

**Balu Vs. State of Rajasthan**

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**Court :** Rajasthan

**Decided On :** Apr-09-2004

**Reported in :** 2005CriLJ33; RLW2004(3)Raj1756

**Judge :** Shiv Kumar Sharma, J.

**Acts :** [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 50 and 50(3)

**Appeal No. :** S.B. Criminal Appeal No. 241 of 2002

**Appellant :** Balu

**Respondent :** State of Rajasthan

**Advocate for Def. :** Chandralekha, Public Prosecutor

**Advocate for Pet/Ap. :** Mridul Jain, Adv.

**Disposition :** Appeal allowed

**Judgement :**

**Shiv Kumar Sharma, J.**

1. The appellant was accused on the file of learned Special Judge NDPS Cases Chittorgarh vide judgment dated February 15, 2002 convicted and sentenced the appellant under Section 8/18 of the [Narcotic Drugs and Psychotropic Substances](#)

[Act, 1985](#) (for short 'NDPS Act') to undergo rigorous imprisonment for ten years and fine of Rs. one lac, in default to further suffer rigorous imprisonment for two years.

2. Brief facts necessary for the disposal of this appeal are these:-

On may 26, 2000 SHO, Police Station Vijaypur after receiving secret information through some Mukhbir proceeded to Vijaypur bus-stand along with police party. Around 11.30 AM one person was seen carrying a plastic bag on his right shoulder. The person got halted and on being enquired he gave his name as Balu Jat. A notice under Section 50 NDPS Act was given to him and on being searched he was found possessing 3.100 kg. opium illegally in the plastic bag. The opium got recovered and necessary memos were drawn. After usual investigation charge sheet was filed. Charge under Section 8/18 NDPS Act was framed against the appellant who denied the charge and claimed trial. The prosecution in support of its case examined as many as 12 witnesses and got exhibited 23 documents. In the explanation under Section 313 Cr.P.C., the appellant claimed innocence. No defence witness was however examined. The learned trial Judge on hearing final submissions convicted and sentenced the appellant as indicated herein above.

3. It is contended by learned counsel for the appellant that on being given written notice under Section 50 of the NDPS Act requiring the appellant to exercise option to be searched either before the Magistrate or the Gazetted Officer, the appellant only wrote on the notice 'Main Sehmat Hoon' (I agree) and put his signatures. The appellant did not give any consent to be searched by the SHO, but the SHO effected the search and thereby flouted the mandate of Section 50 of NDPS Act. Thus very foundation of prosecution case is illegal and the appellant could not be convicted and sentenced.

4. Per contra, learned Public Prosecutor supported the impugned judgment and urged that the appellant was given option under Section 50 of the NDPS Act but he himself asked the SHO to effect the search.

5. I have reflected over the rival submissions and scanned the material on record.

6. Before analysing the contentions raised, I deem it proper to consider the provisions contained in Section 50 of the NDPS Act, which are as under:-

'Section 50 Condition under which search of person 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 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.

(5) When an officer duly authorised under Section 42 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 (2 of 1974).

(6) After a search is conducted under Sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.'

7. Section 50 has been introduced with the obvious intent to avoid any harm to innocent persons and to avoid raising of allegation of planting of fabrication by prosecuting authorities. It mandates that if a person to be searched so requires, the officer who is about to search him under the provisions of Section 41 and 42

shall take such person without any unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate. 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. Requirement of Section 50 may be summarised thus:-

(i) It is mandatory for the officer conducting search and seizure to inform the suspect his right to be searched in presence of the Magistrate or Gazetted Officer.

(ii) It is mandatory for the officer conducting search and seizure to follow the mandate of Sub-section (3) and to inform the suspect that Gazetted Officer or the Magistrate, if sees no reasonable ground for search, shall discharge the person.

8. Sub-section (5) and (6) have been added by Amendment Act 9 of 2001 which came into force with effect from October 2, 2001. Sub-section (5) provides that in an emergent situation the search and seizure may be effected by the authorised officer without taking suspect to the nearest Gazetted Officer or Magistrate when there is possibility that suspect is likely to part with the possession of Narcotic drug or psychotropic substance or controlled substance or any article or document. However adequate statutory safeguards have been provided under Section (6).

9. Adverting to the facts of the case on hand, I find that written notice (Ex.P-2) was given to the appellant under Section 50 of the NDPS Act requiring the appellant to be searched either before the Magistrate or Gazetted Officer. The appellant wrote on the notice 'Main Sehmat Hun' (I agree) and put his signatures. The written consent endorsed by the appellant on the notice would imply that he wanted to be searched either by the Magistrate or the Gazetted Officer but Chand Singh, SHO (PW. 12) himself effected the search. Written Notice (Ex.P-2) bears the signatures of Motbirs Jagdish (PW. 1) and Shankar (PW.2), but they did not support the prosecution case and were declared hostile. It is evident from the perusal of written notice (Ex.P-2) that the appellant was not informed that the Magistrate or Gazetted Officer, if sees no reasonable ground for search, shall discharge the appellant.

10. Prior to incorporation of Sub-section (5) in Section 50, the authorised Officer himself could not search the suspect but with effect from October 2, 2001 the authorised officer in an emergent situation may effect the search and seizure subject to the checks provided in Sub-section (6). These amended provisions are not applicable to the search and seizure effected on May 26, 2000 by Chand Singh SHO in the instant case. By effecting search and seizure himself Chand Singh SHO flouted the mandate of Section 50. From the written notice (Ex.P-2) itself, it is evident that the appellant agreed to be searched either by the Magistrate or the Gazetted Officer and the SHO had no authority to conduct search and seizure.

11. Their Lordships of the Supreme Court in *State of Punjab v. Dalbir Singh* (1), indicated that Section 50 of the NDPS Act confers a valuable right on the person to be searched in the presence of Gazetted Officer or Magistrate if he so requires, since such a search would impart much more authentic and creditworthiness to the proceedings while equally providing an important safeguard to the accused and that, therefore, the safeguard conferred under Section 50 is to be taken as an important requirement and as a legislative imperative and non-compliance would vitiate the trial.

12. Section 50 applies to the personal search. Anything carried by the suspect in his hands, shoulder or head would also be on his person. A purse or packet if is on his person would not become luggage in his hands. A sling bag hanging on the body of the suspect is of on his person would not become luggage if it is carried in the hand. Something on the person of the suspect cannot be taken search of unless provisions of Section 50 are observed. If a bag is carried by the suspect then it is on the person of the suspect and not otherwise. Since the appellant was alleged to carry plastic bag on his shoulder it was essential for the SHO to scrupulously follow the legislative safeguards contained in Section 50. Conviction of appellant under Section 8/18 NDPS Act thus cannot be sustained.

13. For these reasons, I allow the appeal and set aside the impugned judgment dated February 15, 2002 passed by the learned Special Judge NDPS Case Chittorgarh. I acquit the appellant of the charge under Section 8/18 of the NDPS

Act. The appellant, who is in jail, shall be set at liberty forthwith, if not required to be detained in any other case.

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