

SEKHAR SUMAN VERMA

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v.

THE SUPERINTENDENT OF N.C.B. & ANR.

(Criminal Appeal No. 317 of 2006)

JUNE 29, 2016

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[ABHAY MANOHAR SAPRE AND ASHOK BHUSHAN, JJ.]

Narcotic Drugs and Psychotropic Substances Act, 1985 – ss. 21, 42 and 50 – Conviction u/s. 21 by courts below – Plea that the conviction not legally sustainable for non-compliance of the provisions u/ss. 42 and 50 – Held: The raiding party who conducted search and seizure from the accused consisted of gazetted officer – Also the accused was given option of being searched by the Gazetted Officer – Thus, there was no necessity to ensure compliance of s.42 and raiding party followed the procedure to ensure compliance of s.50 – Courts below rightly convicted the accused – Appeal of the accused liable to be dismissed.

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State of Haryana v. Jarnail Singh & Ors. (2004) SAR (Criminal) 535 – relied on.

Prabha Shankar Dubey v. State of M.P. 2003 (6) Suppl. SCR 444 : (2003) 8 Supreme 565 : (2004) 2 SCC 56 – referred to.

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Case Law Reference

(2004) SAR (Criminal) 535 relied on Para 18

2003 (6) Suppl. SCR 444 referred to Para 18

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CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 317 of 2006.

From the Judgment and Order dated 31.08.2004 in CRA No. 269 of 2003 passed by the High Court at Calcutta.

Aniruddha P. Mayee, Adv.(A.C.) for the Appellant.

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Anukul Chandra Pradhan, Sr. Adv., P.K. Dey, Ms. Rekha Pandey, R. S. Pandey, Ajay Kumar Singh, Ms. Anil Katiyar, Manish Vashishtha, Ms. Sushma Suri, Advs. for the Respondents.

The Judgment of the Court was delivered by

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A **ABHAY MANOHAR SAPRE, J.** 1. This appeal is filed against the final judgment and order dated 31.08.2004 passed by the High Court of Calcutta in C.R.A. No. 269 of 2003 whereby the Division Bench of the High Court dismissed the appeal filed by the appellant herein and affirmed the orders dated 11.04.2002 and 12.04.2002 of the Special Judge, N.D.P.S. Act and VIth Bench, City Sessions Court at Calcutta in N.D.P.S. Case No. 11 of 1998 convicting the appellant herein under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as “the NDPS Act”) and sentencing him to suffer rigorous imprisonment for ten years and to pay a fine of Rs.1,00,000/-, in default, to suffer further rigorous imprisonment for one year.

C 2. The case of the prosecution is as under:

D Acting on an information received on 21.05.1998, a batch of officers of N.C.B., EZU, Calcutta led by a Gazetted Officer proceeded for New Sarat Lodge at 77/1A, Acharya Prafulla Chandra Road, Calcutta. After reaching there, the N.C.B. officers searched the room of the appellant herein who was staying in Room No.1 of New Sarat Lodge. The officers asked the appellant in writing as to whether he wanted to be searched in the presence of a Gazetted officer or a Magistrate and informed the appellant that one Gazetted officer was already with them and if he so desired, he might be searched by the said Gazetted officer as well.

E 3. After search being done by the raiding party, a polythene packet containing brown coloured powder weighed 250 grams of heroin was recovered from the left side pocket of his wearing trouser. Thereafter, the appellant was arrested on the same day at 22.30 hrs.

F 4. As a follow up action of the said recovery, one Anjan De was arrested from the Bidhan Nagar Railway Station at Calcutta by the said N.C.B. officers possessing 245 grams of heroin on 22.05.1998.

G 5. During the trial, the prosecution examined eight witnesses and the defence examined nine witnesses.

