

(2000) 02 BOM CK 0001
In the Bombay High Court
Case No : Criminal Appeal No. 158 of 1993

The State of Maharashtra

APPELLANT

Vs

Abdul Jaheb alias Kaloo Abdul Wahed

RESPONDENT

Date of Decision : 17-02-2000

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21, 41(2), 42, 42(1), 42(2)

Citation : (2000) CriLJ 2136

Hon'ble Judges : P.S. Brahme, J;J.N. Patel, J

Bench : Division Bench

Advocate : P.G. Phatak, app, for the Appellant;

Final Decision : Dismissed

Judgement

J.N. Patel, J.—The respondent was charged for having committed offence punishable u/s 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "N.D.P.S. Act") before the Additional Sessions Judge, Akola in Sessions Trial No. 202 of 1990. The learned Additional Sessions Judge acquitted the respondent, but ordered confiscation of the cash amount to the Government, seized from the respondent by his judgment and order dated 27-11-1992 which has been impugned by the State in this appeal against acquittal.

2. The facts can briefly be stated as follows :

Shri Onkar Mahadeo Panday Police Inspector attached to Police Station, Ramdaspath, Akola, received an information on 19-8-1990 from his informer that the respondent Abdul Jahed alias Kaloo Abdul Wahid, resident of Akot (File) was selling Gard (brown sugar) at his residence. Therefore, he called two panchas and apprised them about the information and he along with Police Inspector A.G. Sheikh and Police Sub-Inspector Harkhede, staff and the panchas proceeded in jeep bearing No. MZE 2639 to Akot (File). On reaching the house of the

respondent, they searched it for the purpose of raid. Inspector Panday then told the respondent the purpose and intention of the police party to conduct his house search and personal search. Thereafter, the search was conducted in which the police found that the respondent was having in his possession Gard which was kept by him in the right side pocket of his Nehru shirt and a sum of Rs. 3278.65 was found in the left side pocket of the Nehru shirt and in both the pockets of his pyjama. Brown sugar was found in one small plastic bag which was weighing 5 grams and 950 milligrams and one paper packet containing 5 packets of Gard (Brown Sugar) 1 gram and 400 milligram along with the packets. Therefore, the said property came to be seized in the presence of panchas under the panchanama (Exhibit 24). Brown sugar weighing 7 grams and 350 milligrams came to be sealed on the spot of occurrence by affixing label bearing signature of the pancha in their presence for sending it to the office of the Chemical Analyser, Nagpur for analysis. Nothing was found in the house search and therefore, the respondent came to be arrested and was brought to the Police Station, Ramdaspath where Inspector Panday lodged First Information Report (Exhibit 81). The property seized from the respondent was handed over to the in-charge of muddemal. An information of the raid was given to the S.D.P.O. The property was sent to the Chemical Analyser for analysis. After the C.A. report was received, chargesheet in the case came to be filed. The trial Court found that the prosecution has failed to prove that the accused was in possession of the brown sugar without pass and permit and therefore, acquitted the accused.

3. The learned A.P.P. submits that the finding of acquittal recorded by the learned trial Judge against the accused, is erroneous and without considering the evidence led by the prosecution against the respondent. It is submitted that though the two panchas who accompanied the police party while conducting raid in the house of the respondent have turned hostile, they have admitted their signatures on the panchanama (Exhibit 24) and therefore, it cannot be said that the search and seizure was, in any manner, vitiated as P.I. Panday has specifically deposed before the Court in his evidence that the search was conducted after the panchas were called and they accompanied them for the raid. It is further submitted that the prosecution has proved through the evidence of P.I. Panday (P.W. 4) that at the time the search and seizure came to be made, there was sufficient compliance of Section 50 of the N.D.P.S. Act as before taking his search, the respondent was told that he if he wants his search to be taken before the Gazetted Officer, it can be done but he declined to come before the Gazetted Officer. Further, P.I. Panday was himself a Gazetted Officer. Therefore, there was no reason to hold that the prosecution did not comply with Section 50 of the N.D.P.S. Act.

