

(2000) 11 DEL CK 0071

In the Delhi High Court

Case No : Criminal Appeal No. 380 of 1999

Bagru Ram

APPELLANT

Vs

State of Delhi

RESPONDENT

Date of Decision : 03-11-2000

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 18, 21, 42(2), 50, 55

Citation : (2001) 2 RCR(Criminal) 171

Hon'ble Judges : R.S. Sodhi, J

Bench : Single Bench

Advocate : P.R. Thakur, for the Appellant; M.S. Butalia, for the Respondent

Final Decision : Allowed

Judgement

R.S. Sodhi, J.—This appeal is directed against the judgment and order of the Special Judge dated 17.7.1999 in SC No. 284/97 arising out of FIR No. 442/90, Police Station, Railway Main Delhi, under Sections 21/18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "the Act") holding the appellant, Bagru Ram, guilty of possessing 4 kgs. of heroin and 6 kgs. of opium on 26.11.1990 and for having committed offence punishable under Sections 21/18 of the Act. Further by his order dated 19.7.1999, the learned Judge was pleased to sentence the appellant to 20 years rigorous imprisonment with a fine of rupees two lakhs for the offence u/s 21 and in default of payment of fine to further undergo simple imprisonment for two-and-half years and 10 rigorous imprisonment and a fine of rupees one lakh for the offence u/s 18 and in default of payment of fine to further undergo simple imprisonment for two years. The sentences were to run concurrently.

2. The case of the prosecution against the appellant is that on 26.11.1990 at about 1.30 p.m. SHO, Inspector Satinder Nath, received a secret information which was recorded vide DD No. 10-A through Duty Officer. Thereafter, a raiding party was constituted in which one public witness, Ramesh, was joined. The

aforesaid raiding party reached west passenger hall, near platform No. 18 & 19 of Railway Station Delhi Main at around 2.00 p.m. The accused was seen coming holding a suit case in his right hand and at the pointing out of the informer, the accused was apprehended by Inspector Sanjeev Gupta. Thereafter the Investigating Officer revealed to the accused that he had information in respect of the accused being in possession of narcotics and, Therefore, gave him an option of being searched before a Magistrate or a Gazetted Officer. It is stated that the accused refused to exercise his opinion where after ACP Hira Lal was called to the spot who reached there at about 2.15 p.m. and the search was conducted in his presence. From the suit case held by the accused, 10 tallies of cloth were recovered; four of the tallies upon opening were suspected to contain heroin in crystal form while the balance six tallies were suspected of containing opium. On weighing, each thaily was of one kg. From each of the thaily 50 gms. substance was taken put as sample. The tallies were numbered 1 to 10 and correspondingly the samples from each of the tallies was numbered 1 to 10. The case property was sealed and form CFSL filled in and impression of the seal was affixed. The seal of the SHO was given to the public witness, Ramesh, after use. All the parcels were put in the suit case, which was seized, vide Memo No. Ex.PW-7/B and thereafter the suit case, the CFSL Form and copy of the seizure memo were handed over to the SHO for deposit in the Malkhana. The SHO deposited the same before the Mohrar Malkhana. The Investigating Officer prepared Rukka which resulted in the registering of the FIR and the accused was arrested. After completion of investigation, charge-sheet was filed in the court and charges framed u/s 21/18 of the Act. The prosecution led as many as 11 witnesses to prove the case. The learned Special Judge, on appraisal of the evidence adduced before him, returned a finding as has been stated above.

3. With the help of learned counsel for the parties, I have been taken through the record of the case as also the judgment under appeal. It is the case of the appellant before me that in the present case there is violation of Sections 42(2), 50, 55 and 57 of the Act. Learned counsel for the appellant submitted that violation of mandatory provisions of the Act would vitiate the trial as has been held by the Supreme Court in State of Punjab Vs. Baldev Singh, . Learned counsel referred to the evidence of PW-9, ACP Satinder Nath who has stated that on 26.11.1999 he was working as SHO, Police Station, Railway Station Delhi Main. On that day at about 1.15 p.m. he received a secret information in respect of possession of narcotic drugs by a person. He directed the Duty Officer to record this information in the daily diary as DD No. 10-A at 1.30 p.m. (Ex.PW-9/A). Immediately thereafter he constituted a raiding party consisting of SI Sanjeev Gupta, Const. Raj Nath, Const. Aayas Khan, Const. Kallu Singh, Const. Satish Kumar and joined a public witness, Ramesh, and laid a naka at west passenger hall at the Railway Station Delhi Main, After apprehending the accused, it is stated in the deposition that SI Sanjeev Gupta narrated to him the secret information received regarding the possession of certain narcotic drugs and offered that the accused may give his personal search before a Gazetted

Officer or a Magistrate if he so desired. The accused refused to offer his search before any Gazetted Officer or Magistrate. Despite his refusal, the then ACP, Mr. Hira Lal, was called on the spot. In order to substantiate the case regarding non-compliance of Section 55 of the Act, learned counsel argued that the requirement that the Officer In-charge of a Police Station shall take charge of and keep in safe custody all the articles seized under the Act, has been violated for reasons that the seized property was not deposited in the Malkhana by the SHO which bears evidence from perusal of the Malkhana register, wherein, so far as the entry regarding the person who deposited the goods in the Malkhana is concerned, the name of the SHO is not mentioned but is that of SI Sanjeev Gupta. This aspect of the matter, namely, non-compliance of provisions of Sections 42(2), 50, 55 and 57 has been dealt with by the learned Special Judge in his judgment as follows:

