(2001) 02 SC CK 0090

Supreme Court of India

Case No: Criminal Appeal No. 35 of 2000

Gurbax Singh		APPELLANT
	Vs	
State of Haryana		RESPONDENT

Date of Decision: Feb. 6, 2001

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 100(3)
- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 15, 42, 43, 50, 52
- Opium Act, 1878 - Section 1, 78, 9

Citation: (2001) 1 ACR 781 : AIR 2001 SC 1002 : (2001) AIRSCW 670 : (2001) 1 ALD(Cri) 444 : (2001) 1 ALT(Cri) 288 : (2001) CriLJ 1166 : (2001) 74 ECC 277 : (2001) 2 JT 330 : (2001) 2 RLW 290 : (2001) 1 SCALE 662 : (2001) 1 SCR 882 : (2001) 1 Supreme 625 : (2001) 1

Hon'ble Judges: M. B. Shah, J; K. G. Balakrishnan, J

Bench: Division Bench

Advocate: R.S. Malha, Mrs. Kanwaljit Kochhar, Mrs. Sonal Mahajan, Vinod Kumar, J.D. Jain, for the Appellant; S.R. Sharma and Mahabir Singh, for the Respondent

Final Decision: Dismissed

Judgement

Shah, J.

Aggrieved by the judgment and order dated 8th December, 1995 passed by the High Court of Punjab and Haryana in Criminal Appeal No. 449-SB of 1986 confirming the judgment and order passed by the Additional Sessions Judge, Karnal dated 6.5.1986 convicting the appellant for the offence punishable u/s 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the N.D.P.S. Act") and sentencing him to suffer rigorous imprisonment for 10 years and a fine of Rs.One lac. in default of payment of fine further rigorous imprisonment for 5 years, the appellant has preferred this appeal.

2. The accused was charged u/s 15 of the N.D.P.S. Act. For proving the same, prosecution has examined P.W.2. Ishwar Singh, SI who on 12th January 1986 at about 5.25 p.m. was present on platform No. 1 of Railway Station, Karnal for checking smuggling and other anti-social elements. At about 5.25 p.m. Kalka passenger train arrived at Karnal from the side of Panipat and halted at platform No. 1. It is his say that when he was checking a second class compartment, the appellant who was sitting in the compartment became panicky and left the train from the door towards the side of engine carrying a katta (gunny bag) on his left shoulder. On suspicion, he was nabbed in presence of witness and it was found that he was carrying poppy straw weighing 7 k.g. in a polythene bag of white colour. After separating 100 gms by way of sample, sample and the residue were separately sealed in two separate parcels in presence of witness. The seal which was affixed on parcels was handed over to the witness (PW1) Harbans Lal. He has stated that the case property was deposited with MHC on the same day. He has also stated that on the personal search of the accused, second class railway ticket was recovered. In cross-examination, it is his say that he intercepted the accused outside the compartment of platform No. 1. At that time, Harbans Lal was present at the railway station to see off his relatives. He offered himself to become witness to the recovery. He has also deposed that seal used for sealing the case property remained with Harbans Lal for ten days. It is his say that he had fixed only one seal made of brass bearing I.S. on the gunny bag and also on the sample. He admitted that seal of the police station is different from the seal of the Investigating Officer and he has not affixed the seal of police station on the case property as also on the sample at the time of delivery to M.H.C. He has also admitted that he was not maintaining any record of information sent to Circle Inspector of the Police Headquarter, G.R.P. It is his say that he had telephonically informed his superior officer about the seizure and its quantity. He has denied the suggestion that accused who was a rikshaw puller was falsely implicated in the case. He has also denied the suggestion that accused asked to be searched in presence of Magistrate or other superior officer.

3. Prosecution has also examined P.W. 1 Harbans Lal, a panch witness. It is his say that on the date of incident he was at the railway station to see off his sister and brother in law. At that time, he noticed the accused alighting from the train on seeing the police. Therefore, accused was nabbed by the police in his presence. The police found that the accused was carrying poppy straw placed in polythene bag which on weighment was found to be 7 k.g. The police took sample of 100 grams. The recovery memo was prepared in his presence which he had attested. In cross-examination, he has stated that before searching the contents of gunny bag, the police had not offered itself for search to the accused. It is his say that seal affixed on the case property was made of wood (as against the say of the Investigating Officer that it was a brass seal). The seal was kept with him for 10 days. He has also admitted that he had appeared as a prosecution witness in one excise case and that he was having business of sale of tea near Tonga Stand outside the

railway station for the last 15 years. It is his say that he had not earlier seen the ground poppy husk and the police had informed him that the substance recovered from the accused was ground poppy husk.