4. It is further submitted by the learned A.P.P. that the learned trial Court overlooked that substantial quantity of brown sugar which is known as Gard weighing 7 grams 350 milligram came to be seized from the respondent accused and that the same was despatched to the Regional Forensic Science Laboratory for analysis and the Chemical Analyser in his report dated 31-12-1990 (Exhibit

32) has clearly recorded a finding that Exh. 1 brown coloured powder in a small polythene has and Exh. Nos. 2 to 16 brown coloured powder wrapped in paper separately were analysed and the results of analysis was Heroin (diacetyl morphine) is detected in Exhibit Nos. 1,2,3,4,5 and 6 along with other opium alkaloids and Exhibit Nos. 1 to 6 fall u/s 2(xvi) of the N.D.P.S. Act, 1985 and therefore, the prosecution has successfully proved that the respondent accused was found in possession of the contraband without any pass or permit and ought to have held him guilty of having committed an offence u/s 21 of the N.D.P.S. Act. The learned A.P.P. therefore submits that the impugned order be quashed and set aside and the respondent be convicted and sentenced accordingly.

5. We have carefully examined the record and proceedings of the case and have given a patient hearing to the learned A.P.P. The trial Court found that the only material evidence led by the prosecution in support of their case was by examining P.I. Panday and two panchas namely Raju (P.W. 1) and Eknath (P.W. 2) who have been declared hostile. The learned trial Court found that P.I. Panday, while conducting the raid, pursuant to which search and seizure of the contraband has taken place, has failed to comply the mandatory provisions of Section 50 of the N.D.P.S. Act, 1985. In his evidence before the Court, though Mr. Panday has tried to state that he has informed the respondent that if he wants, his search can be taken before the Gazetted Officer, it does not find support from the panchanama (Exhibit 24) and the First Information report (Exhibit 31) and therefore, Mr. Panday's evidence in the Court appears to be an afterthought. The trial Court also disbelieved P.I. Panday on this point for the reason that what Mr. Panday has stated before the Court that he informed the respondent of his right to be searched before the Gazetted Officer, then there was no need for him to tell before the Court that he himself was a Gazetted Officer and therefore, it creates a doubt in one's mind whether really the respondent was informed of his right or not.

6. Another reason for discarding the prosecution case appears to be non-compliance of Section 42 of the N.D.P.S. Act.

7. Further, the learned trial Court found that P.I. Panday has not been able to satisfy the Court that the contraband seized from the respondent was sealed and deposited in the police station, by handing it over to the In-charge of muddamal as no extract of muddamal register is produced and therefore, the prosecution has not established any link between the property which has been seized from the accused and the one which has been sent to the Chemical Analyser, as the property or contraband which was despatched to the Chemical Analyser was after a long lapse of time considering that the date of offence was 19-8-1990 and the samples were sent on 8-10-1990. It has been observed that the Chemical Analyser's report is positive as regards the contraband, but the prosecution has failed to prove that what was sent to the Chemical Analyser was the same contraband which was found in possession of the respondent.

8. The learned trial Court also found that P.I. Panday has not complied with the

provisions of Section 57 of the N.D.P.S. Act as there is no record produced before the Court to show the report of arrest and seizure after the arrest of the respondent and the seizure of the contraband was made by him to his immediate superior office within forty-eight hours.

9. In addition to this aforesaid lapse on the part of the prosecution, the learned trial Court also found that there is no mention of the fact that in what manner the contraband which came to be seized was weighed as it is absent in the panchanama as well as in the evidence of the Officer and considering all these lacunae in the prosecution case, the learned trial Court found it safe to give benefit of doubt to the respondent.

10. In the opinion of the learned trial Court, as the respondent was not entitled to a clear acquittal and merely a benefit of doubt was extended to him, a sum of Rs. 3278.65 seized from the respondent will have to be confiscated and ordered that the cash amount be confiscated to the Government.

11. In the case of State of Punjab Vs. Balbir Singh, , the Apex Court has examined various provisions of the N.D.P.S. Act and as these questions arise frequently before the trial Court and their Lordships have set out their conclusions out of which we refer to the conclusions drawn in respect of Sections 42 and 50 of the N.D.P.S. Act.

(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. 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.

(5) On prior information, the embowered or authorised officer while acting u/s 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.

12. Now, let us examine whether the prosecution has placed on record evidence to show that there was compliance of Sections 42 and 50 of the N.D.P.S. Act. In the facts of the present case, Section 42(1) and (2) would be attracted as there was prior information received by P.I. Panday that the respondent Abdul Jahed alias Kaloo Abdul Wahid was selling Gard (brown sugar) at his residence and therefore, it was obligatory on the part of P.I. Panday to have taken down in writing the said Information and then enter into and search the house of the respondent and if such information was taken down in writing under Sub-section (1) of Section 42, then Sub-section (2) provides that he shall forthwith send a copy thereof to his immediate official superior, we find that P.I. Panday has not recorded the Information which he received from his informer anywhere as required under Sub-section (1) of Section 42 nor he has complied with Sub-section (2) of Section 42 by forthwith sending a copy thereof to his immediate official superior and as held in *State of Punjab Vs. Balbir Singh*, , this noncompliance affects the prosecution's case.

