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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 168 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT and

MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

LALESHWAR RAJAK KALANAND DHOBI

Versus

STATE OF GUJ

Appearance:

MS RV ACHARYA for Petitioner

MR ST MEHTA for Respondent

CORAM : MR.JUSTICE H.R.SHELAT and

MR.JUSTICE J.R.VORA

Date of decision: 31/01/2000

ORAL JUDGEMENT : [Per: H.R.Shelat, J.]

1. The appellant who was placed on trial relating to the offence punishable under Section 20(b)(ii) of the Narcotic Drugs & Psychotropic Substances Act, 1985 (for short "the Act") came to be convicted thereof on 25th January, 1994 by the then learned Addl. Sessions Judge Jamnagar, in Session Case No. 17 of 1993 and sentenced to rigorous imprisonment for 10 years and a fine of Rs.5 lacs, in default rigorous imprisonment for 5 years more. He, being aggrieved by the said order of conviction and sentence, has preferred this Appeal calling in question the legality and validity of conviction.

2. Necessary facts may in brief be stated. Mr. Kanaksinh Nathusinh Sodha was serving as Police Inspector in `A' Division Police Station, Jamnagar. On 18th April, 1993, he was informed that the appellant was possessing and carrying charas, and was waiting for someone behind the S.T. Bus Station. Mr.Sodha, therefore, on phone directed Revutubha Danubha, Police Constable, on duty at the bus stand, to keep a watch over him. He then went to the ST stand at 8.00 pm. Two panchas were then called by the constable on duty. They were appraised about the raid to be laid. They went near the accused who was on the back side of the ST bus stand. He was then searched in the presence of the panchas. A pink - coloured cloth bag was with the appellant, wherefrom about 8 lumps of charas were found and the weight thereof was about 925 grams. The appellant was not having any pass or permit to possess the same or deal with the same. The lumps were seized along with the bags and the appellant was arrested. A complaint was then lodged against him. About 100 grams of sample from each of the lumps was taken and then sealed and sent to the Forensic Laboratory for analysis. On receipt of the report of the analysis, it was found that lumps seized from the possession of the appellant were of charas. It was then clear that the appellant had committed the aforesaid offence. At the conclusion of the investigation, the charge sheet against the appellant was filed in the Sessions Court at Jamnagar, which came to be registered as Session Case No. 17/93. It was assigned to the then learned Addl. Sessions Judge, Jamnagar, who framed the charge (Exh.5) against the appellant. He pleaded not guilty and came to be tried. The prosecution then led necessary evidence. Appreciating the evidence before him, the then learned Addl. Sessions Judge found that the prosecution had succeeded in establishing the charge levelled against the appellant. He, therefore, convicted the appellant and sentenced him as aforesaid. It is against that order of

conviction and sentence, the present appeal has been filed.

3. It may be mentioned that Mr.Sodha has made clear in his evidence (Exh.18) that the appellant was not at all appraised, though in the panchanama regarding appraisal, a mention is made. Of course, in the panchnama it is also stated that in writing the appellant was informed and a chit about the acknowledgment thereof was taken from the accused. The chit is not produced and the evidence in this regard is running counter to the other one, but even if ignoring the same, it is believed that in this case the Police Officer who carried out the search and seizure, did not inform the accused about his right, which is flowing from Section 50 of the Act, the trial and conviction for the reasons stated herein below cannot be said to have been vitiated. Keeping such facts in mind, the judgment and order are however assailed. The learned advocate representing the appellant contends that in the case on hand, Section 50 of the Act is not complied with. It was incumbent upon the Police Officer to inform the appellant that it was his right to get himself searched either in the presence of the Gazetted Officer or the Magistrate; and if such appraisal was not made, the search and seizure would be vitiated and the evidence regarding the seizure would be inadmissible. If this facts about seizure is kept aside, there is no case on record establishing the charge levelled against the appellant. In support of her contention, she has drawn our attention to the recent decision of the Apex Court rendered in the case of THE STATE OF PUNJAB vs. BALDEV SINGH JT 1999 (4) SC 595 wherein it is held as under :

" (1) That when an empowered officer or a duly authorised officer acting on prior intimation is about to search a person, it is imperative for him to inform the connected person of his right under Subsection (1) of Section 50 of being taken to the nearest Gazetted Officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing;

(2) That failure to inform the concerned person about the existence of his right to be searched before a Gazetted Officer or a Magistrate would cause prejudice to an accused;

(3) That a search made, by an empowered

officer, on prior information, without informing the person of his right that, if he so requires, he shall be taken before a Gazetted Officer or a Magistrate for search and in case he so opts, failure to conduct his search before a Gazetted Officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act.

