
(2010) 12 SHI CK 0490

High Court of Himachal Pradesh

Case No: Criminal Appeal No. 53 of 2001

State of H.P.

APPELLANT

Vs

Naresh Kumar

RESPONDENT

Date of Decision: Dec. 21, 2010

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 20, 50

Hon'ble Judges: Sanjay Karol, J; R.B. Misra, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Sanjay Karol, J.

For an offence, which is alleged to have been committed on 8.12.1999, accused was put to trial. In terms of judgment dated 3.10.2000 passed by Special Judge (Sessions Judge), Kangra at Dharamshala, in Sessions Case No. 9-N/VII/2000, titled as State of H.P. v. Naresh Kumar Sessions Case No. 9-N/VII/2000, accused stands acquitted of the charged offence.

2. It is the case of prosecution that on 8.12.1999, at about 6.P.M., Inspector Surinder Singh (PW.15) was on patrolling duty at Mohtli Ramp along with other police officials. Accused was suspected of carrying contraband substance. Independent witnesses Suresh Kumar (PW.1) and Desh Bandhu (PW.2) were associated and PW.15 apprised the accused of his right of being searched before the police officials, Gazetted Officer or Magistrate. Vide consent memo Ex.PA, accused gave his consent of being searched by Inspector Surinder Singh. Search was carried out in the presence of independent witnesses. In the right pocket of the Windcheater, worn by the accused, a polythene bag was recovered from which charas like substance in different shapes was recovered, which upon weighing was found to be 350 grams. Sample of 25 grams was taken, which along with the remaining stuff was sealed in two different parcels with seal impression

"K". Seal was handed over to Sh. Suresh Kumar (PW.1). Recovery was effected vide memo (Ex.PD). Rukka (Ex.PH) was sent to Police Station, where FIR No. 263/99 dated 8.12.1999 (Ex.PF) u/s 20 of the Narcotic Drugs and Psychotropic Substances Act, was registered with Police Station, Indora. Information about search and recovery was sent to superior officers. Sealed sample was deposited in the Maal Khana of the Police Station and thereafter sent for chemical analysis and report Ex.PQ/1 of the chemical examination obtained. With the completion of investigation, challan was presented in the Court for trial.

3. Accused was charged of having committed offence punishable u/s 20 of Narcotic Drugs and Psychotropic Substances Act, 1985 (in short referred to as the Act), to which he did not plead guilty and claimed trial.

4. In order to prove its case, prosecution examined 15 witnesses and statement of the accused u/s 313 Code of Criminal Procedure was also recorded in which he took up the following defence:

I was coming from the house of my friend Tek Chand at 10 P.M., after attending a party, when Surinder Singh Inspector met me at Petrol Pump, Damtal. I was fueling my scooter and after fueling the same I was about to start the scooter and at that time Constable came and asked me as to why there is no number mentioned on the scooter. I told him that I had purchased a new scooter and I possess all the documents including my identity card, but the constable slapped me by saying that I was a Badmash. I pushed the constable upon which the Inspector also came and told that take this Badmash to police station, as he is trying to be over smart. Thereafter, they took me to the police station alongwith scooter. No recovery was effected from me. On the next day, I came to know that a false case has been planted against me.

5. Court below acquitted the accused on the ground that independent witnesses did not support the prosecution or the aspect of search of the contraband substance. Accused was not informed of his valuable right of being searched before a Gazetted Officer and a Magistrate, thus, there was violation of the mandatory provisions of Section 50 of the NDPS Act. Further there was no link evidence to prove the recovery of charas from the accused.

6. Having heard learned Counsel for the parties and minutely scrutinized the material on record we feel no reason to interfere with the findings returned by the learned trial court.

7. Independent witnesses Suresh Kumar (PW.1) and Desh Bandhu (PW.2) do not support the prosecution on the question of accused being informed of his right of being searched before the police / Gazetted Officer / Magistrate. Only witness on the point is PW.15, who carried out the search. In court, he states states:

In the presence of aforesaid witnesses, I apprised the accused that I want to take his search on account of suspicion of carrying some contraband substance. I told him whether he wants to give his search to me or to some Gazetted Officer or Magistrate. I

apprised him about this in writing (Ex.PA), on which he agreed to offer himself for search alongwith scooter vide endorsement (Ex.PA/1), before me.

