

**Dev Chand and Etc. Vs. State of Rajasthan**

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**SooperKanoon Citation :** [sooperkanoon.com/765202](http://sooperkanoon.com/765202)

**Court :** Rajasthan

**Decided On :** Jul-06-1999

**Reported in :** 2000CriLJ194

**Judge :** M.A.A. Khan, J.

**Acts :** [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 8, 15 and 50

**Appeal No. :** Cri. Appeal No. 520 of 1997 and Criminal Jail Appeal No. 231 of 1997

**Appellant :** Dev Chand and Etc.

**Respondent :** State of Rajasthan

**Advocate for Def. :** Pratap Singh, Public Prosecutor

**Disposition :** Appeal allowed

**Judgement :**

**M.A.A. Khan, J.**

1. Both these appeals involve common facts. These are, therefore, disposed of by this common order.

2. The dates, time and place of hearing of both the appeals were duly notified to their common counsel, Sh. N. L. Saran, Advocates appointed as Amicus Curiae for both the appellants. However, he did not appear for and on behalf of either of the appellants. The learned Public Prosecutor was, therefore, heard in both the appeals and orders were reserved with a view that if the counsel of the appellants appeared later on he may be heard. But despite waiting for the counsel for sufficiently long time, he did not appear for the appellants. The appeals are now being disposed off on merits.

3. The facts relevant and sufficient to dispose of the two appeals are these :

On March 23, 1996 at about 1-15 p.m. PW. 6 Mohan Singh, Station House Officer, Police Station Bakani Distt. Jhalawar (Raj;) received a secret information to the effect that two persons were possessing bags, containing crushed capsules of opium poppy, at Maheshpura Bus Stop. The SHO reduced the said information in the General Diary (Ex. P9), informed his immediate superior office, P.W. 5 Dinesh Chand Chaudhary, Dy. S. P. and Circle Officer at Jhalawar requesting him at the same time to reach Maheshpura Bus Stop and left for the said bus stop along with his staff including PW. 2 Shankar Lal and PW. 4 Ram Narain, Constables. On reaching the Maheshpura Bus Stop he noticed the present appellants sitting on certain bags. He asked them to remain in that position. During the meanwhile the Dy. S. P. also reached there. The SHO then informed the appellants that they would be searched in the presence of the Dy. S.P. for their suspected possession of crushed capsules of opium poppy. It was noticed that the two appellants were possessing two bags each. The bags were opened in the presence of PW. 3 Ram Narain, the hotelwala who had been called to witness the search and seizure proceedings. The bags contained crushed capsules of opium poppy. Four specimen packets, one each from each of the four bags, were prepared. They were duly sealed with the seal of the SHO. The four bags were separately seized and sealed. The sealed packets and the sealed bags were taken to the police station, Bakani and handed over to PW. 7 Prem Singh, the Head Constable In-charge of the Police Malkhana at the Police Station. Later on the sealed packets were sent to the State Forensic Science Laboratory for Rajasthan at Jaipur (FSL) through PW. 1 Satender Constable for examination. On chemical examination, the

water extract of the specimen samples gave positive test for the presence of the chief constituents of opium. The Assistant Director of the FSL, vide his report Ex. P. 20, accordingly reported that the samples were the dried crushed capsules of opium poppy from which juice had been extracted.

4. On finding the above mentioned facts proved and rejecting the defence theory that the two appellants were returned from participating in a marriage in village Bhumada and which theory was supported by DW. 1 Devi Lal and DW. 2 Sheo Narayan, the learned trial Judge held both the appellants guilty of the offences punishable Under section. 8 r.w. Section 15 of the Narcotic Drugs and Psychotropic Substances Act (the NDPS Act), convicted them thereunder and sentenced each of them by his common but separate judgments and orders of the even date i.e. January 4, 1997, to rigorous imprisonment for 10 years each and fine of Rs. one lac each or to undergo further RI for one year each in case of committing default in payment of fines.

5. I have gone through the material on the record of the learned trial Judge and have also heard the learned Public Prosecutor.

