

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 1145 OF 2001

Union of India

...Appellant

Versus

Satrohan

...Respondent

J U D G M E N T

Dr. ARIJIT PASAYAT, J.

1. Challenge in this appeal is to the judgment of the acquittal passed by learned Single Judge of the Allahabad High Court, Lucknow Bench, directing acquittal of the respondent (hereinafter referred to as the 'accused') by setting aside the judgment of conviction recorded by learned Additional District and Sessions Judge, Lucknow in Criminal Appeal No.65 of 1993. The trial Court had convicted the respondent for offences punishable under Section 8(c) and 15

of the Narcotics Drugs and Psychotropic Substances Act, 1985 (in short the 'Act') and sentenced to undergo RI for 10 years and fine of rupees one lakh with default stipulation.

2. Prosecution version in a nutshell is as follows:

On the basis of secret information Sri Naseem Ahmad, an Inspector of Narcotics Department along with other officials raided the house of the respondent on 20.11.1992 at about 8.00 a.m. in village Dadari Jamalpur. The house of the respondent was searched and from his house 29 bags containing poppy straws were recovered. The respondent could not explain legal possession of poppy straws weighing 309 kgs. The respondent was arrested and after investigation charge sheet was submitted against him. The respondent denied the possession and ownership of the property in question and claimed trial.

The trial Court found the evidence adduced to be clear and cogent and directed conviction and imposed sentence as

afore-noted. In appeal, the High Court directed acquittal by a practically non-reasoned order holding that there was non-compliance of Sections 42(2) and 50 of the Act. It was noted that the Narcotics Department has given licence to the father of the respondent for cultivation of opium and if there had been recovery of poppy straws it might be relatable to the ownership of father of the respondent.

3. Learned counsel for the appellant submitted that the trial Court had relied upon the confession of the accused respondent and the grounds on which the High Court directed acquittal are (i) non examination of independent witnesses; (ii) lack of evidence to show exclusive ownership; and (iii) the alleged non compliance of Sections 42(2) and 50 of the Act.

4. It is pointed out that Section 50 is not applicable to the case. Additionally, under Section 57 secret information has to be sent and the particulars of seizure and arrest have to be sent. The records if asked for could have been produced. In the instant case there is no evidence led or not even any

question was asked about absence of records. In the alternative, the inspector was a Gazetted Officer and, therefore, even if it is conceded for the sake of argument that there is any incorrect reference, the acts are covered under Section 41 and not under Section 42.

5. Learned counsel for the respondent on the other hand submitted that the confessional statement could not have been relied upon. The statement was recorded by PW-2 and by the investigating officer (PW-6) on 20.11.1992. There could not have been any recording of statement by PW-6 as he was entrusted with investigation on 3.12.1992. It is pointed out that the investigating officer was not a Gazetted Officer. Since authorization was obtained Section 57 comes into play. It is pointed out that there is licence of the father also. Therefore, the High Court's order does not suffer from any infirmity.

6. Section 2(xv) and Section 2(xviii) define "opium" and "poppy straws" respectively. It is the stand of the respondent that since there was licence of opium, obviously there is

presumption that there was licence of poppy straws. As a matter of fact the High Court did not direct acquittal on the ground that there was licence for poppy straws also. The evidence on record clearly shows that the expressions “opium” and “poppy straws” are not interchangeable as contended by learned counsel for the respondent, as Section 2(xiv) clearly makes out a distinction between opium and poppy straws. So far as the role of PW-6 is concerned, it is to be noted that there is no reference to the stand presently highlighted by the High Court.

7. Undisputedly, there are two different entries for opium and poppy straws. Opium appears at Sl. No.92 while poppy straws appear at Sl. No.110. The statement of the accused-respondent in terms of Section 67 throws considerable light on the controversy. In the statement recorded there was no retraction and in fact during examination under section 313 of the Code of Criminal Procedure, 1973 (in short the ‘Code’) while answering question No.4 it was stated that there was no confession. The confessional statement was recorded on

20.11.1992 and the statement under Section 313 of the Code was recorded on 6.2.1999. Therefore, there has been no retraction at any point of time. The position is also clear from Section 57 of the Code. At the time of production before the Magistrate, there was no allegation of any torture as presently submitted. In this connection a few decisions of this Court need to be noted.

8. In Kanhaiyalal v. Union of India (2008 (1) SCALE 165) at para 7 it was noted as follows:

“7. Since the appellant Kanhaiyalal was convicted on the basis of the statement made by him under Section 67 of the NDPS Act, a question has been raised whether such statement made to an officer within the meaning of Section 42 of the said Act could be treated as a confessional statement and whether the accused could be convicted on the basis thereof in the absence of any other corroborative evidence.”

