

Abid Khan Vs. State of Rajasthan

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Court : Rajasthan

Decided On : Jan-31-2006

Reported in : RLW2006(2)Raj1310; 2006(2)WLC340

Judge : Narendra Kumar Jain, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 8, 12, 21, 29, 41, 41(2), 42, 42(2), 43, 50, 50(5), 51 and 57; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 100, 100(4), 100(8), 165 and 313; [Indian Penal Code \(IPC\), 1860](#) - Sections 187

Appeal No. : S.B. Criminal Appeal No. 722 of 2000

Appellant : Abid Khan

Respondent : State of Rajasthan

Advocate for Def. : B.S. Chhaba, Public Prosecutor

Advocate for Pet/Ap. : N.A. Naqvi and; Liyakat Ali, Advs.

Disposition : Appeal allowed

Judgement :

Narendra Kumar Jain, J

1. Heard the learned Counsel for the parties.

2. The appellant was convicted and sentenced under Section 8/21 of the NDPS Act to 15 years R.I. and a fine of Rs. 1 lac, in default of payment of fine to further undergo one year R.I. by the Court of Special Judge, NDPS Case, Jhalawar in Sessions Case No. 35/99. Being aggrieved with the same, the present appeal was preferred before this Court.

3. PW 11 Rajeev Dutta, SHO, Kotwali, Jhalawar received an information on 24.5.99 at 3.25 p.m. from informer that accused Abid is selling illegal smack. The information was reduced in writing (Ex.P.1 1) and a copy of which was forwarded to S.P. Jhalawar (Ex.P.13). Vide Ex. P.1 to SHO, Kotwali, Jhalawar directed Constable Ramkalyan to bring two independent witnesses of the locality of the place where search is to be made on 24.5.99 at 3.55 p.m. that nobody is willing to be a witness to the search as the entire area belongs to Muslim community. The SHO put a note on Ex.P.1 below the report of PW 2 Ramkalyan that no one is prepared to become an independent witness to the search, therefore, Ashish Bhargava Sub-Inspector and Yashwant Singh, Sub-Inspector were made witnesses in the case. A notice Ex.P.3 under Section 50 of the Act was given to the accused apprising him to get his search before any Gazetted Officer or before the Magistrate or by SHO itself. The accused gave in writing that he wants his search in presence of Gazetted Officer. Vide Ex.P.4 search and seizure memo, 10 gram smack with small paper bags was recovered from the possession of the accused appellant. The net weight of contraband was 5 gram. The site plan Ex.P.2 was prepared. The quantity of contraband was small, therefore, entire smack was sent for chemical examination. As per report Ex.P.19 given by Asstt. Director, Chemical State Forensic Science Laboratory, Rajasthan, Jaipur diacetyl mor phine (Heroin) was found. After receipt of positive report and other investigation of the case, a challan was filed against the appellant under Section 8/21 and against co-accused Dheeraj under Section 8/29 of the Act.

4. The Trial Court framed charge against the appellant under Section 8/21 and against co-accused Dheeraj under Section 8/29 of the Act. The prosecution examined 11 witnesses and produced documentary evidence Ex.P.1 to Ex.P.19. The statement of the accused was recorded under Section 313 Cr.P.C. No evidence oral or documentary was produced in defence. The learned Trial Court,

after nearing both the parties acquitted co-accused Dheeraj from the charge levelled against him, but convicted and sentenced the accused appellant as mentioned above.

5. The learned Counsel for the appellant contended that Ex.P.I notice given by SHO to appellant was not according to Section 50 of the Act as it was mandatory to write in this notice that it is a legal right of the accused to get himself searched in presence of Magistrate or before Gazetted Office but this fact of legal right of an accused was not mentioned in it, therefore, it cannot be said that Section 50 of the Act was fully complied with in the present case. He further contended that as per Sub-section 2 of Section 42 of the Act it was necessary for the SHO to forward the copy of the information Ex.P.11 to his immediate superior officer. Although Ex.P.13 has been placed on record having forwarded the copy or the information to S.P. Jhalawar but at what time it was sent and whether in fact it was received or not in the office of S.P., Jhalawar is not clear from this document or any other evidence, therefore, this is a case of violation of Sub-section 2 of Section 42 of the Act. He further contended that this is an admitted case of the prosecution from Ex.P.I itself that no sincere efforts were made to call two independent witnesses at the time of search of the accused and search was made in presence of police persons who were subordinate to the SHO, searching officer, therefore, it is clear that provisions of Sub-section 5 of Section 50 of the NDPS Act were not complied with. He contended that mere writing a report that independent witnesses are not available cannot be said to be a sufficient compliance of mandatory provisions of Sub-section 5 of Section 50 of the NDPS Act read with Section 100 of the Cr.P.C. in support of his contention he referred *Nadeem v. State of Rajasthan*, 1998 Cr.L.R. (Raj.) 392 and *Saudan and Anr. v. State of Rajasthan*, 2003 (1) R.C.C. 501.

