

CASE NO.:
Appeal (crl.) 222 of 1997

PETITIONER:
State of Himachal Pradesh

RESPONDENT:
Pawan Kumar

DATE OF JUDGMENT: 27/09/2004

BENCH:
Y.K. Sabharwal

JUDGMENT:
J U D G M E N T

O R D E R

Y.K. Sabharwal, J.

The respondent was found guilty of offence under Section 18 of The Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, 'the NDPS Act') by Sessions Judge and sentenced to undergo rigorous imprisonment for 10 years and fine in the sum of Rs.1,00,000/- and in default of payment of fine to undergo further rigorous imprisonment for two years. The High Court, by the impugned judgment, has set aside the conviction of the respondent. The State is in appeal on grant of leave.

Briefly, the case of the prosecution is that the respondent was apprehended at a bus stand on 28th July, 1994 by PW-7 (Hukam Singh), Head Constable Munshi Ram and few others who suspected that he was carrying opium because of smell coming from his bag. Head Constable Munshi Ram telephonically informed PW8 (Prem Thakur), Deputy Superintendent of Police /SHO, Police Station Sadar Mandi about the apprehension of the accused. PW-8 went to the spot and inquired from the accused about his willingness to be searched by the Police or by a Magistrate. The accused showed his willingness to be searched by the police. PW-8 conducted the search of the accused and found opium which was being carried in a bag. On the recovery, opium was weighed and was found to be 360 gms. Two samples of the opium were separately made in two parcels. The remaining opium was put into the third parcel. All the three parcels were sealed. One of the samples was sent to the laboratory at Kandaghat for chemical analysis and the Assistant Chemical Examiner opined vide report (Exhibit PF) that the sample was that of opium.

The High Court has acquitted the respondent primarily on two grounds. One \026 the report (Exhibit PF) has to be excluded from consideration and in absence thereof, there is no other evidence to establish that the material recovered from the possession of the accused was opium. The second ground is non-compliance of Section 50 of the NDPS Act.

'Opium' is defined in Section 2(xv) of the NDPS Act. Section 8 of the Act, inter alia, prohibits the possession of any narcotic drug or psychotropic substances. Section 9 relates to the power of the Central Government to permit, control and regulate the cultivation, protection etc. of narcotic drugs and psychotropic substances subject to the provisions of Section 8. Section 10 relates to the power of the State Government to permit, control and regulate, subject to the provisions of Section 8, the possession, consumption and use of opium and other material mentioned therein. Section 76 is the rule making power of the Central Government for carrying out objects of the Act. Clause (df) of sub-section 2 of Section 76 relates to the power to make rules providing for the drawing of samples and testing and analysis of such samples.

In exercise of the powers conferred by Section 9 read with Section 76 of the NDPS Act, the Central Government has made the Narcotic Drugs and Psychotropic Substances Rules, 1985 (for short, 'the NDPS Rules'). Rule 2(c) defines the expression 'Chemical Examiner' to mean the Chemical Examiner or

Deputy Chief Chemist or Shift Chemist or Assistant Chemical Examiner, Government Opium & Alkaloid Works, Neemuch or, as the case may be Ghazipur. Chapter III of the NDPS Rules relates to opium, poppy cultivation and production of opium and poppy straw. Rules 5 to 34 are in Chapter III. Rule 17 provides the procedure for sending Opium suspected to be adulterated to the Government Opium Factory. It provides that when opium delivered by a cultivator to the District Opium Officer or any other officer authorized in this behalf, is suspected of being adulterated with any foreign substance, it shall be forwarded to the Government Opium Factory separately, after it is properly sealed in the presence of the cultivator and the concerned Lambardar. Rule 22 relates to confiscation of adulterated opium. It provides that all such opium received separately under Rule 17, if found to be adulterated on examination by the Chemical Examiner in the Government Opium Factory may be liable to confiscation by the General Manager. The High Court has held that since the sample in question was not examined by the Chemical Examiner as postulated by Rule 2(c), the opinion (Exhibit PF) given by Chemical Examiner of Kandaghat laboratory cannot be taken into consideration and in absence thereof, it cannot be held that the material allegedly recovered from the respondent was opium. According to the High Court, the Chemical Examiner of Kandaghat Laboratory does not come within the definition of expression 'Chemical Examiner' under Rule 2(c). For its view, the High Court has relied upon a Division Bench decision of the same High Court reported in State of H.P. v. Bikho Ram [ILR 1995 (2) HP (Vol.24) 1645]. In the said decision, the opinion of the Chemical Examiner, Karnal was excluded from consideration since the said Chemical Examiner did not come within the purview of Rule 2(c). The Division Bench did not examine the scope and purport of Chapter III in general and that of Rules 17 and 22 of the NDPS Rules, in particular. The question whether there was any obligation to send the illegally possessed opium to the Chemical Examiner within the meaning of Rule 2(c) was not considered.

