

SAIYAD MOHD. SAIYAD UMAR SAIYED AND ORS.

v.

THE STATE OF GUJARAT

APRIL 3, 1995

[A.M. AHMADI, CJ., S.P. BHARUCHA AND G.T. NANAVATI, JJ.]

Narcotic Drugs and Psychotropic Substances Act, 1985—Section 50—Information to the accused of his right to be searched before a Gazetted Officer or a Magistrate—Whether mandatory—Held yes—Cogent evidence must be produced to prove it—Issue of instructions to Investigating officers to comply with the statutory requirement—Need for.

Indian Evidence Act 1872—Sec. 114 illustration (e)—Applicability of—No evidence to show that accused was informed about his right or protection under Section 50 of the Narcotic Drugs and Psychotropic Substances Act—It cannot be presumed that official act of informing the accused has been regularly performed.

Under Section 50 of the Narcotic Drugs and Psychotropic Substances (NDPS) Act, 1985 the person who is to be searched, has a right to be searched before a Gazetted Officer or a Magistrate, if he so desires. In the present case, during the trial, none of the police personnel who had apprehended the appellants deposed that they had informed the appellants of their right to be searched before a Gazetted Officer or a Magistrate.

The trial court convicted and sentenced the appellants for offences under Section 20 of the NDPS Act and Sections 65 and 66 of the Bombay Prohibition Act, 1949. On appeal the High Court upheld the conviction.

Before the High Court, it was contended that the provisions of Section 50 of NDPS Act are mandatory and as there was no evidence to show that the police personnel who had searched the appellants had informed the appellants of their right under Section 50 the appellants were entitled to an acquittal. The High Court rejected the argument on the grounds that (a) in cases under the NDPS Act, it is the duty of the

Court to raise a presumption under Section 114, illustration (e) of the Evidence Act that the officer had followed the procedure mandated by Section 50 even if he does not depose so; and (b) the argument was a point of fact and could not be raised for the first time before the appellate court.

Hence, the present appeal.

Allowing the appeal and acquitting the appellants, this Court

HELD: 1. Having regard to the grave consequences that may entail the possession of illicit articles under the NDPS Act, namely, the shifting of the onus to the accused and the severe punishment to which he becomes liable, the legislature has enacted the safeguard contained in Section 50 of the NDPS Act. To obviate any doubt as to the possession by the accused of illicit articles under the NDPS Act, the accused is authorised to require the search for such possession to be conducted in the presence of a Gazetted Officer or a Magistrate. The provisions in this behalf are mandatory and the language thereof obliges the officer concerned to inform the person to be searched of his right to demand that the search be conducted in the presence of a Gazetted Officer or a Magistrate. [122-H, 123-A, B]

State of Punjab v. Balbir Singh, [1994] 3 SCC 299, relied on.

2. Having regard to the object for which the provisions of Section 50 have been introduced into the NDPS Act and when the language thereof obliges the officer concerned to inform the person to be searched of his right to be searched in the presence of a Gazetted Officer or a Magistrate, there is no room for drawing a presumption under Section 114, illustration (e) of the Indian Evidence Act, 1872. [123-C]

3. When the Officer concerned has not deposed that he had followed the procedure mandated by Section 50 of the NDPS Act, the court is duty bound to conclude that the accused had not had the benefit of the protection that Section 50 affords; that, therefore, his possession of articles which are illicit under the NDPS Act is not established; that the pre-condition for his having to satisfactorily account for such possession has not been met; and to acquit the accused. Instructions in this behalf need to be issued so that investigation officers take care to comply with the statutory requirement and drug peddlers do not go scot free due to non-compliance

thereof. [123-G, H, 124-A, F]

4. The protection that Section 50 of the NDPS Act gives to those accused of being in possession of illicit articles under the NDPS Act is sacrosanct and cannot be disregarded on the technicality that the point was not taken in the court of first instance. [124-C]

5. For the conviction of the appellants under the provisions of the Bombay Prohibition act no separate punishment was awarded. The 'panchas' did not support the evidence of PSIs which further weakens the case that charas was found in possession of the appellants. Therefore, this conviction under the Bombay Prohibition Act cannot be sustained.

[124-H, 125-A]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 485 of 1995.

From the Judgment and Order dated 23.6.94 of the Gujarat High Court in CrI.A.No. 526 of 1998.

Ms. Kamini Jaiswal for the Appellants.

Bhargav Desai for Ms. Hemantika Wahi for the Respondents.

The Judgment of the Court was delivered by

BHARUCHA, J. Special leave granted.