13-14. As regards the compliance of Section 50 of the N.D.P.S. Act is concerned, as rightly observed by the learned Trial Court, the panchanama (Exhibit 24) or the First Information Report (Exhibit 31) does not record that the police officer informed the respondent that if he so requires, he can be taken without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate. P.I. Panday, for the first time. In his evidence before the Court, has tried to improve his case by stating that "Before taking his search, we told him that if he wants, his search can be taken before the Gazetted Officer. I am Gazetted Officer." According to the learned A.P.P., as P.I. Panday himself was a Gazetted Officer, there was no need to forewarn the respondent before his search could be conducted. We find that this submission of the learned A.P.P. is more fatal to the prosecution case than what has been tried to be justified by P.I. Panday. In case P.I. Panday was under the impression that he was a Gazetted Officer, then there was no need to give such caution to the respondent and if he was satisfied that instead of he being a Gazetted Officer, such caution was necessary, then he has failed to comply with the mandatory provisions of Section 50 of the N.D.P.S. Act. P.I. Panday has tried to justify both. In the case of *State of Punjab Vs. Baldev Singh, etc. etc.*, , a Five Judges' Bench of the Apex Court while analysing the law on the point of compliance of Section 50 of the N.D.P.S. Act, observed in paras 22, 23 and 24 of the reported judgment in *State of Punjab Vs. Baldev Singh, etc. etc.*, :

22. It would, thus, be seen that none of the decisions of the Supreme Court after *State of Punjab Vs. Balbir Singh*, have departed from that opinion. At least none has been brought to our notice. There is, thus, unanimity of judicial

pronouncements to the effect that it is an obligation of the empowered officer and his duty before conducting the search of the person of a suspect, on the basis of prior information, to inform the suspect that he has the right to require his search being conducted in the presence of a Gazetted Officer or a Magistrate and that the failure to so inform the suspect of his right, would render the search illegal because the suspect would not be able to avail of the protection which is inbuilt in Section 50. Similarly, if the concerned person requires, on being so informed by the empowered officer or otherwise, that his search be conducted in the presence of a Gazetted Officer or a Magistrate, the empowered officer is obliged to do so and failure on his part to do so would also render the search illegal and the conviction and sentence of the accused bad.

23. To be searched before a Gazetted Officer or a Magistrate, if the suspect so requires, is an extremely valuable right which the legislature has given to the concerned person having regard to the grave consequences that may entail the possession of illicit articles under the NDPS Act. It appears to have been incorporated in the Act keeping in view the severity of the punishment. The rationale behind the provision is even otherwise manifest. The search before a Gazetted Officer or a Magistrate would impart much more authenticity and creditworthiness to the search and seizure proceedings. It would also verily strengthen the prosecution case. There is, thus, no justification for the empowered officer, who goes to search the person, on prior information, to effect the search, of not informing the concerned person of the existence of his right to have his search conducted before a Gazetted Officer or a Magistrate, so as to enable him to avail of that right. It is, however, not necessary to give the information to the person to be searched about his right in writing. It is sufficient if such Information is communicated to the concerned person orally and as far as possible in the presence of some independent and respectable persons witnessing the arrest and search. The prosecution must, however, at the trial, establish that the empowered officer had conveyed the information to the concerned person of his right of being searched in the presence of the Magistrate or a Gazetted Officer, at the time of the intended search. Courts have to be satisfied at the trial of the case about due compliance with the requirements provided in Section 50. No presumption u/s 54 of the Act can be raised against an accused, unless the prosecution established it to the satisfaction of the Court, that the requirements of Section 50 were duly complied with.