6. In the Memorandum of appeals filed by the appellants through the Superintendent Jail they have simply challenged the legality and validity of the impugned judgment and order. The learned Public Prosecutor, however, heavily relied upon the impugned judgment and order and submitted that all the objections raised by the appellant before the trial Court were satisfactorily commented upon and decided by the learned trial Judge, hence the impugned judgment and order are required to be upheld.

7. In the absence of any assistance from the side of the appellant, I had to examine the factual and legal points in this case with more care and attention and on doing that I have been of the opinion that in the facts and circumstances of the case the charges framed against the two appellants in their separate trials do not stand proved beyond reasonable doubt and that they should not be denied such benefit simply because their counsel did not turn up to assist the Court when he was called upon to do so.

8. On going through the impugned judgment and order I find that apart from inviting the attention of the learned trial Judge to certain contradictions and infirmities in the statements of the prosecution witnesses, which contradictions and infirmities were, in the opinion of the learned counsel for the appellants before the trial Court, relevant to and material for appreciating the evidence on record and the facts and circumstances of the case in right perspective, the learned counsel had mainly urged that since two independent witnesses were not associated with the search and seizure proceedings, as was required by law to be done, and also that the mandatory provisions of Sections 50 of the NDPS Act were not complied with conducting such proceedings, the appellants could not be successfully held guilty of the offence Under section. 8/15 NDPS Act. I find some force in these points.

9. The search and seizure proceedings in this case were conducted not by the officers of the Narcotic Department but by the police officers authorised under the NDPS Act to conduct such proceedings. According to the prosecution, after having received the secret information at police station Bakani at about 1-15 p.m. PW. 6 Mohan Singh SHO had informed the officer immediate superior to him and had left for the Maheshpura Bus Stop along with his team. Though he had taken the necessary staff and material with him as was required for conducting the search and seizure proceedings, yet he did not take any independent witness with him to witness such proceedings. This aspect of the case is not much material for the obvious reason that the place whereat the search and seizure were likely to be conducted was reported to be a bus stop where the presence and availability of independent witnesses could have been reasonably expected. Any way, it is the case of the prosecution themselves that there was a hotel (presumably a tea stall) at the Bus Stop and that the hotelwala PW. 3 Ram Narayan, was called upon to witness the search and seizure proceedings. Since there was a tea stall at the Bus Stop it can reasonably be presumed that there must be some other persons there at least the passengers waiting for the bus. It was the month of March and the farmers may also be reasonably expected to be present at their field at that point of season and time. But no other person was associated with the search and seizure proceedings. No effort was also made to procure any other independent witness during the period the police party had waited for the arrival of the Dy. S.P. at that place.

10. In so far as P.W. 4 Ram Narain, the only independent witness, is concerned he did not support the prosecution case at all, though he admitted his signatures on the relevant memos. It is true that irregularity in conducting the search and seizure proceedings under the NDPS Act is not to fatally destroy the prosecution case. But the effect of the irregularity shall have to be examined in the totality of the entire facts and circumstances of the case. In the instant case, although other independent witness could have also been available to the prosecution but he was not procured despite having sufficient opportunity to do so. Therefore, it has to be examined if the other evidence produced by the prosecution to prove their case against the appellants can be relied upon to base their conviction in this case, particularly in the manner of compliance of the mandatory provisions of Sections 50 NDPS Act.

11. On the compliance of the provisions of Sections 50 there is the sole testimony of PW. 6 Mohan Singh SHO himself. Mohan Singh SHO has stated that before conducting the search and seizure proceedings he had obtained the consent of the appellants of their being searched in the presence of the Dy. S. P. who was a Gazetted Officer. In this behalf he had not been supported either by the Dy. S. P. Dinesh Chand Chaudhary (PW. 5) or by PW. 2 Shankar Lal and PW. 4 Ram Lal constables. These three witnesses have not spoken even a single word in their statements regarding the fact that the appellants were apprised of their right to set themselves and their belongings searched either in the presence of a Magistrate or of a Gazetted Officer. They simply stated that after the arrival of the Dy. S. P. on the spot the bags were opened and the samples were prepared from the contents therein. They did not state that Mohan Singh SHO had ever apprised the appellants of their rights Under Section 50 and asked them to exercise their option in either of the two ways. Even Mohan Singh SHO himself did not State that he had informed the appellants to get themselves and their belongings searched either in the presence of a Magistrate or of a Gazetted officer. What he has stated in that behalf is that after the arrival of the Dy. S. P. he had delivered the 'consent memo' to the appellant. He did not State that he had informed the appellants that they had a right to get themselves and their belongings searched in the presence of either a Magistrate or a Gazetted officer which the Dy. S. P. was and that they were free to choose between the two. In my opinion, it was not sufficient

compliance of the provisions contained in Sections 50 of the NDPS Act.

