

Shantilal Vs. State of Rajasthan

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Court : Rajasthan

Decided On : Jul-15-2003

Reported in : RLW2004(3)Raj1490

Judge : Sunil Kumar Garg, J.

Acts : Narcotic Drugs and Psychotropic Substances Act, 1985 - Sections 50

Appeal No. : S.B. Criminal Appeal No. 18 of 2001

Appellant : Shantilal

Respondent : State of Rajasthan

Advocate for Def. : Ramesh Purohit, Public Prosecutor

Advocate for Pet/Ap. : R.K. Charan, Adv.

Disposition : Appeal allowed

Judgement :

Sunil Kumar Garg, J.

1. Both the abovementioned appeals are being decided by this common judgment as in both of them, common questions of law and facts are involved and they have been preferred against the judgment and order dated 8.12.2000 passed by the learned Special Judge, NDPS Cases, Chittorgarh in Sessions Case No. 37/98, by

which he convicted all four accused appellants for the offence under Section 8/18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the 'NDPS Act') and sentenced each of them to undergo 10 years RI and to pay fine of Rs. one lac, in default of payment of fine, to further undergo two years RI.

2. The facts giving rise to these two appeals, in short, are as follows:-

PW12 Tulsiram, who was at the relevant time SHO Police Station Parsoli prepared a Parchakayami (Ex.P/27) on 18.2.1998 stating inter-alia that on 18.2.1998 at about 1.15 PM he received a secret information from mukhbir to the effect that Shanti Lal (accused appellant No. 1 of appeal No. 18/2001) of village Anoppura Khardi and Bhanwarlal (accused appellant No. 2 of appeal No. 18/2001) of village Harpura and their two companion used to deal in contraband opium and they had proceeded in a white car alongwith contraband opium towards Jodhpur through Bheechor via Bhilwara Road for selling the contraband opium and that information was reduced into writing first in Rojnamcha and for making compliance of Section 42(2) of the NDPS Act, that mukhbir information was sent to Dy. SP, Beghu through Constable Devi Singh (PW10) and also to SP, Chittorgarh and Addl. SP, Rawatbhata and a copy of which is Ex.P/19. Thereafter, PW12 Tulsiram alongwith Narain Singh (PW11), Sultan Singh (PW8), Badrilal (PW1) proceeded towards the spot in a Government vehicle, the driver of which, was Majid Mohammed and he also took two motbir witnesses, namely, Hazari Lal (PW4) and Gyan Singh (PW7) and when they reached near Bheechor crossing, ASI Ranvir Singh (PW5) also accompanied them and at 2.00 PM they reached near turn before village Makhanganj and there they made nakabandi and at about 2.30 PM, they saw a white Ambassador Car coming from Bheechor and it was got stopped and four persons came out from the car alongwith bags in their hands and thereafter, they tried to run away, but they were caughthold and on being asked they told their names as Shantilal, Bhanwarlal, Kailash and Udai Singh (accused appellants of both appeals). Thereafter, PW12 Tulsiram gave notices under the provisions of Section 50 of the NDPS Act to each accused appellant and the notices given to the accused appellants Udai Singh, Kailash, Shantilal and Bhanwarlal are Ex.P/3. Ex.P/4, Ex.P/5 and Ex.P/6 respectively and all accused appellants gave their

consent that they could be searched by PW12 Tulsiram. Thereafter, first search of accused appellant Shantilal was made and from him, a bag was recovered and on checking that bag, a white polythene bag, which was tied by thread, was found in it and on opening that polythene bag, black substance was found in it and on being tested, it was assessed that it was opium and on being asked, the accused appellant Shantilal told that he was not having any valid license for keeping that opium. Thereafter, the opium recovered from the accused appellant Shantilal alongwith the polythene bags was weighed on the spot and its weight was found to be 5 kgs., out of which, two samples of 30-30 grms. each were taken for the purpose of chemical analysis and sealed separately and marked as A1 and A2 and the remaining opium was also sealed separately and marked as A.

