AJMER SINGH
v.
STATE OF HARYANA
(Criminal Appeal No. 436 of 2009)

FEBRUARY 15, 2009

[P. Sathasivam and H.L. Dattu, JJ.]
2010 (2) SCR 785

The Judgment of the Court was delivered by

H.L. DATTU, J. 1. This appeal, is directed against the judgment and order of the High Court of Punjab and Haryana in Criminal Appeal No.926-SB of 1997 dated 7.12.2007, whereby and where under, the High Court has upheld the conviction of the appellant by the Additional Sessions Judge, Kurukhestra, vide judgment and order dated 5.11.1997/6.11.1997 in Sessions Case No.14 of 1996, for offences punishable under Section 20 of the Narcotics Drugs & Psychotropic Substances Act, 1985.

2. The factual matrix of the case is as under : That on 24.1.1996, ASI Maya Ram accompanied by other police officials, namely, Head Constable Raja Ram and Constables Gian Chand and Shyam Singh was on patrol duty. The said police party was present near the Markanda Bridge when the accused along with another person Randhir Singh were seen coming from the side of Ismailabad. On seeing the police party, the appellant and other person Randhir Singh made an attempt to turn back and escape. However, the police over-powered them as their activities were found suspicious. Thereafter, they were served with a notice under Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the Act') vide memo (Ex.PD) giving an option to them to be searched either by the Gazetted officer or the Magistrate. They signed the memo by making the choice to be searched by the Gazetted officer and they were arrested by the Head Constable Raja Ram and C-1 Gian Chand. Both of them were produced before the then D.S.P., Pehowa, Shri Paramjit Singh Ahalawat who

is a Gazetted Officer, and on his direction, the bag that they were carrying was searched before him. The bag that was carried by the appellant on his shoulder was found to be containing 500 grams of charas wrapped in wax paper. Out of that, 50 grams of charas was taken as sample. Thereafter, the sample and residue were sealed separately with seal 'MR' of the Investigating Officer and 'PSA' of the D.S.P. Seal MR was handed over to HC Raja Ram while seal 'PSA' was retained by the D.S.P. himself. FIR was registered being Case F.I.R. No. 14 dated 24.1.1996 and the property was taken into possession by drawing a mahazar. The rough site plan was also prepared and the accused was arrested after informing the grounds of arrest. The statements of witnesses were recorded and challan was issued on receipt of the report of the Chemical Examiner Exhibit PH. The accused was charge-sheeted under Section 20 of the Act and he pleaded not guilty and claimed trial. The other person who was also apprehended on the same day, was also charge- sheeted and tried separately.

Case of Prosecution before the Trial Court:

3. The prosecution examined Constable Balkar Singh PW-1, MHC Som Nath PW-2, DSP Paramjit Singh Ahalawat PW-3, Head Constable Raja Ram PW-4, ASI Maya Ram PW-5 and SI Dilpanjir Singh PW-6. The prosecution also got marked the Chemical Examination Report and closed the prosecution evidence. The accused was called upon to lead evidence in defence, if any. The statement of the accused under Section 313 of the Criminal Procedure Code was recorded by putting incriminating evidence against him. Being confronted with incriminating circumstance appearing against him, the accused pleaded innocence and false implication.

4. The case of the appellant before the Sessions Court :

(a) that there was no strict compliance of the Section 50 of the Act.

(b) independent witnesses not joined and associated during the search.

(c) that the accused was falsely implicated in the case.

Decision of Sessions Court:

5. The Additional Session Judge has observed that the accused was given an option, whether he should be searched by a Gazetted officer or a Magistrate and after obtaining his option, he was produced before Deputy Superintendent of Police, who is a Gazetted Officer and on his direction the accused was searched and, therefore, there is compliance of Section 50 of the Act. Secondly, the prosecution has shown that there were enough efforts taken by the Investigation Officer to implead independent witness. Thirdly, there has been no missing link in the evidence and thus the prosecution has been able to prove the case beyond reasonable doubt that the accused "retained in his conscious possession 500 grams of charas without any permit or license on 24.1.1996". Thus, the accused was held guilty under Section 20 of the Act and was convicted vide judgment dated 5.11.1996. The accused was sentenced to undergo rigorous imprisonment for a period of ten years and a fine of Rs.1,00,000/-(Rupees one lac). In default of payment of fine, to further undergo rigorous imprisonment for another one year.

Appeal before the High Court:

6. Feeling aggrieved by the decision of Additional Session Judge, Kurukshetra, the accused preferred Criminal Appeal No.926-SB of 1997 before the High Court of Punjab and Haryana.

