

CASE NO.:
Appeal (crl.) 31 of 2000

PETITIONER:
KHET SINGH

Vs.

RESPONDENT:
UNION OF INDIA

DATE OF JUDGMENT: 20/03/2002

BENCH:
R.P. Sethi & K.G. Balakrishnan

JUDGMENT:

K.G. Balakrishnan, J.

This appeal is directed against the judgment of the High Court of Rajasthan challenging the conviction and sentence of the appellant under Sections 17, 18 & 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "NDPS Act"). Appellant had been sentenced to undergo 10 years' rigorous imprisonment and a fine of Rs. 1 lakh and in default of payment of fine further to undergo two years and six months' rigorous imprisonment.

Appellant Khet Singh was tried along with one Kanhaiya Lal for the aforesaid offences and Kanhaiya Lal was acquitted by the Sessions Court. The case of the prosecution is that on 6.5.1989, PW6 Shri Narain Das Lakhara, Inspector, Customs Department, Jaisalmer, along with the Superintendent of Customs and two other constables was proceeding on patrolling and checking duty towards Ramgarh. Near Brahamsar crossing, they started checking several motor vehicles as it was suspected that there might be drug trafficking. In truck no. RJC 1472, the appellant was found sitting with a cloth basket in his hand. During the search, a polythene bag was found in the basket which contained some black substance suspected to be opium. Appellant Khet Singh and Kanhaiya Lal along with the cloth basket were brought to the Office of the Customs. In the office of the Customs, the opium was seized, samples were taken from it and were sealed. Appellant and Kanhaiya Lal were questioned. The appellant stated that he had purchased the seized opium from Kanhaiya Lal. The samples were sent for chemical examination and the report from the Forensic Science Laboratory revealed that the sample was 'opium'.

The appellant contended before the trial court that there was violation of Section 50 of the NDPS Act as the search and seizure was not made in the presence of a Gazetted Officer or a Magistrate and that the appellant was not told in advance that he had a right to demand that the search to be effected shall be in the presence of a Magistrate or a Gazetted Officer. This plea was rejected on the ground that search and checking was being conducted of the vehicles and it was during the course of this general search that the appellant was found travelling with the opium and hence Section 50 of the NDPS Act is not applicable and that the same would apply in the case of a search on the person of the appellant. The same plea was raised before the High Court and was rightly rejected.

The learned Counsel, Mr. Doongar Singh who appeared on behalf of the appellant raised a contention that though the search and seizure was effected

near Brahamsar crossing, no mahazar was prepared and no samples were taken from the contraband article; the seizure memo was prepared in the Office of the Customs Department and the samples were also taken at the Office of the Customs Department, and that this has caused serious prejudice to the appellant. According to the appellant's Counsel, the seizure memo should have been prepared at the place where the contraband article was seized from the accused. He further pointed out that the recovery was effected but the contraband article was not sealed at the spot and the truck along with the driver and the appellant were brought to the office of Customs Department at Jaisalmer and that there were about 10 other persons in the truck and all of them were allowed to go. The learned counsel further contended that had the search mahazar been prepared at the spot, it could have been satisfactorily proved that it was from the appellant's possession that the bag was taken and it is doubtful whether the bag belonged to the appellant or to any other passengers.

It is true that the search and seizure of contraband article is a serious aspect in the matter of investigation related to offences under the NDPS Act. The NDPS Act and the rules framed thereunder have laid down a detailed procedure and guidelines as to the manner in which search and seizure are to be effected. If there is any violation of these guidelines, Courts would take a serious view and the benefit would be extended to the accused. The offences under NDPS Act are grave in nature and minimum punishment prescribed under the Statute is incarceration for a long period. As the possession of any narcotic drugs or psychotropic substance by itself is made punishable under the act, the seizure of the article from the appellant is of vital importance.

