
(1998) 09 MP CK 0030

In the Madhya Pradesh High Court

Case No : Criminal Appeal No. 466 of 1994

Amar Bahadur Khadak Bahadur

APPELLANT

Vs

State of M.P.

RESPONDENT

Date of Decision : 15-09-1998

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 50(1)

Citation : (1999) 1 MPLJ 67

Hon'ble Judges : R.P. Gutpa, J

Bench : Single Bench

Advocate : Rajendra Singh, for the Appellant; R.A. Robertson, for the Respondent

Final Decision : Allowed

Judgement

R.P. Gutpa, J.

This Judgment shall govern Cr. Appeal No. 467/94 also, filed by Dhanbahadur.

It was in Sessions Trial No. 91/93 of the Court of 4th Additional Sessions Judge, Bhopal that vide Judgment dated 16-4-1994, these appellants were convicted u/s 20(b)(ii) of the Narcotic Drugs and Psychotropic Substances Act, 1985 for possession of Charas on 19-2-1993 at about 7.20 p.m. in the area of Neelam Park, Jehangirabad, situated in Bhopal. Amar Bahadur was found in possession of 1 kg. 950 grams of Charas while Dhanbahadur was found in possession of 850 Grams of Charas. Both were sentenced to R.I. for ten years, each, and fine of Rs. 1 lac each. In default of fine, further R.I. for one year each.

The prosecution case is that on 19-2-1993 the Station Officer, N. K. Saxena of Police Station Jehangirabad, Bhopal had received a secret information that two Nepalese would be coming to Neelam Park for selling charas. They passed on such information to the Superintendent of Police S. K. Guru and under his instructions, a trap was laid. A Police Party consisting of N. K. Saxena, S. I. N. S. Vaishya, Constable Rajendra and Constable Jyotikumar reached Neelam Park in

civil dress. The Superintendent of Police Shri S. K. Guru also reached there. Independent public witnesses were also called and a search of the body of all police officials was given to the witnesses. This party hid themselves as per plan. The two Nepalese came there and Shri Saxena talked to them about the availability of Charas. The accused persons showed the sample of Charas with them by showing a Pudiya to Shri Saxena. Shri Saxena gave a pre-determined signal to the other police party and these accused were got searched of their person which showed that Dhan Bahadur was carrying a handbag hanging on his shoulder. It contained 850 Grams of Charas in a plastic wrapper. Apart from it, some more Charas in a Pudiya by way of sample was in the pocket of his bush-shirt. Similarly from the handbag hanging on the shoulder of Amarbahadur, charas weighing 1 Kg. 950 Grams was found and one Pudiya by way of sample was also found in his pocket. These articles were seized separately from them and they were arrested. FIR was lodged against them on the basis of this recovery. The sealed property was sent to FSL, Sagar for testing. It was reported to be the Charas in both cases. The prosecution had examined the Superintendent of Police Shri S. K. Guru as PW4 who supported the above story of the prosecution. The memorandum of search of the police party had been prepared as Ex.P-9 and it was disclosed to both the accused by him that he was Superintendent of Police and Gazetted Officer and wanted to search them. They agreed to that search and memoranda Ex.P-1 and P-2 were prepared about the disclosure to them. Seizure-memo Ex.P-3 was prepared about the recovery from Dhan Bahadur and Ex.P-4 about the recovery from Amarbahadur.

The other witnesses examined by the prosecution were N. K. Saxena, Inspector as PW7, Shri N. S. Vaishya as PW6. They supported the version of Shri S. K. Guru. One wrist watch was also taken in possession from Dhan Bahadur accused. The recovered Charas had been weighed there in relation to the respective accused before seizing. From the possession of Amarbahadur a sum of Rs. 375.15 p. in currency notes were also recovered apart from wrist watch. The recovered charas was sealed in packets. At the time of the recovery, the public witnesses PW1 Nandkishore and PW2 Laxman were present. However, in evidence, they turned hostile to the prosecution case. They were cross-examined by the prosecution as hostile witnesses. They had signed the Panchnama and seizure memo but they had hardly any explanation to give why they signed, if nothing had happened in their presence.

The contention of the counsel for the appellants is firstly that the information received from the informer initially was nowhere recorded or sent to higher officer. It was required to be recorded as per Section 42(1) of Narcotics Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act). In the absence of source of secret information, the information should be discarded. Secondly, it is urged that no option was given to either of accused-appellants to be searched before a Magistrate or a Gazetted Officer. In the absence of such option, the search even in the presence of Superintendent of Police who is a Gazetted Officer, is illegal. So, there has been an infringement of mandatory

provision of Section 50(1) of the NDPS Act and the search is rendered illegal thereby. It is thirdly argued that there is no credible evidence that the recovered Charas was duly sealed and was kept undisturbed, in the proper custody till the time it was sent to F.S.L. Sagar. It was sent after 37 days after its recovery but there is no evidence as to whether during this period it was kept intact with original seal and we do not know what those seal marks were. The alleged handbags from which Charas was recovered, were not produced in Court as required. So, the prosecution story becomes doubtful.