The appeal is directed against the judgment and order of a Division Bench of the High Court of Gujarat. The High Court upheld the conviction of the appellants for offences punishable under Section 20 of The Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) and the punishment imposed on each of them therefor, namely, rigorous imprisonment for a term of ten years and fine of Rupees one lakh; in default of payment of the fine, rigorous imprisonment for a further term of two years. It upheld also the conviction of the appellants under the provisions of Sections 65 and 66 of the Bombay Prohibition Act, 1949, in respect whereof no separate punishment had been imposed.

It was the case of the prosecution that on 18th October, 1986, Police Sub-Inspectors Rathod and Rana received information that the first appellant was doing the business of selling 'charas' in Vagharivad, opposite

Renbasera, Ahmedabad. Along with other police personnel, PSIs Rathod and Rana raided the area. Upon search 55 grams of 'charas' was found from the first appellant and 10 grams from the second and third appellants. The appellants were charge-sheeted, tried by the Additional City Sessions Judge, Ahmedabad, and convicted and sentenced as aforesaid.

It was contended by learned counsel appearing for the appellants before the High Court that, under the provisions of Section 50 of the NDPS Act, the appellants were required to be informed of their right to be searched in the presence of a Gazetted Officer or a Magistrate and there was no evidence to show that PSI Rathod or PSI Rana had informed the appellants accordingly; there being a breach of the provisions of Section 50, the appellants were entitled to an acquittal. The learned Additional Public Prosecutor pointed out to the High Court that this argument had not been made before the trial court and he submitted that a question of fact could not be permitted to be raised for the first time in appeal. He also submitted that, by reason of Section 54 of the NDPS Act, the burden was on the appellants to prove that they had not committed offences under the NDPS Act and this they had failed to do. In the alternative, he submitted that the act of informing the accused of their right to be searched in the presence of a Gazetted Officer or a Magistrate under Section 50 of the NDPS Act was an official act to be performed by a police officer and the High Court should raise a presumption under the provisions of Section 114, illustration (e) of the Indian Evidence Act, 1872, to that effect. The High Court noted the judgment of this court in the case of *State of Punjab v. Balbir Singh*, [1994] 3 SCC 299, and observed that it was an imperative requirement that a police officer intending to search a person for the possession of articles covered by the NDPS Act should inform him that he had a right to be searched, if he so chose, in the presence of a Gazetted Officer or a Magistrate. The High Court then stated :

"In nutshell we may say that both PSI Rathod and PSI Rana have stated almost each and everything in their evidence regarding the information received by them, calling for the Panchas, going to the place of offence, searching the accused and on search finding of muddamal 'Charas' of 55 grams from accused Nos. 1 and 10 grams each from accused Nos. 2 and 3. What is not stated by them before the Court is that they had informed the accused about their right under section 50 of the NDPS Act to be searched in

presence of a gazetted officer or a magistrate. In our opinion, Mr. Shelat, learned Addl. P.P. was right in submitting that the Court has to raise presumption that PSI Rathod and PSI Rana must have informed the accused about their such a right to be searched in presence of a gazetted officer or a magistrate before the search as it was an official act....."

The High Court went on to state:

"To inform the accused about his right to be searched in presence of a gazetted officer or a magistrate under section 50 of the NDPS Act is an official act. Therefore, ordinarily it is not deposed by police officer before the Court that he had informed the accused about his right to be searched in presence of a gazetted officer or a magistrate under section 50 of the DPS Act since is to be presumed..... We may further say that in the case under the NDPS Act, it is the duty of the Court to raise presumption under section 114(e) of the Evidence Act, if the police officer has not deposed in his evidence before the Court and if the Court does not raise such a presumption, then it would be falling in its duty."

Section 50(1) of the NDPS Act reads thus:

"When any officer duly authorised under Section 42 is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate."

This court in the case of *Balbir Singh* (ibid) held:

"18..... In the context in which this right has 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 to be searched before a gazetted officer or a magistrate. To us, it appears that this is a valuable right given to the person to be searched in the presence of a gazetted officer or a magistrate if he so requires, since such a search would impart

much more authenticity and creditworthiness to the proceedings while equally providing an important safeguard to the accused. To afford such an opportunity to the person to be searched, he must be aware of his right and that can be done only by the authorised officer informing him. The language is clear and the provision implicitly makes it obligatory on the authorised officer to inform the person to be searched of his right.....

19. Under the Act wide powers are conferred on the officers and deterrent sentences are also provided for the offences under the Act. It is obvious that the legislature while keeping in view the menace of illicit drug trafficking deemed it fit to provide for corresponding safeguards to check the misuse of power thus conferred so that any harm to the innocent persons is avoided and to minimise the allegations of planting or fabricating by the prosecution, Section 50 is enacted.

22. Therefore, it is to be taken as an imperative requirement on the part of the officer intending to search to inform the person to be searched of his right that if he so chooses, he will be searched in the presence of a gazetted officer or a magistrate. Thus the provisions of Section 50 are mandatory."

