

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 164 OF 2002

Hamidhbai Azambhai Malik

..Appellant

Versus

State of Gujarat

..Respondent

J U D G M E N T

Dr. ARIJIT PASAYAT, J.

1. Challenge in this appeal is to the judgment of the Division Bench of the Gujarat High Court upholding the conviction of the appellant for offence punishable under Section 20 (b)(ii) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short the “NDPS Act”). The learned Additional Sessions Judge, Bharuch had found him guilty under the

aforesaid provision for having committed the offence under Section 8(c) of the NDPS Act. Minimum sentence of 10 years' rigorous imprisonment and a fine of Rs.1,00,000/- with default stipulation was imposed.

2. The appellant, who is the original accused in Sessions Case No. 84 of 1996, was charged for having committed offence punishable under Section 20(b) (ii) of the NDPS Act, on the basis of a complaint lodged by one PSI KD Pandya, LCB Branch, Aharuch District, Complainant in Course of investigation of one snottier offence, registered vide CR No, II 135 of 1995, under the NDPS act, came to know that accused is also possessing and selling the contraband articles at his residence. Upon such information he and other Officers started for raid.

3. Initially, he informed about having received such information to the higher officers, namely D.S.P. and Circle Inspector of Bharuch District, by writing a report in a sealed envelope, and sent it through one Police Constable.

4. On the basis of the said report, entry came to be recorded in Jambusar Police Station Diary at SL. No.17 of 1995 at about 2.30 P.M., the raid was

effected on 15. 12.1995 after calling panchas and other officers and a photographer, and after undertaking other exercise required under law.

5. The raiding party led by Mr. Pundya, PSI, went to the residence of accused, bearing Bharuch Municipal House No, 3132. The door of the house was open, and one person standing there was questioned, who replied that his name was Hamidbhai Azambhai Malik, the accused and the appellant before us. After introducing himself, he prepared a memorandum, to the effect as to whether, accused would like his house to be searched in presence of an Executive Magistrate or a Gazetted Officer, to which, accused replied in the negative. Since, accused had no objection, before starting search, PSI Pandya, took the signature of the accused on the memorandum, produced at Exh. 29.

6. Thereafter, the house was searched in presence of Panchas, and a ladies purse containing 17 closed plastic small bags were found out, containing small tablets. Out of 17, the 16 small plastic bags contained the same weight. Plastic bags were opened and verified and weighed in presence of panchas, photographs were taken and again they were placed in the plastic bags. It was apprehended that on account of the unpleasant odour and smell, it seemed to be contraband articles like 'Charas'. The necessary

procedure for seizure was undertaken and after the procedure was followed, the seal of LCB Branch, Bharuch was applied on the cover. The total weight of the contraband articles, like charas came to 4,900 mgs. The sealed mudammal contraband articles charas thereafter was forwarded to the Director of Forensic Science Laboratory, for examination and report, who upon examination reported, it to be falling within the prohibited and contraband article under the NDPS Act i.e. 'Charas'. The FSL authority had, also, verified the seal and it tallied with the forwarding letter and the item sent. Upon the basis of the report, the accused came to be charged as stated above.

7. In support of the prosecution case, the prosecution placed reliance on as many as nine prosecution witnesses and also on 21 documents. The defence of the accused was of total denial. No defence evidence was led. Upon the analysis and appraisal of the evidence of the prosecution, the learned Addl. Sessions Judge found accused guilty for having committed an offence punishable under Section 20(b) (ii) of the NDPS Act, and after hearing on the quantum of sentence, awarded minimum sentence prescribed i.e. 10 years rigorous imprisonment and a minimum fine of Rs.1,00,000/- and in default, to undergo further simple imprisonment of one year more.

8. The accused preferred an appeal before the high Court which was dismissed as aforesaid. Primary stand was that the officer who conducted the search was not authorized and was not an empowered officer. It was pleaded that there was non-compliance with the requirement of Section 42 (2) of the Act.

9. Learned counsel for the respondent-State on the other hand supported the judgment of the trial court and affirmed by the High Court.

