

CASE NO.:
Appeal (crl.) 541 of 2005

PETITIONER:
State of Rajasthan

RESPONDENT:
Ram Chandra

DATE OF JUDGMENT: 12/04/2005

BENCH:
ARIJIT PASAYAT & S.H. KAPADIA)

JUDGMENT:
J U D G M E N T
(Arising out of SLP (Crl.)No. 3316/2003)

ARIJIT PASAYAT, J.

Leave granted.

The State of Rajasthan is in appeal against the judgment of learned Single Judge, Rajasthan High Court, Jaipur Bench, Jaipur holding that there was non-compliance with the mandatory requirements of Section 50 of Narcotic Drugs and Psychotropic Substances Act, 1985 (in short the 'Act'). The said conclusion was arrived at on the ground that though the accused respondent had been given the option of being searched in the presence of Shri Satyender Singh (PW-3), the Deputy Superintendent of Police, he was in essence a member of the raiding party and, therefore, the search in his presence cannot at all be said to be in consonance with Section 50 of the Act, though he was a Gazetted Officer.

Background facts in a nutshell are as under:

On 8.9.1995 Prem Shaker Meena (PW-2), SHO Police Station, Kotwali, Baran having received information about illicit trafficking in narcotic substances, rushed to the place pointed out by the informant and apprehended the accused respondent. Satyendra Singh, Dy. S.P. (PW-3) also reached there. Subsequently, being of the suspicion that accused respondent was in possession of contraband, the SHO informed him of his right to have his search conducted either in presence of Shri Satyendra Singh, Dy. S.P. (PW-3) who was a Gazetted Officer and happened to be present there or in the presence of any magistrate. The accused consented for his search to be conducted in the presence of the Dy. S.P. (PW-3). On being searched, 570 grams of opium was recovered from his possession in the presence of Ramesh Chand (PW-5) and Rajendra Kumar (PW-6). Out of the recovered opium, a sample weighing 30 grams was taken and was sealed. The remaining opium was also sealed. The accused was accordingly arrested vide arrest memo Ex.P-5 and memo of recovery was prepared. The SHO, thereafter, registered a case vide FIR Ex.P-4 and deposited the recovered opium in the 'Malkhana'. During investigation, the police recorded the statement of witnesses and sent the sample to the Forensic Science Laboratory. On chemical examination, the sample contained in the packet marked 'B' gave positive tests for the chief constituents of coagulated juice of opium poppy having 5.43% morphine.

After completion of all these formalities, the accused was charge sheeted under Sections 8 and 18 of the Act. The Trial Judge framed charges against the accused under Sections 8 and 18 of the Act, to which the accused denied and claimed trial.

The learned Sessions Judge, Baran held that the accused was guilty, convicted him in terms of Sections 8 and 18 of the Act and sentenced him to undergo 10 years RI with a fine of rupees one lakh with a default stipulation of one year's RI.

In appeal, the main stand of the accused respondent was that there was non-compliance with the requirements of Sections 42 and 50 of the Act. The High Court held that since the accused was searched on a public road and the contraband articles were seized, Section 42 of the Act had no application in view of Explanation appended to Section 43 of the Act. It was noted that Prem Shanker (PW-2) who was an authorized officer under Section 42 of the Act informed the accused of his right to be searched in the presence of the Deputy Superintendent of Police (PW-3) who happened to be a Gazetted Officer and was present at the site and if he desired, he can be taken to any Magistrate. The accused consented for his search in the presence of the Deputy Superintendent of Police and accordingly search was conducted in the presence of PW-3, the Deputy Superintendent of Police which was witnessed by other witnesses, Ramesh Chandra (PW-5) and Rajendra Kumar (PW-6). But, it was held that the consent given by the accused to be searched in the presence of the Deputy Superintendent of Police (PW-3) was not sufficient compliance of Section 50 of the Act.

Learned counsel appearing for the State of Rajasthan submitted that the High Court's approach is clearly erroneous. It is not a fact that PW-3 was a member of the raiding party as was observed by the High Court. Further, option was given to the accused to be searched in the presence of PW-3 or if he wanted he could be taken to the Magistrate. The accused himself having consented to be searched in the presence of PW-3, there was no infirmity.

In response, learned counsel for the accused-respondent submitted that more trust is put on the Gazetted Officer and, therefore, the High Court was right in holding that the accused should have taken to some other Gazetted Officer.

