
(1997) CriLJ 3466

Andhra Pradesh High Court

Case No: Criminal Appeal No. 948 of 1993

I. Additional Sessions
Judge, East Godavary

APPELLANT

Vs

State

RESPONDENT

Date of Decision: Jan. 28, 1997

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) " Section 20, 41(2), 42, 50, 57

Citation: (1997) CriLJ 3466

Hon'ble Judges: S.V. Maruthi, J

Bench: Single Bench

Advocate: G.V.S. Raju, for the Appellant; Public Prosecutor, for the Respondent

Judgement

1. The appeal is filed against the judgment of the I Additional District and Sessions Judge, East Godavary at Rajahmundry in C.C. No. 44/1992

convicting and sentencing the appellant to suffer rigorous imprisonment for two years and to pay a fine of Rs. 5,000/- and in default to suffer simple

imprisonment for six months u/s 8(c) read with Section 20(1)(b) of the Narcotic Drugs and Psychotropic Substances Act. 1985.

2. The charge framed against the accused in that on 16-10-1992 at about 8 p.m. near the R.T.C. complex, Tuni he was found in possession of 4

1/2 kgs. of ganja without possession of any permit, licence or authority issued by competent authority and thereby committed an offence

punishable u/s 8(c) read with Section 20(1)(b) of NDPS Act, 1985.

3. The case of the prosecution in brief is that the accused is the resident of Brahmanagarimatham, Qudnapah District. On 16-10-1992, on information, P.W. 3 K. Raghavendraro, C.I. of Excise Enforcement, Kakinada, along with two mediators, P.W. 1 Lanka Sanyasirao and Pasupuleti Musili Naidu (D.W. 2) and P.W. 5 Md. Ahmadullah, Excise, S.I. Tuni and other staff conducted patrolling of Tuni Town under the supervision of P.W. 4 N. Dasrath, Assistant Commissioner of Excise, Enforcement, Kakinada for excise offences. At about 8 p.m. the accused was found sitting covering his body with a bed sheet by the side of the public road 30 yards east to the R.T.C. Complex in-gate, which is leading to the railway station, through Ammajipeta. On seeing the Excise Officers, the accused tried to run away. On suspicion P.W. 5 got the accused open the bed sheet and searched the accused in the presence of P.W. 4 and found one big cloth bag slinging to his right shoulder. When P.W. 3 enquired the accused about the contents of the bag, he did not give proper answer. Hence P.W. 5 got the cloth bag opened and found one mica manure bag containing ganja in it. P.W. 5 got the above ganja weighed in the rice store of Samanthula; Sanyasisetti. The ganja weighed 4 1/2 kgs P.W. 5 took samples from the ganja into two sample packets each containing about 200 gms of ganja and affixed identity slips and sealed those packets with his seal. The accused gave his name and address on interrogation. He did not produce any licence or permit to possess and transport the ganja. P.W. 5 therefore, arrested the accused after informing him about the reasons for his arrest, under the cover of mediators report drafted on the spot seized the contraband P.Ws. 3 and 5 attested the mediators report P.W. 5 registered the mediators report as Crime No. 8/92-93 of Tuni Range u/s 8(c) read with Section 20(b) of the N.D.P.S. Act. A report was sent u/s 57 of the N.D.P.S. Act to the Superior Officer within 48 hours. The packets which were sealed were sent to the chemical examiner, who on analysis found the sample as ganja. After investigation the charge sheet was filed and the accused was tried.

4. The prosecution examined six witnesses in support of its case and filed Exs. P1 to P8 and M.Os. 1 to 4. P.W. 1 is the mediator. P.W. 2 is the

chemical examiner. P.W. 3 is the C.I. of Excise Enforcement, Kakinada. P.W. 4 is the Assistant Commissioner of Excise, Enforcement, Kakinada,

who is a Gazetted Officer. P.W. 5 is the Excise, S. I. Tuni. P.W. 6 is Excise Inspector. Ex. P1 is the mediators report. Ex. P4 is the chemical

examiner"s report. The accused pleaded not guilty. On the basis of the evidence the learned Judged held that the accused is in possession of

narcotic and psychotropic substances in violation of the provisions of the Act and therefore liable to be convicted under the Act. He rejected the

contention that the accused was not informed of his right to be searched either in the presence of a Gazetted Officer or a Magistrate on the ground

that the search itself was conducted in the presence of a Gazetted Officer P.W. 4. He also disagreed with the contention that since the shop owner

namely Samanthula Sanyasisetti, in whose shop the ganja was wighed was not examined and therefore, the prosecution case should fail on the

ground that it is not necessary to examine the shop owner as he is not a material witness, against which the present appeal is filed.

