

Dalip Singh Vs. the State of Rajasthan

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Court : Rajasthan

Decided On : Oct-04-2001

Reported in : 2002(4)WLN70

Judge : Sunil Kumar Garg, J.

Appeal No. : S.B. Criminal Appeal No. 65 of 1999

Appellant : Dalip Singh

Respondent : The State of Rajasthan

Disposition : Appeal allowed

Judgement :

Sunil Kumar Garg, J.

1. This appeal has been filed by the accused appellant against the judgment and order dated 30.1.1999 passed by the learned Special Judge, NDPS Cases, Hanumangarh in Sessions Case No. 52/97 by which he convicted the accused appellant for the offence under Section 8/15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the NDPS Act') and sentenced him to undergo ten years rigorous imprisonment and to pay fine of Rs. One lac, in default of payment of fine, to further undergo R.I. for six months.

2. The facts giving rise to this appeal, in short, are as follows:

On 3.10.1996 at about 5.40 PM, PW-7 Rajpal Singh, SHO Police Station, Sangaria District Hanumangarh received a secret information from Mukhbir to the effect that two persons, namely, Dalip Singh (present accused appellant) and Devilal (for Devilal, a separate case was made and the learned Special Judge, NDPS Cases, Hanumangarh through his judgment and order dated 26.2.1999 acquitted him for the offence under Section 8/15 of the NDPS Act) used to deal in the business of illegal transportation of Doda Post and they had just come alongwith Doda Post in their attaches and would cross bridge of Sadul Branch for Bolawali and they should be checked as their attaches contained Doda Post. That information was reduced into writing by PW-7 Rajpal Singh and the same is Ex.P/14. Thereafter, PW-7 Rajpal Singh alongwith other police officials including PW-2 Bhan Singh, PW-6 Mahaveer Singh and PW-3 Narain Singh proceeded in a Government Jeep towards the spot and near Government Hospital, Sangaria, they took two Motbirs, namely, PW-4 Subhash and PW-5 Karm Singh and both were given notices and they are Ex.P/8 and Ex.P/12 respectively for becoming Motbirs and they gave their consent to become Motbirs and joined the raiding party and at about 6.10 PM they reached near the bridge of Sadul Branch and they saw two persons with attaches and seeing the police, they tried to run away, but they were apprehended and on being asked, one person told him name as Devilal and another person told him name as Dalip Singh (present accused appellant) and on suspicion that his attache contained Doda Post, PW-7 Rajpal Singh asked the accused appellant Dalip Singh whether he wanted to be searched before the Gazetted Officer or Magistrate or before PW-7 Rajpal Singh himself and upon this, accused appellant gave his consent and the Fard of consent is Ex.P/9 and, thereafter, his attache was checked and inside attache, there was a polythene bag and in it, there was Doda Post for which he was asked whether he has any valid license or not and upon this, he told that he had no such license. Thus, he has committed the offence under Section 8/15 of the NDPS Act. Thereafter, the Doda Post was weighed and its weight was found to be 9kgs., out of which two samples of 500 grms. were taken for the purpose of chemical analysis and sealed separately on the spot and marked as A and B and the remaining Doda Post was kept in the attache and sealed separately on the spot and marked as C. The Fard of search and seizure and arrest memo was prepared on the spot by PW-7 Rajpal

Singh and the same is Ex.P/6. The Fard of specimen impression of seal is Ex.P/5. PW-7 Rajpal Singh chalked out regular F.I.R. and the same is Ex.P/19. PW-7 Rajpal Singh handed over the recovered articles and samples to the Malkhana Incharge PW-3 Narain Singh, who deposited the same in the Malkhana and made entries in the Malkhana Register Ex.P/7A. Thereafter, on 27.10.1996 PW-3 Narain Singh gave one sample marked A to PW-1 Lal Singh for depositing in FSL, Jaipur and PW-1 Lal Singh deposited the sample in FSL Jaipur on 28.10.1996 and obtained receipt Ex.P/2. The FSL report is Ex.P/21, where it was reported that the sample contained in the packet marked A gave positive test for the presence of chief constituents of opium, hence the sample was of dried crushed capsules of opium poppy.