Thereafter, the search of accused appellant Bhanwarlal was made and from him, a bag was recovered and on checking that bag, a white polythene bag, which was tied by thread, was found in it and on opening that polythene bag, black substance was found in it and on being tasted, it was assessed that it was opium and on being asked, the accused appellant Bhanwarlal told that he was not having any valid license for keeping that opium. Thereafter, the opium recovered from the accused appellant Bhanwarlal alongwith the polythene bags was weighed on the spot and its weight was found to be 3 kgs., out of which, two samples of 30-30 grms. each were taken for the purpose of chemical analysis and sealed separately and marked as B1 and B2 and the remaining opium was also sealed separately and marked as B.

Thereafter, the search of accused appellant Kailash was made and from him, a bag was recovered and on checking that bag, a white polythene bag, which was tied by thread, was found in it and on opening that polythene bag, black substance was found in it and on being tasted, it was assessed that it was opium and on being asked, the accused appellant Kailash told that he was not having any valid license for keeping that opium. Thereafter, the opium recovered from the accused appellant Kailash alongwith the polythene bags was weighed on the spot and its weight was found to be 1 kg., out of which, two samples of 30-30 grms. each were taken for the purpose of chemical analysis and sealed separately and marked as C1 and C2 and the remaining opium was also sealed separately and marked as C.

Thereafter, the search of accused appellant Udai Singh was made and from him, a bag was recovered and on checking that bag, a white polythene bag, which was tied by thread, was found in it and on opening that polythene bag, black substance was found in it and on being tasted, it was assessed that it was opium and on being asked, the accused appellant Udai Singh told that he was not having any valid license for keeping that opium. Thereafter, the opium recovered from the accused appellant Udai Singh alongwith the polythene bags was weighed on the spot and its weight was found to be 1 kg., out of which, two samples of 30-30 grms. each were taken for the purpose of chemical analysis and sealed separately and marked as D1 and D2 and the remaining opium was also sealed separately and marked as D.

On the spot, fard of search and seizure was prepared by PW12 Tulsiram and the same is Ex.P/8. The accused appellants Udai Singh, Bhanwarlal, Kailash and Shantilal were arrested through Ex.P/9, Ex.P/10, Ex.P/11 and Ex.P/12 respectively. The specimen seals, which were affixed on the fard of search and seizure Ex.P/8 were also taken on a separate paper and the same is Ex.P/13. On the basis of parchakayami (Ex.P/27), FIR (Ex.P/28) was chalked out. The seized articles were deposited in the Malkhana by PW12 Tulsiram and the copy of Malkhana Register is Ex.P/17A and at that time, the Malkhana Incharge was PW6 Moti Singh. Thereafter, through PW15 Dhannalal, the samples were sent to the FSL, Udaipur and the copy of receipt is Ex.P/16. The FSL report is Ex.P/24 where it has been stated as under:

'On chemical and micro-chemical examination, sample contained in each of the packet marked A-1, B1, C1 and D-1 gave positive test for major chemical constituents of coagulated juice of opium poppy and contained 7.94% (seven decimal nine four percent), 7.94% (seven decimal nine four percent), 8.23% (eight decimal two three percent) and 8.12% (eight decimal one two percent) morphine respectively.'

After usual investigation, police filed challan against the accused appellants in the Court of Special Judge, NDPS Cases, Chittorgarh.

On 29.5.1998, the learned Special Judge, NDPS Cases, Chittorgarh framed charge for the offence under Section 8/18 of the NDPS Act against each accused appellant and the same was read over and explained to each accused appellant. The accused appellants denied the charge and claimed trial.

The prosecution in support of its case examined as many as 16 witnesses and got exhibited several documents. Thereafter, statements of the accused appellants under Section 313 Cr.P.C. were recorded.

