

CASE NO.:

Appeal (crl.) 634 of 2003

Appeal (crl.) 1122 of 2003

PETITIONER:

Prabha Shankar Dubey

RESPONDENT:

State of Madhya Pradesh

DATE OF JUDGMENT: 02/12/2003

BENCH:

DORAISWAMY RAJU & ARIJIT PASAYAT

JUDGMENT:

J U D G M E N T

ARIJIT PASAYAT, J

These two appeals relate to the common judgment rendered by a learned Single Judge of the Madhya Pradesh High Court at Jabalpur Bench upholding conviction of the appellants (hereinafter referred to as the accused by their respective names) for commission of offence punishable under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the 'Act'). In addition to custodial sentence of 10 years, a fine of Rs.1,00,000/- was imposed.

Prosecution version as unfolded during trial is as under:

On 3.11.1998 S.B. Shrivastava (PW-6) received information that two persons in possession of opium were going on scooter No.M.P.-04-R-7693 from the side of new jail to Gandhi Nagar. This information was recorded at Serial No.216 in Roznamcha and transmitted to the C.S.P. as per Ex.P-1. The accused persons were stopped and apprised through the notices Ex.P-10 and Ex.P-11 that if they so desire, can be taken to a Magistrate or a gazetted officer for search. They opted to be searched by him. On their search 200 grams of opium was found on the "person" of each of them. It was seized as per seizure memos Ex.P-4 and Ex.P-6. Samples of 10 grams each were taken and sealed. The seized opium in sealed condition was deposited in Malkhana of the police station. The crime was registered as per Ex.P-12. The information relating to search and arrest of the accused persons was sent to the superior officer on 5.11.1998 as per Ex.P-2. The sealed samples were sent to the Forensic Science Laboratory and as per report Ex.P-14, the commodity which was seized was found to be opium. The accused persons pleaded not guilty. Their defence was that they have been falsely implicated.

The trial Court held that the testimony of the investigating officer to be reliable and unbreakably supported by the Onkar Singh Kushwaha (PW-1) and Rajindra Singh Yadav (PW-3)-Police Constable, who accompanied him though the two panch witnesses Ramesh (PW-4) and Yakoob Khan (PW-5) did not support the prosecution version. The trial Court held that there was full compliance with the statutory requirements contained in Sections 42, 50, 55 and 57 of the Act and, therefore, convicted and sentenced the appellants as afore-noted. Appeals before the High Court as indicated at the threshold did not bring any relief to the accused-appellants.

In support of the appeals, learned counsel appearing for the

accused-appellants mainly focused on alleged non-compliance with the requirements of Section 50 of the Act. According to them, mere asking the accused as to whether they would like to be searched by the Gazetted Officer or the Magistrate is not sufficient compliance of the requirements embodied in Section 50 of the Act. By merely asking them what is to be done is seeking their opinion and not making them aware of their right. Great emphasis is laid on certain observations made by a Constitution Bench in *State of Punjab v. Baldev Singh* (1999 (6) SCC 172). With reference to the questions that were formulated for determination in *Baldev Singh's* case (supra), it was submitted that the sanctity that is attached to the compliance with the requirements has to be culled out from references made to the principles under the Preventive Detention Laws, The Fifth Amendment to the American Constitution and the imperative and obligatory nature of the duty as indicated in *D.K. Basu v. State of West Bengal* (1997 (1) SCC 416). The Act provides stringent measures attached for infraction. That itself brings in the necessity to ensure strict compliance with the requirements. What has been done in the instant case is not in any way compliance with the requirements as there was no specific information given about the right. It is pointed out that in some cases, this Court has said that substantial compliance would be sufficient which is against the settled position in law that in respect of penal statutes substantial compliance will not be sufficient.

In response, learned counsel for the State submitted that the purpose of informing the accused is to ensure that there is transparency and is aimed at ruling out allegations of false implication. There is no specific manner in which the information/intimation is required to be given. The accused did not opt to be searched by the Gazetted Officer or the Magistrate even though it was pointed out to him that he had the choice. It was not as if he had limited option. The search could be conducted in the presence of the named officers to the exclusion of the officer making the offer for the search if accused so chose. According to learned counsel, before the Constitution Bench in *Baldev Singh's* case (supra) the form of information/intimation aspect was not under consideration.

