

CASE NO.:
Appeal (crl.) 53 of 2003

PETITIONER:
Smt. Krishna Kanwar @ Thakuraeen

RESPONDENT:
State of Rajasthan

DATE OF JUDGMENT: 27/01/2004

BENCH:
DORAISWAMY RAJU & ARIJIT PASAYAT.

JUDGMENT:
J U D G M E N T

[With Crl. A. No. 52/2003]

ARIJIT PASAYAT, J.

Originally three appeals were filed against the common judgment of the Rajasthan High Court, Jodhpur, whereby three appeals were disposed of. During the pendency of Criminal Appeal no. 51/2003, the appellant Shamshuddin died and by order dated 20.1.2004 the appeal has been dismissed having abated. The consideration, therefore, is restricted to other two appeals i.e. Criminal Appeal nos. 52/2003 and 53/2003.

Of the two appeals one has been filed by convict-accused Smt. Krishna Kanwar i.e. Crl. Appeal No.53 of 2003 and the other appeal has been filed by the State of Rajasthan (Crl. Appeal No. 52 of 2003) questioning the acquittal of accused Mangi Lal and Nathu Singh, as directed by the Trial Court and upheld by the High Court. Initially, seven persons were treated to be accused persons. Four of them, namely, Shamshuddin, Smt. Krishan Kanwar, Mangi Lal and Nathu Singh were tried by District and Sessions Judge, Pratapgarh, who found accused Shamshuddin and Smt. Krishna Kanwar guilty of offences punishable under Sections 8 and 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short 'the Act') and sentenced each to undergo rigorous imprisonment for 14 years and to pay a fine of Rs.2 lakh with default stipulation. Nathu Singh and Mangi Lal (A-6 and A-7) respectively, were acquitted.

Prosecution case as unfolded during trial is as follows:

Prassan Kumar Khamesara (PW-16), Dy. S.P. Chhoti Sadri received information at about 8.30 p.m. on 5.7.1994 to the effect that on 6.7.1994 between 5.00 a.m. to 9.00 a.m., one Shamshuddin S/o Shakoor Khan, resident of Dharakhedi, shall be coming on a Rajdoot motorcycle, from Chittorgarh side and will be proceeding towards Udaipur, alongwith contraband heroin.

The above information was not only recorded but also forwarded to S.P., Chittorgarh and Addl. S.P., Pratapgarh through Indermal (PW-9). Upon above information, Shiv Prasad (PW-14), Addl. S.P., Pratapgarh alongwith lady constable Smt. Vimla Chaudhary (PW-5) and other members of staff

reached Police Station, Chhoti Sadri on 6.7.1994 in the morning at about 4.00 a.m. Rajeev Dasot, S.P. Chittorgarh reached at Ghomana Choraya in the morning of 6.7.1994, where Datar Singh SHO (PW-11) alongwith other staff of his Police Station were present. After discussing the matter with S.P. and Addl. S.P., Dy. S.P. Prassan Kumar Khamesara (PW-16) staged a nakabandi at Ghomana Choraya, in which Yudhishtar Singh (PW-8) and Wardichand (PW-13), independent attesting witnesses were also associated.

At about half past six in the morning, one motorcycle came from Pratapgarh side, which was apprehended by the police party. The person who was driving the motorcycle, disclosed his name as Shamshuddin and pillion rider disclosed her name to be Smt. Krishna Kanwar. Both the persons were apprised of the secret information that they were carrying contraband heroin and, therefore, their search is to be conducted and, if they desire, same can be undertaken in the presence of a Magistrate or a Gazetted Officer. Written notices (Exb.P-9 and P-10 respectively) were given to them whereupon both of them wanted to be searched by Dy. S.P. Prassan Kumar Khamesara (PW-16) himself.

Thereafter their personal search was conducted in the presence of not only police personnel but also in the presence of attesting witnesses Yudhisthar (PW-8) and Wardichand (PW-13). A plastic bag was found tied on the stomach and waist of Shamshuddin in which 2 Kgs. heroin was kept. Similarly, from the personal search of Smt. Krishna Kanwar, 600 gms. heroin was recovered. They were not having any license to carry the above contraband; therefore, same was seized and two samples of 30 gms. from each lot were drawn and sealed separately. The remaining mal-mudda was also sealed separately. Seizure memo, (Exb.P-3) was prepared simultaneously, on which thumb impression of not only both the accused persons but signatures & thumb impression of both the attesting witnesses and police party were taken, and seal impression was placed on the memo. The sealed articles were deposited in Malkhana.

