

State of U.P. Vs Pramod Kumar

Court: Allahabad High Court

Date of Decision: July 6, 1999

Acts Referred: Criminal Procedure Code, 1973 (CrPC) â€” Section 313
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) â€” Section 18, 20, 24, 41, 41(2)

Citation: (1999) CriLJ 4677

Hon'ble Judges: Bhagwan Din, J

Bench: Single Bench

Advocate: Vijay Shankar Mishra, A.G.A, for the Appellant; Raghubans Sahai and O.P. Singh, for the Respondent

Final Decision: Dismissed

Judgement

Bhagwan Din, J.

The acquittal of the respondent, Pramod Kumar in a case u/s 18/20 of the N.D.P.S. Act (the Act for convenience),

necessitated the filing of this appeal by the State of U.P. assailing the judgment and order dated 26-3-1996 passed by the III Addl. Sessions

Judge, Hamirpur holding the respondent not guilty of the offence punishable u/s 18/20 of the Act.

2. The facts, which had bearing on the decision of the trial Court briefly stated are, that on 1-10-1992 at about 1.00 a.m. in the dead hours of the

night Sri Vishram Singh the S.O. of P.S. Kotwali, Hamirpur with the police party comprised of Sub Inspector Surendra Singh, Head Constable,

IndraPal Singh, Constable, Raj Kumar Singh and constable, Kamlesh Kumar Awasthi, was on law and order duty during Ram Lila festival in the

city of Hamirpur. It is stated that when the police party on a jeep driven by the Constable, Suresh Singh reached near Laxmi Park, Sri Vishram

Singh saw the respondent coming from opposite direction on the road. On seeing the police, the respondent crouched in fear and tried to flee

away, however, the police party succeeded to approach him near flour mill of one Guru. On interrogation, he told that he was carrying opium and

Charas in the bag for being sold to its consumers. On this S.O. Sri Vishram Singh asked him whether he would like to be searched before the

Gazetted Officer or the Magistrate. The respondent expressed his faith in S.O. Sri Vishram Singh and said that there was no necessity of the

presence of the Gazetted Officer or the Magistrate during the search. Then the S.O. took personal search of the respondent and recovered 700

grms. Charas and 300 grms. Opium wrapped in a polythene sheet from the bag held by the respondent. He sealed the same in that very bag and

got a search and recovery memo prepared by S.I. Surendra Singh on spot on his dictation. Thereafter, he brought the respondent with the

recovered article to the police station.

3. The Head Moharrir, on duty, on the basis of the search memo, prepared the chick F.I.R. and registered a case against the respondent u/s 18/20

of the Act, vide Crime No. 354 of 1992.

4. Dy. S.P., Sri Dariyao Singh was entrusted with investigation of the case he recorded the statements of the members of the police party who

claimed to have been present at the time of the search and recovery and the Searching Officer Sri Vishram Singh. Then he sent the sample of

Opium and charas to the Public Analyst, Agra for examination. On receipt of the Analyst's Report, he forwarded the respondent to the Court vide

a charge-sheet for trial.

5. The trial Court directed the respondent to be tried on the charges u/s 18 read with Section 20 of the Act for having been found in possession of

contraband opium and charas. For which he did not possess valid licence.

6. The respondent repudiated the charges and pleaded not guilty. He asserted that Sri Vishram Singh, the Station Officer, P.S. Kotwali, Hamirpur

had planted the contraband article to fasten him in a false of recovery of opium and Charas.

7. The prosecution in order to bring the guilt of the respondent at home, examined Kamlesh Kumar Awasthi as PW 1 and Head Constable, Indra

Pal Singh as PW 2. The respondent in his statement u/s 313, Cr.P.C. took the common plea of denial and examined none in defence.

8. The trial Court acquitted the respondent on the ground that the Searching Officer did not comply with the provisions of Section 50 of the Act in

its intention and spirit. He observed that the Searching Officer simply asked the accused, if he wants to be searched before the Magistrate or the

Gazetted Officer. The accused said that he may himself take the search. The S.O. did not inform the accused that he has right to be searched in

presence of the Magistrate or the Gazetted Officer and if the accused denied to be searched before the Magistrate or the Gazetted Officer, the

Searching Officer ought to have got it in writing separately. The trial Court further held that before completion of recovery, memo it is mentioned

therein that the memo has been read over and signatures of the witnesses are being obtained. Thus, it appears that the signatures were obtained on

a blank paper.

9. Learned Additional Government Advocate appearing for the State urged that the Searching Officer did not have information from any person

that any narcotic drug or psychotropic substance was being carried by the respondent in his bag. It was a coincidence that the respondent was

coming on the road from opposite direction and when he saw the police party, he cowered out of fear. It aroused a suspicion in the mind of the

S.O. Sri Vishram Singh that the respondent was a criminal, therefore, he halted and arrested him on the road near the flour mill. It was a sudden

arrest and search of the respondent. Therefore, the provisions of Section 50 of the Act are not attracted. Therefore, it was not even necessary for

the Searching Officer to ask him, if he wants to be searched before the Gazetted Officer or the Magistrate.

10. On the other hand, the learned counsel appearing for the respondent contends that the provisions of Section 50 of the Act are mandatory and

any failure in compliance thereof is considered fatal to the prosecution case. He urged that the trial Court has rightly acquitted the respondent of the

offences u/s 18/20 of the Act for non-compliance of the provisions of Section 50 of the Act.