Only question to be adjudicated is the alleged non-compliance of Section 50. The said provision reads as follows:

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

(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 of any of the departments mentioned in Section 42 or to the nearest Magistrate.

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

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

A bare reading of Section 50 shows that it only applies in case of personal search of a person. It does not extend to search of a vehicle or a container or a bag, or premises. (See *Kalema Tumba v. State of Maharashtra and Anr.* (JT 1999 (8) SC 293), *State of Punjab v. Baldev Singh* (1999 (6) SCC 172) and *Gurbax Singh v. State of Haryana* (2001(3) SCC 28). The language of Section 50 is implicitly clear that the search has to be in relation to a person as contrasted to search of premises, vehicles or articles. This position was settled beyond doubt by the Constitution Bench in *Baldev Singh's* case (supra).

In order to appreciate rival submissions, some of the observations made by the Constitution Bench in *Baldev Singh's* case (supra) are required to be noted. It is also to be noted that the Court did not in the abstract decide whether Section 50 was directory or mandatory in nature. It was held that the provisions to the Act implicitly make it imperative and obligatory and casts a duty on the investigating officer (empowered officer) to ensure that search of the person (suspect) concerned is conducted in the manner prescribed by Section 50 by intimating to the person concerned about the existence of his right that if he so requires, he shall be searched before a Gazetted Officer or a Magistrate and in case he so opts, failure to conduct his search before a Gazetted Officer or a Magistrate would cause prejudice to the accused and render the recovery of the illicit articles suspect and vitiate the conviction and sentence of the accused. Where the conviction has been recorded only on the basis of the possession of the illicit article recovered during a search conducted in violation of the provisions of Section 50 of the Act, it was illegal. It was further held that the omission may not vitiate the trial as such, but because of the inherent prejudice which would be caused to an accused by the omission to be informed of the existence of his right, it would render his conviction and sentence unsustainable. In paragraph 32 of the judgment (at page 200) this position was highlighted. In para 57, inter alia, the following conclusions were arrived at:

"(1) That when an empowered officer or a duly authorized 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 the Act of being taken to the nearest gazetted officer or nearest Magistrate for making the search. However, such information may not necessarily be in writing.

(2) That failure to inform the person concerned about the existence of his right to be searched before a gazetted officer or a Magistrate would cause prejudice to an accused.

(3) That a search made by an empowered officer, on prior information, without informing the person of his right that if he so requires, he shall be taken before a gazetted officer or a Magistrate for search and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act.

(5) That whether or not the safeguards provided in Section 50 have been duly observed would have to be determined by the court on the basis of the evidence led at the trial. Finding on that issue, one way or the other would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of Section 50 and, particularly, the safeguards provided therein were duly complied with, it would not be permissible to cut short a criminal trial.

(6) That in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Section 50 are mandatory or directory, but hold that failure to inform the person concerned of his right as emanating from sub-section (1) of Section 50 and render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law.

(7) That an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search."

It is not disputed that there is no specific form prescribed or intended for conveying the information required to be given under Section 50. What is necessary is that the accused (suspect) should be made aware of the existence of his right to be searched in presence of one of the officers named in the Section itself. Since no specific mode or manner is prescribed or intended, the Court has to see the substance and not the form of intimation. Whether the requirements of Section 50 have been met is a question which is to be decided on the facts of each case and there cannot be any sweeping generalization and/or strait-jacket formula.

Section 50 does not involve any self-incrimination. It is only a procedure required to protect the rights of an accused (suspect) being made aware of the existence of his right to be searched if so required by him before any of the specified officers. The object seems to be to ensure that at a later stage the accused (suspect) does not take a plea that the articles were planted on him or that those were not recovered from him. To put it differently, fair play and transparency in the process of search has been given the primacy. In *Raghubir Singh v. State of Haryana* (1996 (2) SCC 201), the true essence of Section 50 was highlighted in the following manner:

"8. The very question that is referred to us came to be considered by a Bench of two learned Judges on 22.1.1996 in *Manohar Lal v. State of Rajasthan* (Crl.M.P.No.138/96 in SLP(Crl.)No.184/1996). One of us (Verma, J), speaking for the Bench, held:

"It is clear from Section 50 of the NDPS Act that the option given thereby to the accused is only to choose whether he would like to be searched by the officer making the search

or in the presence of the nearest available Gazetted Officer or the nearest available Magistrate. The choice of the nearest Gazetted Officer or the nearest Magistrate has to be exercised by the officer making the search and not by the accused".