6. The learned Counsel for the appellant lastly contended that although in view of non-compliance of mandatory provisions of Section 50 of the Act, the accused is entitled to be acquitted, but if this Court does not agree with his submission then at least, the case of appellant for the purpose of sentence of imprisonment be considered. He contended that the accused appellant was arrested at the spot on 24th May, 1999 and he was not enlarged on bail during investigation/trial as well

as during pendency of this appeal, therefore, he is in jail since 24th May, 1999 and has already undergone a sentence of imprisonment for more than 6 and half years, however a minimum sentence of 10 years imprisonment is prescribed in the above offences, hence at least sentence of 15 years imprisonment awarded by the Trial Court be reduced to a period of minimum sentence of 10 years R.I. particularly when the contraband found in the present case was only 5 gram in quantity.

7. The learned P.P. contended that the Trial Court has considered oral as well as documentary evidence and rightly convicted and sentenced the accused appellant and no interference is called for in this appeal.

8. I have considered the rival submissions and examined the impugned judgment passed by the Trial Court.

9. Ex.P.3 is the notice given under Section 50 of the Act to the appellant wherein it is specifically mentioned that accused may get himself searched before the Magistrate or before Gazetted Officer or by SHO. In *Prabha Shankar Dubey v. State of M.P.* : 2004(91)ECC194 the Hon'ble Apex Court considered the provisions of Section 50 and held that there is no form prescribed or intended for conveying the information required to be given under Section 50. What is necessary is that the accused (suspect) should be made aware of the existence of his right to be searched in the presence of one of the officers named in the Section itself. Since no specific mode or manner is prescribed or intended, the court has to see the substance and not the form of intimation. Whether the requirements of Section 50 have been met is a question which is to be decided on the facts of each case and there cannot be any sweeping generalization and/or straitjacket formula. In view of above judgment of Hon'ble Supreme Court I find from the perusal of Ex.P.3 that sufficient compliance in respect of giving notice under Section 50 of the Act has been made in the present case, therefore, I do not find any force in the contention of the learned Counsel for the appellant in this regard.

10. Another contention about forwarding of an information Ex.P. 11 to superior officer is concerned, I find that although it was forwarded to S.P., Jhalawar, which is clear from Ex.P. 13 but apart from it there is no dispute that Mr. Rajeev Dutta

PW11 SHO, Kotwali, Jhalawar was Gazetted Officer. The Hon'ble Supreme Court in G. Srinivas Goud v. State of A.P. 2005 Cri.L.J. 4367 considered the provisions of Sub-section 2 of Section 42 of the Act and held that when search was conducted by Gazetted Officer, then the requirement of sending copy to the superior officer is not mandatory, therefore, I do not find any force in this contention of the learned Counsel for the appellant also.

11. Now I come to next contention of the learned Counsel for the appellant about compliance of Sub-section 5 of Section 50 of the Act. From Ex.P.I prepared by Rajeev Dutta, SHO, PW-1 it is clear that he directed one Constable Ramkalyan to bring two independent witnesses but he gave a report that no one is willing to be a witness to the search as accused is muslim by caste and locality in which accused is to be searched was of muslim community. Thereafter the SHO Rajeev Dutta did not make any efforts about giving any notice to any person of the locality in writing to attend and witness to the search and directly made a report in his own handwriting that Ramkalyan was sent for bringing two independent witnesses but no one is willing to be independent witness to the search hence Shri Ashish Bhargava, Sub-Inspector and Shri Yashwant Singh, Sub-Inspector are made independent witnesses to the search in the case.

12. Section 50 of the NDPS Act reads as under:

50. Conditions under which search of persons shall be conducted. 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.

13. Sub-section 5 of Section 50 is also reproduced as under:

(5) When an officer duly authorised under Section 12 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled

substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under Section 100 of the Code of Criminal Procedure, 1973.

14. Section 51 of the Act is also reproduced as under:

Provisions of the Code of Criminal Procedure, 1973 to apply to warrants, arrest, searches and seizure.-The provisions of the Code of Criminal Procedure, 1973 shall apply, in so far as they are not inconsistent with the provisions of this Act, to all warrants issued and arrests, searches made under this Act.

15. Sub-section 4 and 8 of Section 100 Cr.P.C. read as under:

100 (4) Before making a search under this Chapter, the officer or other person about to make it shall call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situate or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search and may issue an order in writing to them or any of them so to do.

100(8) Any person who, without reasonable cause, refuses or neglects to attend and witness a search under this section, when called upon to do so by an order in writing delivered or tendered to him, shall be deemed to have committed an offence under Section 187 of the Indian Penal Code, 1860 (45 of 1860).

