

(2007) 06 JH CK 0009

In the Jharkhand High Court

Case No : Criminal Appeal (S.J.) No. 238 of 2004 and Criminal Appeal (D.B.) No. 588 of 2004

Anil Kumar and Sakil Ahmad

APPELLANT

Vs

The State of Jharkhand

RESPONDENT

Date of Decision : 12-06-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 100
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 41, 42, 43, 50

Citation : (2007) 2 BLJR 2185

Hon'ble Judges : D.P. Singh, J; Amareshwar Sahay, J

Bench : Division Bench

Advocate : A.K. Kashyap and Arbind Kr. Sinha, for the Appellant; H.K. Jha, APP., for the Respondent

Final Decision : Allowed

Judgement

Amareshwar Sahay, J.—Both the above-mentioned criminal appeals arise out of the same impugned judgment, and, as such, both the appeals were taken up and heard together and are being disposed of by this common judgment.

2. Both the appellants were charged and tried for committing the offence punishable u/s 20 of the N.D.P.S. Act. Against the appellant Anil Kumar of Cr. Appeal No. 238/2004 it is alleged that he was found having unlawful possession of 25 purias of "Ganja" whereas the appellant Sakil Ahmad of Cr. Appeal No. 588/2004 was found having unlawful possession of 4 purias of "Heroin". The learned Special Judge, under the N.D.P.S. Act by the impugned judgment dated 16/01/2004, convicted both the appellants for the offence punishable u/s 20 of the N.D.P.S. Act. The appellant Anil Kumar has been sentenced to undergo R.I. for a period of four years and to pay a fine of Rs. 25,000/- in default to undergo R.I. for a further period of one year. Appellant Sakil Ahmad has been sentenced to undergo R.I. for a period of 12 years and to pay a fine of Rs. 1,00,000/-(one

lakh) in default to undergo R.I. for a further period of three years.

3. In short, the prosecution case is that the informant Alok Kumar (PW-6), Officer-in-Charge, Daltonganj (Town) police station with Ramadhar Singh, A.S.I. (PW-4) and others while in investigation in another case namely, Sadar (Town) P.S. Case No. 105/2000, saw three persons in the lane in between Emergency Ward and Female Ward of Sadar Hospital, Daltonganj, who took to heels towards Kund Mohalla. One of the persons, who were arrested, disclosed his name to Sakil Ahmad, (the appellant in Cr. Appeal No. 588/2004). On search, four purias of "Heroin" was recovered from his right pocket of his fullpant in presence of Bijay Kumar Ram (PW-1) and one Sanjay Kumar. The same was seized vide seizure list (Ext.-4). Further case of the prosecution is that in course of investigation the informant saw a crowd near Gumti shop at village Sudana. The crowd also took to heels but one of them was arrested, who disclosed his name to be Anil Kumar, (the appellant in Cr. Appeal No. 238/2004). On his search, 25 purias of "Ganja" was recovered from his right pocket of his fullpant in present of Sanjay Kumar (PW-2) and Md. Azad (PW-3). The same was seized vide seizure list (Ext.-4/1). Both the arrested persons could not give satisfactory explanation of the possession of the "Heroin" and "Ganja". 4. In course of trial altogether six witnesses were examined on behalf of the prosecution to establish the charges against the accused persons.

5. The learned trial court on the basis of the evidence adduced by the prosecution, held the appellants guilty and, thereby, convicted and sentenced them as already stated herein above.

6. Assailing the judgment impugned, Mr. Kashyap, learned Counsel appearing for the appellants firstly submitted that there is complete non-compliance of Section 50 of Narcotic Drugs and Psychotropic Substances Act, 1985, which is mandatory in nature and the non-compliance of which makes the conviction and sentenced passed against the appellants to be illegal and bad in law. He submitted in this regard that it is a settled principle of law that a person to be searched under the N.D.P.S. Act, 1985 is required to be told about his right u/s 50 before he is searched and that is a mandatory requirement. He submitted that in the present case, there is no evidence on the record to show that the appellants were informed about their said right and, therefore, the said mandatory requirement of Section 50 of N.D.P.S. Act, 1985 was not complied with in this case. He further submitted that before recovering the packets (purias) containing "Ganja" or "Heroin" from the possession of the appellants, they were not informed by the police officials that they had a right to be searched in presence of Magistrate or a Gazetted Officer. In support of his submissions, he relied on the decision of the Supreme Court in the case of C. Ali v. State of Kerala reported in 1999 SCC 1183 and in the case of Babu v. State of Kerala reported in 1999 SCC 1493.

