

## Shyam Sundar Vs State of M.P.

**Court:** Madhya Pradesh High Court

**Date of Decision:** Aug. 18, 1999

**Acts Referred:** Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) â€” Section 20B, 50, 50(1)

**Citation:** (2000) 1 MPHT 103

**Hon'ble Judges:** R.S. Garg, J

**Bench:** Single Bench

**Advocate:** Sanjay Sharma, for the Appellant; D.S. Thakur, for the Respondent

### Judgement

R.S. Garg, J.

The appellant being aggrieved by the judgment dated 23-3-99 passed in Special Case (Narcotics) No. 61/98 by the Special

Judge, Narcotics, Jagdalpur convicting the appellant u/s 20B of Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "the Act"),

sentencing the appellant to undergo three years and six months R.I. and pay fine of Rs. 5,000/-, has filed this appeal.

2. The prosecution case in brief is that on 15-10-98 Station House Officer Satish Dwivedi of Police Station Nagarnar received an information that

somebody was coming from Borgaon side with contraband Ganja. After recording the information and sending a copy of it to the senior officers,

the said police officer proceeded towards the spot. The accused was seen coming on a bicycle; he was carrying two plastic bags filled with certain

things. Said Satish Dwivedi as he says gave a notice u/s 50 of the Act; apprised the accused of his statutory right and after seeking no-objection

from the accused, searched the accused. In the search, 17 kg. and 18 kg. Ganja was found in the said two bags. 100 grams sample was drawn

from each bag and thereafter the samples and the remaining Ganja was separately sealed. After bringing the accused to the police station, the first

information report was recorded on basis of Dehati Nalish recorded on the spot. Samples were sent for analytical examination to the Forensic

Science Laboratory which were found to be contraband Ganja according to the laboratory report. After completing the investigation, the police

filed challan against the accused. The Trial Court after recording the evidence and hearing the parties, convicted and sentenced the accused as

referred to above.

3. Shri Sharma, learned counsel for appellant submits that present is a case where the prosecution has failed to comply with the mandatory

provisions of Section 50 of the Act, therefore, the accused is entitled to be acquitted.

4. Shri D.S. Thakur, learned counsel for State submits that as Section 50 is applicable to a body search only and in the present case body search

was not taken, Section 50 was not applicable. He submits that in the present case notice u/s 50 was given to the accused, therefore, no argument

can be developed on foundation of non-submission of the notice u/s 50 of the Act.

5. Shri Sanjay Sharma, learned counsel for the appellant taking exception to the arguments of Shri Thakur submits that catena of the authorities

including the judgment of the Supreme Court in the matter of Ali Mustaffa Abdul Rahman Moosa Vs. State of Kerala, , and number of the

judgments of this Court the point is not res-integra. According to him, a notice u/s 50 is required to be given when the search of the luggage carried

by the person is required to be taken. He submits that though notice u/s 50 was offered to the appellant, but from the statement of P.W. 6 Satish

Dwivedi, it would clearly appear that the contents of the notice were not explained to the accused. He submits that compliance of Section 50 is a

mandate of law, therefore, a force of compliance would not satisfy the very spirit and soul of the legal provisions. I have heard the parties at length

and have perused the records.

6. P.W. 6 Satish Dwivedi, in his examination-in-chief has stated that he had given a notice Ex. P/2 to the appellant. In the cross-examination

paragraphs 16 and 17 one can read that the accused had informed Satish Dwivedi that he was a person who was not knowing Hindi. In para 16,

the witness had admitted that he gained the knowledge that the accused could not write Hindi. He further admitted that the accused informed him

that the accused did not know Hindi but was knowing Urdu only. In para 17 the witness has admitted that he did not record the fact that the

accused did not know Hindi.

7. Neither in para 16 or 17 nor in paragraph 4, the witness has said that after gaining the knowledge about the lingual problem of the accused, the

contents of the notice were explained to the accused. True it is that notice Ex. P/2 was offered to the accused, but nobody says that the accused

could read it or understand the contents of the same. Nobody says that the contents of the said notice were explained to the accused. Nobody

says that the accused understood the contents of the said notice and thereafter gave his consent for his search by the officer offering the notice.

8. Section 50 provides that whenever the empowered officer proposes to take the search, he is obliged to give a notice to the accused that the

said accused can be taken to a Gazetted Officer or a Magistrate for his search. In the matter of Ali Mustafa, their Lordships of the Supreme Court

have observed that provisions of Section 50 are applicable to the search of the luggage also. The said judgment has been followed by this Court in

the matter of Mukkan @ Balmukund Vs. State of M.P., . In the matter of Ramkaran v. State of M.P. 1996 Vol. 1 MPWN 160, this Court

following the judgment of Ali Mustafa, held that provisions of Section 50 would be applicable to the search of the luggage.

9. In the matter of Mulchand v. State of M.P. 1996 Vol. 1 MPWN 62, in an identical situation where the accused was carrying the contraband on

the carrier of his cycle was acquitted by the High Court as notice u/s 50 of the Act was not given to the accused. In the matter of Mukkan v. State

of M.P., following the judgment of Ali Mustafa, I have also taken the same view.

10. The submission of the learned counsel that Section 50 is not applicable to the search of the luggage can straightway be rejected in view of the

judgments referred to above.

11. Once it is held that provisions of Section 50 are mandatory, then the prosecution has to prove that the mandatory provisions were complied

with. It is settled law that if something is required to be done in accordance with the statute, then it must be done in accordance with the provisions

or not at all. In the present case, P.W. 6 Satish Dwivedi has simply said that he had offered the notice to the accused. In view of the facts narrated

above and admitted by Satish Dwivedi, it was incumbent upon him to show that not only he offered the notice to the accused, but in fact explained

the contents of the said notice to the accused. In the matter of State of Punjab v. Balbir Singh, Judgment Today 1994 (2) S.C. 108, their

Lordships have held that proper notice should be given to the accused otherwise the trial would stand vitiated.

12. In the matter of State of Punjab v. Baldev Singh, Judgment Today 1999 Vol. 4, S.C. 595 while upholding the correctness of the judgment in

the matter of Balbir Singh (supra) and Ali Mustafa (supra), their Lordships observed that it is sufficient if such information is communicated to the

concerned person orally and as far as possible in presence of some independent and respectable persons witnessing the arrest and search. In the

present case though the prosecution has produced on record the notice offered to the accused, but has failed to prove that the information

contained in the said notice was communicated to the accused. The result obviously would be as decided by their Lordships in the matter of

Baldev Singh (supra). Their Lordships have held that failure to inform the concerned person of his right as emanating from Sub-section (1) of

Section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law.

13. The conviction and sentence of the accused being unsustainable in law deserve to and are accordingly set aside. The accused is acquitted of

the charges. The accused is in jail. He be immediately released.