9. We concur with the view taken in Manohar Lal's case supra.

10. Finding a person to be in possession of articles which are illicit under the provisions of the Act has the consequence of requiring him to prove that he was not in contravention of its provisions and it renders him liable to severe punishment. It is, therefore, that the Act affords the person to be searched a safeguard. He may require the search to be conducted in the presence of a senior officer. The senior officer may be a Gazetted Officer or a Magistrate, depending upon who is conveniently available.

11. The option under Section 50 of the Act, as it plainly reads, is only of being searched in the presence of such senior officer. There is no further option of being searched in the presence of either a Gazetted Officer or of being searched in the presence of a Magistrate. The use of the word 'nearest' in Section 50 is relevant. The search has to be conducted at the earliest and, once the person to be searched opts to be searched in the presence of such senior officer, it is for the police officer who is to conduct the search to conduct it in the presence of whoever is the most conveniently available, Gazetted Officer or Magistrate".

As has been highlighted in Baldev Singh's case (supra) it has to be seen and gauged whether the requirements of Section 50 have been met. Section 50 in reality provides for additional safeguards which are not specifically provided by the statute. The stress is on the adoption of a reasonable, fair and just procedure. No specific words are necessary to be used to convey existence of the right.

The above position was elaborately dealt with in Prabha Shankar Dubey v. State of Madhya Pradesh (2003 AIR SCW 6592) and in Madan Lal and Anr. v. State of Himahal Pradesh (2003 (6) Supreme 382).

These aspects were highlighted and reiterated in Smt. Krishna Kanwar @ Thakuraeen v. State of Rajasthan (JT 2004 (1) SC 597).

Section 50 of the Act deals with conditions under which search of a person shall be conducted. Section 50 comes in operation when an officer authorized in terms of Section 42 is to search any person, under the provisions of Sections 41, 42 and 43. Here comes the requirement of informing the person about to be searched to exercise his option to be searched in the presence of nearest Gazetted Officer, of any of the departments mentioned in Section 42 or the nearest Magistrate.

If the person so requires, the officer referred to under sub-section (1) of Section 50 may detain the person to bring him before the Gazetted Officer or the Magistrate, as the case may be. As was noticed in Raghbir Singh's case (supra) the Act affords the person to be searched a safeguard to the effect that he may require the search to be conducted in the presence of a senior officer. The senior officer may

be a Gazetted Officer or a Magistrate depending upon who is conveniently available. That being the purpose of the Act, if any Gazetted Officer even if he is a police officer of a particular rank is present nearby when the accused is detained, the accused may be asked as to whether he would like to be searched in the presence of that officer or a Magistrate. The foundation of the stand taken by the accused-respondent which found favour with the High Court is that if he is a member of the raiding party the requirements of Section 50 are not met. This is not legally tenable, and in any event on the facts of the present case it was not so because PW-3, the Deputy Superintendent of Police reached the spot after the person was detained.

As noted above, in Raghbir Singh's case (supra) the option given to the accused is only to choose whether he would like to be searched by the officer making the search or in the presence of the nearest available Gazetted Officer or the nearest available Magistrate. The choice of the nearest Gazetted Officer or the nearest Magistrate has to be exercised by the officer making the search and not by the accused. In the instant case all the options were made known to the accused and he himself opted to be searched in the presence of the Deputy Superintendent of Police (PW-3).

Sections 41, 42, 43 or Section 50 do not speak of a raiding party. Section 41(2) speaks of arrest by any officer of gazetted rank of enumerated department or by an officer subordinate to him (but superior in rank to a peon, sepoy or a constable) to arrest such a person. Under sub-section (1) of Section 41 a warrant may be addressed to an officer for arrest of a person under circumstances enumerated in the said provision. Section 42 deals with action permissible to be taken by an officer authorized. Section 43 deals with power of an officer of any of the departments mentioned in Section 42. The officer exercising power under Sections 41, 42 and 43 can take assistance of others for the purpose of carrying out the prescribed acts.