After usual investigation, police submitted challan for the offence under Section 8/15 f against the accused appellant in the Court of Session, Hanumangarh.

On 13.6.1997, the learned Special Judge, NDPS Cases, Hanumangarh framed charge for the offence under Section 8/15 of the NDPS Act against the accused appellant. The charge was read over and explained to the accused appellant. He denied the charge and claimed trial.

During trial, the prosecution in support of its case examined as many as seven witnesses and got exhibited some documents. Thereafter, statement of the accused appellant under Section 313 Cr.P.C. was recorded. In defence, one witness was produced by the accused appellant. In defence, it was submitted by the accused appellant that he was license holder to keep the Doda Post upto 7 kg. and he has produced his license Ex.D/2A.

After conclusion of trial, the learned Special Judge, NDPS Cases, Hanumangarh through his judgment and order dated 30.1.1999 convicted the accused appellant for the offence under Section 8/15 of the NDPS Act and sentenced him in the manner as indicated above holding inter-alia that the prosecution has proved its case beyond all reasonable doubts against him for the offence under Section 8/15 of the NDPS Act.

Aggrieved from the said judgment and order dated 30.1.1999 passed by the learned Special Judge, NDPS Cases, Hanumangarh, this appeal has been filed by the accused appellant.

3. In this appeal, the learned Counsel appearing for the accused appellant has made the following submissions:

1. That PW-7 Recovery Officer did not comply with the mandatory provisions of Section 50 of the NDPS Act as he did not give proper notice to the accused appellant telling therein his right to be searched before the Magistrate or Gazetted Officer and he merely took the consent of the accused appellant to be searched by himself and, therefore, such type of consent is not the compliance of Section 50 of the NDPS Act and, therefore, the findings of the learned Special Judge that compliance of Section 50 of the NDPS Act has been made in the present case are liable to be set aside and the accused appellant is entitled to acquittal on this ground alone.

2. That in the present case, from the evidence oral as well as documentary produced by the prosecution, it clearly appears that the link evidence is self-contradictory, as according to Malkhana Register Ex.P/7A, sample which was to be sent to FSL, Jaipur was taken out from the Malkhana on 27.10.1996 and the same was handed over to PW-1 Lal Singh on the same day and PW-1 Lal Singh deposited the same in the FSL, Jaipur on 28.10.1996 and obtained receipt Ex.P/2 and on 29.10.1996, the receipt Ex.P/2 was handed over by him to PW-3 Narain Singh, who was at that time Malkhana Incharge, but from the forwarding letter Ex.P/4 from SP, Hanumangarh to FSL, Jaipur, it appears that sample was received by SP Office from SHO on 26.10.1996 through letter Ex.P/20 and, thereafter, on the same day i.e. on 26.10.1996 through letter Ex.P/4, the same was sent to FSL, Jaipur through PW-1 Lal Singh. Since in Malkhana Register Ex.P/7A there is no entry that the sample was taken out from Malkhana on 26.10.1996, therefore, the case of the prosecution that sample was taken out from Malkhana on 27.10.1996 has become doubtful. Apart from this, when the sample was taken on the spot, its weight was 500 grms., but in FSL report Ex.P/21, its weight was found to be 400 grms. In these circumstances, it cannot be said that

seal put on the sample remained intact and the possibility of tampering with the sample cannot be ruled out.

(3) That there was joint secret information about two persons, namely, accused appellant Dalip Singh and one Devilal and two cases were registered separately and similar type of evidence was recorded, but it is surprising that the learned Special Judge, NDPS Cases, Hanumangarh on the same evidence acquitted another accused Devilal through his judgment and order dated 26.2.1999 while the present accused appellant was convicted by the same Special Judge through his judgment and order dated 30.1.1999 and he has produced the certified copy of that judgment and order and he has stressed upon that some suitable action be taken against the Special Judge, NDPS Cases, Hanumangarh, who has delivered two judgments of different nature on the same evidence.