10. Before dealing with the factual aspect certain observations made by this Court in State of Punjab v. Baldev Singh [1999(6) SCC 172] need to be noted:

“9.Sub-section (1) of Section 42 lays down that the empowered officer, if has a prior information given by any person, he should necessarily take it down in writing and where he has reason to believe from his personal knowledge that offences under Chapter IV have been committed or that 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 he may do so without recording his reasons of belief.

10.The proviso to sub-section (1) lays down that if the empowered 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. Vide sub-section (2) of Section 42, the empowered officer who takes down information in writing or records the grounds of his belief under the proviso to sub-section (1), shall forthwith send a copy of

the same to his immediate official superior. Section 43 deals with the power of seizure and arrest of the suspect in a *public place*. The material difference between the provisions of Section 43 and Section 42 is that whereas Section 42 requires recording of reasons for belief and for taking down of information received in writing with regard to the commission of an offence before conducting search and seizure, Section 43 does not contain any such provision and as such while acting under Section 43 of the Act, the empowered officer has the power of seizure of the article etc. and arrest of a person who is found to be in possession of any narcotic drug or psychotropic substance in a public place where such possession appears to him to be unlawful.

17. The trial court in those cases had acquitted the accused on the ground that the arrest, search and seizure were conducted in violation of some of the “relevant and mandatory” provisions of the NDPS Act. The High Court declined to grant appeal against the order of acquittal. The State of Punjab thereupon filed appeals by special leave in this Court. In some other cases, where the accused had been convicted, they also filed appeals by special leave questioning their conviction and sentence on the ground that their trials were illegal because of non-compliance with the safeguards provided under Section 50 of the NDPS Act. A two-Judge Bench speaking through K. Jayachandra Reddy, J. considered several provisions of the NDPS Act governing arrest, search and seizure and, in particular, the provisions of Sections 41, 42, 43, 44, 49, 50, 51, 52 and 57 of the NDPS Act as well as the provisions of the Code of Criminal Procedure relating to search and seizure effected during investigation of a criminal case. Dealing with Section 50, it was held that in the context in which the right had been conferred, it must naturally be presumed that it is imperative on the part of the officer to *inform* the person to be searched of his right that if he so requires he shall be searched before a gazetted officer or Magistrate and on such request being made by him, to be taken before the gazetted officer or Magistrate for further proceedings. The reasoning given in *Balbir Singh case*¹ was that to afford an opportunity to the person to be searched “if he so requires to be searched before a gazetted officer or a Magistrate” he must be made aware of that right and that could be done only by the empowered officer by *informing* him of the existence of that right. The Court went on to hold that failure to inform the person to be searched of that right and if he so requires, failure to take him to the gazetted officer or the

Magistrate, would mean non-compliance with the provisions of Section 50 which in turn would “affect the prosecution case and vitiate the trial”. The following conclusions were arrived at by the two-Judge Bench in *State of Punjab v. Balbir Singh* [1994 (3) SCC 299] (SCC pp. 320-22, para 25)

“25. The questions considered above arise frequently before the trial courts. Therefore we find it necessary to set out our conclusions which are as follows:

(1) If a police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offences as provided under the provisions of CrPC and when such search is completed at that stage Section 50 of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act.

(2-A) Under Section 41(1) only an empowered Magistrate can issue warrant for the arrest or for the search in respect of offences punishable under Chapter IV of the Act etc. when he has reason to believe that such offences have been committed or such substances are kept or concealed in any building, conveyance or place. When such warrant for arrest or for search is issued by a Magistrate who is not empowered, then such search or arrest if carried out would be illegal. Likewise only empowered officers or duly authorized officers as enumerated in Sections

41(2) and 42(1) can act under the provisions of the NDPS Act. If such arrest or search is made under the provisions of the NDPS Act by anyone other than such officers, the same would be illegal.

(2-B) Under Section 41(2) only the empowered officer can give the authorisation to his subordinate officer to carry out the arrest of a person or search as mentioned therein. If there is a contravention, that would affect the prosecution case and vitiate the conviction.

(2-C) Under Section 42(1) the empowered officer if has a prior information given by any person, 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.

To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.

(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 prosecution 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.

(4-A) If a police officer, even if he happens to be an 'empowered' officer while effecting an arrest or search during normal investigation into offences purely under the provisions of

CrPC fails to strictly comply with the provisions of Sections 100 and 165 CrPC including the requirement to record reasons, such failure would only amount to an irregularity.