16. This Court in *Nadeem v. State of Rajasthan* (supra) considered the provisions of Section 50, 57 of the NDPS Act and Section 100 Cr.P.C. In this case also the similar of report was given by the SHO that he tried for independent witnesses to the search but nobody was willing for the same. Section 51 of the Act and Sub-section 4 and 8 of Section 100 of the Code of Criminal Procedure were considered and it was observed as under:

As already stated the accused was nabbed in a busy area as per the statement of witness Mahendra Singh Constable (PW 5) but another constable Radha Kishan (PW 1) stated that he attempted to make search of independent witness but found none. I am not prepared to believe that in the afternoon no witness was present in

a busy area. Calling of independent witness of the locality for witnessing the search was not an idle formality. The provisions made in Sec. 100(4) Cr.P.C. is a salutary safeguard to ensure the sanctity of the search conducted by the police officers. The mere statement by the Investigating Officer that he tried to associate some respectable of the locality but none was available cannot suffice as a convenient bypass to the said provision. Mahendra Singh Constable (PW 5) categorically stated in his cross-examination that C.I. Did not stop the persons from the place of incident which was a busy area. This shows that witnesses were available but they were not associated with the search. All this leads me to the conclusion that the recovery of smack as alleged, is not free from doubt.

17. In *Saudan and Anr. v. State of Rajasthan* (supra), this Court again examined the provisions of Section 100 Cr.P.C. and also the judgment of the Apex Court in *State of Punjab v. Balbir Singh* and held as under:

In *State of Punjab v. Balbir Singh* : 1994 CriLJ3702 their Lordships of the Supreme Court while considering the impact of failure to comply with the provisions of Code of Criminal Procedure, set out conclusions in para 25 of the judgment, Clause (4-B) of the conclusions is relevant for the purpose which is reproduced below:

If an empowered officer or an authorised officer under Section 41(2) of the Act carries out a search, he would be doing so under the provisions of Cr.P.C. namely Sections 100 and 165 Cr.P.C. then such search would not per se be illegal and would not vitiate the trial.

Their Lordships then held that the effect of such failure has to be borne in mind by the courts while appreciating the evidence in the facts and circumstances of each case.

18. Now I further examine the evidence of the present case in respect of compliance of Sub-section 5 of Section 50 of the Act and Sub-section 4 and 8 of Section 100 Cr.P.C. PW9 Yashwant Singh witnessed to search memo admitted that it was a busy area where search of the accused was made. PW 4 Bhim Raj also admitted in his cross-examination that number of persons had gathered at the time when accused was detained and search was conducted. PW 10 Jai Narain

also stated that number of persons had gathered at the place where search was conducted and it was a busy area. Ex.P.I shows that SHO directed Ramkalyan Constable to bring two independent witnesses and Ramkalyan gave his report that nobody is willing to be a witness to search. His report shows that he has not reported as to whom he requested to become independent witness and who refused him for the same. Ex.P.I further shows that PW11 Rajeev Dutta, SHO did not make any effort after receipt of report of Ramkalyan, to give notice in writing to any person of the locality or to persons who were present at the time of search of the accused at the place of occurrence. Ex.P.2 is the site plan which clearly shows that number of inhabitants and residents were their near the place of occurrence. The Legislature has given safeguard in the cases relating to NDPS as a severe punishment is provided in it. Before amendment made in the Act in the year 2001 the minimum sentence of imprisonment was 10 years irrespective of quantity of contraband. The appellant has been convicted by the Trial Court for 15 years R.I. whereas total quantity of contraband recovered in the present case was 5 gram. In this view of the matter it is necessary to examine and scrutiny the statement of the prosecution witnesses as well as the mandatory provisions of the Act strictly. As per Section 51 of the Act, the provisions of Cr.P.C. in respect of search and seizure were applicable and as per Sub-section 4 of Section 100 Cr.P.C., it was necessary that before making a search, the officer to make, it shall call upon two or more Independent witnesses and respectable inhabitants of the locality in which the place to be searched is situate or of any other locality if no such Inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search and may issue an order in writing to them or any of them so to do. From the oral as well as documentary evidence available in the present case it is clear that no order in writing was delivered or tendered to any person of the locality to attend and witness a search by PW 11 Rajeev Dutta. Sub-section 8 of Section 100 Cr.P.C. is also an important provision and it clearly says that any person cannot refuse without reasonable cause to attend and witness a search when he is called upon to do so by an order in writing and if he refuses then it is an offence under Section 187 of the IPC. In these circumstances, it is clear that recovery of contraband recovered in the present case is not free from doubt. I have examined the finding of the learned Trial Court in this regard. The learned

Trial Court has not considered the mandatory provisions of Sub-section 5 of Section 50 of the Act and further failed to consider the provisions of Section 51 of the Act as well as Sub-section 4 and 8 of Section 100 Cr.P.C. Therefore, in these circumstances, the Judgment of conviction passed by the Trial Court cannot be allowed to be sustained. The Trial Court has committed an illegality in convicting and sentencing the accused appellant for the reasons as mentioned above.

19. Consequently, I allow this appeal, set aside the impugned judgment of the Trial Court and acquit the accused appellant from the offence, he was charged. The accused appellant is in custody, therefore, it is directed that he be released forthwith, if his custody is not required in any other case.

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