4. Learned counsel for the appellant submitted that the Investigating Officer has not followed the procedure prescribed u/s 50 of the Act of informing the accused whether search should be carried out in presence of Gazetted Officer or Magistrate. As against this, learned counsel for the respondent submitted that in the present case, there is no question of following procedure u/s 50 because from the person of the accused, nothing was recovered, but from the gunny bag which he was holding, poppy straw was recovered. For this purpose reliance is placed on the decisions of this Court in 268020 and 265113 .

5. In Kalema Tumba (supra) this Court considered the mandatory requirement of Section 50 of NDPS Act and held that only when ''the person'' of an accused is to be searched then he is required to be informed about his right to be examined in presence of a gazetted officer or a magistrate. The Court further held that in view of the decision in the case of Baldev Singh (supra) the decision rendered by this Court in 265077 wherein it was held that though poppy husk was recovered from the bags of the accused, he was required to be informed about his right to be searched in presence of a gazetted officer or a magistrate stood overruled. In facts of that case the Court held that Heroine was found from the bags belonging to the appellant and not from his person and therefore it was not necessary to make an offer for search in presence of a gazetted officer or a magistrate.

6. In the case of Baldev Singh (supra) the Constitutional Bench (in para 12) observed thus:-

"On its plain reading, Section 50 would come into play only in the case of a search of a person as distinguished from search of any premises etc."

7. Further after considering various decisions the Court held (in para 57) that when an empowered officer or a duly authorised officer acting on prior information is about to "search a person", it is imperative for him to inform the person concerned of his right under sub-section (1) of Section 50 of being taken to the nearest gazetted officer or the nearest magistrate for making the search. However, such information may not necessarily be in writing.

8. In view of the aforesaid decision of the Constitutional Bench, in our view, no further discussion is required on this aspect. However, we may mention that this right is extension of right conferred u/s 100(3) of the Criminal Procedure Code. Sub-Section (1) of Section 100 of the Code provides that whenever any place liable to search or inspection is closed, any person residing in, or being in charge of, such place, shall, on demand of the officer or other person executing the warrant, and on production of the warrant allow him free ingress thereto, and afford all reasonable facilities for a search therein. Sub-Section (3) provides that where any person in or

about such place is reasonably suspected of concealing about his person any article for which search should be made, such person may be searched and if such person is a woman, the search shall be made by another woman with strict regard to decency. Sub-section (7) of Section 100 further provides that when any person is searched under sub-section (3) a list of all things taken possession of shall be prepared and a copy thereof shall be delivered to such person. This would also be clear if we refer to search and seizure, procedure provided under Sections 42 and 43 of the building, conveyance or place. Hence, in our view, Section 50 of the N.D.P.S. Act would be applicable only in those cases where the search of the person is carried out.

9. The learned counsel for the appellant next contended that from the evidence it is apparent that the I. O. has not followed the procedure prescribed under Sections 52 55 and 57 of the N.D.P.S. Act. May be that the I.O. had no knowledge about the operation of the N.D.P.S. Act on the date of the incident as he recorded the FIR u/s 9/1/78 of the Opium Act. In our view, there is much substance in this submission. It is true that provisions of Sections 52 and 57 are directory. Violation of these provisions would not ipso facto violate the trial or conviction. However, I.O. cannot totally ignore these provisions and such failure will have a bearing on appreciation of evidence regarding arrest of the accused or seizure of the article. In the present case, I.O. has admitted that the seal which was affixed on the muddamal article was handed over to the witness P.W.1 and was kept with him for 10 days. He has also admitted that the muddamal parcels were not sealed by the officer in charge of the police station as required u/s 55 of the N.D.P.S. Act. The prosecution has not led any evidence whether the Chemical Analyser received the sample with proper intact seals. It creates a doubt whether the same sample was sent to the Chemical Analyser. Further, it is apparent that the I.O. has not followed the procedure prescribed u/s 57 of the N.D.P.S. Act of making full report of all particulars of arrest and seizure to his immediate superior officer. The conduct of panch witness is unusual as he offered himself to be a witness for search and seizure despite being not asked by the I.O., particularly when he did not know that the substance was poppy husk., but came to know about it only after being informed by the police. Further, it is the say of the Panch witness that Muddamal seal used by the PSI was a wooden seal. As against this, it is the say of PW2 SI/IO that it was a brass seal. On the basis of the aforesaid evidence and faulty investigation by the prosecution, in our view, it would not be safe to convict the appellant for a serious offence of possessing poppy-husk.

10. In the result, the appeal is allowed and the impugned judgment and order passed by the High Court confirming the conviction of the appellant is set aside. The appellant be released forthwith, if he is not required in any other case.