(4) That there is indeed need to protect society from criminals. The societal intent in safety will suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it does not exist. The answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously inviting action against the concerned official so that the laxity on the part of the investigating authority is curbed. 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 judicial process may come under 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 law and may have the effect of unconscionably compromising the administration of justice. That cannot be permitted. An accused is entitled to a fair trial. A conviction resulting from an unfair trial is contrary to our concept of justice. The use of evidence collected in breach of the safeguards provided by Section 50 at the trial, would render the trial unfair.

(5) That whether or not the safeguards provided in Section 50 have been duly observed would have to be determined by the Court on the basis of evidence led at the trial. Finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of Section 50, and particularly the safeguards provided therein were duly, complied with, it would not be permissible to cut-short a criminal trial.

(6) That in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Section 50 are mandatory or directory, but, hold that failure to inform the concerned person of his right as emanating from Subsection (1) of Section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law.

(7) That an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search.

4. So far as the principle laid down by the Supreme Court is concerned, there is no dispute about the same. If Sec. 50 of the Act is not complied with, the conviction and the sentence inflicted, cannot be sustained because the search and seizure would be vitiated, and the evidence regarding the search and seizure would have to be kept out of consideration. But, the question that arises for consideration in this case is whether it is incumbent upon the officer taking search

to inform the accused about his right of being searched in the presence of Gazetted Officer or a Magistrate in case where he (the Officer) taking the search is himself the Gazetted Officer or a Magistrate? When query was made, the learned Advocate representing the appellant draws our attention to two decisions of the Supreme Cour rendered subsequent to the aforesaid decision and they are C.A. ALI vs. STATE OF KERALA, 1999 SCC (Cri) 1182 and KALAYATH NASSAR vs. STATE OF KERALA, 1999 SCC (Cri) 1191. In both the decisions, it is made clear that requirement of informing the accused of his right to be searched in the presence of a Gazetted Officer or a Magistrate is a must and non-compliance thereof vitiates the search, seizure and trial. No presumption about the compliance can be raised. The same has to be proved leading necessary evidence. Even if the accused does not make the request on his own, the search would be conducted in the presence of the Gazetted Officer or the Magistrate, it cannot be said that there was no need to inform him of that right. So far as the principle made clear, there cannot be any dispute regarding the same, but all the three decisions, in our view, will not apply because the point which is posed before us for determination, was not at all specifically raised in either of the three decisions and dealt with. All the three decisions are silent on the point. At this stage, the learned Advocate for the appellant also draws our attention to another decision rendered by the Punjab and Haryana High Court in SURAJ BHAN vs. STATE OF PUNJAB, 1996 (1) Crimes 183, wherein also the same principle is reiterated holding that if the requirements of Section 50 of the Act are not complied with while effecting search, conviction cannot be sustained. If the Sub-Inspector states that he had informed the accused in writing and the notice in writing given to the accused is not produced, it must be held that the prosecution has failed to bring home the offence against the accused. We fully agree with the principle made clear by the Punjab & Haryana High Court but, the same also cannot be, for the reasons stated hereinabove, pressed into the service of the appellant. There also, the question which is posed before us was not specifically posed for the determination and the decision on that point is silent.

5. Of course, our attention is also drawn to Sections 41, 42 and 43 of the Act, but the contention based there on cannot be accepted. Section 41 relates to power to issue warrant and authorisation by the Metropolitan Magistrate or a Magistrate of First Class or Magistrate of Second Class specially empowered by the State Government for the arrest of a person. Sec. 42

relates to power of entry, search, seizure and arrest without warrant or authorisation, while Sec.43 relates to power of seizure and arrest in public places by any officer of any of the departments mentioned in Sec.42. The endeavours of the learned advocate for the appellant is to cause us to agree with her that the empowered or authorised officer carrying out raid and taking search and seizing the things or articles, would always be Gazetted Officer because the word "Gazetted" is also used in clause (2) of Sec. 41; and so, that officer being a party to the raid, search and seizure, the same would not be fair. Sec. 50 of the Act envisages that to have fair, unbiased and honest search, investigation and seizure; the accused, if he so desires should be given the chance of being searched in the presence of another Gazetted Officer or Magistrate, and deprivation of such search would certainly vitiate the trial.