9. Similarly in A.K. Mehaboob v. The Intelligence Officer, Narcotics Control Bueau (JT 2001 (1) SC 614) it was observed as follows:

“4. Smt. Malini Poduval, learned counsel for the appellants contended that Exhibit P-8 cannot be relied on for more than one reason. One is that the said statement had been retracted by the accused himself. Second is that on 11.8.1994 appellant- Naushad informed the Magistrate in writing that the said statement had been coaxed out from him. The third is that the said retracted confession had no corroboration and therefore cannot be made the basis for conviction.

5. There is nothing to indicate that Exhibit P-8 had been elicited from A-2 by any coercion, threat or force and therefore the learned Single Judge of the High Court had spurned down that contention. Regarding the complaint alleged to have been made by appellant-Naushad on 11.3.1994 we have perused it. His case therein was that he offered himself to be a witness in the case and some reward was offered for it. It was on the said offers that he agreed to sign the said statement. It must be remembered that appellant-Naushad has no case that when he was produced before the Magistrate, immediately after his arrest, he made any grievance of any maltreatment administered to him by the members of the Narcotics Control Bureau. Wisdom downed on him (when the complaint dated 11.3.1994 was filed) to put up an advance defence against the statement given by him under his own signature. Even

then he did not think it necessary to make any allegation that any intimidatory tactic, much less any third degree method had been applied on him. His case in the said complaint that a reward was offered to him and hence he agreed to sign the statement is contrary to the present stand adopted by him that he was coerced and threatened to make such a statement. The learned Single judge had rightly repelled the contentions made on behalf of appellant- Naushad relating to Exhibit P-8.”

10. The inferential conclusion that the articles seized might have been recovered by the father's licence is a conclusion without any foundation and basis.

11. So far as the fulfillment of the requirement of Section 57 of the Act is concerned it is to be noted that the legal position was stated by this Court in T. Thomson v. State of Kerala and Anr. (2002 (9) SCC 618) and in State, NCT of Delhi v. Malvinder Singh (JT 2007 (9) SC 283). In Malvinder Singh's case (supra) at para 6, it was observed as follows:

“6. At this juncture, it would be relevant to take note of that has been stated by this Court

in T. Thomson v. State of Kerala and Anr. At para 5 it was observed as follows:

“5. Learned Senior counsel further argued that the record alleged to have been prepared by PW-1 on getting information regarding the movement of the appellants has not been produced in court. But he conceded that no motion was made on behalf of the appellants to call for the said record. There is no statutory requirement that such a record should be produced in the Court as a matter of course. We are, therefore, not disposed to upset the finding on that score either.”

12. So far as the applicability of Section 42 is concerned few decisions need to be noted.

13. In M. Prabhulal v. The Assistant Director, Directorate of Revenue Intelligence (JT 2003 (2) Supp SC 459) it was noted as follows:

“8. Now, we come to the last and rather more serious objections raised on behalf of the appellants regarding the non-compliance with Section 42 of the NDPS Act vitiating the conviction which looks quite formidable but

only on the first impression and not on its deeper examination. The contention of Mr R.K. Jain is that the view of the High Court that when a Gazetted Officer himself conducts a search it is not necessary to comply with Section 42(2) of the Act, is clearly erroneous. Section 42(2) provides 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. This was the statutory provision at the relevant time. By the Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2001 which came into force on 2-10-2001, Section 42(2) was amended whereunder the information taken down in writing under sub-section (1) or grounds of belief recorded under the proviso thereto are required to be sent within seventy-two hours to officers' immediate official superior. The contention is that the officer who searched and seized the contraband did so on information received by him as per Ext. PW 1 but the said information was not forwarded to his superior officer as contemplated in Section 42(2) of the NDPS Act, thus vitiating the entire prosecution. Further argues the counsel that the respondent after grant of bail to the appellants by the High Court taking into consideration the non-compliance with Section 42(2) has tried to fill in the lacuna with a view to show the compliance of this mandatory provision.

9. The officer who conducted the arrest, search and seizure was an empowered Gazetted Officer of the Department. This fact is

not in dispute. According to Mr Vasdev, learned Senior Counsel for the respondent, Section 42(2) is not applicable when an empowered Gazetted Officer conducts the arrest, search and seizure. The counsel submits that there was no obligation on the officer to comply with the requirement of Section 42(2) of the NDPS Act. It was also contended, in the alternative, that Section 42 (2) of the NDPS Act was complied with.