Hence, it was prayed that this appeal be allowed and the accused appellant be acquitted of the charge framed against him.

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

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

Point No. 1

6. Before examining this point, legal aspect of Section 50 of the NDPS Act has to be mentioned here.

Object and purpose of Section 50 of the NDPS Act

7. 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.

8. These provisions have been made in order to protect the interests of the citizens from irregular and illegal invasion on the 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.

9. 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.

10. The provisions of Section 50 of the NDPS Act have been made with the intention to act as a safeguard against the vexatious and unfair dealings. The provisions have also been incorporated in order to protect and safeguard the interest of an innocent person.

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. It also provides a protection to the law enforcing agency.

11. 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.

12. The Hon'ble Supreme Court in K. Mohanan v. State of Kerala 2000 SCC (Cri.) 1228 has held as under:

Narcotic Drugs and Psychotrophlc Substances Act, 1985 - Section 50 --Before subjecting a person to search, the officer concerned must inform him of his right to be searched before a Gazetted Officer or a Magistrate and failure to do so would cause prejudice to such person--Where before conducting the search the police officer concerned merely asking the accused appellant whether he was required to be produced before a Gazetted Officer or a Magistrate for the purpose of the search but not informing him about his right in that behalf under the law, held, mandatory requirement of Section 50 not satisfied--If he had been told about his right, what would have been the answer given by the accused cannot be gauged

at this distance of time--This is particularly so when the main defence adopted by the appellant at all stages was that Section 50 of the Act was not complied with. In view of non-compliance with Section 50 , the evidence of search spoken to by the police officer who had conducted the search cannot be acted upon in the absence of any other independent evidence to show that the appellant was in possession of the contraband article.

13. In Ahmed v. State of Gujarat : 2000(71)ECC459 it has been held as under:

Sections 50, 41, 42--Compliance--Search taken by a 'Gazetted Officer'--If the accused still has the right to be informed about his right to be searched before a Gazetted Officer or Magistrate. Accused himself wanting to be searched before Gazetted officer or Magistrate--Request declined. Held that there was infraction the accused himself is a Gazetted Officer, right of accused cannot be denied.

14. From perusing the above two rulings of the Hon'ble Supreme Court, it becomes crystal clear that the officer concerned must inform accused of his right to be searched before Gazetted Officer or Magistrate and failure to do so would caused prejudice to such person. Merely asking accused whether he was required to be produced before a Gazetted Officer or a Magistrate for the purpose of the search, but not informing about his right in that behalf under the law, it would mean that mandatory requirement of Section 50 of the NDPS Act has not been satisfied.

15. 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.

16. Keeping the above legal position in mind, the present case is being examined.

17. In the present case, the Fard of consent as stated by PW-7 Rajpal Singh is Ex.P/9 and the Motbirs of that Fard and PW-4 Subhash and PW-5 Karmsingh and both of them have been declared hostile. From perusing that Fard Ex.P/9, it appears that it does not contain the words 'Section 50 of the NDPS Act' and it simply reveals that since PW-7 Rajpal Singh had suspicion that accused appellant

had Doda Post in his attache, therefore, he asked the accused appellant whether he wanted to be searched before the Magistrate or Gazetted Officer or before him (PW-7 Rajpal Singh) and he gave his consent that he could be searched by PW-7 Rajpal Singh and thumb impression of the accused appellant was taken.