After conclusion of trial, the learned Special Judge, NDPS Cases, Chittorgarh through his judgment and order dated 8.12.2000 convicted and sentenced the accused appellants for the offence under Section 8/18 of the NDPS Act in the manner as indicated above holding inter-alia.

(i) That it was a case of personal search and valid compliance of Section 50 of the NDPS Act has been made by the prosecution.

(ii) That the prosecution has proved its case beyond all reasonable doubts against the accused appellants for the offence under Section 8/18 of the NDPS Act.

Aggrieved from the said judgment and order dated 8.12.2000 passed by the learned Special Judge, NDPS Cases, Chittorgarh, this appeal has been filed by the accused appellants.

3. In this appeal, the main contention of the learned counsel for the accused appellants is that compliance of mandatory provisions of Section 50 of the NDPS Act has not been made by the prosecution in this case strictly and, therefore, whole trial stands vitiated because of non-compliance of Section 50 of the NDPS Act and thus, the accused appellants are entitled to acquittal on this ground alone.

4. On the other hand, the learned Public Prosecutor supported the impugned judgment and order passed by the learned Special Judge, NDPS Cases, Chittorgarh.

5. I have heard the learned counsel for the accused appellants and the learned Public Prosecutor and perused the record of the case.

6. The question for consideration is whether strict compliance of Section 50 of the NDPS Act has been made by the prosecution in this case or not.

7. Before proceeding further, it would be worthwhile to state here the object and purpose of Section 50 of the NDPS Act.

Object and purpose of Section 50 of the NDPS Act

8. The purpose of informing a suspect that search could be taken in the presence of a Gazetted Officer was to ensure that there was safeguard against planting any incriminating article.

9. These provisions have been made in order to protect the interests of the citizens from irregular and illegal invasion on his liberty by the authorities as well as in the interest of the State to secure the evidence bearing upon the commission of the crime and necessary to enable the justice to be done shall not be withheld from the course of law on merely formal or technical grounds.

10. The object of making it peremptory on the part of the officer so as to ensure that the officer, who is charged with the duty of conducting the search, to conduct it properly and not to harm or wrong, such as planting of offending drugs by any interested party and to prevent fabrications of any evidence.

11. The provisions of Section 50 are intended to provide a safe ground against vexations search, any unfair dealings and to protect and safeguard the interests of the innocent persons. It also provides a protection to the law enforcing agency. If a person is searched before a Gazetted Officer or before a magistrate, as the case may be, then it will provide a weapon to the law enforcing agency against the common allegation that the opium has been planted by the investigating agency.

12. The rational behind this provision is manifest. A search before a Gazetted Officer or a Magistrate would impart much more authenticity and credit worthiness to the proceedings. It would, varily, strengthen the prosecution.

13. The Hon'ble Supreme Court in so many cases has held that the provisions of Section 50 of the NDPS Act are mandatory in nature and violation of these

provisions would per se be fatal to the prosecution case or in other words, non-compliance of these provisions would have the effect of vitiating the entire trial.

14. Keeping in mind the object and purpose of Section 50 of the NDPS Act, the facts and evidence of the present case are being examined to see whether the compliance of Section 50 of the NDPS Act in strict sense has been made or not.

15. The fard of search and seizure is Ex.P/8 prepared by PW12 Tulsiram and it was prepared in presence of two motbir witnesses, namely, PW7 Gyan Singh and PW4 Hazarilal and apart from them, some other witnesses were present, namely, PW5 Ranvir Singh, PW8 Sultan Singh, PW1 Badrilal and PW11 Narain Singh.

16. In the fard of search and seizure Ex.P/8, it has been stated that notices under the provisions of Section 50 of the NDPS Act were given to the accused appellants and the accused appellants gave their consent that they could be searched by PW12 Tulsiram and in that fard, there is no mention that the accused appellants were asked whether they wanted to be searched before the Magistrate or Gazetted Officer.