11. To appreciate the submissions of the learned counsel for the State and the learned counsel for the respondent and arrive at the correct

decision, the perusal of the relevant provisions of Sections 50 and 42 of the Act is essential.

12. Section 50 of the Act provides that ""when any officer duly authorised 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 department in Section 42 or to the nearest Magistrate.

13. Section 42 lays down that ""any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of Cement

Excise, Narcotics, Customs, Revenue, Intelligence or any other department of the Central Government or of the Border Security Force as is

empowered in this behalf, by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon,

sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf, by

general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and

taken down in writing, that any narcotic drug, or psychotropic substance, in respect of which an offence punishable under Chapter IV, has been

committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed in any building,

conveyance or enclosed place, may search and seize such drug or substance.

14. The compliance of provisions of Section 50 of the Act is mandatory as has been held by the Hon"ble Supreme Court in the case of State of

Punjab v. Baldev Singh (1982) 2 SCC 724 ""on prior information the empowered officer or authorised officer while acting u/s 41(2) or 24 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.

15. The provisions of Section 50 have been made mandatory in order to have a check on the misuse of the authority conferred u/s 42 of the Act.

The person to be searched to be taken to the nearest Magistrate or the Gazetted Officer, if so desired by him, particularly, when the authorised

officer has reason to believe from his personal knowledge or information given by any person that any narcotic drug or psychotropic substance is

likely to be recovered. Section 42 further requires the authorised officer to reduce such belief or information in writing. In this context the Hon"ble

Supreme Court in the State of Punjab Vs. Balbir Singh, has held that ""the object of the NDPS Act is to make stringent provisions for control and

regulation of operations relating to those drugs and substances. At the same time, to avoid harm to the innocent persons and to avoid abuse of the

provisions of the offences, certain safeguards are provided which in the context have to be observed strictly. Therefore, these provisions make it

obligatory that such of those officers mentioned therein on receiving an information, should reduce the same to writing and also record reasons for

the belief, as required u/s 42(1) Any failure in this behalf would vitiate the trial.

16. A question was mooted before the Hon"ble Supreme Court if the person to be searched has a right to be produced before the Gazetted

Officer or the Magistrate. The Hon"ble Supreme Court in the case of State of Punjab v. Balbir Singh 1998 (2) SCC 724 (supra) held that ""the

words " "if the person to be searched so desires" are important. One of the submissions is whether the person who is about to be searched should

by himself make a request or whether it is obligatory on the part of the officer empowered or the authorised officer to inform such person that if he

so requires, he would be produced before a Gazetted Officer or a Magistrate and thereafter the search would be conducted. In the context in

which this right has been conferred, it must naturally be presumed that it is imperative on the part of the officer to inform the person to be searched

of his right that if he so requires to be searched before a Gazetted Officer or a Magistrate. To us it appears that this is a valuable right given to the

person to be searched in the presence of a Gazetted Officer or a Magistrate....

17. Non est certandum de regulis juris the police of Uttar Pradesh has been empowered by the State Government in this behalf to search and seize

the narcotic drug any psychotropic substance. S.O. Vishram Singh was thus, an authorised officer u/s 42 of the Act to search the respondent.

18. As far relates to the question whether the compliance of the provisions of Section 50 of the Act, in the case in hand was necessary or not, it

may be mentioned, that the respondent, when was confronted by the police party, told that he was carrying narcotic drug for being sold to its

consumers. This information as such was sufficient for the authorised officer to believe that the respondent has committed the offence punishable

under chapter IV of the Act. The compliance of the provisions of Section 50 is, however, relaxed only when the Searching Officer had no pre-in-

formation of the likelihood of the recovery of the narcotic drug or psychotropic substance from any premises or a person that is, when in the

course of search of an incriminating article connected with the commission of the offence punishable under the law other than the law providing

punishment under Chapter IV of the Act, the authorised officer recovers contraband drug therefrom.

19. In the instant case, respondent before the search started, informed the authorised officer that he is in possession of Opium and Charas, thus,

the authorised officer, before the search of the person of the respondent began, was informed that respondent was in possession of contraband

drug and thus had reason to believe that respondent has committed the offence under Chapter IV of the Act.

20. The. trial Court in view of the above observations of the Hon"ble Supreme Court has correctly held that the Searching Officer has not

complied with the provisions of Section 50 of the act and has rightly acquitted the respondent.

21. Apart that there is another feature in this case which needs attention of the Court. The search of the respondent was conducted by S.O. Sri

Vishram Singh. It is said that after completion of the search and recovery, he got the search memo prepared by S.I. Sri Surendra Singh. The

prosecution has not produced Sri Vishram Singh, who was the author of the search memo. The documents, like search memo, F.I.R. etc. which

are the foundation of the criminal proceedings in the Court, need to be proved by the author of the same. Therefore, his examination as witness in

the Court was necessary to prove the authenticity of the search memo or the F.I.R. the prosecution cannot wash off its hand by examining the

witness who had signed the search memo, without examining the author of the same to prove the guilt beyond probable and reasonable doubt. In

the instant case the prosecution ought to have examined the Searching Officer who had conducted the search and prepared memo to establish the

prosecution case.

For the reasons shown above, I am of the view that the appeal is without merit and deserves to be dismissed.

The appeal is, accordingly, dismissed.