

CASE NO.:
Appeal (crl.) 1480 of 2004

PETITIONER:
Dilip & Anr.

RESPONDENT:
State of M.P.

DATE OF JUDGMENT: 24/11/2006

BENCH:
S.B. Sinha & Markandey Katju

JUDGMENT:
J U D G M E N T

S.B. Sinha, J.

Appellant was prosecuted for commission of an offence under Section 8/18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('the NDPS Act', for short) on the basis of a First Information Report lodged by one Shri S.S. Tomar, the Officer in-charge of P.S. Kumbhraj alleging that while he was posted as S.H.O. at the said police station, on 24.12.1996 when he came out of the gate for arresting one Shivraj Meena, he found two persons coming out at a fast speed in a scooter. They were stopped. They disclosed their names as Dilip Singh (Appellant) and Ramsharan. A search of their person was conducted. Nothing was found, but, on search of the scooter, some black coloured liquid substance contained in six big plastic bags and one small plastic bag were seen, which were said to be containing opium. Allegedly, the S.D.O.P. of the place Raghogarh, named, Shri G.S. Jadon was informed and 5 kgs. 890 gms opium was recovered.

They were arrested at the spot. Learned Sessions Judge, Guna recorded a judgment of acquittal, inter alia, holding that the search and seizure was vitiated in law as mandatory statutory requirements contained in Sections 50 and 42 the NDPS Act were not complied with. The seizure witnesses did not support the prosecution case. The informant also did not comply with the requirements of Section 57 of the NDPS Act. Sealing of the contraband materials was not carried out in accordance with law as no responsible officer fixed seal on the seized samples.

The State preferred an appeal before the High Court against the said judgment of acquittal which was registered as Criminal Appeal No.524 of 1998. The High Court reversed the said judgment of the learned Sessions Judge holding :

(1) provisions contained in Section 57 of the NDPS Act are not mandatory and there has been a substantial compliance of the said provision as the informant Shri S.S. Tomar did not have any prior information;

(2) the question of obtaining any warrant from a Magistrate or a Gazetted Officer under Section 41 did not arise;

(3) he has also no opportunity to comply with Section 42 of the NDPS Act. The conduct of the appellants in speedily crossing the road which aroused suspicion of police officers was enough to show that they had knowledge that contraband was concealed in the scooter.

On the aforementioned findings they were sentenced to undergo rigorous imprisonment for 10 years and pay a fine of Rs.1 lakh each, in default of which they were directed to undergo rigorous imprisonment for a

further period of 2 years each.

The appellants are, thus, before us.

It is now well settled that the offence committed under the Act is a grave one. Procedural safeguards provided therefor in terms of Sections 41, 42 and 50 of the NDPS Act should be complied with.

We may notice Section 50 of the NDPS Act, which reads as under:

"50. Conditions under which search of persons shall be conducted.\026 (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.

(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."

The witnesses of the seizure were : P.W.1 - a sweeper engaged in the police station and P.W.2 - a cycle mechanic who was carrying on his business in front of the police station. They were examined before the learned Trial Judge. They have not supported the case of the prosecution at all. They were declared hostile.

Having regard to the testimonies of the said witnesses, as also various other circumstances as noticed in his judgment, the learned Sessions Judge opined that the likelihood of S.S. Tomar having prior information about the matter cannot be ruled out. The learned Judge found that P.W.10 in his cross-examination accepted that he entertained doubts that the accused had been in possession of contraband and, therefore, he intended to comply with the provisions of Section 50 of the NDPS Act. The High Court, however, without meeting the reasonings of the learned Sessions Judge proceeded to take the prosecution case as gospel truth and opined that neither the provisions of Section 50 of the NDPS Act nor Section 42 thereof were required to be complied with.

The First Information Report did not contain any statement that the provisions of Section 50 had been complied with. But the prosecution introduced two notices marked as Exhibits P10 and P11, which were said to

have been issued to the accused informing them about their right to get themselves searched either before S.D.O.P., a Magistrate or some gazetted officer. The learned Sessions Judge noticed that in the aforementioned two documents there had been no mention of the fact that he had formed an opinion that the scooter in question contained any contraband. Furthermore, in the aforementioned two purported notices time, date, name, residence and age of the officer giving notice had not been disclosed. It had furthermore not been mentioned that the accused were informed of their legal right.

P.W.3 \026 Narendra Singh in his deposition before the Court categorically stated that P.W.10 did not inform the accused about their legal right in this behalf. Who scribed the said documents was also in doubt, as according to P.W.10 the same were recorded by P.W.8 \026 Arvind Sanger, whereas the latter stated that it was P.W.10 \026 S.S. Tomar who scribed the same. P.W.8 has been examined under Section 161 of the Code of Criminal Procedure, 1973. His said statement was marked as Exhibit D2. He did not make any statement before the Investigating Officer as to who prepared the notices.

Before seizure of the contraband from the scooter, personal search of Appellants had been carried out and, admittedly, even at that time the provisions of Section 50 of the Act, although required in law, had not been complied with.

P.W.10 did not offer any satisfactory explanation as to on what basis the notices were purported to have been served.

Ms. Vibha Datta Makhija, learned Counsel appearing on behalf of the State, however, would support the judgment of the High Court contending that this Court in State of Punjab vs. Balbir Singh [(1994) 3 SCC 299] categorically held that an illegal search may not have any direct impact on the prosecution case. This Court therein opined as under :

"The questions considered above arise frequently before the trial courts. Therefore we find it necessary to set out our conclusions which are as follows :

(1) If a police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offences as provided under the provisions of CrPC and when such search is completed at that stage Section 50 of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act.