The conclusions of the High Court would have been correct if the officer proposing to effect the search is a Gazetted Officer and he gives option to be given under Section 50 to the person detained to be searched in his presence. In that event, the requirement of Section 50 would not be met because the officer proposing to effect the search cannot act in dual capacity; first as an officer authorized under Section 42 to search a person and second as the Gazetted Officer in whose presence the accused may opt to be searched.

The object of the Act being that the search is conducted in the presence of a superior officer, in order to lend transparency and authenticity to the search it cannot be held as a principle in law that if a superior officer happens to be with the officer authorized (which the High Court has described as being a member of the raiding party) the position would be different. The High Court proceeds on the basis that there may be bias on the part of the officer because he was accompanying the officer authorized. Such a presumption is not legally available.

The High Court was, therefore, not correct in holding that the search in the presence of PW-3 was not in compliance with the requirements of Section 50. Stress is on the search being conducted in the presence of any of the enumerated categories of the officers. In *S. Jeevanatham v. State through Inspector of Police, T.N.* (2004 (5) SCC 230), it was contended by the accused that investigation having been conducted by the complainant-police officer, the conviction in terms of Section 8(c) read with Section 20(b)(ii) of the Act was vitiated. The plea was repelled relying on the decision of this Court in *State represented by Inspector of Police, Vigilance and Anti-corruption, Tiruchirapalli, T.N. v. Jayapaul* (2004 (5) SCC 223). It was observed that nothing was pointed out to show that the investigation had caused

prejudice or was biased against the accused. In the instant case, the accused was informed of his rights and options to be exercised. He consented to be searched in the presence of PW-3. Therefore, it was not open to him even to urge non-compliance of Section 50.

In fact in S. Jeevanatham's case (supra) this Court did not accept the plea that an officer who was the complainant cannot be the investigating officer. The question of prejudice or bias has to be established and not inferred. In any event, there cannot be any legal presumption in that regard. At this juncture, it is to be noted that under sub-section (3) of Section 50, the Gazetted Officer or the Magistrate before whom the person who is to be searched is brought can, in a given case, come to hold that there is no reasonable ground for the search and shall forthwith "discharge" the person. Otherwise, he shall direct the search to be made. The expression 'discharge' used in sub-section (3) of Section 50 is used in the sense that the detention is terminated.

The powers to detain, search and arrest have been conferred by Sections 41(2), 42 and 43. Under Section 42(1)(d) the officer authorized may between sunrise and sunset detain and search and if he thinks proper arrest any person who he has reason to believe has committed an offence punishable under Chapter IV relating to the notified drug or substance. The question of arrest comes after a person is detained and searched and thereafter if the officer thinks proper arrest can be effected on the foundation that the officer has reason to believe that the person so detained and searched has committed an offence punishable under Chapter IV. It cannot be said that the person accompanying the officer authorized cannot say 'No' to the proposed search even if he sees no reasonable ground for search. It is the legislative trust imposed on a superior officer to act fairly and reasonably. Therefore, it is for the accused to establish prejudice which is to be done at the trial. On the facts of the case, actually these questions do not arise. The object of requiring the search to be conducted if so required before the specified Gazetted officer or nearest Magistrate is to ensure that the officers who are charged with a duty of conducting search conduct them properly and do no harm or wrong such as planting of an offending drug by any interested party and preventing fabrication of any false evidence. The provision in essence intends to act as a safeguard against vexatious search, unfair dealings and to protect and safeguard the interest of innocent persons. In order to avoid arrest and nip the investigation in the bud thereby protecting the liberty of a person, a statutory safeguard is provided in sub-section (3) of Section 50. Power has been vested in the Magistrate or the Gazetted Officer before whom the concerned person is brought on his requisition made under sub-section (2) to forthwith discharge the person without formal proceedings on his satisfaction that there is no reasonable ground for search. As a consequence, search takes place only when he declines to discharge such a person.

Firstly, as noted above PW-3 arrived at the spot after the person was detained and search was proposed to be done by the officer authorized. Secondly, the respondent-accused was given the option as to whether he would like to be searched in the presence of PW-3 or the nearest magistrate. He exercised his option to be searched in the presence of PW-3.

High Court's conclusions are clearly untenable. The inevitable result is that the High Court's judgment is indefensible and is set aside and that of the trial Court is restored. The accused shall surrender to custody forthwith to serve the remainder of the sentence. Appeal is allowed.