8. We are of the view that in Court he has made a false statement for the reason that in Ex.PA, word "Magistrate" is not there. Consequently, testimony of this witness stands contradicted and falsified by contemporaneous material prepared by him. The defence taken by the accused appears to be probable. None of the police officials accompanying PW.15 have examined in Court.

9. The Apex Court in case [State of Punjab Vs. Baldev Singh, etc. etc.](#), has held that provisions of Section 50 of the Act are mandatory. It obliges the official concerned to inform the person to be searched of his legal right to demand that the search be conducted in the presence of a Gazetted Officer or a Magistrate.

10. In [Saiyad Mohd. Saiyad Umar Saiyad and Others Vs. State of Gujarat](#), the Apex Court further held that if no evidence to the effect is given by Officer concerned, Court would assume that the person to be searched was in fact not informed of the said protection and that provision of illicit contraband carried by the accused cannot be said to be established.

11. In [Manohar Lal Vs. State of Rajasthan](#), and in [Raghbir Singh Vs. State of Haryana](#), the Apex Court has further held that the choice has to be made by the police officer making the search and not by the accused. This view has subsequently been reiterated by the Apex Court in [Ajmer Singh Vs. State of Haryana](#), wherein it has been held that "14. The object, purpose and scope of Section 50 of the Act was the subject-matter of discussion in a number of decisions of this Court. The Constitution Bench of five Judges of this Court in State of Punjab v. Baldev Singh after exhaustive consideration of the decisions of this Court in Ali Mustaffa Abdul Rahman Moosa v. State of Kerala and Pooran Mal v. Director of Inspection (Investigation) 57, have concluded in para 57 (Baldev Singh case, SCC PP 208-09):

(I) When search and seizure is to be conducted under the provisions of the Act, it is imperative for him to inform the person concerned of his right of being taken to the nearest gazetted officer or the nearest Magistrate for making search.

(II) Failure to inform the accused of such right would cause prejudice to an accused.

(III) That a search made by an empowered officer, on prior information, without informing the accused of such a right may not vitiate trial, but would render the recovery of the illicit article suspect and vitiate the conviction is solely based on the possession of the illicit article recovered from his person, during such search.

(IV) The investigation agency must follow the procedure as envisaged by the statute scrupulously and failure to do so would lead to unfair trial contrary to the concept of justice.

(V) That the question as to whether the safeguards provided in Section 50 of the Act have been duly observed would have to be determined by the court on the basis of the evidence at the trial and without giving an opportunity to the prosecution to establish the compliance of Section 50 of the Act would not be permissible as it would cut short a criminal trial.

(VI) That the non compliance of the procedure i.e. informing the accused of the right under Sub-section (1) of Section 50 may render the recovery of contraband suspect the conviction and sentence of an accused bad and unsustainable in law.

(VII) The illicit article seized from the person of an accused during search conducted without complying with the procedure u/s 50, cannot be relied upon as evidence for proving the unlawful possession of the contraband.

(Emphasis supplied)

12. Undisputedly mandatory requirement of law has not been complied with in the instant case. Thus, no error can be found in the judgment delivered by the trial court. In view of our aforesaid discussion, in detail, we are not going into the other grounds of acquittal.

13. The accused has had the advantage of having been acquitted by the Court below. Keeping in view the ratio of law laid down in Mohammed Ankoos and Ors. v. Public Prosecutor High Court of [Md. Ankoos and Others Vs. The Public Prosecutor, High Court of A.P.](#), it cannot be said that the Court below has not correctly appreciated the evidence on record or that acquittal of the persons has resulted into travesty of justice. No ground for interference is called for. The present appeal is dismissed. Bail bonds, if any, furnished by the accused are discharged.