
(2004) 02 MP CK 0032

In the Madhya Pradesh High Court

Case No : Criminal Appeal No. 135 of 2001

Fatto alias Phoola alias Kamla Bee

APPELLANT

Vs

State of M.P.

RESPONDENT

Date of Decision : 10-02-2004

Acts Referred:

Civil Procedure Code Amendment Act, 1974 — Section 374

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 15, 50(4), 8

Citation : (2004) CriLJ 4353 : (2004) 2 MPHT 67 : (2004) 2 MPLJ 123 : (2004) 2 MPLJ 122 : (2004) 2 RCR(Criminal) 684

Hon'ble Judges : A.K.Shrivastava, J

Bench : Single Bench

Advocate : F.A. Shah, for the Appellant; Kusum Sharma, for the Respondent

Final Decision : Allowed

Judgement

A.K. Shrivastava, J.

Feeling aggrieved by the judgment of conviction and order of sentence dated 6-11 -2000 passed by Special Judge, Vidisha in Special Case No. 32/2000 convicting the appellant u/s 8 read with Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred as to "the Act"), the appellant has preferred this appeal u/s 374 of Code of Criminal Procedure, 1973.

In brief, the case of the prosecution is that on 4-5-2000, Excise Sub Inspector Gopilal Sharma (P.W. 3) received an information that the appellant is carrying poppy straw. This information was registered in the offence register and the information was transmitted to the Distt. Excise Officer vide Ex. P-10. Thereafter, along with S.P. Mishra (P.W. 4) who is Asstt. Excise Officer and is a Gazetted Officer alongwith his staff, he rushed at Madhoganj Chauraha alongwith witnesses Harishanker Sharma and Rambabu Dubey. After sometime, the appellant who was carrying a canvass bag (bora) on her head came. She was stopped by Constable Harishanker and she named herself as Fatto alia's Phoola. Thereafter in presence of the witnesses Deepak Vyas and Indresh, a Panchnama

(Ex. P-1) was prepared by Gopilal and notice u/s 50 of the Act (Ex, P-2) was given to the appellant and she was informed that she may be searched either before a Magistrate or Gazetted Officer Shri S.P. Mishra who was present there. The appellant who is an illiterate lady directed Deepak Vyas (P.W. 1) to record her consent letter (Ex. P-3). According to Ex. P-3 she did not express her desire to be searched before any Magistrate or Gazetted Officer. Thereafter, canvass bag was checked in which poppy straw was found and on weighing, it was found to be 17.600 kgs.

Investigating Officer Gopilal Sharma (P.W. 3) in furtherance to his investigation, seized contraband articles, sealed it and sent it for chemical examination and on receiving its report, filed a charge-sheet before the Special Judge.

The Special Judge framed charges punishable u/s 8 read with Section 15 of the Act, which was denied by the appellant.

In order to prove the charges, the prosecution examined as many as four witnesses and placed Ex, P-1 to P-19 the documents on record. In her defence the appellant did not choose to examine any witness.

The learned Special Judge after carefully examining oral evidence and documents placed on record, came to hold that the appellant did commit the offence punishable u/s 8 read with Section 15 of the Act and eventually, convicted her and passed sentence to suffer RI for 10 years and fine of Rs. 1,00,000/- (One lac), in default, further imprisonment of two years by the impugned judgment, hence, this appeal.

In this appeal, Shri F.A. Shah, learned Counsel for the appellant by taking the aid of Section 50(4) of the Act has contended that the appellant was not searched by any female and therefore, the mandatory requirement of law has not been followed and hence, the conviction can not be sustained in the eyes of law. He has further submitted that if the evidence is considered in proper perspective, it is perceivable that Gopilal Sharma (P.W. 3) who is the Investigating Officer and upon whose insistence, the search was made, did not offer himself for search and for this reason also, no conviction could be accorded.

On the other hand, it has been contended by Smt. Kusum Sharma, learned Counsel appearing for the State that the appellant did not express her desire to be searched by any female therefore, even if she was not searched by any female, the search can not be said to be vitiated. According to her, appeal sans substance and the same be dismissed.

After having heard learned Counsel for the parties, I am of the view that this appeal deserves to be allowed.

Under Section 50(4) of the Act, a female shall be searched only by a female. This requirement of law is mandatory. On going through Section 50(4) of the Act, which require that no female shall be searched by anyone except a female, has to be given effect fully, as this provision or law is mandatory and can not be

ignored. Admittedly, the appellant who is lady, was not searched by any female, therefore, mandatory requirement of law was not followed and hence, the conviction of the appellant is bad in law. It shall be profitable to rely a decision of the Apex Court in the case of State of Punjab v. Surinder Rani alias Chhiddi 2001 SCC (Cri.) 1487, which was followed by this Court in the case of Geeta Bai alias Portable v. State of M.P. 2002(2) EFR 328. The contention of the learned Counsel appearing for the State is that at the relevant point of time, no female was present therefore, the search of the appellant was not made by a female, can not be accepted because, the law is mandatory and it can not be diluted on this ground. According to me, when the information was received by Investigating Officer Gopilal Sharma that a lady is carrying contraband article, he arranged the presence of Gazetted Officer but why he did not make any arrangement to search the appellant by any female.

According to learned Trial Judge, because the contraband article (poppy straw) was being carried by the appellant in a gunny bag, which was kept over her head, her person was not required to be searched and therefore, even if the search was not made by female, there is no contravention of any particular provision of law. I am afraid of such a finding. In the case of Geeta Bai (supra), the similar situation was there. In that case, the lady was carrying contraband article weighing 11.300 Gms in a potli which was being carried by her on her head and in that situation, this Court has held that compliance of the provisions of Section 50(4) of the Act, was mandatory and as it was not complied with, conviction was found to be bad in law. According to me, the case of Geeta Bai (supra) squarely covers the fate of this case also.

It is well settled in law that if a thing is to be done in a particular manner, it should be done in the same manner and not otherwise. If the mandatory requirement of law u/s 50(4) of the Act that a female shall be searched by a female then full effect to this provision should be given, having not done so by the Investigating Officer, in my opinion, the conviction of the appellant is bad in law.

In the result, appeal succeeds and is hereby allowed. The conviction of the appellant is hereby set aside. She be set at liberty forthwith if not required in any other case.