Rule 2(c) of the NDPS Rules has to be read in conjunction with Chapter III of the said Rules including Rules 17 and 22. These Rules show that when the opium is delivered by the cultivator to the District Opium Officer, if suspected of being adulterated with any foreign substance, it shall be forwarded to the Government Opium Factory. Chapter III relates to analysis of samples of lawfully cultivated and produced opium. Rule 22 provides for confiscation if opium on examination by the Chemical Examiner is found to be adulterated. There is no provision in the NDPS Act or Rules debarring chemical analysis of opium found to be in illegal possession of an accused contrary to the provisions of the Act and seized, in any other laboratory which may be authorized to analyse the sample. There is also no requirement that such opium must be examined by the Chemical Examiner within the meaning of Rule 2(c).

In the present case, two notifications \026 one dated 14th April, 1982 and the other dated 9th April, 1984 issued by Government of Himachal Pradesh have been extracted in the impugned judgment. By notification dated 14th April, 1982 issued in the name of the Governor, Himachal Pradesh, the public analyst, Himachal Pradesh Food and Drugs Laboratory Kandaghat, District Solan was appointed as Chemical Examiner for the whole State of Himachal Pradesh with immediate effect in public interest. By notification dated 9th April, 1984, the setting up of composite testing laboratory at Kandaghat, District Solan, Himachal Pradesh for analysing/testing samples taken from various departments mentioned in the notification under various Acts/Rules was ordered with immediate effect. The Police department is one of the departments mentioned therein. The notification, inter alia, provides that functions of the laboratory is testing of samples, sent by various departments, Police being one of it.

The High Court, with reference to the above notifications, has noticed that the NDPS Act was enforced subsequent to the issue of notifications and the notifications would not cover the cases under the said Act. I am unable to sustain this view. The notification dated 9th April, 1984 is not restricted to the testing of samples sent under any particular Act/Rule. It is a notification which empowers the laboratory at Kandaghat to analyse and test the samples sent by Police department under various Acts/Rules without mentioning name of any Act/Rule. The notification would not exclude samples sent for testing under the NDPS Act. The notification is not restricted to only those Acts and Rules which were in existence when the notification was issued. Clearly, it would include the testing of samples sent by the Police department under any Act or Rule which may

even come into operation after the issue of the notification. In our view, the Full Bench of Madhya Pradesh High Court in Ram Dayal v. Central Narcotic Bureau [1993 Cri.L.J. 1443] on analysis of Sections 9 and 76 of the NDPS Act and Rule 2(c) rightly came to the conclusion that there is no provision in the Act and the Rules debarring chemical analysis of unlawfully possessed opium seized in connection with an offence, elsewhere at any other laboratory. The High Court fell into an error in excluding from consideration the opinion of Chemical Examiner, Kandaghat laboratory (Exhibit PF). Therefore, the conclusion of the High Court that the prosecution has failed to prove that the incriminating material recovered from the possession of the respondent was opium, could not be sustained.

Regarding the other ground, the question of non-compliance of Section 50 of the NDPS Act would arise if on the facts and circumstances of the case, it is held that the case in hand relates to search of a 'person'.

Section 50, on its plain reading, applies to search of 'any person'. When any duly authorized officer is about to search any person, he is required to comply with conditions stipulated in Section 50. In State of Punjab v. Baldev Singh [(1999) 6 SCC 172], a Constitution Bench has held that Section 50 would come into play only in case of search of person as distinguished from search of any premises etc. Clearly, there is a distinction between search of a person and search of any premises, place, vehicle etc. In later case for search, Section 50 will have no applicability, search being not of any person.

In Madan Lal & Anr. v. State of H.P. [(2003) 7 SCC 465], on personal search of the accused, nothing incriminating was found but when the car was searched, the contraband was found and, under these circumstances, it was held that Section 50 does not extend to search of a vehicle or container or bag or premises.

In Bharatbhai Bhagwanjibhai v. State of Gujarat [(2002) 8 SCC 327], Section 50 was held not applicable as it was found that at the time of effecting search, the Inspector had no knowledge that an offence under Chapter IV of the NDPS Act has been committed by the accused. If the officer conducting search has no information, knowledge or belief in respect of commission of offence under the NDPS Act, the question of complying with Section 50 of the said Act at the time of such a search would not arise.