17. The notices which were given to the accused appellants Udai Singh, Kailash, Shantilal and Bhanwarlal under the provisions of Section 50 of the NDPS Act are Ex.P/3, Ex.P/4, Ex.P/5 and Ex.P/6 respectively and as per the statement of PW12 Tulsiram, these notices Ex.P/3 to Ex.P/6 were reduced into writing by PW5 Ranvir Singh and in all these notices Ex.P/3 to Ex.P/6, it has been stated that PW12 Tulsiram asked the accused appellants whether they wanted to be searched before Magistrate or any competent officer and in all these notices Ex.P/3 to Ex.P/6, there is no mention of the option 'Gazetted Officer'.

18. Now oral evidence of the prosecution witnesses on that point may be seen.

19. PW1 Badrilal, who was present at the time of search and seizure, states that notices in writing were given to the accused appellants and the accused appellants were asked by PW12 Tulsiram whether they wanted to be searched by PW12 Tulsiram or by Gazetted Officer. This witness does not say that the accused appellants were asked whether they wanted to be searched by the Magistrate.

20. PW4 Hazarilal, who was also present at the time of search and seizure and was one of the panch witnesses of the fard of search and seizure Ex.P/8 and was Nayab Tehsildar at the relevant time, states that notices Ex.P/3 to Ex.P/6 were given to the accused appellants and thereafter, the accused appellants gave their consent for searching by PW12 Tulsiram. This witness does not say that PW12 Tulsiram asked the accused appellants whether they wanted to be searched before the Magistrate or Gazetted Officer.

21. PW5 Ranvir Singh is another witness, who was present at the time of search and seizure and he was ASI at the relevant time. He has stated that the accused appellants were asked by PW12 Tulsiram whether they wanted to be searched by PW12 Tulsiram or some Magistrate. In his statement, there is no mention of the option 'Gazetted Officer'.

22. PW7 Gyan Singh has been declared hostile.

23. PW8 Sultan Singh is another witness, who was also present at the time of search and seizure and he was at the relevant time Constable. He has stated that PW12 Tulsiram asked the accused appellants whether they wanted to be searched before competent officer or Magistrate. Thus, this witness does not say that PW12 Tulsiram gave the option of 'Gazetted Officer' to the accused appellants.

24. Another witness is PW11 Narain Singh, who was also present at the time of search and seizure and he was at the relevant time Constable. He has simply stated that notices were given to the accused appellants by PW12 Tulsiram stating that he intended to search them. This witness does not say that the accused appellants were asked whether they wanted to be searched before the Magistrate or Gazetted Officer.

25. PW12 Tulsiram is the star witness, who has prepared the fard of search and seizure Ex.P/8 and under his guidance, notices Ex.P/3 to Ex.P/6 under the provisions of Section 50 of the NDPS Act were given to the accused appellants. He has stated that he gave notices under the provisions of Section 50 of the NDPS Act to the accused appellants and the accused appellants were asked

whether they wanted to be searched before the Magistrate or Gazetted Officer or competent officer. In cross-examination, he has stated that these fards Ex.P/3 to Ex.P/6 under the provisions of Section 50 of the NDPS Act were got written by PW5 Ranvir Singh and he has further admitted that in the fards Ex.P/3 to Ex.P/6, alternative option that they could be searched before Gazetted Officer had not been mentioned.

26. A bare reading of the statements of the above witnesses and the words contained in the notices Ex.P/3 to Ex.P/6 under Section 50 of the NDPS Act and fard of search and seizure Ex.P/8 goes to show that there is no uniformity in the words uttered by these witnesses and the words which are found in the notices Ex.P/3 to Ex.P/6 under Section 50 of the NDPS Act and furthermore, it appears that PW12 Tulsiram asked the accused appellants whether they wanted to be searched before Magistrate and the option of 'Gazetted Officer' was missing.