Section 51 of the NDPS Act provides that the provisions of the Code of Criminal Procedure, 1973 shall apply in respect of warrants, arrests, searches and seizure in so far as they are not inconsistent with the provisions of the NDPS Act. Section 165 of the Code confers powers on the police to search any place without search warrant. 'Place' has been defined in Section 2(p) of the Code as one which includes house, building, tent, vehicle and vessel. Section 165 of the Code empowers a police officer making an investigation to conduct search without a warrant if he has reasonable grounds for believing that anything necessary for the purpose of an investigation into any offence may be found and that he is of the opinion that undue delay may frustrate the object of the search. Further, Section 100 of the Code lays down the detailed procedure and guidelines regarding the manner in which search is to be conducted of a closed place.

In the present case, the learned Counsel for the appellant contended that the police officer did not prepare the seizure mahazar at the spot and thereby violated the provisions of law. Therefore, it is argued that the evidence collected by the prosecution was not admissible. The learned Counsel further contended that the directions contained in the Standing Instructions issued by the Narcotics Control Bureau were not complied with. Our attention was drawn to clause 1.5 of the Standing Instruction No. 1/88 issued by the Narcotics Control Bureau, New Delhi, which is to the following effect :-

" Place and time for drawal of sample

Samples from the Narcotic Drugs and Psychotropic Substances seized, must be drawn on the spot of recovery, in duplicate, in the presence of search(Panch) witnesses and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchnama drawn on the spot."

The learned Counsel for the appellant also pointed out to us Clause 3.8 of the Standing Order No. 2/88 issued by the Narcotics Control Bureau, New Delhi, which reads as follows :-

Each seizing officer should deposit the drugs fully packed and sealed with his seal in the godown within 48 hours of seizure of such drugs, with a forwarding memo indicating:

- (i) NDPS Crime No. as per crime and prosecution register under the new law (i.e. NDPS Act)
- (ii) Name (s) of accused
- (iii) Reference of test memo
- (iv) Description of drugs in the sealed packages/containers and other goods, if any
- (v) Drug-wise quantity in each package/container
- (vi) Drug-wise number of packages/containers
- (vii) Total number of all packages/containers

The learned Counsel for the appellant contended that these instructions issued by the Narcotics Control Bureau, New Delhi, were not followed and the seizure memo was not prepared at the spot and there was delay in depositing the seized drug in the godown. It was argued that this has caused serious prejudice to the accused and therefore, his conviction is vitiated on that account.

The instructions issued by the Narcotics Control Bureau, New Delhi are to be followed by the officer in-charge of the investigation of the crimes coming within the purview of the NDPS Act, even though these instructions do not have the force of law. They are intended to guide the officers and to see that a fair procedure is adopted by the officer in-charge of the investigation. It is true that when a contraband article is seized during investigation or search, a seizure mahazar should be prepared at the spot in accordance with law. There may, however, be circumstances in which it would not have been possible for the officer to prepare the mahazar at the spot, as it may be a chance recovery and the officer may not have the facility to prepare a seizure mahazar at the spot itself. If the seizure is effected at the place where there are no witnesses and there is no facility for weighing the contraband article or other requisite facilities are lacking, the officer can prepare the seizure mahazar at a later stage as and when the facilities are available, provided there are justifiable and reasonable grounds to do so. In that event, where the seizure mahazar is prepared at a later stage, the officer should indicate his reasons as to why he had not prepared the mahazar at the spot of recovery. If there is any inordinate delay in preparing the seizure mahazar, that may give an opportunity to tamper with the contraband article allegedly seized from the accused. There may also be allegations that the article seized was by itself substituted and some other items were planted to falsely implicate the accused. To avoid these suspicious circumstances and to have a fair procedure in respect of search and seizure, it is always desirable to prepare the seizure mahazar at the spot itself from where the contraband articles were taken into custody.

In the present case, though the article was seized from the accused while he was travelling in a truck, no seizure mahazar was prepared at that time. The accused persons were taken to the office of customs and the seizure mahazar was prepared at the office of customs. The learned Single Judge of the High Court held that no prejudice was caused to the appellant. The learned Counsel for the appellant contended that NDPS Act being a special Statute with provision for severe punishment on the accused found guilty of the offences punishable thereunder, the procedure established by law for search and seizure is to be strictly complied with and any failure to comply with such procedure is to be viewed seriously and any evidence collected shall be made inadmissible under law.