Upon interrogation, Shamshuddin gave a disclosure statement (Exb.P-33) and regarding Rs.33,000/- which he earned by selling heroin and other household articles purchased from such earning. Thereafter, Shamshuddin took the police party to his house in village Batalganj (U.P.) and in the presence of Kanhaiya Lal and Magni Ram, attesting witnesses, Rs.33,000/-, an FDR of Rs.20,000/- dated 30th May, 1994 issued by SBBJ Branch, Chetak Circle, Udaipur were recovered. Other household articles and jewellery were also recovered vide Exb.P-5.

Shamshuddin also disclosed that the contraband heroin so seized from both the accused was purchased from Mangi Lal and Nathu Singh. This led to arrest of both of these persons, and upon their disclosure statement, their houses were also searched on 6.7.1994 from 4.00 p.m. to 6.00 p.m. 27 gms. heroin was recovered from the house of Mangi Lal whereas 225 gms. heroin was recovered from house of Nathu Singh. Seizure memos Exb.P-1 and P-2 respectively were prepared. Rupees 41,980/- were recovered from the house of Nathu Singh. Other necessary memos were prepared.

After completion of investigation, charge sheet was placed. Accused persons pleaded innocence and in order to substantiate their plea examined seven witnesses. The Trial

Court found two of the accused persons guilty, but acquitted Mangi Lal and Nathu Singh as noted above. Convicted accused persons preferred appeals before the High Court. State also filed an appeal questioning the acquittal. Before the High Court it was submitted that no independent witness was examined and in addition there was non-compliance of mandatory provision contained in Sections 42, 50 and 57 of the Act. The High Court did not find any substance and upheld the conviction and the sentence. The appeal filed by the State of Rajasthan questioning acquittal of Nathu Singh and Mangi Lal was also dismissed holding that there was no infirmity in the conclusions of the Trial Court.

In support of the appeal filed by Smt. Krishan Kanwar, learned counsel for the appellant submitted that this is a case where the prosecution has not tendered evidence of any independent witness. Only official witnesses have been examined. The independent witnesses who were examined did not support the prosecution version and, in fact, stated that they only put signatures on blank papers; the arrest of the accused persons was done on 4.7.1994 and not on 6.7.1994 as claimed. There are certain suspicious circumstances which corrode prosecution version, about safe dispatch of the alleged collected samples. Though the case of the prosecution was that alleged contraband articles were procured by the accused Shamshuddin and Smt. Krishan Kanwar from Mangi Lal and Nathu Singh, they have been acquitted, and therefore, the source of procurement as allegedly done by the accused has not been established. The quantity recovered from Smt. Krishan Kanwar cannot be said to be huge quantity, as observed by the Trial Court and the High Court. It was a fairly small quantity. The evidence regarding alleged search of accused-appellant Smt. Krishan Kanwar by lady constable (PW-5) is also full of contradictions. No reliance should be placed on her evidence. It was a fairly small quantity. Residually it was submitted that the sentence of 14 years and fine of Rs.2 lakhs is extremely high.

Per contra, learned counsel for the State supported the judgment and conviction and submitted that three high placed officials were involved in the process of search and seizure. There is no reason as to why they would falsely implicate the accused persons. PW-16 monitored the entire operation in the presence of Addl. S.P. Pratapgarh (PW-14). The S.P. was also present though he has not been examined as witness. The moment the information was received, there was communication to the higher authorities, and therefore, there is no violation of Section 42 as alleged. The requirements of Section 50 were complied with by intimating the accused of his option and choice and the existence of his right of being searched by the police officer (PW-16) or by a gazetted officer. The accused opted to be searched by the police officer. So, there is no violation as alleged. So far as samples are concerned, the forensic laboratory report clearly indicates that the samples were received sealed and tags, seals were in tact and on analysis found to be heroin.

It is seen that Exb.P-32 contains the secret information that was received by the Dy. S.P. (PW-16). Constable Indermal (PW-9) had categorically stated that he had taken the intimation to the S.P. and the Addl. S.P. The envelope was handed over to the S.P. at 9.00 p.m. and at 11.00 p.m. to the S.P. Pratapgarh and Chhoti Sadri. On the

same day, at about 4.00 a.m. he returned to the police station. The Addl. S.P. has been examined as PW-14 and also presence of S.P. has been deposed by the witnesses. This clearly goes to show that there was receipt of information dispatched by Dy. S.P. PW-16. That being so, merely because particulars of the dispatch number were not stated that would not corrode credibility of the evidence of the witnesses examined to establish that the information was conveyed to the higher officials.