18. The best oral evidence in this respect is of PW-7 Rajpal Singh himself. He states in examination-in-chief that accused appellant was asked whether he wanted to be searched before Magistrate or Gazetted Officer or before him (PW-7 Rajpal Singh) and he gave his consent that search could be made by PW-7 Rajpal Singh and the Fard of consent is Ex.P/9. In cross-examination, this witness admits the following facts pertaining to this aspect:

- (1) That accused appellant was illiterate and he used to put his thumb impressions.
- (2) That by whom recitals in Ex.P/9 were written he does not know.
- (3) That he has not mentioned the name of the scribe of Ex.P/9.
- (4) That he did not give any notice separately under the provisions of Section 50 of the NDPS Act to the accused appellant.
- (5) That after taking the consent of the accused appellant, he prepared the Fard Ex.P/9.
- (6) That in Ex.P/9, he has not made a note what it contains and accused appellant Dalip Singh might have understood it.
- (7) That in this case, his statement under Section 161 Cr.P.C. was not recorded as he himself investigated the case.

19. In my considered opinion, looking to the above evidence, it cannot be said that compliance of Section 50 of the NDPS Act has been made in the present case. The provisions of Section 50 of the NDPS Act have been made with intention to act as a safeguard against vexatious and unfair dealings. Simply preparing Fard in the manner in which it has been prepared in the present case by PW-7 Rajpal Singh is no compliance of mandatory provisions of Section 50 of the NDPS Act.

The person by whom compliance is said to have been made by PW-7 Rajpal Singh, nowhere states that before putting thumb impressions, accused appellant was informed of his right as contained in Section 50 of the NDPS Act. The Fard of search and seizure Ex.P/6 nowhere mentions the words 'Section 50 of the NDPS Act', rather the fact that PW-7 Rajpal Singh does not know who wrote it also goes to show that for PW-7 Rajpal Singh, it was nothing but a mere formality to the performed during search and seizure not by him, but by any one of the members of the raiding party. Even in the Fard of search and seizure Ex.P/6, it has not been mentioned that before making search of the accused appellant, he was informed of his right as mandated by Section 50 of the NDPS Act. In other words, Section 50 of the NDPS Act does not find place in the Fard of search and seizure Ex.P/6 and F.I.R. Ex.P/19. By simply putting thumb impressions, it cannot be inferred that the accused appellant actually gave his consent that he could be search by PW-7 Rajpal Singh himself.

20. For the reasons stated above, it is held that compliance of mandatory provisions of Section 50 of the NDPS Act has not been made in the present case and non-compliance of mandatory provisions of Section 50 of the NDPS Act vitiates the entire trial against the accused appellant and he is entitled to acquitted on this ground alone.

Point No. 2

21. The relevant witnesses for link evidence is PW-1 Lal Singh, PW-3 Narain Singh and PW-7 Rajpal Singh and the relevant documents are letter Ex.P/20 from PW-7 Rajpal Singh, SHO to SP Hanumangarh and forwarding letter Ex.P/4 from SP Hanumangarh to FSL, Jaipur.

22. PW-3 Narain Singh, who was at the relevant time Malkhana Incharge, states that on 27.10.1996 he gave one sample to PW-1 Lal Singh and entry of this fact was made by him in Malkhana Register Ex.P/7A at place A to B and C to D are signatures of PW- 1 Lal Singh and his signatures are at place E to F. He further states that on 29.10.1996, PW-1 Lal Singh gave him receipt Ex.P/2 which shows that sample was deposited in FSL, Jaipur on 28.10.1996 and entry of this fact was also made by him in the Malkhana Register Ex.P/7A. In cross-examination, this

witness denied that in the Malkhana Register Ex.P/7A at place where date 27.10.1996 is mentioned, over-writing has been made. He has further stated that without making entry in the Malkhana Register, no article is taken out from the Malkhana and the same is not sent unless and until there is entry in the Malkhana Register.

23. PW-1 Lal Singh, who is bearer of the sample, has stated that on 27.10.1996 he took one sample from PW-3 Narain Singh, Malkhana Incharge for depositing the same in FSL, Jaipur and he deposited the sample on 28.10.1996 in FSL, Jaipur and obtained receipt Ex.P/2 and the receipt Ex.P/2 was handed over by him to PW-3 Narain Singh and forwarding letter is Ex.P/4, which bears his signatures as place A to B.

It may be stated here that Ex.P/4 is a letter not from SHO to SP, but from SP to FSL, Jaipur and the same is dated 26.10.1996.