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. In the case at hand the information was conveyed in the following manner:

"By way of this notice you are informed that we have received information that you are illegally carrying opium with you, therefore, we are required to search your scooter and you for this purpose. You would like to give me search or you would like to be searched by any gazetted officer or by a magistrate".

In response to the aforesaid intimation each of the accused gave in writing as follows:

"Sir, I have no objection if you search me or my scooter".

Sd/-
Ram Vilas

Sd/-
Prabhashankar
3.11.1998

Sd/-
at 14.20 P.M.
3.11.98

Sd/-
Thana Shahjaibad
at 14.25 P.M.
Thana Shahjaibad".

The notice in the present case has great similarity with what was conveyed to the accused in *Joseph Fernandez v. State of Goa* (2000 (1) SCC 707). It was inter alia held in the said case as follows:

"2. Learned counsel tried to highlight a point that Section 50 of the Act has not strictly been complied with by PW-8, the officer who conducted the search. According to the learned counsel for the appellant the searching officer should have told the person who was subjected to search that he had a right to be searched in the presence of a gazetted officer or a Magistrate. In this case PW-8 has deposed that she told the appellant that if he wished he could be searched in the presence of the gazetted officer or a Magistrate to which the appellant had not favourably reciprocated. According to us the said offer is a communication about the information that the appellant has a right to be searched so. It must be remembered that the searching officer had only Section 50 of the Act then in mind unaided by the interpretation placed on it by the Constitution Bench. Even then the searching officer informed him that "if you wish you may be searched in the presence of a gazetted officer or a Magistrate". This according to us is in substantial compliance with the requirement of Section 50. We do not agree with the contention that there was non-compliance with the mandatory provision contained in Section 50 of the Act".

(Underlined for emphasis)

Though, learned counsel for the appellants submitted that this was a case where the Court erroneously held that substantial compliance would

be sufficient, we find that the underlined portion is what was held by the Court to be information of the right. The offer in the present case is almost a replica of what was said in that case.

Though there cannot be any quarrel with the general principle highlighted by learned counsel for the appellants that if a thing is required to be done in a particular way it should be done in that way, the position here is different in view of our conclusions that the requirements of Section 50 of the Act were sufficiently complied with. The general principle as noted has been stated illuminatingly in *Nazir Ahmad v. King-Emperor* (AIR 1936 P.C. 253), and later by this Court in *State of Uttar Pradesh v. Singhara Singh and Ors.* (1964 (4) SCR 485). What the concerned officer is required to do is to convey about the choice the accused had. The accused (suspect) has to be told in a way that he becomes aware that the choice is his and not of the concerned officer, even though there is no specific form. The use of the word 'right' at relevant places in the decision of Baldev Singh's case (supra) seems to be to lay effective emphasis that it is not by the grace of the officer the choice has to be given but more by way of a right in the 'suspect' at that stage to be given such a choice and the inevitable consequences that have to follow by transgressing it.

The use of the expression 'substantial compliance' was made in the background that the searching officer had Section 50 in mind and it was unaided by the interpretation placed on it by the Constitution Bench in Baldev Singh's case (supra). A line or a word in a judgment cannot be read in isolation or as if interpreting a statutory provision, to impute a different meaning to the observations.

Above being the position, we find no substance in the plea that there was non-compliance with the requirements of Section 50 of the Act.

It was pleaded that the requirements of Section 57 have not been complied with. There was no material placed either before the trial Court or the High Court to substantiate such a plea. The grievance in this regard does not merit any consideration, leave alone the impact of it on the guilt and conviction of the accused.

Additionally, it may also be noticed that while giving statement under Section 313 of the Code of Criminal Procedure, 1973 (for short the 'Code'), the accused did not say that he was unaware of his rights or that he was misled on that account in any manner. On the contrary, in general and vague manner it was only said that he did not know or he had no idea of the allegations. Though that by itself is not sufficient to convict accused, in view of the procedural safeguards required to be observed by compliance with the requirements of Section 50, yet that is of some relevance in appreciating the grievance, now sought to be ventilated. There is no infirmity in the impugned judgment to warrant interference. The appeals are accordingly dismissed.