7. He further submitted that since there is no report of Forensic Science Laboratory to show that the alleged recovered article was a contraband article, i.e. Narcotic Drugs and Psychotropic Substances and, therefore, the conviction of

the appellant for the said charge was bad in law. He further submitted that though the seizure witnesses did not support the recovery of "Ganja" or "Heroin" from the possession of the appellants, even then the trial court, wrongly and illegally convicted the appellants for the alleged offence. He further submitted that the alleged recovery of "Ganja" from the possession of the appellant Anil Kumar and the alleged recovery of Heroin" from the possession of the other appellant Sakil Ahmad, were not in one transaction. The place of occurrence of both the alleged recovery was different, the time of occurrence was different and, therefore, both the cases could not have been tried together. By putting both the appellants in one joint trial was illegal and, therefore, the whole trial is vitiated.

8. In order to test submissions of the learned Counsel for the appellants, let us examine Section 50 of the N.D.P.S. Act as also the evidences of the witnesses, adduced on behalf of the prosecution.

Section 50 of the N.D.P.S. Act reads as under:

50. Conditions under which search of persons shall be conducted: - (1) When any officer duly authorized 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 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 authorized u/s 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 u/s 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(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.

9. From bare perusal of Section 50 of the N.D.P.S. Act, quoted above, it appears that the conditions mentioned in Section 50 have been envisaged by the

legislature to serve two purposes. Firstly, to protect and safeguard the person from false accusation and frivolous charges and secondly, to lend credibility to the search and seizure conducted by the empowered officer. Reference in this regard may be made to the case of Beckodan Abdul Rahiman Vs. State of Kerala, .

10. As already stated six witnesses were examined on behalf of the prosecution in order to prove its case, out of whom, FW-1 Bijay Kumar Ram and PW-3 Md. Azad, who were the seizure list witnesses, were declared hostile, whereas PW-2 Sanjay Kumar another witness of seizure did not support the recovery of the alleged articles in his presence, rather he stated in his evidence that his signature was taken on the seizure list at the Police Station. PW-4 Ramadhar Singh is A.S.I and was one of the members of the raiding party. He has stated about the arrest of the appellants and recovery of "Ganja" and "Heroin" from the pockets of the appellants. He stated that from the right pocket of the fullpant of the appellant Sakil Ahmad, four purias of "Brown sugar" (Heroin) were recovered and from the right pocket of the fullpant of appellant Anil Kumar 25 purias of "Ganja" was recovered. PW-5 Raj Kumar Prasad Khatri is the Investigating Officer of the case. He has also stated in the same line to that of PW-4 Ramadhar Singh. PW-6 Alok Kumar is the Officer-in-Charge of Daltongaj (Town) Police Station. His evidence is also on the same line to that of PW-4 and PW-5. None of these prosecution witnesses have stated a word regarding the fact that the appellants were told about their right u/s 50 of the N.D.P.S. Act, 1985 before they were searched.

11. The Supreme Court in the decisions noticed above, i.e. C. Ali v. State of Kerala reported in 1999 SCC 1183 and in the case of Babu v. State of Kerala reported in 1999 SCC 1493 has held that requirement u/s 50 of the N.D.P.S. Act is mandatory in nature, therefore the learned Counsel for the appellants is right in his submissions that there is complete non-compliance of the mandatory provision of Section 50 of the N.D.P.S. Act, 1985 in the present case and, as such, in view of the decision of the Supreme Court in the aforesaid cases, the conviction and sentence passed by the learned Special Judge, cannot be sustained.

12. Consequently, both these Appeals are allowed. The conviction and sentence passed against the appellants by the Special Judge. Palamau at Daltonganj in Narcotic Case No. 6/2000 is hereby set aside. The appellant Anil Kumar is on bail and, as such, he is discharged from the liabilities of his bail bonds. Whereas the appellant Sakil Ahmad, who is in custody, is hereby directed to set at liberty forthwith if not wanted in any other case.

Since both the appeals have been allowed on the very first point argued by the counsel for the appellants and, therefore, it is not necessary to deal with the other submissions advanced on behalf of the appellants.