H 6. The learned Judge VIth Bench, City Sessions Court acting as the Judge, Special Court under the N.D.P.S. Act by his judgment and orders dated 11.04.2002 and 12.04.2002 found the appellant guilty of the offence punishable under Section 21 of the NDPS Act, convicted him thereunder and sentenced him to suffer rigorous imprisonment for ten

years and to pay a fine of Rs.1,00,000/-, in default to suffer further rigorous imprisonment for one year. However, the appellant was acquitted of the offence charged under Section 29 of the NDPS Act. So far as another accused- Anjan De was concerned, he was not found guilty of both the offences under Sections 29 and 21 of the NDPS Act and was accordingly acquitted thereof. A

7. Challenging the said order of conviction and sentence, the appellant preferred an appeal being C.R.A. No. 269 of 2003 before the High Court. The High Court, by impugned judgment and order dated 31.08.2004, dismissed the appeal filed by the appellant. B

8. Aggrieved by the said judgment and order, the appellant has filed this appeal by way of special leave before this Court. C

9. By order dated 17.09.2007, this Court released the appellant on bail.

10. In this appeal, we find from the record that the appellant was originally represented by an amicus curiae - Mr. Mulkh Raj, who later stopped appearing for the appellant after leave was granted by this Court. Thereafter Mr. Abhijit Sengupta, learned counsel appeared for the appellant and bail was granted by this Court on 17.09.2007. On 10.12.2015, Mr. Abhijit Sengupta, learned counsel also filed application for discharge of advocate of the appellant. By order dated 15.12.2015, this Court allowed the application filed by Mr. Abhijit Sengupta and discharged him from acting as AOR on behalf of the appellant. The Registry served notice on the appellant by speed post but no one represented the appellant. D E

11. When the appeal came up for hearing on 19.05.2016, in the interest of justice and fair play, we requested Mr. Aniruddha P. Mayee, learned counsel, who was present in Court, to appear as amicus curiae on behalf of the appellant. On our request Mr. Aniruddha P. Mayee, learned counsel appeared and argued the case for the appellant. We place on record our appreciation for Mr. Aniruddha P. Mayee for his valuable services in arguing the case of the appellant. F

12. In these circumstances, we are of the opinion that the appellant is sufficiently and duly represented throughout in these proceedings and it is not necessary to issue any fresh notice to the appellant and give him another opportunity to engage a counsel of his choice. G

13. The submission of the learned counsel appearing for the appellant H

A (accused) was only one and that was in regard to non-compliance of requirements of Section 42 read with Section 50 of the NDPS Act. According to him, the compliance of these Sections being mandatory at the time of search and the same in this case was not done in the manner required by the concerned officials of the Department, the appellant's conviction is rendered legally unsustainable and hence deserves to be set aside.

14. Learned counsel for the respondents, however, supported the impugned order and urged for dismissal of the appeal. It was his submission that compliance of the requirements of Sections 42 and 50 of the NDPS Act has been done in letter and spirit and both the Courts rightly held the same to have been done and hence there arises no case to interfere in the impugned order.

15. Having heard the learned counsel for the parties and on perusal of the record of the case, we find no merit in this appeal.

D 16. The point urged by the learned counsel for the appellant was dealt with by the High Court as under:

E **“Now, we come to the main area which has detained Shri Jash at length. His argument that there was no compliance of Section 42 of the said Act. This ground has to be discarded at the very outset in view of the latest decision of Supreme Court in State of Haryana Vs. Jarnail Singh and Ors. [2004 SAR (Criminal) 535] wherein Their Lordships had held:**

F *“Moreover it cannot be lost sight of that the Superintendent of Police was also a member of the searching party. It has been held by this Court in M. Prabbulal vs. Assistant Director, Directorate of Revenue Intelligence: (2003) 8 SCC 449 that where a search is conducted by a gazetted officer himself acting under Section 41 of the NDPS Act, it was not necessary to comply with the requirement of Section 42. For this reason also, in the facts of this case, it was not necessary to comply with the requirement of the proviso to Section 42 of the NDPS Act.”*

G **Such being the position the argument of Shri Jash so far as infraction of Section 42 of the said Act is concerned has no**

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merit at all since PW7 was a Gazetted Officer himself and he conducted the raid and also effected the search and seizure from the Appellant. A

Now, this brings us to the last ground of Shri Jash that Section 50 of the said Act was not strictly complied with. We have carefully gone through the evidence of P.Ws 4,6, and 7 in this regard and we feel that the provisions of Section 50 of the said Act have been complied with. B