12. The provisions contained in Sections 50 of the NDPS Act are mandatory in character and non-compliance thereof may vitiate the trial of an accused. Sec. 50 gives a valuable right to an accused of an offence under the Act to which offence such provisions are applicable. Substantial compliance of the provisions contained in Sections 50 is a must for successful prosecution of an accused charged with the offence Under Sections 8/15 of the NDPS Act. It cannot be lost sight of that the punishment provided for such offence under the NDPS Act is quite severe. Therefore, the non-compliance of the provisions contained in Sections 50 cannot be ignored on the ground of mere technicality or in-effective irregularity. Substantial compliance of a mandatory provision of the relevant law has to be stressed upon for successful prosecution. Otherwise the very purpose of conferring the status of mandatory nature upon a provision would get frustrated and such provisions would be brought to the level of directory provisions. Substantial compliance of a mandatory provision means that the person who is charged with the duty of complying such provision is alive to comply it in all sincerity and does not regard it to be simply a legal formality. If the compliance of such provision cast a duty upon him to inform the person whose right is embedded in the mandatory provision and which right affords an opportunity to that person to exercise the same to the best of his interest, and he informs the other of such right, the provisions may be said to have been substantially complied with. In view of the language employed in Sections 50 it would be altogether a different proposition that once the accused was apprised of his right to be searched in the presence of either a Magistrate or a Gazetted officer and irrespective of option exercised by the accused to be searched in the presence of a particular officer if he was searched in the presence of another officer who was at the nearest place in comparison to the place of other, the search would not get vitiated. But that is not the position in the present case. Herein the Gazetted officer's presence was required even before the offence was even found to have been committed. On the evidence placed on record I have no hesitation in holding that the SHO did not inform the appellants at all of their right Under section. 50 NDPS, and, therefore, the question of substantial compliance thereof does not simply arise. Such non-compliance of the mandatory provisions of Sections 50 has caused prejudice to

the appellants in their trial.

13. In the instant case it has been seen that Mohan Singh SHO had not substantially complied with the mandatory provisions of Sections 50 of the NDPS Act. Added to it was that no efforts were made to associate two independent witnesses in the search and seizure proceedings. The only independent witnesses PW/2 Ram Narain did not support the prosecution case. Mohan Singh SHO is the informant as well as the investigating officer in the case. PW. 2 Shanker .Singh and PW. 4 Ram Lal are his subordinates. The testimony of all these witnesses suffers from certain infirmities, which have been pointed out and dealt with by the learned trial Judge himself. Taken individually such infirmities and contradictions may not be sufficient to demolish the prosecution case but when those are appreciated along with other aspects of the case, as discussed, above, they become quite material and cannot be overlooked and ignored. In the totality of the entire facts and circumstances of this case it has to be held that the prosecution evidence was not impartial, trustworthy and reliable and that it is of doubtful character. Simply because the appellants were residents of a place, outside of the territorial jurisdiction of the State of Rajasthan and that the police cannot be said to be interested in planting the search and seizure of four bags of crushed capsules of opium poppy from them, the element of doubt, which reasonably shows its presence in the case of prosecution, cannot be lightly brushed aside.

14. To sum up, I hold that the prosecution had failed to prove their case against the two appellants with cogent, impartial and reliable evidence and beyond reasonable doubt. Therefore, both the accused are entitled to the benefit of doubt and consequently acquittal from the charges Under section. 8 r.w. 15 of the NDPS Act.

15. In the result the impugned judgment and order in the two appeals are set aside and Gaura Lal and Dev Chand appellants are acquitted of the charges Under section. 8 r.w. Section 15 of the N&PS; Act. They are in jail. They shall be released forthwith if not wanted in any other case. The amount of fine, if already realised from them, shall be returned to them.

16. Both the appeals are allowed.

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