

BECKODAN ABDUL RAHIMAN

A

v.

STATE OF KERALA

APRIL 16, 2002

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[R.P. SETHI AND D.M. DHARMADHIKARI, JJ.]

*Narcotic Drugs and Psychotropic Substances Act, 1985—Sections 42(2) and 50—Mandatory provisions—Non-compliance—Effect of—Held, in view of the violation of mandatory provisions accused entitled to be acquitted.*

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Accused-appellant was prosecuted under Sections 9(c) r/w Section 18 of Narcotic Drugs and Psychotropic Substances Act, 1985. Prosecution case was that PW-1 after recording information, searched the accused in presence of witness and found him in possession of opium. When the accused was inquired as to whether he would like to meet any higher official or Gazetted Officer he replied in negative. He was convicted and sentenced for the offence by trial court and in appeal the conviction and sentence was upheld.

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In appeal to this Court appellant assailed the impugned judgment on the ground of violation of provisions of Sections 42(2) and 50 of the Act.

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Allowing the appeal, the Court

**HELD : 1.1.** The mandatory provisions of sub-sections (2) of Section 42 and Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 were not complied with by the prosecution which rendered the case as not established. Hence, the appellant is entitled to be acquitted. [59-C-D]

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**1.2.** In the instant case violation of the mandatory provisions is writ large, as PW1 had not complied with the mandate of sub-section (2) of Section 42 of the Act. Similarly, the provisions of Section 50 have not been complied with as the accused has not been given any option as to whether he wanted to be searched in presence of a Gazetted Officer or Magistrate. The accused was required to be apprised of his right conferred under Section 50 giving him the option to search being made in the presence of Gazetted Officer or Magistrate. The accused is not shown to have been apprised of his right nor any option offered to him for search being conducted in the presence of the

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**A Magistrate. [58-H; 59-A-B]**

*State of Punjab v. Baldev Singh*, [1999] 6 SCC 172; *State of Punjab v. Balbir Singh*, [1994] 3 SCC 299 and *Saiyad Mohd. Saiyad Umar Saiyad and Ors. v. State of Gujarat*, [1995] 3 SCC 610, referred to.

**B CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 619 of 1997.**

From the Judgment and Order dated 17.3.1995 of the Kerala High Court in Crl. A.No. 290 of 1992.

**C T.N. Singh (N.P.) for the Appellant.**

Ramesh Babu M.R. for the Respondent.

The Judgment of the Court was delivered by

**D SETHI, J.** For allegedly possessing 11 gms. of opium without licence, the appellant has been convicted under Section 9 (c) read with Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the Act"). He has been sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs. 1 lakh and in default of payment of fine to suffer further rigorous imprisonment for six months. It is stated at the Bar **E** that the appellant has already undergone sentence of about 8 years.

No-one has appeared for the appellant. From the memo of the appeal it is found that the conviction and sentence awarded to the appellant has been assailed mainly on the ground of violation of the provisions of Sections 42 and 50 of the Act. The learned counsel, appearing for the respondent-State **F** has, however, contended that as there was substantive compliance of the provisions of the Act, no interference is called for.

According to the prosecution, the Sub Inspector of Police received a telephonic message on 6.10.1990 at about 8.30 A.M. that narcotic drugs were being sold at T.C. Junction. He recorded the information in the general diary **G** and proceeded to the scene of occurrence in a jeep. On reaching T.C. Junction at about 8.45 A.M. he saw the accused carelessly walking from the bus shelter towards Kathu Parambu side. Allegedly seeing him in suspicious condition, the Sub Inspector along with his party approached him and after disclosing his identity searched the person of the accused in presence of **H** witnesses. It was found that inside the fold of Dhoti, which the appellant was

wearing, opium had been concealed in a polythene bag. As he was found unauthorisedly possessing the opium, he was arrested and the opium seized was weighed to be 11 gms. Out of that 2 gms. each were separated and two samples were roped in plastic paper. On enquiry from the accused whether he would like to meet any higher official or Gazetted Officer, he allegedly replied in negative. Section 42 of the Act provides:

“42. Power of entry, search, seizure and arrest without warrant or authorisation. - (1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central 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, drug 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, between sunrise and sunset -

- (a) enter into and search any such building, conveyance or place;
- (b) in case of resistance, break open any door and remove any obstacle to such entry;
- (c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under Chapter IV relating to such drug or substance; and
- (d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under Chapter IV relating to such drug or substance:

A Provided that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sun set and sun rise after recording the grounds of his belief.

B (2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto he shall forthwith send a copy thereof to his immediate official superior. ”

C Section 50 of the Act prescribes:

“50. Conditions under which search of persons shall be conducted -

D (1) When any officer duly authorised under section 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 or any of the departments mentioned in section 42 or to the nearest Magistrate.