(4-B) If an empowered officer or an authorised officer under Section 41(2) of the Act carries out a search, he would be doing so under the provisions of CrPC namely Sections 100 and 165 CrPC and if there is no strict compliance with the provisions of CrPC then such search would not per se be illegal and would not vitiate the trial.

The effect of such failure has to be borne in mind by the courts while appreciating the evidence in the facts and circumstances of each case.

(5) On prior information the empowered officer or authorised officer while acting under Sections 41(2) or 42 should comply with the provisions of Section 50 before the search of the person is made *and such person should be informed that if he so requires, he shall be produced before a gazetted officer or a Magistrate as provided thereunder. It is obligatory on the part of such officer to inform the person to be searched. Failure to inform the person to be searched and if such person so requires, failure to take him to the gazetted officer or the Magistrate, would amount to non-compliance of Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial.* After being so informed whether such person opted for such a course or not would be a question of fact.

(6) The provisions of Sections 52 and 57 which deal with the steps to be taken by the officers after making arrest or seizure under Sections 41 to 44 are by themselves not mandatory. If there is non-compliance or if there are lapses like delay etc. then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case.”

23. In *Mohinder Kumar v. State, Panaji, Goa* [(1998) 8 SCC 655] a three-Judge Bench (to which one of us, Sujata V. Manohar, J., was a party) once again considered the requirements of Sections 42 and 50 of the Act. In that case the police officer “accidentally” reached the house while on patrol duty and had it not been for the conduct of the accused persons in trying to run into the house on seeing the police party, he would perhaps not have had any occasion to enter the house and effect search. But when the conduct of the accused persons raised a suspicion, he went into the house and effected the search, seized the illicit material and caused the arrest. The Court opined that in the facts and circumstances of the case, when the investigating officer accidentally stumbled upon the offending articles and himself not being the empowered officer, then on coming to know that the accused persons were in possession of illicit articles, then from that stage onwards he was under an obligation to proceed further in the matter only in accordance with the provisions of the Act. On facts it was found that the investigating officer did not record the grounds of his belief at any stage of the investigation, subsequent to his realising that the accused persons were in possession of charas and since he had made no record, he did not forward a copy of the grounds to his superior officer nor did he comply with the provisions of Section 50 of the Act, inasmuch as he did not inform the person to be searched that if he required, his search could be conducted before a gazetted officer or a Magistrate. The Bench held that for failure to comply with the provisions of Sections 42 and 50, the accused was entitled to an order of acquittal and consequently the appeal was allowed and the order of conviction and sentence against the accused was set aside.”

11. Coming to the factual background it has to be noted as follows:

The search was made by the raiding party at about 4.30 P.M. on 15. 12.1995. Section 42 will be invocable only if the search is made by the police officer or the concerned authority, upon the prior information. If such a person has reason to believe from personal knowledge or information given by any person and obliged to take down in writing as such the information about the accused having possessed of and dealing with contraband article like 'charas' came to be appraised of by the concerned PSI Mr. K,D,Pandya, LCB Branch of Bharuch Police Station, in course of his investigation of an offence, registered vide CR No.II-135 of 1995. Therefore, it is settled proposition of law when such an information or intimation or knowledge comes to the notice of the Investigating officer in course of the regular patrolling or an investigation of some other offence, it is not necessary to follow in all cases the conditions incorporated in Section 42.

12. However, it may also be noted that by way of abundant precaution, the PSI Mr. Pandya though he was investigating the offence registered with CR No. 135 of 1995 under the NDPS Act, upon receipt of an intimation or information about the present offence, also noted down such an information taken down in writing, which is produced at Exh. 30, and such information was transmitted through a messenger immediately to the higher officers.

Not only that this part of the procedure, by way of abundant precaution, exercised and followed by the PSI, is also manifestly recorded in the complaint at Exh.32.

13. Additionally, the question as to whether the officer who conducted the proceedings was empowered officer or not was not raised before the trial court and the High Court and, therefore, that plea cannot be entertained.

14. The appeal is without merit, deserves dismissal which we direct.

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

.....J.
(Dr. MUKUNDAKAM SHARMA)

New Delhi,
January 12, 2009