In Kalema Tumba v. State of Maharashtra & Anr. [(1999) 8 SCC 257], a decision rendered by a Two Judge Bench, observations were made to the effect that if a person is carrying a bag or some other article with him and a narcotic drug or psychotropic substance is found from it, it cannot be said that it was found from his 'person'. The observations have to be seen in the context of the facts of the case. It was a case where a passenger had arrived at the airport from a foreign country. The Intelligence Officer in Narcotic Control Bureau had information that the concerned person was likely to carry sizeable quantity of heroin. After the arrival of the flight, the person was questioned and asked to identify his baggage. The heroin was found in the baggage that was opened on the identification of the accused. Clearly, there was no search of the person. It was the search of luggage identified by him. The observations made in the decision have to be understood in the context of these facts. Similarly, the observations made in Sarjudas & Anr. v. State of Gujarat [(1999) 8 SCC 508] and Birakishore Kar v. State of Orissa [(2000) 9 SCC 541] have to be considered in the light of the facts and circumstances of the facts of the said cases.

Many a times, there may be a thin and fine line separating the question of the search of a 'person' in contradistinction to bag, vehicle or the premises. The analysis of facts and circumstances of each case would provide an answer. It has, however, to be borne in view that the conditions of Sections 50 have to be strictly complied having regard to stringent punishment provisions of the NDPS Act.

In Abdul Rashid Ibrahim Mansuri v. State of Gujarat [(2000) 2 SCC 513], a three Judge Bench, noticing Baldev Singh, Sarjudas and Kalema Tumba held that where not a person of the driver, but the vehicle driven by him was searched and was found to contain gunny bags containing Charas, the question of complying with the requirements of Section 50 of the NDPS Act does not arise as the place in the vehicle where the gunny bags were stacked was not inextricably connected with the person of the driver. However, on the fact situation, it was held that Section 50 was not applicable.

The answer to the real question in cases where the line of separation is thin

and fine can be obtained by applying the test of inextricable connection and then conclusion reached as to whether the search was that of a 'person' or not. If the search is of a bag which is inextricably connected with the person of the accused, Section 50 of the NDPS Act will apply, and if it is not so connected, the provisions will not apply. The bag searched on facts that were under consideration in Kalema Tumba and other similar cases was not inextricably connected with the person of the accused and, therefore, had no application. There has to be inextricable connection between the person and the object to be searched for Section 50 to apply.

Learned counsel for the appellant has also placed reliance on *Gurbax Singh v. State of Haryana* [(2001) 3 SCC 28]. In that case, on checking by the staff of a second class compartment of a train, the appellant, who was sitting in the compartment being checked became panicky and left the train carrying a katta (gunny bag) on his left shoulder. A Sub-Inspector who was present on platform for checking smuggling and other antisocial elements, on suspicion, nabbed him and found that he was carrying poppy straw weighing 7 kgs. in the bag. The panic reaction of the appellant created suspicion. The Police Officer had neither information, nor knowledge nor reason to believe that the offence under the NDPS Act had been committed and it is in this light that the question of the applicability of Section 50 on the search of the person was examined and observations made that the said provision would be applicable only in those cases where the search of the person is carried out.

Lastly, reference may be made to *Namdi Francis Nwazor v. Union of India & Anr.* [(1998) 8 SCC 534], a three Judge Bench decision. The facts were that the accused/petitioner, a Nigerian national, who was leaving India for Lagos was first asked at the airport if he was carrying any narcotics or other contraband goods and on his refusal, his luggage was checked. Nothing incriminating was found from the two handbags which the accused was carrying. He had, however, booked one bag which had already been checked in and was loaded in the aircraft by which he was supposed to travel. The bag was called back. The contraband articles were recovered from the said bag. It was held that on a plain reading of sub-section (1) of Section 50 it is obvious that it applies to cases of search of any person and not search of any article in the sense that the article is at a distant place from where the offender is actually searched. Under these circumstances, it was held that Section 50 of the NDPS Act has no applicability, but while so holding the clarification that was given in that case is very relevant here. It was clarified that 'if that person is carrying a handbag or the like and the incriminating article is found therefrom, it would still be a search of the person of the accused requiring compliance with Section 50 of the NDPS Act'. In the fact situation of the present case, the principles laid in this decision are clearly attracted. The offending article was found in the bag which accused/respondent was carrying. The test of inextricable connection between the person searched and the object recovered is demonstrably applicable. It cannot be held that Section 50 has no application merely because the offending article was in the bag which the accused was carrying with him.

