded by the lower Court and the direction regarding

set off of the pretrial detention period towards sentence of imprisonment are sustained.

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