P.W.4, who conducted the Raid, stated:

“We gave him off in writing whether he likely to be searched in presence of a Magistrate or a Gazetted Officer or a Gazetted Officer accompanying the raiding party. He agreed to be searched before the accompanying Gazetted Officer. Prior to search, we gave offer to him if he likes he can search the Gazetted Officer, N.C.B. Officers etc. But he declined.” C D

P.W.6, conducting the raid on the relevant date and time of seizure, supported the said version and stated:

“We gave written offer that we want to search and disclosed to him whether he would like to be searched by a Gazetted Officer or a Magistrate or the accompanying Gazetted Officer, who was with us. He stated to us that he could be searched before our accompanying Gazetted Officer. We asked him to search us before we started conducting search to him. He expressed his unwillingness.” E

P.W.7 the Gazetted Officer similarly stated: F

“One of our officers offered the accused to be searched in presence of a Gazetted Officer or a Magistrate. We also told him that one Gazetted Officer accompanied the raiding party. The accused agreed to be searched in presence of the accompanying Gazetted officer.” G

The decision of KRISHNA KANWAR (SMT) ALIAS THAKURAEEN (supra), relied upon by the Revenue has full application in the fact situation of the instant case (see also Prabha Shankar Dubey Vs. State of M.P. [(2003) 8 Supreme 565. H

A From a broad analysis of the entire evidence and other
materials on record we find from the Seizure List (Ext.9)
which discloses seizure of contraband articles from the place
of occurrence (New Sarat Lodge at 77/1A, A.P.C. Road,
B Calcutta – 700 009) on 21.5.98 at about 16-00 hours in
presence of the witnesses and being signed by the Appellant
himself. The said contraband articles in question, which was
seized from the possession of the Appellant were found to
be HEROIN on the basis of the Report (Ext.2) submitted
by Chemical Analyst (P.W.2) and even if we leave out the
Statement (Ext.6) made by him as he had disclosed on the
C second day of his production (08.6.98) that “he was forced
to write his confessional statement on the threat and torture.
It is also his allegation that his signature on more or less
18 blank papers were taken by the prosecution” we find
that the other evidence on record is quite sufficient to prove
the Charge against the Appellant.

D We find that the Prosecution has been able to prove its
case beyond any shadow of doubt against the Appellant and
the points canvassed by Shri Jash have no manner of
application in view of the discussion held hereinabove.”

E 17. We are in complete agreement with the aforementioned finding
of the High Court as, in our opinion, it is just, legal and proper calling no
interference in this appeal.

F 18. Firstly, the High Court has recorded the finding keeping in view
the law laid down by this Court in **State of Haryana vs. Jarnail Singh
& Ors.**, (2004) SAR (Criminal) 535. Secondly, since PW-7 himself
was the gazetted officer, it was not necessary for him to ensure
compliance of Section 42 as held by this Court in **Prabha Shankar
Dubey vs. State of M.P.** (2003) 8 Supreme 565 = (2004) 2 SCC 56 and
lastly, so far as compliance of the requirement of Section 50 is concerned,
it was found and indeed rightly that the offer to search the appellant was
G given to him in writing and on his giving consent, he was accordingly
searched.

H 19. The High Court was, therefore, right in upholding the procedure
followed by the raiding party for ensuring compliance of Section 50 and
rightly held against the appellant on this issue. We find no ground to take

a different view than the one taken by the High Court and accordingly uphold the finding on this issue against the appellant. A

20. We have also carefully examined the record with a view to find out as to whether the appeal involves any ground other than the one urged. Having so examined, we find none except the one urged and decided against the appellant. B

21. In the light of foregoing discussion, we find no merit in this appeal. It thus fails and is accordingly dismissed.

22. As a result, the bail granted to the appellant by this Court by order dated 17.09.2007 is hereby cancelled and the appellant is directed to surrender before the Trial Court to undergo the remaining period of sentence awarded to him by the courts below. C

Kalpana K. Tripathy

Appeal dismissed.