All those objections were raised before the trial Court also but the trial Court repelled them.

Section 50 of Narcotic Drugs and Psychotropic Substances Act lays down as under :-

"50. Conditions under which search of person shall be conducted. -

(1) When any officer duly authorised u/s 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 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 of 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 except a female."

Thus, in substance, the requirement of this section is that the authorized searching officer, on requisition by the person to be searched, take him to the nearest Gazetted Officer or the nearest Magistrate. The interpretation put to this section is that this is by way of protection for the person to be searched. He should be informed that he has a right to be searched either before a Gazetted Officer or before the Magistrate. It is his choice that he may exercise this option or may waive this option altogether. But the searching officer should intimate him of his right to exercise such an option. The question is whether this requirement is obviated if the person searching or person at the search is himself a Gazetted Officer in the Police Department.

In the case of State of Punjab Vs. Balbir Singh, , the Apex Court pronounced that the requirements of Section 50 of Narcotic Drugs and Psychotropic Substances Act were mandatory. The Searching Officer should comply with these requirements, and a person to be searched should be informed that, if he so requires, he shall be produced before a Gazetted Officer or Magistrate, as provided thereunder, it is obligatory on the part of such officer to inform a person

to be searched. Failure to inform the person to be searched and if such person so requires, failure to take such person before the Magistrate, would amount to non-compliance of the mandatory provision of Section 50 and thus, it would affect the prosecution case and vitiate the trial. After being so informed, whether such person opted for such option or not, would be a question of fact.

In the same case, the Apex Court also laid down that if a narcotic drug and psychotropic substance was recovered from the accused, without any prior information while he was being searched in some other context, the provisions of Section 50 NDPS do not come into play. The requirement of the Act would then start from the stage after recovery.

However in a later case *Raghubir Singh Vs. State of Haryana*, , it was observed that the option u/s 50 is only of being searched in the presence of such senior officer. There is no further option of being searched in the presence of either a Gazetted Officer or of being searched in the presence of Magistrate. The use of the word "nearest" in Section 50 of the Narcotic Drugs and Psychotropic Substances Act is relevant. The search has to be conducted at the earliest and once a person to be searched wants to be searched in the presence of such senior officer, it is for the police officer who has to take the search, to take the search in the presence of the senior officer whosoever is conveniently available. The same interpretation was given by the Apex Court in another case - *Manohar Lal Vs. State of Rajasthan*, .

So, these latter authorities explain the requirement of Section 50 of the Narcotic Drugs and Psychotropic Substances Act and the option of the accused is further limited to saying that he wants to be searched before a Gazetted Officer or a Magistrate. It is for the Searching Officer to take him before any of these. That is the Searching Officer's choice.

The question is whether the requirement would be met if the Gazetted Officer accompanies the search party? If we go by the spirit of the provision and not by form, the requirement should be met if a Gazetted Officer, of whatever department, is accompanying the searching officer or he himself is searching officer. In the present case, the Superintendent of Police was a Gazetted Officer and it was in his presence that the accused were searched. He has signed the seizure memo and proved it appearing as PW4. His assistant N. K. Saxena, SHO, had apprehended these accused and produced them before him and both these accused were asked about search vide Memoranda-Ex.P-1 and P-2 and these accused had stated that they were prepared to be searched in his (S. K. Guru, Superintendent of Police) presence. Now, in the memorandum-Ex.P-1, it is recorded that Amar Bahadur has expressed his consent to be searched before the Superintendent of Police Shri S. K. Guru. This memorandum is signed by Amar Bahadur- accused-appellant, as also by two public witnesses - Laxman and Nandkishore. Similar memorandum is Ex.P-2 in respect of Dhan Bahadur who signed it. The seizure memo in respect of Charas recovered from Dhan Bahadur is Ex.P-3 signed by S. K. Guru and the seizure-memo of Charas recovered from

Amar Bahadur is Ex.P-4. This is also signed by S. K. Guru and witnesses. PW4 Shri S. K. Guru has stated that before the memorandas Ex.P-1 and P-2 were prepared, he had informed that he was Superintendent of Police and was a Gazetted Officer. He has supported the form of recovery from these two accused i.e. 850 Grams from Dhan Bahadur and 1 Kg. and 950 Grams from Amar Bahadur. He admits in cross examination that he did not inform the accused persons that they can get themselves searched before a Magistrate. The Sub-Inspector Narendra Singh Vaishya (PW6) and Inspector N. K. Saxena (PW7) also support the assertion that Shri S. K. Guru had given his introduction to the accused before their search that he was a Gazetted Officer and Superintendent of Police and they agreed to be searched before him and then the recovery of this contraband substance was made respectively. Of course, the recovery of money and wrist watch was also narrated. They also depose about the seizure-memo and panchnama before the Superintendent of Police consequent upon their consent to be searched before him (Shri S. K. Guru).