E (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 person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

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

G Keeping in mind the grave consequences which are likely to follow on proof of possession of illicit articles under the Act, namely, the shifting of the onus to the accused and severe punishment to which he becomes liable, the Legislature has enacted and provided certain safeguards in various provisions of the Act including Sections 42 and 50 of the Act. A Constitution Bench of this Court in *State of Punjab v. Baldev Singh*, [1999] 6 SCC 172 has held that while conducting search and seizure in addition to the safeguards provided under the Code of Criminal Procedure, the safeguards provided under the Act are also required to be followed. The harsh provisions of the Act cast a duty upon the prosecution to strictly follow the procedure and compliance of the H safeguards. In that case the Court observed:

“Prior to the passing of the NDPS Act, 1985 control over narcotic drugs was being generally exercised through certain Central enactments though some of the States also had enacted certain statutes with a view to deal with illicit traffic in drugs. The Opium act, 1857 related mainly to preventing illicit cultivation of poppy, regulating cultivation of poppy and manufacture of opium. The Opium Act, 1878 supplemented the Opium Act, 1857 and made possession, transportation, import, export, sale, etc., of opium also an offence. The Dangerous Drugs Act, 1930, was enacted with a view to suppress traffic in contraband and abuse of dangerous drugs, particularly derived from opium, Indian hemp and coca leaf etc. The Act prescribed maximum punishment of imprisonment for three years with or without fine, in so far as the first offence is concerned and for the second or the subsequent offence the punishment could go up to four years’ RI. These Acts, however, failed to control illicit drug traffic and drug abuse on the other hand exhibited an upward trend. New Drugs of addiction known as psychotropic substances also appeared on the scene posing serious problems. It was noticed that there was an absence of comprehensive law to enable effective control over psychotropic substances in the manner envisaged by the International Convention on Psychotropic Substances, 1971. The need for the enactment of some comprehensive legislation on narcotic drugs and psychotropic substances was, therefore, felt. Parliament with a view to meet a social challenge of great dimensions, enacted the NDPS Act, 1985 to consolidate and amend existing provisions relating to control over drug abuse etc. and to provide for enhanced penalties particularly for trafficking and various other offences. The NDPS Act, 1985 provides stringent penalties for various offence. Enhanced penalties are prescribed for the second and subsequent offences. The NDPS Act, 1985 was amended in 1988 w.e.f. 29.5.1989. Minimum punishment of 10 years’ imprisonment which may extend upto 20 and a minimum fine of Rs. 1 lakh which may extend up to Rs. 2 lakhs have been provided for most of the offences under the NDPS Act, 1985. For the second and subsequent offences, minimum punishment of imprisonment is 15 years which may extend to 30 years while minimum fine is Rs. 1.5 lakhs which may extend to Rs. 3 lakhs. Section 31 (a) of the Act, which was inserted by the Amendment Act of 1988, has even provided that for certain offences, after previous convictions, death penalty shall be imposed, without leaving any discretion in the court to award imprisonment for life in appropriate

A cases. Another amendment of considerable importance introduced by the Amendment Act, 1988 was that all the offences under the Act were made triable by a Special Court. Section 36 of the Act provides for constitution of Special Courts manned by a person who is a Sessions Judge or an Additional Sessions Judge. Appeals from the orders of the Special Courts lie to the High Court. Section 37 makes all the offences under the Act to be cognizable and non-bailable and also lays down stringent conditions for grant of bail. However, despite the stringent provisions of the NDPS Act, 1985 as amended in 1988 drug business is booming; addicts are rapidly rising; crime with its role in narcotics is galloping and drug trafficking network is ever-growing. While interpreting various provisions of the statute, the object of the legislation has to be kept in view but at the same time the interpretation has to be reasonable and fair. ”

D After referring to host of judgments, the Constitution Bench of the Court held that the provisions of Sections 42 and 50 are mandatory and their non compliance would render the investigation illegal. It was reiterated that severer the punishment, greater the care to be taken to see that all the safeguards provided in the statute are scrupulously followed. The safeguards mentioned in Section 50 are intended to serve a dual purpose to protect the person against false accusation and frivolous charges as also to lend credibility to the search and seizure conducted by the empowered officer. If the empowered officer fails to comply with the requirements of the Section, the prosecution is to suffer for the consequences. The legitimacy of the judicial process may come under the cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for the law and may have the effect of unconscionably compromising the administration of justice.

G In *State of Punjab v. Balbir Singh*, [1994] 3 SCC 299 it was held that under Section 42 (2) the empowered officer who takes down any information in writing or records the grounds under proviso to Section 42 (1) should forthwith send a copy thereof to his immediate official superior. If there is a total non compliance of the provisions the same affects the prosecution case. To that extent it is mandatory. To the same effect is the judgment in *Saiyad Mohd. Saiyad Umar Saiyad and Ors. v. State of Gujarat*, [1995] 3 SCC 610.

H In this case the violation of the mandatory provisions is writ large as

is evident from the statement of K.R. Premchandran (PW1). After recording the information, the witnesses is not shown to have complied with the mandate of sub-section (2) of Section 42 of the Act. Similarly the provisions of Section 50 have not been complied with as the accused has not been given any option as to whether he wanted to be searched in presence of a Gazetted Officer or Magistrate. The compliance of Section 50 is held to have been fulfilled on his (PW1) asking the accused "whether I should search him in the presence of senior officers or Gazetted officer". The accused was required to be apprised of his right conferred under Section 50 giving him the option to search being made in presence of gazetted officer or the Magistrate. The accused is not shown to have been apprised of his right nor any option offered to him for search being conducted in the presence of the Magistrate.

We are of the firm opinion that the provisions of sub-section (2) of Section 42 and the mandate of Section 50 were not complied with by the prosecution which rendered the case as not established. In view of the violation of the mandatory provisions of the Act, the appellant was entitled to be acquitted. Both the trial court as well as the High Court have failed to consider this aspect of the matter which warrants the setting aside of the impugned judgment.

Under the circumstances the appeal is allowed by setting aside the impugned judgment. The appellant is directed to set at liberty forthwith unless required in any other case.

K.K.T.

Appeal allowed.