
(2006) 08 JH CK 0004

Jharkhand High Court

Case No: Criminal Appeal (S.J.) No. 5 of 2005

Ajay Kumar

APPELLANT

Vs

State of Jharkhand

RESPONDENT

Date of Decision: Aug. 21, 2006

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 100, 313
- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 20, 41, 42, 43, 50
- Penal Code, 1860 (IPC) - Section 414

Citation: (2007) 1 BLJR 361

Hon'ble Judges: R.R. Prasad, J

Bench: Single Bench

Advocate: Ritu Kumar, for the Appellant; Sanjay Srivastava, APP, for the Respondent

Final Decision: Allowed

Judgement

R.R. Prasad, J.

The appellant Ajay Kumar was put on trial to face charges u/s 20 of the Narcotic Drugs and Psychotropic Substances

Act, 1985 as well as u/s 414 of the Indian Penal Code for having possession of brown sugar without any licence and stolen pair of silver payal and

chain. The trial court having found the appellant guilty u/s 20 of the Narcotic Drugs and Psychotropic Substance Act sentenced him to undergo

rigorous imprisonment for ten years and to pay fine of Rs. 1 lac and in default of making payment to undergo further rigorous imprisonment for

2½ years.

2. The case of the prosecution is that one Hareram Sharma, Sub-Inspector of Police was deputed at "Durgabadi" along with the armed force to

maintain law and order on the occasion of Durgapuja. On 3.10.2003 at about 7 p.m. while he was on duty at Durgabadi, he received secret

information that some body has been selling brown sugar on the bank of the river. On getting such information, he along with other Police Officers

came over there and saw two persons sitting near the bank of the river. They on getting sight of the police started moving downward towards the

river. On being suspicion by the conduct of those persons, he asked the police force to keep watch on them and he informed about it to Jyoti Udai

Tele, Dy. Superintendent of Police, (Headquarters). When Dy. S.P came, they apprehended those two persons and then he made search on the

persons of those two accused persons in presence of Dy.S.P. and two independent witnesses, Rakesh Kumar, P.W. 6 and Anil Kumar, P W.5.

On search being made, four packets of brown sugar kept in the pocket of the full pant and pair of Silver payal and one chain were recovered. On

being asked, he disclosed his name as Ajay Kumar. Further case is that on being searched, four packets of brown sugar was recovered from the

possession of Ashok Sharma. Those articles were seized before the Dy.S.P and the independent witnesses under seizure list (Ext.1).

Subsequently, the said Hareram Sharma, Sub-Inspector of Police, P.W.2 submitted a written report (Ext.3) before the Officer-in-Charge of Town

Police Station. On the basis of which, a case was Instituted and the matter was taken up for investigation by Shyama Prasad Singh, Investigating

Officer, P.W.4. In course of investigation, seized article said to be brown sugar was sent for Chemical Examination. On being examined by

Regional Forensic Science Laboratory, the incriminating article was found to be as brown sugar and a report to that effect was submitted which

has been marked as Ext. 2.

3. After completion of investigation, police submitted charge sheet against the appellant Ajay Kumar as well as Ashok Sharma and, accordingly,

cognizance of the offences was taken. Subsequently, when Ashok Sharma absconded his case was separated. Thereafter when the case was

committed to the court of sessions, charges were framed to which the appellant pleaded not guilty and claimed to be tried.

4. In this case the prosecution examined altogether eight witnesses, of them Jyoti Udai Tete, Dy.S.P has been examined as. P.W.1, P.W.2

Hareram Sharma is the informant, Chahdeshwar Singh, a member of the raiding party has been examined as P.W.3, Investigating Officer Shyama

Prasad Singh is P.W.4 and other witnesses Anil Kumar, P.W.5, Rakesh Kumar P.W. 6, Jogmohan Ram, P.W. 7, Vijay Kumar Singh, P.W.8

have been declared hostile. After closure of the prosecution, the appellant was questioned about the incriminating circumstances appearing against

them u/s 313 of the Code of Criminal Procedure to which he denied.

5. Thereafter learned trial court having found the appellant guilty passed the order of conviction and sentenced as aforesaid.

6. Learned Counsel appearing for the appellant submitted that prosecution has failed to observe mandatory provisions as contained in Section 50

of the Narcotic Drugs and Psychotropic Substance Act as before seizure of any incriminating article from the person of the appellant he was never

communicated about his right of being searched before any Magistrate or the Gazetted Officer and as such, entire trial gets vitiated and

consequently, the order of conviction and sentence is quite illegal.

7. From the evidence of P.W.1, P.W.2 and P.W.3 adduced it appears that when this appellant and Ashok Sharma were apprehended by P.W.2

along with armed forces, search was made in presence of Dy.S.P (P.W.1) as well as independent witnesses Anil Kumar and Rakesh Kumar and

four packets of brown sugar were recovered but the witnesses are consequently silent on the point as to whether the appellant was communicated

about his right of being searched in presence of Magistrate or any other Gazetted Officer. On the contrary, I do find that P.W.1 in his cross-

examination has stated that he did not consider it necessary to ask about it from the accused. The trial court also did not consider the statutory

requirement to be necessary as according to him when the search was made before Dy.S.P, who is a Gazetted Officer accused is not required to

be asked about the option. But the trial court in its approach is not correct. Here, it would be appropriate to take notice of Section 50 of the

Narcotic Drugs and Psychotropic Substance Act which reads as under:

Section 50 - ""Conditions under which search of persons shall be conducted-

(1) When any officer duly authorized 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 departments mentioned in

Section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in

Sub-section (1).

(3) 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.

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorized u/s 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted

Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance,

or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to

search the person as provided u/s 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under Sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within

seventy two hours send a copy thereof to his immediate official superior.

8. From its reading it is evidently clear that if the person who is to be searched needs to be conveyed the statutory right as to whether he wishes to

be searched before the Gazetted Officer or the Magistrate. This proposition of law has been well settled by so many High Courts as well as by the

apex Court. Recently in the case of State of Haryana v. Ranbir @ Rana reported in 2006 (3) JLJR 117(SC) . Their Lordships have been pleased

to reiterate the earlier view of three Judge Bench of the Supreme Court expressed in the case of State of Himachal Pradesh Vs. Pawan Kumar,

that Section 50 of the Act would be applicable only in a case of personal search of the accused and not when it is made in respect of some

baggage like a bag, article or container etc. which the accused at the relevant time was carrying. In the instant case as has been found that

mandatory requirement of asking option from the appellant in terms of Section 50 of the Narcotic Drugs and Psychotropic Substance has not been

complied with connection of the appellant cannot be upheld. Accordingly, the judgment of conviction dated 18.12.2005 and order of sentence

dated 21.12.2005 passed by the 1st Additional Sessions Judge-cum-Special Judge, Palamau at Daltonganj in Narcotic Case No. 2003 is hereby

set aside and the appellant is acquitted and he is discharged from the liability of the bail bonds.

9. In the result, this appeal is allowed.