14. Section 41(1) which empowers a Magistrate to issue warrant for arrest of any person whom he has reason to believe to have committed any offence punishable under the NDPS Act or for search, has not much relevance for the purpose of considering the contention. Under Section 41(2) only a Gazetted Officer can be empowered by the Central Government or the State Government. Such empowered officer can either himself make an arrest or conduct a search or authorize an officer subordinate to him to do so but that subordinate officer has to be superior in rank to a peon, a sepoy or a constable. Sub-section (3) of Section 41 vests all the powers of an officer acting under Section 42 on three types of officers (i) to whom a warrant under sub-section (1) is addressed, (ii) the officer who authorized the arrest or search under sub-section (2) of Section 41, and (iii) the officer who is so authorized under sub-section (2) of Section 41. Therefore, an empowered Gazetted Officer has also all the powers of Section 42 including the power of seizure. Section 42 provides for procedure and power of entry, search, seizure and arrest without warrant or authorization.

An empowered officer has the power of entry into and search of any building, conveyance or place, break open any door, remove obstruction, seize contraband, detain, search and arrest any person between sunrise and sunset in terms provided in sub-section (1) of Section 42. In case of an emergent situation, these powers can also be exercised even between sunset and sunrise without obtaining a search warrant or authorization, in terms provided in the proviso to sub-section (1) of Section 42. Sub-section (2) of Section 42 is a mandatory provision. In terms of this provision a copy of information taken down in writing under sub-section (1) or ground recorded for the belief under the proviso thereto, is required to be sent by the officer to his immediate superior official. It is clear from Section 41(2) that the Central Government or State Government, as the case may be, can only empower an officer of a gazetted rank who can either himself act or authorize his subordinate on the terms stated in the section. Under sub-section (1) of Section 42, however, there is no restriction on the Central Government or the State Government to empower only a Gazetted Officer. But on an officer empowered under sub-section (1) of Section 42, there are additional checks and balances as provided in the proviso and also provided in sub-section (2) of Section 42. It is clear from the language of sub-section (2) of Section 42 that it applies to an officer contemplated by sub-section (1) thereof and not to a Gazetted Officer contemplated by sub-section (2) of Section 41, when such a Gazetted Officer himself makes an arrest or conducts search and seizure. It would be useful to also notice Section 43 which relates

to power of seizure and arrest in a public place. Any officer of any of the departments mentioned in Section 42 is empowered to seize contraband etc. and detain and search a person in any public place or in transit on existence of ingredient stated in Section 43. It can, thus, be seen that Sections 42 and 43 do not require an officer to be a Gazetted Officer whereas Section 41(2) requires an officer to be so. A Gazetted Officer has been differently dealt with and more trust has been reposed in him can also be seen from Section 50 of the NDPS Act which gives a right to a person about to be searched to ask for being searched in the presence of a Gazetted Officer. The High Court is, thus, right in coming to the conclusion that since the Gazetted Officer himself conducted the search, arrested the accused and seized the contraband, he was acting under Section 41 and, therefore, it was not necessary to comply with Section 42. The decisions in *State of Punjab v. Balbir Singh*, *Abdul Rashid Ibrahim Mansuri v. State of Gujarat* and *Beckodan Abdul Rahiman v. State of Kerala* on the aspects under consideration are neither relevant nor applicable.”

14. Section 67 reads as follows:

“67. Power to call for information, etc.

Any officer referred to in Section 42 who is authorised in this behalf by the Central Government or a State Government may, during the course of any enquiry in connection

with the contravention of any provision of this Act, -

(a) Call for information from any person for the purpose of satisfying himself whether there has been any contravention of the provisions of this Act or any rule or order made thereunder;

(b) Require any person to produce or deliver any document or thing useful or relevant to the enquiry;

(c) Examine any person acquainted with the facts and circumstances of the case.”

15. Section 41(2) deals with two situations. One is relatable to Gazetted Officer while in the other case the Gazetted Officer may authorize his subordinate to do the relevant act or may do it himself. Section 41(3) refers to the power under Section 42 which refers to subordinates.

16. In the confessional statement the accused has clearly stated about the ownership. So, there has been no retraction at considerable length of time.

17. Above being the position, the High Court was clearly in error by setting aside the judgment of the trial Court. We set aside the judgment of the High Court and restore that of the trial Court. The appeal is allowed to the aforesaid extent.

.....J.
(Dr. ARIJIT PASAYAT)

.....J.
(P. SATHASIVAM)

New Delhi,
July 14, 2008