5. The learned counsel took me through the entire evidence. Further he contended that it is mandatory u/s 50 of the N.D.P.S. Act that at the time

of search of the appellant, the respondents i.e., the officer authorised to search should have informed the appellant that he has an option to be

searched either in the presence of the Gazetted Officer, namely P.W. 4 or the Magistrate and in the present case there is failure on the part of

P.Ws. 3 and 4 apprising the appellant his right to be searched either in the presence of a Magistrate or a Gazetted Officer. Therefore, the whole

prosecution should fail. He brought to my notice a number of judgments of the Supreme Court, in support of his contention.

6. The Public Prosecutor pointed out that since the search was made in the presence of a Gazetted Officer, it is not necessary that the appellant

should have been apprised of his right u/s 50 of the Act.

7. The earliest decision on the scope of Section 50 is the judgment of the Supreme Court reported in *State of Punjab Vs. Balbir Singh*, . It was

held that;

Section 50 confers a valuable right on the person to be searched in the presence of a Gazetted Officer or a Magistrate if he so requires, since such

a search would impart much more authenticity and creditworthiness to the proceedings while equally providing an important safeguard to the

accused. To afford such an opportunity to the person to be searched, he must be aware of his right and that can be done only by the authorised

officer informing him. Under the Act wide powers are conferred on the officers and deterrent sentences are also provided for the offences under

the Act. The legislature while keeping in view the menace of illicit drug trafficking deemed it fit to provide for corresponding safeguards to check

the misuse of power thus conferred so that any harm to innocent persons is avoided and to minimise the allegations of planting or fabricating by the

prosecution, Section 50 is enacted. When such is the importance of a right given to an accused person in custody in general, the right by way of

safeguard conferred u/s 50 in the context is all the more important and valuable.

Therefore it is to be taken as an imperative requirement on the part

of the officer intending to search. It must therefore, be held that on prior information the empowered officer or authorised officer while acting u/s

41(2) or Section 42 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. After being so informed whether such person opted for such a person or a not would be a question of fact. The provisions

of Section 50 are thus mandatory.

8. In Saiyad Mohd. Saiyad Umar Saiyad and Others Vs. State of Gujarat, , followed the judgment in State of Punjab Vs. Balbir Singh, and

reiterated the view expressed in Balbir Singh's case. The learned Judges also pointed out that no presumption can be raised that the officer have

informed the required mandatory requirement u/s 50 of the N.D.P.S. Act to the accused and that it is necessary that Courts dealing with offences

under the N.D.P.S. Act should be very careful to see that it is established to their satisfaction that the accused has been informed by officer

concerned that he had a right to choose to be searched before a Gazetted Officer or a Magistrate. The accused must be made aware of this right

to protection granted by the statute and unless cogent evidence is produced to show that he was made aware of such right or protection, there

would be no question of presuming that the requirements of Section 50 were complied with. Instructions in this behalf need to be issued so that

investigation officers take care to comply with the statutory requirement and drug-pedlars do not go scot-free due to non-compliance thereof. Such

instructions would be of great value in the effort to curb drug trafficking.

9. In Raghbir Singh Vs. State of Haryana, , reiterated the view expressed in Saiyad Mohd. Saiyad Umar Saiyad and Others Vs. State of Gujarat, .

10. From the above it is clear that u/s 50 the appellant has a right to be searched in the presence of a Gazetted Officer or a Magistrate. The

question of exercising the option to be searched in the presence of a Gazetted Officer or a Magistrate arises, provided the accused is aware of

such a right. Accused would be aware of such a right only if the officers who proposed to search the accused informs the accused of his option

available to him u/s 50 of the N.D.P.S. Act. Unless the accused is informed of the option available to him u/s 50 of the N.D.P.S. Act, the accused

cannot exercise the option u/s 50 of the Act. On the facts of the present case it does not appear that P.W. 4 has informed the accused/appellant of

the option which is available to him u/s 50. On the other hand in the trial Court the argument that was advanced was since the search was made in

the presence of a Gazetted Officer, there is no violation of Section 50. Therefore, there is no evidence that P.W. 4 informed the appellant of his

option which is available to him u/s 50. Further the fact that the appellant was examined by a Gazetted Officer does not absolve the prosecution

from informing the accused the option available u/s 50. It is a valuable right available to the accused under the Act. Therefore, the fact that the

accused was examined by a Gazetted Officer does not cure the infirmity in the prosecution. The prosecution of the appellant is in violation of

Section 50 of the N.D.P.S. Act. Therefore, it fails and the appeal is accordingly allowed. The appellant is acquitted u/s 8(c) read with Section

20(1) of the N.D.P.S. Act. The appeal is allowed.

11. The respondents are directed to set the appellant free forthwith, if not required to be detained in any other cases.

12. As pointed out by the Supreme Court, the respondents are directed to issue instructions to the authorities under the Act the necessity to inform

the accused the option available u/s 50 of the Act before making any search on information received by them that persons are in possession of

Narcotic Drugs and Psychotropic Substances under the Act in Contravention of the provisions of the Act.

13. Appeal allowed.