7. Apart from reiterating the contentions canvassed before the learned Sessions Judge, the learned counsel for the accused-appellant had also contended that there was delay of 15 days in sending the sample for chemical examination to FSL, Madhuban (Karnal) and no explanation is given by the prosecution for the delay caused. The High Court while considering this issue has concluded that the delay is properly explained by the prosecution. It has further observed that, the statement of the witnesses and the report of the FSL, Madhuban shows that the sample was received in

sealed cover and there was no tampering of the sample, and therefore, the said FSL, Madhuban Report must be held to have full evidentiary value.

Appeal:

8. Before us the learned counsel for the appellant contended that the prosecution has failed to establish the guilt of the accused ; that the conviction and sentence of the appellant is illegal in view of failure to observe the safeguards, while conducting search and seizure, as provided under Section 50 of the Act ; that the prosecution has not joined any independent witnesses to prove the fact of recovery of 'Charas' from the possession of the accused ; that the principle of parity requires the awarding of lesser punishment as has been done in the case of co-accused Randhir Singh.

9. In order to appreciate the contention raised by the learned counsel appearing for appellant, it is necessary to notice Section 50 of the Act. It reads:

> *"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 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."

10. Section 43 of the Act empowers an officer referred to in Section 42 to conduct search and seizure and arrest in public places. The provision reads as under:

> "Power of seizure and arrest in public places. Any officer of any of the departments mentioned in Section 42 may—
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> (a) seize, in any public place or in transit, any narcotic drug or psychotropic substance in respect of which he has reason to believe an offence punishable under Chapter IV has been committed, and, along with such drug or substance, any animal or conveyance or article 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 an offence punishable under Chapter IV relating to such drug or substance;
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> (b) detain and search any person whom he has reason to believe to have committed an offence punishable under Chapter IV, and, if such person has any narcotic drug or psychotropic substance in his possession and such possession appears to him to be unlawful, arrest him and any other person in his company.
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> Explanation.—For the purposes of this Section, the expression "public place" includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to the public."

11. Section 42 of the Act reads as under :

> "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 embowered 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,

drugs 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:

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 sunset and sunrise after recording the grounds of his belief.

(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."

12. The object, purpose and scope of Section 50 of the Act was the subject matter of discussion in number of decisions of this Court. The Constitution Bench of five Judges of this Court in the case of *State of Punjab*

v. Baldev Singh, [(1999) 6 SCC 172], after exhaustive consideration of the decision of this court in the case of *Ali Mustaffa Abdul Rahman Moosa vs. State of Kerala,* [(1994) 6 SCC 569] and Pooran Mal vs. Director of Inspection (Investigation), New Delhi & Ors., [(1974) 1 SCC 345], have concluded in para 57 :

(I) When search and seizure is to be conducted under the provision of the Act, it is imperative for him to inform the person concerned of his right of being taken to the nearest gazetted officer or the nearest Magistrate for making search.

(II) Failure to inform the accused of such right would cause prejudice to an accused.

(III) That a search made by an empowered officer, on prior information, without informing the accused of such a right may not vitiate trial, but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction is solely based on the possession of the illicit article, recovered from his person, during such search.

(IV) The investigation agency must follow the procedure as envisaged by the statute scrupulously and failure to do so would lead to unfair trial contrary to the concept of justice.

(V) That the question as to whether the safeguards provided in Section 50 of the Act have been duly observed would have to be determined by the court on the basis of the evidence at the trial and without giving an opportunity to the prosecution to establish the compliance of Section 50 of the Act would not be permissible as it would cut short a criminal trial.

(VI) That the non compliance of the procedure i.e. informing the accused of the right under sub-Section (1) of Section 50 may render

the recovery of contraband suspect and conviction and sentence of an accused bad and unsustainable in law.

(VII) The illicit article seized from the person of an accused during search conducted without complying the procedure under Section 50, cannot be relied upon as evidence for proving the unlawful possession of the contraband.

13. The learned counsel for the appellant contended that the provision of Section 50 of the Act would also apply, while searching the bag, brief case etc., carried by the person and its non-compliance would be fatal to the proceedings initiated under the Act. We find no merit in the contention of the learned counsel. It requires to be noticed that the question of compliance or non-compliance of Section 50 of the N.D.P.S. Act is relevant only where search of a person is involved and the said Section is not applicable nor attracted where no search of a person is involved. Search and recovery from a bag, brief case, container, etc., does not come within the ambit of Section 50 of the N.D.P.S. Act, because firstly, Section 50 expressly speaks of search of person only. Secondly, the Section speaks of taking of the person to be searched by the Gazetted Officer or Magistrate for the purpose of search. Thirdly, this issue in our considered opinion is no more res-integra in view of the observations made by this court in the case of *Madan Lal vs. State of Himachal Pradesh* 2003 Crl.L.J. 3868. The Court has observed:

> "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 vs. State of Maharashtra and Anr*. (JT 1999 (8) SC 293), *State of Punjab vs. Baldev Singh* (JT 1994 (4) SC 595), *Gurbax Singh vs. State of Haryana* (2001 (3) SCC 28). The language of section is implicitly clear that the search has to be in relation to a person as contrast to search of premises, vehicles, or articles. This position was settled beyond doubt by the Constitution Bench

in *Baldev Singh's* case (supra). Above being the position, the contention regarding non-compliance of Section 50 of the Act is also without any substance."