The rationale behind Section 50, the effect of conducting a search without intimating to the suspect that he has a right to be searched before a Gazetted Officer or a Magistrate ? that right being a part of a reasonable, fair and just procedure and the dual purpose intended to be served by the said provision ? to protect a person against false acquisition and frivolous charges as also to lend credibility to the search and seizure conducted by the empowered officer, has been emphasized in *Baldev Singh's case* (supra) in the following words:

"To be searched before a gazetted officer or a Magistrate, if the suspect so requires, is an extremely valuable right which the legislature has given to the person concerned having regard to the grave consequences that may entail the possession of illicit articles under the NDPS Act. It appears to have been incorporated in the Act keeping in view the severity of the punishment. The rationale behind the provision is even otherwise manifest. The search before a gazetted officer or a Magistrate would impart much more authenticity and creditworthiness to the search and seizure proceeding. It would also verily strengthen the prosecution case.

The safeguard or protection to be searched in the presence of a gazetted officer or a Magistrate has been incorporated in Section 50 to ensure that persons are only searched with a good cause and also with a view to maintain the veracity of evidence derived from such search. We have already noticed that severe punishments have been provided under the Act for mere possession of illicit drugs and narcotic substances. Personal search, more particularly for offences under the NDPS Act, are critical means of obtaining evidence of possession and it is, therefore, necessary that the safeguards provided in Section 50 of the Act are observed scrupulously. The duty to inform the suspect of his right to be searched in the presence of a gazetted officer or a Magistrate is a necessary sequence for enabling the person concerned to exercise that right under Section 50 because after *Maneka Gandhi v. Union of India* ((1978) 1 SCC 248) it is no longer permissible to contend that the right to personal liberty can be curtailed even temporarily, by a procedure which is not 'reasonable, fair and just' and when a statute itself provides for a 'just' procedure, it must be honoured. Conducting a search under Section 50, without intimating to the suspect that he has a right to be searched before a gazetted officer or a Magistrate, would be violative of the 'reasonable, fair and just procedure' and the safeguard contained in Section 50 would be rendered illusory, otiose and meaningless. Procedure based on systematic and unconscionable violation of law by the officials responsible for the enforcement of law, cannot be considered to be a 'fair', just or reasonable procedure. We are not persuaded to agree that reading into Section 50, the existence of a duty on the part of the empowered officer, to intimate to the suspect, about the existence of his right to be searched in the presence of a gazetted officer or a Magistrate, if he so requires, would place any premium on ignorance of the law. The argument loses sight of a clear distinction between ignorance of the law and ignorance of the right to a 'reasonable, fair and just procedure'.

This Court cannot overlook the context in which the NDPS Act operates and particularly the factor of widespread illiteracy among persons subject to investigation for drug offences. It must be borne in mind that severer the punishment, greater has to be the care taken to see that all the safeguards provided in a statute are scrupulously followed. We are not able to find any reason as to why the empowered officer should shirk from affording a real opportunity to the suspect, by intimating to him that he has a right 'that if he requires' to be searched in the presence of a gazetted officer or a Magistrate, he shall be searched only in that manner. As already observed the compliance with the procedural safeguards contained in Section 50 are intended to serve a dual purpose - to protect a person against false accusation and frivolous charges as also to lend creditability to the search and seizure conducted by the empowered officer. The argument that keeping in view the growing drug menace, an insistence on compliance with all the safeguards contained in Section 50 may result in more acquittals does not appeal to us. If the empowered officer fails to comply with the requirements of Section 50 and an order or acquittal is recorded on that ground, the prosecution must thank itself for its lapses. Indeed in every case the end result is important

but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of the judicial process may come under a cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for the law and may have the effect of unconscionably compromising the administration of justice. That cannot be permitted."

The case of the prosecution itself is that the accused was carrying a bag on his shoulder; opium like smell was coming from the bag; and the Head Constable informed the Deputy Superintendent of Police who came to the spot. Before search, the Deputy Superintendent of Police was informed of the suspected possession of the opium. The testimony of PW7 is that the person of the accused was then searched by the Deputy Superintendent of Police and on search, bag containing opium was found. On this fact situation, it cannot be held that the search was not of a person but was of a bag. Both are inextricably connected. It has to be held that the search was that of the respondent's person. Clearly, Section 50 of the NDPS Act was applicable but was not complied. Therefore, the conviction of the respondent could not be sustained and the High Court rightly held that Section 50 had been breached.

The judgment of the High Court does not warrant any interference. The appeal is, accordingly, dismissed.