Whether evidence collected by illegal search or seizure is admissible or not was considered by this Court in series of decisions and one of the earliest decisions is the decision of the Constitution Bench in *Pooran Mal vs. The Director of Inspection (Investigation), New Delhi and others*, etc.etc. 1974(1) SCC 345. Though the search in that case was done under the provisions of the Income Tax Act, it is apposite to note the following observation made by this court:-

"So far as India is concerned its law of evidence is modelled on the rules of evidence which prevailed in English Law, and Courts in India and in England have consistently refused to exclude relevant

evidence merely on the ground that it is obtained by illegal search or seizure."

In State of Punjab Vs. Baldev Singh, 1999(6) SCC 172, the Constitution Bench of this Court extensively considered the question whether the procedure laid down under Section 50 of NDPS Act is mandatory or not. It was held that the judgment in Pooran Mal case cannot be understood to have laid down that an illicit article seized during a search of a person, on prior information, conducted in violation of the provisions of Section 50 of the Act, can by itself be used as evidence of unlawful possession of the illicit article on the person from whom the contraband has been seized during the illicit search. In paragraph 45 of the Judgment, Dr. A.S. Anand(Chief Justice) held as under:-

"..Prosecution cannot be permitted to take advantage of its own wrong. Conducting a fair trial for those who are accused of a criminal offence is the cornerstone of our democratic society. A conviction resulting from an unfair trial is contrary to our concept of justice. Conducting a fair trial is both for the benefit of the society as well as for an accused and cannot be abandoned. While considering the aspect of fair trial, the nature of the evidence obtained and the nature of the safeguard violated are both relevant factors. Courts cannot allow admission of evidence against an accused, where the court is satisfied that the evidence had been obtained by a conduct of which the prosecution ought not to take advantage particularly when that conduct had caused prejudice to the accused. If after careful consideration of the material on record it is found by the court that the admission of evidence collected in search conducted in violation of Section 50 would render the trial unfair then that evidence must be excluded.."

In State of H.P. vs. Prithi Chand and Another 1996(2) SCC 37, it was held that it would thus be settled law that every deviation from the details of the procedure prescribed for search does not necessarily lead to the conclusion that search by the police renders the recovery of the articles pursuant to the illegal search irrelevant evidence nor the discovery of the fact inadmissible at the trial. Weight to be attached to such evidence depends on facts and circumstances in each case. The court is required to scan the evidence with care and to act upon it when it is proved and the court would hold that the evidence would be relied upon.

In Radha Kishan vs. State of Uttar Pradesh AIR 1963 SC 822 this Court held that the evidence obtained by illegal search and seizure would not be rejected but requires to be examined carefully. In State of Maharashtra Vs. Natwarlal Damodardas Soni 1980(4) SCC 669 it was held that even if the search was illegal, it will not affect the validity of the seizure and further investigation of the authorities or the validity of the trial which followed on the complaint by the customs officials.

Law on the point is very clear that even if there is any sort of procedural illegality in conducting the search and seizure, the evidence collected thereby will not become inadmissible and the Court would consider all the circumstances and find out whether any serious prejudice had been caused to the accused. If the search and seizure was in complete defiance of the law and procedure and there was any possibility of the evidence collected likely to have been tampered with or interpolated during the course of such search or seizure, then, it could be said that the evidence is not liable to be admissible in evidence.

In the present case, though the mahazar was not prepared at the spot where the accused persons were found to be in possession of the contraband article but the same was done only at the Office of the Customs Department while the accused persons were very much present throughout, there was no allegation or suggestion that the contraband article was, in any way, meddled with by the officers. Therefore, we are of the view that the appellant has rightly been found to be in possession of the opium. We find no reason to interfere with the conviction and sentence entered against the appellant. The appeal is

dismissed accordingly.

J.
(R.P. SETHI)

J.
(K.G. BALAKRISHNAN)

March 20, 2002.

JUDIS