14. In *State of Himachal Pradesh vs. Pawan Kumar,* [2005 4 SCC 350], this Court has stated:

"A bag, briefcase or any such article or container, etc. can, under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body or a human being. Depending upon the physical capacity of a person, he may carry any number of items like a bag, a briefcase, a suitcase, a tin box, a thaila, a jhola, a gathri, a holdall, a carton etc. of varying size, dimension or weight. However, while carrying or moving along with them, some extra effort or energy would be required. They would have to be carried either by the hand or hung on the shoulder or back or placed on the head. In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore, it is not possible to include these articles within the ambit of the word "person" occurring in Section 50 of the Act."

After discussion on the interpretation of the word 'person', this Court concluded:

"that the provisions of section 50 will come into play only in the case of personal search of the accused and not of some baggage like a bag, article or container, etc. which (the accused) may be carrying"

The court further observed :

"In view of the discussion made, Section 50 of the Act can have no application on the facts and circumstances of the present case as opium was allegedly recovered from the bag, which was being carried by the accused."

15. It appears from the evidence on record that the accused was confronted by ASI Maya Ram and other police officials on 24.1.1996 and he was informed that he has the right to either be searched before the Gazetted Officer or before a Magistrate and the accused chose the later. Thereafter, the accused was taken to the DSP, Pehowa, Shri Paramjit Singh Ahalawat and as directed by him, the bag carried by accused on his shoulder was searched and the charas was found in that bag. Thus, applying the interpretation of the word "search of person" as laid down by this court in the decision mentioned above, to facts of present case, it is clear that the compliance of Section 50 of the Act is not required. Therefore, the search conducted by the investigation officer and the evidence collected thereby, is not illegal. Consequently, we do not find any merit in the contention of the learned counsel of the appellant as regards the non-compliance of Section 50 of the Act.

16. The learned Counsel for the appellant has submitted that the evidence of the official witness cannot be relied upon as their testimony, has not been corroborated by any independent witness. We are unable to agree with the said submission of the learned Counsel. It is clear from the testimony of the prosecution witnesses PW-3 Paramjit Singh Ahalwat, D.S.P., Pehowa, PW-4 Raja Ram, Head Constable and PW-5 Maya Ram, which is on record, that efforts were made by the investigating party to include independent witness at the time of recovery, but none was willing. It is true that a charge under the Act is serious and carries onerous consequences. The minimum sentence prescribed under the Act is imprisonment of 10 years and fine. In this situation, it is normally expected that there should be independent evidence to support the case of the prosecution. However, it is not an inviolable rule. Therefore, in the peculiar circumstances of this case, we are satisfied that it would be travesty of justice, if the appellant is acquitted merely because no independent witness has been produced. We cannot forget that it may not be possible to find independent witness at all places, at all times.

The obligation to take public witnesses is not absolute. If after making efforts which the court considered in the circumstances of the case reasonable, the police officer is not able to get public witnesses to associate with the raid or arrest of the culprit, the arrest and the recovery made would not be necessarily vitiated. The court will have to appreciate the relevant evidence and will have to determine whether the evidence of the police officer was believable after taking due care and caution in evaluating their evidence. In the present case, both the trial court and the High Court by applying recognized principle of evaluation of evidence of witnesses has rightly come to the conclusion that the appellant was arrested and Charas was recovered from the possession of the appellant for which he had no licence. We find no good reason to differ from that finding.

17. The learned counsel for the appellant further contends that the sentence of ten years rigorous imprisonment deserves to be modified and the accused deserves to be acquitted on the ground of parity as the sentence of other accused Randhir Singh, who was searched on 24.1.1996 and convicted by the additional Session Judge for being in possession of one Kilogram of charas, without any permit or license, has been reduced to that already suffered by him.

18. The principle of parity in criminal case is that, where the case of the accused is similar in all respects as that of the co-accused then the benefit extended to one accused should be extended to the co-accused. With regard to this principle, it is important to mention the observation of this court in the case of *Harbans Singh v. State of Uttar Pradesh and Ors.,* [(1982) 2 SCC 101]. In that case it was held, that, in view of commutation of death sentence of one of the accused, who was similarly placed as that of appellant, award of death sentence to appellant was unjustified and, hence, the death sentence of the appellant was stayed till the decision of the President on commutation of sentence. An important observation of this Court on the point need to be noticed at this stage:

"it will be a sheer travesty of justice and the course of justice will be perverted, if for the very same offence, the petitioner has to swing and pay the extreme penalty of death whereas the death sentence imposed on his co-accused for the very same offence is commuted to one of life imprisonment and the life of the co-accused is shared."