In cross-examination, this witness states that he did not go to Jaipur on 27.8.1996 and he did not go to the office of SP and letter from SP office was given to him by Malkhana Incharge.

24. PW-7 Rajpal Singh, who sent the letter to SP Office in capacity as SHO, states that letter Ex.P/20 does not bear any date and he cannot say by which police official letter Ex.P/20 was sent.

25. In this case, the person, who prepared letter Ex.P/4 from SP office to FSL, Jaipur, has not been produced. In other words, no person has been produced from SP Office, Hanumangarh.

26. From the letter Ex.P/20, which was addressed to SP from SHO, it appears that sample A was sent through PW-1 Lal Singh.

27. Another forwarding letter from SP Office to FSL, Jaipur is Ex.P/4, which is dated 26.10.1996, which reveals that sample was further forwarded by SP Office to FSL, Jaipur and bearer of that letter is PW-1 Lal Singh.

It may be stated here that in letter Ex.P/4, the date 26.10.1996 is clearly mentioned.

28. Further to verify the fact whether letter Ex.P/4 addressed to FSL, Jaipur from SP Office was despatched on 26.10.1996 or not, receipt Ex.P/2 issued by FSL, Jaipur dated 28.10.1996 may be referred to, which also shows that forwarding letter through which sample was sent to FSL is dated 26.10.1996.

29. Thus, sample from the Malkhana was taken out on 26.10.1996 by PW-3 Narain Singh and it was handed over to PW-1 Lal Singh on 26.10.1996 and, thereafter, PW-1 Lal Singh through letter Ex.P/20 must have reached to the SP Office from where he got another forwarding letter Ex.P/4 dated 26.10.1996 and then deposited the sample in FSL, Jaipur on 28.10.1996. However, Malkhana Register Ex.P/7A speaks otherwise. The Malkhana Register Ex.P/7A nowhere states that sample was taken out on 26.10.1996 from the Malkhana. What does it say that it was taken out from Malkhana on 27.10.1996 and this is the statement of PW-3 Narain Singh, Malkhana Incharge as well as PW-1 Lai Singh, bearer of the sample.

30. Thus, there are contradictions between the oral evidence and documentary evidence. The entries made in the Malkhana Register Ex.P/7A do not tally with the entries made in forwarding letter Ex.P/20 dated 26.10.1996 from SHO to SP and further forwarding letter Ex.P/4 dated 26.10.1996 from SP Office to FSL, Jaipur. Apart from this, when the sample was taken on the spot, its weight was 500 grms., but in FSL report Ex.P/21, the weight of the sample was shown as 400 grms. and this aspect also creates doubt. In these circumstances, the case of the prosecution that sample and articles remained in proper custody and proper form cannot be accepted and the possibility of tampering with sample cannot be ruled out. Hence, the prosecution case comes under the shadow of doubt and the accused appellant is entitled to benefit of doubt.

Point No. 3

31. From perusing the judgment and order dated 26.2.1999 passed by the learned Special Judge, NDPS Cases, Hanumangarh acquitting accused Devilal, it appears

that learned Special Judge came to the conclusion that in that case compliance of Section 50 of the NDPS Act has not been made and link evidence was also not sufficient and both points, after discussion and analysing evidence, are found in favour of present accused appellant by this Court. Therefore, it appears that it is for the Special Judge how he has passed two different judgments on the same facts and it is a serious matter and this Court does not want to say anything more than that on this point.

32. For the reasons stated above, the findings of the learned Special Judge convicting the accused appellant for the offence under Section 8/15 of the NDPS Act are liable to be set aside and this appeal deserves to be allowed and the accused appellant is entitled to acquittal.

Accordingly, the appeal filed by the accused appellant Dalip Singh is allowed and the judgment and order dated 30.1.1999 passed by the learned Special Judge, NDPS Cases, Hanumangarh are set aside and the accused appellant is acquitted of the charge framed against him. Since he is in jail, he be released forthwith, if not required in any other case.

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