24. The safeguard or protection to be searched in presence of a Gazetted Officer or a Magistrate has been incorporated in Section 50 to ensure that persons are only searched with a good cause and also with a view to maintain veracity of evidence derived from such search, we have already noticed that severe punishments have been provided under the Act for mere possession in Illicit Drugs and Narcotic substances. Personal search, more particularly for offences under the NDPS Act, are critical means of obtaining evidence of possession and it is, therefore, necessary that the safeguards provided in Section 50 of the Act are observed scrupulously. The duty to inform the suspect of his right to be searched

in presence of a Gazetted Officer or a Magistrate is a necessary sequence for enabling the concerned person to exercise that right u/s 50 because after *Khatki Ahmed Mushabhai Vs. Limdi Municipality*, it is no longer permissible to contend that the right to personal liberty can be curtailed even temporarily, by a procedure which is not "reasonable, fair and just" and when a statute itself provides for a "just" procedure, it must be honoured. Conducting a search u/s 50, without intimating to the suspect that he has a right to be searched before a Gazetted Officer or a Magistrate, would be violative of the "reasonable, fair and just procedure" and the safeguard contained in Section 50 would be rendered illusory, otiose and meaningless. Procedure based on systematic and unconscionable violation of law by the officials responsible for the enforcement of law, cannot be considered to be "fair", just or reasonable procedure. We are not persuaded to agree that reading into Section 50, the existence of a duty on the part of the empowered officer, to intimate to the suspect, about the existence of his right to be searched in presence of a Gazetted Officer or a Magistrate, if he so requires, would place any premium on ignorance of law. The argument loses sight of a clear distinction between ignorance of the law and ignorance of the right to a "reasonable, fair and just procedure."

In view of the clear declaration of the law, we have no hesitation to hold that if the person who is supposed to be searched so requires, he should be taken to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate, and if he exercises the option of being searched before the Gazetted Officer or the Magistrate, a Gazetted Officer other than the empowered Officer who is going to conduct the search is the person contemplated u/s 50, because Sub-section (3) of Section 50 clearly provides that 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 and therefore, we find that P.I. Panday has not complied with Section 50 of the N.D.P.S. Act before proceeding to take search of the respondent. In his cross-examination, P.I. Panday has gone to the extent of stating that there is no need to mention this fact in the panchanama and the first information report. This attempt on his part to justify the lacunae is laudable, but is fatal to the prosecution case as his evidence before the Court that he has complied with the provisions of Section 50 of the N.D.P.S. Act does not find support from the facts recorded in the panchanama and the first information report. The panchanama (Exhibit 24) being contemporaneous record, of what had taken place when the search and seizure was conducted, exposes the false claim of P.I. Panday that he did give the necessary caution to the respondent before his search came to be conducted.

15. In our opinion, on these two counts alone, the respondent was entitled to acquittal. As the prosecution failed to comply with the mandatory provisions of Sections 42 and 50 of the N.D.P.S. Act, but the trial Court has taken further caution in the matter and even examined the prosecution's case on the point whether the contraband seized from the respondent has been actually sent to the

Chemical Analyser or not and there also, the prosecution has miserably failed to prove that the contraband which was seized from the respondent was actually deposited in the police station and duly entered in the muddamal register and it was the same contraband which was subsequently sent to the Chemical Analyser for analysis.

16. Therefore, both on facts and law, the prosecution has miserably failed to prove its case. To this extent, we do not agree with the trial Court that the respondent was entitled for benefit of doubt. In our opinion, the respondent was entitled for outright acquittal as the whole search and seizure is vitiated for non-compliance of the mandatory provisions of Sections 42 and 50 of the N.D.P.S. Act and further on facts also, the prosecution has not been able to establish any link between the seizure of the contraband and its transmission to the Chemical Analyser for analysis. There is no explanation as to why the contraband was sent to the Chemical Analyser after a lapse of almost 50 days as the contraband was seized from 19-8-1990 and was sent to the Chemical Analyser on 8-10-1990 and during this time where the contraband was lying. In addition to this, even the contraband which was sent to the Chemical Analyser could not be properly linked to the seizure as it was not found to bear the signature and seal of P.I. Panday.

17. Before we part with this judgment, we would like to observe that the learned trial Court also erred in ordering confiscation of the cash amount i.e. a sum of Rs. 3278.65 p. which came to be seized from the respondent and which was claimed by the respondent at the conclusion of the trial. No doubt, u/s 62 of the N.D.P.S. Act, the Courts entitled to confiscation of sale proceeds of illicit drugs or substances. But, in the present case, the prosecution has not established that the sum of Rs. 3278.65 p. were towards the sale proceeds of illicit drugs or substances. Unfortunately, the respondent has not preferred any appeal to the Court of Session against the order of confiscation as provided under Sub-section (3) of Section 63 of the N.D.P.S. Act and therefore, we do not interfere with this part of the order.

18. In the result, the appeal is dismissed.