Thus on consideration of these, it appears clear to this Court that there has been a substantial compliance with the requirement of Section 50 of the Narcotic Drugs and Psychotropic Substances Act. The accused were informed that they were before a Gazetted Officer of the Police Department, of a rank of Superintendent of Police. They raised no objection to be searched before him and expressed it under their signatures and then they were searched. The necessary safety provided by Section 50 of the Narcotic Drugs and Psychotropic Substances Act has thus been adopted in this case by the police.

The next question is whether the identity of the contraband substance was maintained from the time it was seized by the police and sealed till it reached the FSL, Sagar. Rajendra Singh Constable (PW5) had taken it there. He narrated that he had taken the sealed packet to the FSL, Sagar and delivered them duly sealed and obtained receipt also. The Report of the FSL, Sagar is Ex.P-11 dated 31-3-1993 showing that the sealed packets A and B were brought by Rajendra Singh Constable on 29-3-1993 and the seal was intact according to the sample seal. The contents of both the packets were separately tested and were found to be Charas. The forwarding letter consigning these two sealed packets to FSL, Sagar were signed and sent from the office of the Superintendent of Police Bhopal, Shri S. K. Guru. This letter is Ex.P-10 dated 23-3-1993. These were two articles duly sealed bearing marks A and B. A was of 1 Kg. 950 Grams and B was of 850 Grams of Charas. However, in this letter or even in the Report of FSL, Sagar, although it is mentioned that the articles were sealed, but there is no mention of the nomenclature of the seal whether it was the seal of Shri S. K. Guru or seal of Shri Saxena or some other seal. The sample mark of the seal is not narrated in the letter. In the seizure memoranda Exs.P-3 and P-4 also, there is no mention as to what was the nomenclature of seal with which the packets were sealed.

PW6 Narendra Singh SI and PW7 N. K. Saxena, Inspector have not stated about

the initials of the nomenclature of the seal nor as to whom the seal belongs. So also Shri S. K. Guru has not stated about it. So, no witnesses have stated about it. These witnesses have not stated as to where the sealed packets were kept, after the seizure and before being sent to FSL, Sagar through Constable Rajendra Singh (PW5), in safe custody.

Now let us examine the possibility where the sealed articles were kept with Shri Saxena. Rajendra Singh does not say from whom or from where he obtained the sealed packets on 29-3-1993. Shri S. K. Guru does not say that they were under his control or under the control of the Police party. Could there be no substitution of recovered articles with something else. The prosecution should disclose that the identity of the recovered article was maintained till it reached the FSL, Sagar. That can be done by expressly stating as to what was the seal by which it was sealed. Where the seal was kept and whether the article was retained in sealed condition properly and undisturbed. They might have been retained in the Malkhana. If so, those entries in the Malkhana should have been produced to say that the articles remained undisturbed. In fact, it is proper to keep the seal in the hand of an independent person. Shri S. K. Guru could be such an independent person, even though he was connected with the recovery but his status could ensure independence. We do not know in this case if some thing else (recovered from somewhere else and bearing same seal) was sent to FSL, Sagar as property of this case. The Court has been taken for granted that the article sent to FSL, Sagar was the same article as was recovered from the accused. There is a great gap in this part of the events, when we closely scrutinize the evidence.

In a criminal case, with grave consequences, where minimum imprisonment is of ten years and minimum fine is Rs. 1 lac, the Court has to see that there is reliable evidence on each of the necessary aspects of the case. There should be no scope for interference with the recovered articles. If the identity can be disturbed at any stage, the accused are entitled to benefit of doubt. In this case, therefore, this Court is of definite opinion that although there was no infringement of provisions of Section 50, Narcotic Drugs and Psychotropic Substances Act, the prosecution has failed to prove that the articles sent to FSL, Sagar were the same as were recovered from the appellants.

The appellants are given benefit of doubt. The appeals are allowed. The Judgment of conviction and sentence is set aside and the appellants are acquitted of the charges. If they are not in custody, they shall be released forthwith, if not required in any other case.