27. Thus, it can be concluded that the option which was given by PW12 Tulsiram to the accused appellants, was not an option as contemplated under the provisions of Section 50 of the NDPS Act and at the most it can be said to be a partial option, which was given to the accused appellants.

28. The next question for consideration is whether in a case where partial option or offer is given, compliance of Section 50 of the NDPS Act can be said to have been made in strict sense or not or whether partial offer amounts to non-compliance of Section 50 of the NDPS Act and vitiates the trial or not.

Partial offer

29. Section 50 of the NDPS Act provides inter-alia that when any officer duly authorised under Section 42 of the NDPS Act is about to search any person, he shall, if such person so requires, take such person to the nearest Gazetted Officer or to the nearest Magistrate. 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). This provision was interpreted by various High Courts meaning that the officer about to take the search is under an obligation to give the persons to be searched both the options i.e., of being searched before a

Gazetted Officer as well as of being searched before a Magistrate and if only one option of being searched before a Gazetted Officer or being searched before a Magistrate is given, it will amount to a partial offer which will not be a compliance of Section 50 of the NDPS Act and will vitiate the trial.

30. In *Malaram v. State of Rajasthan* (1), this Court held that alternate option for search in presence of a Gazetted Officer was not given and as such the provisions of Section 50 of the NDPS Act cannot be said to Have been fully complied with and thus, the accused was entitled to acquittal.

31. In *Badrilal v. State of Rajasthan* (2), appeal was allowed and conviction under Sections 8/17-18 of the NDPS Act was set aside for the reason that appellant of that case was given only one option to the searched in the presence of a Gazetted Officer, the option to be searched in the presence of a Magistrate was not given observing that the mandatory provisions of Section 50 of the NDPS Act were not fully complied with.

32. In *Nagendra Singh v. State of Rajasthan* (3), appeal was allowed as only partial offer of search before a Gazetted Officer was given and alternative offer of search before a Magistrate was not given observing that it is compulsory that the accused should be given both the options, i.e., whether he wanted the search in the presence of a Gazetted Officer or in the presence of a Magistrate. Where both the options are not given, the provisions of Section 50 of the NDPS Act are not fully complied with.

33. In *Sukhpal Singh @ Pala v. State of Rajasthan* (4), appeal was allowed as only partial offer of being searched before a Magistrate was given and no option of search before a Gazetted Officer was also given, even though the officer conducting the search was himself said to be a Circle Officer and a Gazetted Officer.

34. This Court in *Smt. Chandi v. State of Rajasthan* (5), held that the provisions contained in Section 50 of the NDPS Act are mandatory in nature and if partial option is given to the accused, it amounts to non-compliance of Section 50 of the NDPS Act.

35. In my considered opinion, in view of the law laid down by this Court in the above cases, since before conducting the search of the accused appellants, only partial option under the provisions of Section 50 of the NDPS Act was given and that partial option, which is self-contradictory in itself, cannot be said to be a compliance of mandatory provisions of Section 50 of the NDPS Act in strict sense and thus, non-compliance of mandatory provisions of Section 50 of the NDPS Act vitiates the entire trial.

36. For the reasons stated above, it is held that compliance of the mandatory provisions of Section 50 of the NDPS Act in its letter and spirit has not been made by the prosecution in the present case, as a result whereof, the whole proceedings stand vitiated and thus, the findings of the learned Special Judge convicting the accused appellants for the offence under Section 8/18 of the NDPS Act cannot be sustained and liable to be set aside and both the appeals deserve to be allowed and the accused appellants are entitled to acquittal.

Accordingly, both the appeals filed by the accused appellants Shantilal, Bhanwarlal, Kailash Chandra and Udai Singh are allowed and the judgment and order dated 8.12.2000 passed by the learned Special Judge, NDPS Cases, Chittorgarh are set aside and the accused appellants are acquitted of the charge framed against them.

Since the accused appellants are in jail, they be released forthwith, if not required in any other case.