(2-A) Under Section 41(1) only an empowered Magistrate can issue warrant for the arrest or for the search in respect of offences punishable under Chapter IV of the Act etc. when he has reason to believe that such offences have been committed or such substances are kept or concealed in any building, conveyance or place. When such warrant for arrest or for search is issued by a Magistrate who is not empowered, then such search or arrest if carried out would be illegal. Likewise only empowered officers or duly

authorized officers as enumerated in Sections 41(2) and 42(1) can act under the provisions of the NDPS Act. If such arrest or search is made under the provisions of the NDPS Act by anyone other than such officers, the same would be illegal.

(2-B) Under Section 41(2) only the empowered officer can give the authorisation to his subordinate officer to carry out the arrest of a person or search as mentioned therein. If there is a contravention, that would affect the prosecution case and vitiate the conviction.

(2-C) Under Section 42(1) the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc. he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.

To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.

(3) Under Section 42(2) such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case.

(4-A) If a police officer, even if he happens to be an empowered officer while effecting an arrest or search during normal investigation into offences purely under the provisions of CrPC fails to strictly comply with the provisions of Sections 100 and 165 CrPC including the requirement to record reasons, such failure would only amount to an irregularity.

(4-B) If an empowered officer or an authorised officer under Section 41(2) of the Act carries out a search, he would be doing so under the provisions of CrPC namely Sections 100 and 165 CrPC and if there is no strict compliance with the provisions of CrPC then such search would not per se be illegal and would not vitiate the trial.

The effect of such failure has to be borne in mind by the courts while appreciating the evidence in the facts and circumstances of each case.

(5) On prior information the empowered officer or authorised officer while acting under Sections 41(2) or 42 should comply with the provisions of Section 50 before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a Gazetted Officer or a Magistrate as provided thereunder. It is obligatory on the part

of such officer to inform the person to be searched. 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. After being so informed whether such person opted for such a course or not would be a question of fact.

(6) The provisions of Sections 52 and 57 which deal with the steps to be taken by the officers after making arrest or seizure under Sections 41 to 44 are by themselves not mandatory. If there is non-compliance or if there are lapses like delay etc. then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case."

This Court, therefore, clearly held as to what extent provisions of Sections 41 and 42 are mandatory and to what extent they would not be.

Indisputably, however, effect of a search carried out in violation of the provisions of law would have a bearing on the credibility of the evidence of the official witnesses, which would of course be considered on the facts and circumstances of each case.

In this case, the provisions of Section 50 might not have been required to be complied with so far as the search of scooter is concerned, but, keeping in view the fact that the persons of the appellants were also searched, it was obligatory on the part of P.W.10 to comply with the said provisions. It was not done.

In State of Punjab vs. Baldev Singh [(1999) 6 SCC 172], a Constitution Bench of this Court opined :

".....Thus, while conducting search and seizure, in addition to the safeguards provided under the Code of Criminal Procedure, the safeguards provided under the NDPS Act are also required to be followed. Section 50(4) of the NDPS Act lays down that no female shall be searched by anyone excepting a female. This provision is similar to the one contained in Section 52 of the Code of Criminal Procedure, 1898 and Section 51(2) of the Code of Criminal Procedure, 1973 relating to search of females. Section 51(2) of the Code of Criminal Procedure, 1973 lays down that whenever it is necessary to cause a female to be searched, the search shall be made by another female with strict regard to decency. The empowered officer must, therefore, act in the manner provided by Section 50(4) of the NDPS Act read with Section 51(2) of the Code of Criminal Procedure, 1973 whenever it is found necessary to cause a female to be searched. The document prepared by the investigating officer at the spot must invariably disclose that the search was conducted in the aforesaid manner and the name of the female official who carried out the personal search of the female concerned should also be disclosed. The personal search memo of the female concerned should indicate compliance with the aforesaid provisions. Failure to do so may not only affect the credibility of the prosecution case but may also be found as violative of the basic right of a female to be treated with decency and proper dignity."

Requirements of law in this case had been giving a complete go by. The prosecution story as to how the SHO found the appellants on the road near the police station is also not free from doubt.

Unfortunately, the High Court did not meet the reasonings of the learned Sessions Judge. The findings of the learned Trial Judge that P.W.10 had prior information, had also not been met by the High Court. The High Court was dealing with a judgment of acquittal. It was, therefore, bound to show that the findings of the learned Sessions Judge were not legally tenable.

It is well known that if two views are possible, benefit of doubt should be given to the accused.

We may notice that a Three Judge Bench of this Court in Jagdish vs. State of M.P. [(2003) 9 SCC 159], had set aside the judgment of conviction where panch witnesses denied that search and seizure of the opium took place in their presence. {See also Ritesh Chakravarti vs. State of Madhya Pradesh [2006 (9) SCALE 644].}

The High Court, in our opinion, could not have brushed aside the findings of the learned Sessions Judge without meeting the reasonings assigned by it as it was dealing with a judgment of acquittal. For the reasons aforementioned, the impugned judgment cannot be sustained which is set aside accordingly.

The appeal is allowed. Appellants are directed to be set at liberty forthwith, unless wanted in connection with any other case.