19. In the case of Akhil Ali Jehangir Ali Sayyed v. State of Maharashtra, [(2003) 2 SCC 708], this Court maintained that as the second accused was placed on the same situation as the appellant, Article 21 of the Constitution would not permit this court to deny the same benefit to the second accused.

20. The Court of Appeal Albert, *Canada in R. v. Christie* [2004 Carswell Alta 1224 Alberta Court of Appeal, 2004] discussed the meaning of the principle in connection with sentencing in criminal cases. The Court of Appeal stated:

"40. Parity is a principle which must be taken into account in any sentence, and particularly where the offence was a joint venture. There will, of course, be cases where the circumstances of the co-accused are sufficiently different to warrant significantly different sentences, such as where one co-accused has a lengthy related criminal record or played a much greater role in the commission of the offence."

Thus, expressing its view on 'parity in sentencing' the Court observed:

"43. What we must strive for is an approach to sentencing whereby sentences for similar offences committed by similar offenders in similar circumstances are understandable when viewed together, particularly in cases involving joint ventures."

Also the observation of the Court of Appeal Alberta in the case of *Wahby v The Queen,* [(2004) WASCA 308 2004 WL 3061688] whereby, the Court quoted the explanation given in the case of *Goddard v The Queen,* [(1999) 21 WAR 541], is relevant for the discussion in present case:

"In considering the application of the principle, all the circumstances of the case are to be taken into account; those concerned with the commission of the offence and those which are personal to the offender before the court and the co-offender. Where there are differences, as almost inevitably there will be, true parity will be produced by different sentences, each proportionate to the criminal culpability of each offender, bearing in mind, as is often said but is worth repeating, that sentencing is not and should not be a process involving a search for mathematical precision, but is an act of discretion informed by the proper application of sentencing principles to the particular case. Inevitably there will be a range of appropriately proportionate sentences which may be passed for the offence before the court."

21. The Court of Appeal of the Supreme Court of Victoria, Australia in the case of *R v Hildebrandt* [187 A Crim R 42 2008 WL 3856330; [2008] VSCA 142] observed:

"Judicial expositions of the meaning of the parity principle are not entirely uniform. The term "the parity principle" is used in at least two senses in the relevant authorities. First, to express the recognition that like cases should be treated alike (itself an emanation of equal justice). Secondly, the phrase is used to describe the requirement to consider the "appropriate comparability" of co-offenders, and in that sense, comprehends the mirror propositions that like should be treated alike, and that disparate culpability or circumstances may mandate a different disposition."

22. In the case *Postiglione v The Queen* [(1997) 189 CLR 295; 94 A Crim R 397] Dawson and Gaudron JJ stated:

"The parity principle upon which the argument in this Court was mainly based is an aspect of equal justice. Equal justice requires that like should be treated alike but that, if there are relevant differences, due allowance

should be made for them In the case of co-offenders, different sentences may reflect different degrees of culpability or their different circumstances. If so, the notion of equal justice is not violated ...Discrepancy or disparity is not simply a question of the imposition of different sentences for the same offence. Rather, it is a question of due proportion between those sentences, that being a matter to be determined having regard to the different circumstances of the co-offenders in question and their different degrees of criminality."

The Court, therefore, concluded the principle to mean:

"……it the concept simply is that, when two or more co-offenders are to be sentenced, any significant disparity in their sentences should be capable of a rational explanation."

23. What can be inferred from the above decision is, that for applying the principle of parity both the accused must be involved in same crime and must be convicted in single trial, and consequently, a co-accused is one who is awarded punishment along with the other accused in the same proceedings. However, we are unable to apply the principle of parity to the present case as the record show that the accused Randhir Singh was convicted vide a separate trial arising out of a separately registered F.I.R. Merely because the accused Randhir Singh happened to be searched on 24.1.1996 before the same gazetted officer i.e. D.S.P., Pehowa, Shri Paramjit Singh Ahalawat, he cannot be said to be a co-accused in the present case. Further, the sentence of accused Randhir Singh was altered by the Punjab and Haryana High Court vide a separate judgment dated 3.12.2002 arising out of a separate appeal being Criminal Appeal No.855-57 of 1999. Therefore, we do not find any merit in the contention canvassed by learned counsel for the appellant.

24. In view of the aforesaid findings, we do not find any infirmity in the impugned order of the High Court. Accordingly, the present appeal fails and is dismissed.