The requirements vis-à-vis Sections 42 and 50 have been dealt with in many cases, more particularly by a Constitution Bench in *State of Punjab v. Baldev Singh* (1999 (6) SCC 172). In para 17 the conclusions in an earlier judgment *State of Punjab v. Balbir Singh* (1994 (3) SCC 299 at para 25) were quoted and approved. We are concerned with conclusions (2-C) and (3) which read as follows:

"(2-C) Under Section 42(1) the empowered officer if has a prior information given by any persons, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc. he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.

(3) Under Section 42(2) such 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 total non-compliance of this provision the same affects the prosecutions case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case."

Section 42 deals with power of entry, search, seizure and arrest without of authorization. The provision reads as follows:

"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, 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) 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 :

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."

Section 42 enables certain officers duly empowered in this behalf by the Central or State Government, as the case may be, to enter into and search any building, conveyance or enclosed place for the purpose mentioned therein without any warrant or authorization. Section 42 deal with "building, conveyance or enclosed place" whereas Section 43 deals with power of seizure and arrest in public place. Under sub-section (1) of Section 42 the method to be adopted and the procedure to be followed have been laid down. If the concerned officer has reason to believe from personal knowledge, or information given by any person and has taken down in writing, that any narcotic drugs or substance in respect of which an offence punishable under Chapter IV of the Act has been committed or any other articles which may furnish evidence of the commission of such offence is kept or concealed in any "building or conveyance or enclosed place" he may between sunrise and

sunset, do the acts enumerated in clauses (a), (b), (c) and (d) of sub-section (1).

The proviso came into operation if such officer has reason to believe that search warrant or authorization cannot be obtained without affording opportunity for the concealment of evidence or facility for the escaped offender, he may enter and search such building, conveyance or enclosed place any time between sunrise and sunset after recording grounds of his belief. Section 42 comprises of two components. One relates to the basis of information i.e. (i) from personal knowledge (ii) information given by person and taken down in writing. The second is that the information must relate to commission of offence punishable under Chapter IV and/or keeping or concealment of document or article in any building, conveyance or enclosed place which may furnish evidence of commission of such offence. Unless both the components exist Section 42 has no application. Sub-section (2) mandates as was noted in Baldev Singh's case (supra) that 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. Therefore, sub-section (2) only comes into operation where the officer concerned does the enumerated acts, in case any offence under Chapter IV has been committed or documents etc. are concealed in any building, conveyance or enclosed place. Therefore, the commission of the act or concealment of document etc. must be in any building, conveyance or enclosed place.

The Trial Court and the High Court after analyzing the evidence have come to hold that there was compliance of Section 42(2) in the sense that requisite documents were sent to the superior officer. Though learned counsel for the appellant tried to submit that there was no definite evidence about sending copies of the requisite documents to the superior officers, yet in view of the analysis of evidence done by the trial Court and also by the High Court, with which no infirmity of any kind could be substantiated effectively, we do not find any substance in the plea that there was violation of Section 42(2).

So far as the alleged non-compliance of Section 50 is concerned, 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), *Baldev Singh's case* (supra), *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 cast 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).

A similar question was also examined in Madan Lal and Anr. v. State of Himachal Pradesh (2003 (6) Supreme 382).

The quantity recovered by no stretch of imagination is small. Further, nothing could be shown as to how there was violation of Section 57 of the Act. The safe custody of seized articles and samples has been established by cogent evidence. Forensic Laboratory report shows that the samples were received in sealed conditions with seals and tags in tact. That being so, there is no infraction as alleged.

When the factual position is tested on the legal principles indicated above, the inevitable conclusion is that the prosecution has established its case beyond a shadow of doubt and the conviction and sentence imposed are well merited. The appeal filed by the accused Smt. Krishna Kanwar stands dismissed.

Coming to the appeal filed by the State of Rajasthan, questioning acquittal of Nathu Singh and Mangi Lal, we find that the Trial Court and the High Court found lack of material to connect them with the crime. The Trial Court categorically observed that the requirements of Section 42(1) and 42(2) were not complied with. The houses of these accused were straightaway searched. Even there was no compliance with the requirements of Sections 50 though there was personal search involved. It was submitted by learned counsel for the State that on the basis of information given by the co-accused, recovery was made and, therefore, Section 27 of the Indian Evidence Act, 1872 was applicable. The so-called disclosure is allegedly made by accused Shamshuddin and Smt. Krishan Kanwar. Here again the Courts below have found evidence to be inadequate.

In view of the infirmities noticed by the Trial Court and the High Court, they were justified in directing acquittal of Nathu Singh and Mangi Lal. The said appeal is sans merit and stands dismissed.

Both Criminal Appeal Nos. 52 and 53 of 2003 are accordingly dismissed.