It is to be noted that under the NDPS Act punishment for contravention of its provisions can extend to rigorous imprisonment for a term which shall not be less than 10 years but which may extend to 20 years and also to fine which shall not be less than Rupees one lakh but which may extend to Rupees two lakhs, and the court is empowered to impose a fine exceeding Rupees two lakhs for reasons to be recorded in its judgment. Section 54 of the NDPS Act shifts the onus of proving his innocence upon the accused; it states that in trials under the NDPS Act it may be presumed, unless and until the contrary is proved, that an accused has committed an offence under it in respect of the articles covered by it "for the possession of which he fails to account satisfactorily". Having regard to the grave consequences that may entail the possession of illicit articles under the NDPS Act, namely, the shifting of the onus to the accused and the severe punishment to which he becomes liable, the legislature has enacted the safeguard contained in Section 50. To obviate any doubt as to the posses-

sion by the accused of illicit articles under the NDPS Act, the accused is authorised to require the search for such possession to be conducted in the presence of a Gazetted Officer or a Magistrate. We endorse the finding in *Balbir Singh's* case that the provisions in this behalf are mandatory and the language thereof obliges the officer concerned to inform the person to be searched of his right to demand that the search be conducted in the presence of a Gazetted Officer or a Magistrate.

Having regard to the object for which the provisions of Section 50 have been introduced into the NDPS Act and when the language thereof obliges the officer concerned to inform the person to be searched of his right to be searched in the presence of a Gazetted Officer or a Magistrate, there is no room for drawing a presumption under Section 114, illustration (e) of the Indian Evidence Act, 1872. By reason of Section 114 a court "may presume the existence of any fact which it think likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to facts of the particular case." It may presume "(e) that judicial and official acts have been regularly performed." There is no room for such presumption because the possession of illicit articles under the NDPS Act has to be satisfactorily established before the court. The fact of seizure thereof after a search has to be proved. When evidence of the search is given all that transpired in its connection must be stated. Very relevant in this behalf is the testimony of the officer conducting the search that he had informed the person to be searched that he was entitle to demand that the search be carried out in the presence of a Gazetted Officer or a Magistrate and that the person had not chosen to so demand. If no evidence to this effect is given the court must assume that the person to be searched was not informed of the protection the law gave him and must find that the possession of illicit articles under the NDPS Act was not established.

We are unable to share the High Court's view that in cases under the NDPS Act it is the duty of the court to raise a presumption, when the officer concerned has not deposed that he had followed the procedure mandated by Section 50, that he had in fact done so. When the officer concerned has not deposed that he had followed the procedure mandated by Section 50, the court is duty bound to conclude that the accused had not had the benefit of the protection that Section 50 affords; that, therefore,

his possession of articles which are illicit under the NDPS Act is not established that the pre-condition for his having to satisfactorily accounted for such possession has not been met; and to acquit the accused.

The High Court relied upon the fact that the argument that Section 50 had not been complied with had not been made before the trial court and held that a point of fact could not be taken for the first time in appeal. The protection that Section 50 given to those accused of being in possession of illicit article under the NDPS Act is sacrosanct and cannot be disregarded on the technicality that the point was not taken in the court of first instance.

Finding a person to be in possession of articles which are illicit under the provisions of NDPS Act has, as we have said, the consequence of requiring him to prove that he was not in contravention of its provisions and it renders him liable to punishment which can extend to 20 years rigorous imprisonment and a fine of Rupees two lakhs or more. It is necessary, therefore, that courts dealing with offences under the NDPS Act should be very careful to see that it is established to their satisfaction that the accused has been informed by the concerned officer that he had a right to choose to be searched before a Gazetted Officer or a Magistrate. It need hardly be emphasised that the accused must be made aware of this right or protection granted by the statute and unless cogent evidence is produced to show that he was made aware of such right or protection, there would be no question of presuming that the requirements of Section 50 were complied with. Instructions in this behalf need to be issued so that investigation officers take care to comply with the statutory requirement and drug peddlers do not go scot free due to non-compliance thereof. Such instructions would be of great value in the effort to curb drug trafficking. At the same time, those accused of possessing drugs should, however heinous their offence may appear to be, have the safeguard that the law prescribes.

For the reasons aforesaid, the conviction of the appellants under the NDPS Act and the sentence imposed upon them for the same must be set aside.

For the conviction of the appellants under the provisions of the

Bombay Prohibition Act no separate punishment was awarded. The High Court has not dealt with the aspect of these offences. We find that the 'panchas' did not support the evidence of PSIs Rathod and Rana, which further weakens the case that 'charas' was found in the possession of the appellants. We cannot, therefore, sustain their conviction under the Bombay Prohibition Act.

The appeal is allowed. The judgment and order under appeal is set aside. The accused are acquitted and shall be discharged forthwith.

Appeal allowed.