6. In Sec.41 officers of two categories are referred to; one Gazetted; and another non-Gazetted but above the rank of peon, sepoy or constable. The officers of both the categories are made empowered or authorised officer either by statutory provision or issuance of special order and notification thereof. It is not necessary to state in details about both the categories of officers. Sec. 43 refers to the officers mentioned in Sec. 42 and the Sec.42 does not expressly refer the Gazetted Officers, but refers the officers of the Departments mentioned and of the rank superior to a peon, sepoy or constable empowered by general or special order, and that indicates that empowered officers may be gazetted or non-gazetted. Non-Gazetted officers are also made empowered or authorised officers to carry out the search and seizure, and arrest the accused if that is found necessary. Their search and seizure may at times be faulty or unskilful, defective or unfair, and accused has to, in that case, being helpless repine, or feel discontented. To have a satisfaction that the search and seizure made by non-Gazetted officer is free from mistake, bias, foible or defect, and to be sure that everything is done fairly by the non-Gazetted officer, Sec.50 casts an obligation on such officer to inform the accused whether he would like to be searched in the presence of any Gazetted Officer or a Magistrate provided of course the search is being made in public place and that too on previous information. If Gazetted Officer or the Magistrate is taking the search, it would not in view of such position of law be necessary to inform the accused as envisaged by Sec.50 of the Act. A similar question arose before this Court in the case of M.R.PATHAN vs. STATE OF GUJARAT, 39(1) [1998(1)] GLR

445, wherein it is made clear that when the search is made by the Gazetted Officer, the accused need not be asked the question, whether he would like to be searched in the presence of the Magistrate or the Gazetted Officer, and if the Gazetted Officer himself is taking the search, it cannot be contended in such case that there is non-compliance of Section 50. It is held that the Gazetted Officer taking the search asks the question and if accused if so desires, takes him to another Gazetted Officer, it would be futile, redundant and rediculous and some times it would amount to mockery of procedure and object of the law. When this court has specifically answered the point, which was not at all in issue in above cited three decisions, two of the Supreme Court and one of the Punjab & Haryana High Court, the contention advanced cannot be accepted because Police Inspector Mr. Sodha who was the Gazetted Officer, has carried out the search and has seized the contraband articles.

7. It is the contention on behalf of the appellant that in view of the decision rendered by this Court in the case of SHIVABHAI GAJMALBHAI vs. STATE OF GUJARAT, 37(2) 1996(2) GLR 64, the Investigating Agency ought to have after the seizure of charas, reported to the Magistrate as required by Sec. 102 (3) of the Criminal Procedure Code immediately but when that is not done, the omission to report to the Magistrate would vitiate the trial.

8. If the Magistrate is not informed as per the provision of Sec.102(3) of the Criminal Procedure Code, it is made clear by this court in the decision cited that the trial would be vitiated, but if the report is made in one or another form or fashion, mode or manner, the decision rendered would not be helpful to the appellant. It may be mentioned that no form or mode or manner is prescribed for making a report. An intimation in any form or manner is sent would be sufficient. The incident happened on 18th April, 1993 and thereafter it appears, when we went through the original record that on the next day i.e. 19th April, 1993 while presenting the application for police - remand before the Judicial Magistrate, the Police Inspector mentioned specifically in the application that charas was found from the possession of the accused, the weight thereof was 925 grams and the value thereof was Rs. 45,000/-. Thus, the report to the Magistrate can be said to have been made and that should be treated to be the compliance of Section 102 (3) of the Criminal Procedure code. The contention raised in this behalf, therefore, cannot find

favour.

9. Our attention is also drawn to Section 57 of the Act by the learned advocate representing the appellant, which provides that after the arrest and seizure under this Act, the officer making the arrest and seizure has to within 48 hours next after such arrest or seizure, make a full report of all the particulars of such arrest or seizure to the immediate official superior, and if the same is not complied with, it would vitiate the trial. Let us make it clear that Sec.57 is not mandatory. Non-compliance thereof would therefore vitiate the trial or search and seizure only when it is shown that non-compliance of Sec.57 has caused serious prejudice to the accused. It is not shown that appellant's interest was jeopardized. However, it may be stated that Pratapsinh Bhupatsinh (Exh. 28) has in his deposition stated that the report regarding the seizure and search was on the same day sent to the DSP. The letter under which the report was sent is produced at Exh. 19. It is dated 18th April, 1993 and as per the endorsement in the margin, the same was received by the higher officer i.e. D.S.P. on 19th April, 1993 at 2.20 p.m. It may be mentioned that the incident happened at 8.00 p.m. on 18th April, 1993. It therefore follows that within 48 hours next after such arrest and seizure, full report in this regard was made to the higher authority, namely, the DSP, Jamnagar. Thus, Section 57 is complied with, and there is no omission or lapse on the part of the Investigating Agency. The contention advanced by the learned Advocate for the appellant in this behalf therefore fails. On no other ground submissions were made.

10. Suffice it to say that we generally agree with the reasons given by and findings of the learned Addl. Sessions Judge. When that is so, it is not necessary to re-state all the reasonings of the learned Judge.

11. For the aforesaid reasons, the appeal being devoid of merits is required to be dismissed and is hereby dismissed maintaining the order of conviction and sentence.

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