"As far as the contention regarding the compliance of mandatory requirement u/s 42 of the Act is concerned, the prosecution has proved the DD entry No. 10A Ex.PW9/A which has been recorded by ACP Satinder Nath, the then SHO of P.S. Railway Main Delhi who had received the secret information at about 1.15 p.m. on 26.11.90 while he was in Police Station in respect of the possession of the narcotics drugs with a person and that DD No. 10A was recorded at about 1.30 PM and the same has been proved as Ex.PW9/A. Since Inspector Satinder Nath, the then SHO himself has received the secret information and has reduced the same into writing in DD No. 10A Ex.PW9/A who is very much superior in rank to a person contemplated u/s 42(1) of the Act, I find that there was no need to send the copy of the same to any superior officer. Therefore, I find that the provision contained u/s 42 of the Act has been complied with, within the words and spirit. Therefore, the contention raised by Id. counsel for the accused in that regard has no substance or merit at all. Hence the same is rejected.

4. Ld. counsel for the accused further contended that notice u/s 50 of the Act has not been served upon the accused and Therefore the mandatory requirement of Section 50 of the Act has not been complied with. Section 50 of the Act under Sub-section (1) states that when any officer duly authorised u/s 42 of the Act is about to search any person under the provisions of Sections 31, 32 or 43 of the Act, he shall, if such person so required, take such person without unnecessary delay to the nearest Gazetted Officer of any of the department mentioned in Section 42 of the Act or to the nearest Magistrate. In compliance of this provision, prosecution has produced the evidence on record that the accused has been explained by the police officers that a secret information regarding possession of the narcotic drug with the accused had been explained and it has also been explained that his search was necessary and that if he so desired, his search could be taken before a Gazetted Officer or a Magistrate, but he refused to offer his search before any Gazetted Officer or a Magistrate. Even despite his refusal, police had taken car to call the Gazetted Officer at the spot and ACP Hira Lal, a Gazetted Officer of the police department who was empowered to conduct the search u/s 42 of the Act had been called at the spot and the ACP Hira Lal PW-7 had arrived there and it was in his presence that the search of the accused

was taken after the search of (he IO was offered to him by the police in the presence of public witness. Therefore, in view of the search of the accused before a Gazetted Officer i.e. ACP-PW7 Hira Lal, who had fully supported the prosecution case and his version has been corroborated by all the witnesses present at the spot and his testimony has not been challenged on any ground regarding the search of the accused in his presence by the IO SI Sanjeev Kumar Gupta, I find that the provision contained u/s 50 of the Act has also been fully complied with in words and spirit and that being so, there appears no merit or substance in the contention raised by the Id. counsel for the accused. So this contention of Id. counsel is also rejected."

5. The above reasoning of the learned Judge appears to be reading down Section 42 as also Section 50.

6. It is the admitted case that the secret information was reduced into writing as required by Section 42(1) of the Act but a copy of the substance reduced into writing was not forwarded to a superior officer. To say that the ACP having received the secret information, there is no superior officer to the ACP, is a fallacy. The law requires strict compliance of mandatory provisions and frowns upon its violations. The Supreme Court in *State of Punjab Vs. Balbir Singh*, has dealt with violation of Section 42 and has noted as under :

"25. (2-C) u/s 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.

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

(3) u/s 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.

8. In the same judgment the Supreme Court, while considering the impact of violation of Section 50, held that "it would effect the prosecution case and vitiate the trial". In *Koluttumottil Razak v. State of Kerala*, 2000 SCC 829 the Supreme Court has reiterated the view taken in *State of Punjab v. Balbir Singh* (supra) by referring to a constitution bench decision of the Supreme Court in *State of Punjab Vs. Baldev Singh*, . In the present case, another admitted factor is that

the notice purportedly given to the accused u/s 50 of the Act is not on the record. Obviously, no written notice had been given. This again runs counter to the decision in *State of Punjab v. Baldev Singh* (supra) where the court insists upon this valuable right enshrined in Section 50 of the Act to be complied with in the manner specified by the Act which has been interpreted as service of a written notice. Merely calling the ACP at the spot does not advance the case of the prosecution. The right of being searched before a Magistrate has been denied to the accused.

9. It is well settled that violation of a mandatory provision reads prejudice to the accused into the violation. There is no requirement of the accused proving prejudice. The procedure adopted, if it causes prejudice to the accused, must render the trial vitiated or at least the conviction must suffer. In the present case it is evident that both Sections 42(2) and 50 of the Act have been violated. Therefore, keeping the dictates of the Supreme Court in view, I have no option but to set aside the judgment of conviction and order of sentence under challenge.

10. In the result, Criminal Appeal No. 380 of 1999 is allowed. The appellant be set at liberty forthwith if not wanted in any other case.