

Usman Vs. State of Rajasthan

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Court : Rajasthan

Decided On : Feb-12-2002

Reported in : RLW2003(1)Raj666; 2003(1)WLC754; 2002(5)WLN194

Judge : Khem Chand Sharma, J.

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

Appeal No. : S.B. Criminal Appeal No. 826 of 1998

Appellant : Usman

Respondent : State of Rajasthan

Advocate for Pet/Ap. : Madhav Mitra, Public Prosecutor; Sunit Kumar Awasthi, Adv.

Disposition : Appeal allowed

Judgement :

Sharma, J.

1. The appellant was tried by the learned Special Judge, NDPS Cases, Jaipur for the offence under Section 8/22 of the [Narcotic Drugs and Psychotropic Substances Act, 1985](#) (hereinafter referred to as 'the Act'), as he was found in possession of 102 grams of smack on 5.10.1993. The learned Special Judge,

NDPS Cases, Jaipur, on considering the prosecution evidence and the material on record, arrived at a conclusion that the prosecution has been able to establish beyond reasonable doubt that smack was found from the pocket of the trouser of the accused appellant. Therefore, the learned Special Judge found the accused appellant guilty of having committed offence under Section 8/22 of the Act and accordingly, convicted the accused of the said offence and sentenced him to undergo rigorous imprisonment for 10 years with a fine of Rs. 1 lac, in default thereof, to further undergo simple imprisonment for 2 years.

2. Feeling aggrieved by the aforesaid judgment of conviction and sentence, the appellant has preferred this criminal appeal under Section 374 Cr.P.C.

3. Learned counsel for the appellant has assailed the conviction inter alia on the ground that there was only partial compliance of the provisions of Section 50 of the Act. Referring to the memo, Ex.P2 initiating proceedings under Section 50 of the Act, learned counsel for the appellant has submitted that the officer empowered under Section 42 of the Act informed the accused of his right to have his search conducted in the presence of C.O., Kotwali, who was present there or in the presence of a Magistrate, who was present there or in the presence of a Magistrate. According to him, this partial option does not meet the requirements of mandatory provisions of Section 50 of the Act. Learned counsel submitted that the learned trial court has erred in not taking into consideration this legal issue as to the effect of partial option.

4. It is well settled that when any officer duly authorised under Section 42 of the Act is about to search a person, he is bound to inform the person concerned of his legal right to have his search conducted either in the presence of a Magistrate or in the presence of a Gazetted Officer.

5. The question as to the effect of non-compliance of the provisions of Section 50 came up for consideration before the Hon'ble Supreme Court in catena of decisions.

6. In *State of Punjab v. Balbir Singh (1)*, the Apex Court held that failure to inform the person to be searched and if such person so requires, failure to take him to the

Gazetted Officer or the Magistrate would amount to non compliance of Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial.

7. In *State of Punjab v. Baldev Singh and Ors. (2)*, the Constitution Bench of the Supreme Court after considering number of cases including *Balbir Singh's* case have held that It is imperative for the investigating officer to inform the suspect, orally or in writing, about his right to be searched before a gazetted officer or a Magistrate. Failure to give such information may not vitiate the trial but render the recovery of illicit article illegal and vitiate the conviction and sentence if recorded only on the basis of possession of such illicit article. The Hon'ble Court further held that if the person so informed requires to be searched before a gazetted officer or a Magistrate, the empowered officer is obliged to comply else it would render the search and conviction solely based on it bad.

8. In the aforesaid case, the Constitution Bench have considered the various questions relating to interpretation of Section 50, the obligatory character of the provisions therein and the consequence of the non-compliance with the requirements. On a detailed discussion of the various contentions raised and the previous decisions of the Apex Court in the matter, their Lordships of the Constitution Bench held as under:

'To be searched before a gazetted officer or a Magistrate, if the suspect to requires, in an extremely valuable right which the legislature has given to the person concerned having regard to the grave consequences that may entail the possession of illicit articles under the NDPS Act. It appears to have been incorporated in the Act keeping in view the severity of the punishment. The rationale behind the provision is even otherwise manifest. The search before a gazetted officer or a Magistrate would impart much more authenticity and crediworthiness to the search and seizure proceeding. It would also verily strengthen the prosecution case. There is, thus, no justification for the empowered officer, who goes to search the person, on prior information, to effect the search, of not informing the person concerned of the existence of his right to have his search conducted before a gazetted officer or a Magistrate, so as to enable him to avail of

that right. It is however, not necessary to give the information to the person to be searched about his right in writing. It is sufficient if such information is communicated to the person concerned orally and as far as possible in the presence of some independent and respectable persons witnessing the arrest and search. The prosecution must, however, at the trial, establish that the empowered officer had conveyed the information to the person concerned of his right of being searched in the presence of the Magistrate or a gazetted officer, at the time of the intended search. The Courts have to be satisfied at the trial of the case about due compliance with the requirements provided in Section 50. No presumption under Section 54 of the Act can be raised against an accused unless the prosecution establishes it to the satisfaction of the court, that the requirements of Section 50 were duly complied with.'

9. In para 57 of the Judgment, the conclusions arrived at by the Constitution Bench have been summed up as below :

(1) 'That when an empowered officer or duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the concerned of his right under Sub-section (1) of Section 50 of being taken to the nearest Gazetted Officer or the nearest Magistrate for making the search. However, such information not necessarily be in writing.

(2) That failure to inform the concerned person about the existence of his right to be searched before a Gazetted Officer or a Magistrate would cause prejudice to an accused.

(3) That a search made, by an empowered officer, on prior information, without informing the person of his right that if he so requires, he shall be taken before a Gazetted Officer or a Magistrate for search and in case he so opts failure to conduct his search before a Gazetted Officer or a Magistrate, may not vitiate the trial but would render therecovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act.'

10. Recently in *T. Hamza v. State of Kerala* (3), after considering various previous cases and quoting the aforesaid observations of the Constitution Bench in *Baldev Singh's case* (supra), the Apex Court have held that since there was non compliance of the provisions of Section 50(1) of the Act before effecting the search and seizure, the conviction of the appellant was unsustainable.

11. In *Badshah v. State* (4), the Delhi High Court relying upon the recent judgment of the Apex Court in *T. Hamza v. State of Kerala* (supra), has observed that the accused has to be informed of his right to be searched in presence of a Gazetted Officer or a Magistrate, and there has to be a full compliance of Section 50 of the Narcotic Drugs and Psychotropic Substance Act, and substantial or partial compliance would be violative of Section 50 of the NDPS Act.

12. This Court, in the case of *Ballu @ Sheruddin v. State of Rajasthan* (5), has taken a view that partial compliance would be violative of Section 50 of the NDPS Act and the compliance should be made in the letter and spirit of Section 50 of the NDPS Act.

13. Thus, on the basis of the above pronouncement, it is now settled law on the point that compliance of Section 50 of the Act is imperative and its non-compliance would render the recovery suspicious and result in vitiating the conviction and sentence of the accused.

14. In the present case, to deal with the argument that there was non-compliance of the provisions of Section 50 it would be necessary to look at the evidence and the record.

15. PW.1 Hardayal Singh, SHO, Police Station, Kotwali, Jaipur having received information, Ex.P.1 on 5.10.93 that accused appellant was trying to sell smack at the corner of Khajanewalon-ka-rasta, left the police station along with police personnels in a Government jeep at 4.00 PM. The accused was found standing at the corner of Khajanewalon-ka-rasta. The SHO then first asked him that as per his information he was in possession of smack and therefore he was to be searched. Before conducting search, PW.1 Hardayal Singh initiated proceedings under Section 50 of the Act vide Ex.P.2, thereby informing the suspect of his right to

have his search conducted either in the presence of Circle Officer, who was already present there or in the presence of a Magistrate. Thereupon, the accused gave his consent in writing on Ex.P.2 for his search to be conducted, by PW. 1 Hardayal Singh SHO, in the presence of Circle Officer. Accordingly, search of the accused was conducted in the presence of PW.8 Anil Kumar and PW.2 Manohar Lal. From a perusal of Ex.P.2 it is clear that only partial opinion was given to the appellant. The accused was asked to have his search conducted either in the presence of Circle Officer (Deputy Superintendent of Police), who happened to be at the place of incident or in the presence of a Magistrate.

16. PW.1 Hardayal Singh, SHO has stated in his examination in chief that C.O. sahib, Kotwali also arrived at the scene. He then stated that on being asked whether he wanted to have his search conducted in the presence of a Magistrate or Gazetted officer, the accused gave his consent in writing on Ex.P.2 itself that his search be conducted in the presence of Shri Anil Kumar, C.O.

17. PW.4 Jagdish Prasad, who was a member of the raiding party, has admitted in his cross examination that the Incharge (PW.1 Hardayal Singh) had conducted search of the accused in the presence of Deputy Superintendent of Police. The witness in his examination in chief has stated that they asked the accused whether he was ready for his search or he wanted to be produced before the Magistrate. Then the accused consented for his search by them.

18. PW.5 Shahjad Ali, Head Constable, yet another member of the raiding party has stated in his examination in chief that on seeing the police vehicle, the accused tried to ran away. In the mean-time, C.O. Sahib also arrived at the scene. The witness further stated that Incharge Sahib asked the accused whether he wanted his search to be conducted either by the Magistrate or by them. Thereupon, the accused consented to be searched by the Police Officer present there.

19. Thus, from the evidence, oral as well as documentary as discussed above, it is evident option for search only in the presence of a person, namely, the Deputy Superintendent of Police who happened to be present at the scene, was given to the accused appellant and thus, only partial option was given to the appellant,

which in my opinion does not fulfil the legal requirements of Section 50 of the Act and thus, non-compliance of this mandatory provision has rendered the recovery suspicious. The search, therefore, is liable to be struck down as the offer was partial.

20. Dealing with similar situation, the Punjab & Haryana High Court in *Gurnam Singh v. State of Punjab* (6), wherein the Investigating Officer had only confined the option of a gazetted officer of the police department, held that by restricting the option of the accused, the mandatory provisions of Section 50 have not been complied with.

21. Again in *Jaswinder Singh v. State of Punjab* (7), the Punjab & Haryana High Court held that by restricting the officer to the accused to be searched in the presence of gazetted police officer, the legitimate right of the accused that he might have exercised the option of gazetted officer of other department had been gagged. Accordingly, the search was struck down as the offer was partial.

22. It is worthy to note that the learned trial court has seriously erred in not touching this important aspect as to the effect of partial option. The conviction of the appellant, therefore, deserves to be set-aside only on this ground.

23. The result of the above discussion is, that this appeal succeeds and is hereby allowed. The conviction of the appellant under Section 8/22 of the Act is set aside. He is acquitted of the offence charged. He is in jail and be released forthwith if not required in any other case.