

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:28-03-2002

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THE HON'BLE MR. JUSTICE MALAI.SUBRAMANIAN

CRIMINAL APPEAL NO.656 OF 1994

Sikandar Appellant

vs

State by Inspector of Police,
D. Nagar Circle, Pondicherry,
through Public Prosecutor,
Pondicherry

..... Respondent

This appeal is filed under Sec.374(2) CR.P.C. Against the judgment convicting the appellant under Sec.20(b)(i) of the N.D.P.S. Act 1985 and sentencing him to undergo 3 years R.I and to pay a fine of Rs.5,00 0/- in S.C.No.3/93 on 24.9.93 by the learned III Additional Sessions Judge, Pondicherry.

! For appellant : Mr.R. Gothandaraman
^ For respondent : Mr.T. Murugesan
Public Prosecutor (Pondy.)

:@J@UDGMENT

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The appellant was convicted by the III Additional Sessions Judge, Pondicherry in S.C.No.3/93 for an offence punishable under Sec.20(b)(i) of N.D.P.S. Act 1985 and was sentenced to undergo R.I for 3 years and to pay a fine of Rs.5,000/-, in default, to undergo S.I for 6 months and hence this appeal.

2.P.W.3 Inspector of Police, Muthialpet, Pondicherry, after receiving information from P.W.2 Superintendent of Police, Special Branch, Pondicherry over phone, rushed to Indira Gandhi park, Solai Nagar, Muthialpet, Pondicherry with P.W.1 and Manjini @ Krishnan and along with other police party at 3.30 p.m on 6.9.92 and found the appellant and other accused possessing bags. After ascertaining their

names and enquiring them, he was satisfied that they were selling Ganja. Therefore, he took them along with the witnesses to P.W.2's office at about 4.00 p.m. and in the presence of P.W.2, the appellant and others were examined and 950 grams of Ganja leaves in 378 packets found in a polythene bag was recovered from this appellant. An amount of Rs.15 .50 was also recovered from the appellant. Certain amounts of ganja were also seized from A.2 and A.3 also with which were are not concerned presently. The Magazar has been marked as Ex.P.1, attested by P.W.1 and another witness.

3.P.W.3 thereafter took samples from the packet under Ex.P.4 Mahazar attested by P.W.1 and later took the accused to the Police Station; registered a case in Crime No.209/92. The next day he forwarded the appellant for remand. On the instructions of P.W.2, another Inspector of Police took up investigation.

4.P.W.4 took up further investigation on 28.9.92; examined P.W.1 and Manjini @ Krishnan and recorded their statements. He also received Ex.P.7 -Analyst Report from Public Health Laboratory, Pondicherry. After completing investigation, he laid final report on 5.11.1992 against the appellant and others.

5.P.W.3 Inspector of Police, Muthialpet, Pondicherry, after receiving information, took P.W.1, who was working as Watchman in Public Works Department, Pondicherry to Indira Gandhi Park, Solai Nagar, Muthialpet. The Sub Inspector of Police and other constables also accompanied. P.W.3's evidence that he found the appellant and others in possession of ganja was corroborated by P.W.1, an independent witness. It is the further evidence of P.W.1 that P.W.3 took them along with the accused to P.W.2, and the appellant admitted the offence before P.W.2. P.W.1 corroborates the evidence of P .W.3 regarding seizure of 950 grams of ganja in 378 packets found in polythene bag and he also corroborates recovery of an amount of Rs.15.50. P.W.1 identifies M.O.1 series- Ganja packets and M.O.2 series of currency notes.

6.From the evidence of P.W.1 and P.W.3, possession of ganja of 950 grams in 378 small packets kept in a polythene bag by the appellant has been proved. Insofar as the samples are concerned, according to Ex.P.7 report, they were found to contain ganja (cannabis). Therefore, I hold that the prosecution has proved possession of ganja by the appellant as held by the learned Sessions Judge.

7.The main thrust of argument of the learned counsel appearing for the appellant is that Sec.50 of Narcotic Drugs and Psychotropic Substances Act, 1985 has not been properly followed, since search was not made in the presence of an independent gazetted officer. In support of his contention, he relied on a ruling of the Calcutta High Court reported in KARTICK SHAW AND ANOTHER VS STATE OF WEST BENGAL (iv (2 001) CCR 382 . According to the learned counsel, P.W.3 taking the accused to a Gazetted Officer of the same Department is not sufficient compliance of Sec.50 of N.D.P.S. Act. A Full Bench of Calcutta High Court in JADUNANDAN ROY VS

STATE OF WEST BENGAL relied on in the earlier ruling held that once an option is exercised, the accused is required to be taken to the nearest Gazetted Officer or the Magistrate, but the said provision would be made nugatory if the Gazetted Officer is already at the spot. According to the Full Bench, the provision contemplates a decision by an independent Officer and not an officer, who is already a member of the raiding party. They have also held that the search must be conducted in the presence of a Magistrate or a Gazetted Officer, who is totally independent and is not in any way interested in the success of the raid. The learned counsel further argues that the search said to have been made in the presence of P.W.2 on whose direction P.W.3 went to locate the accused is vitiated as P.W.2 is interested in the success of the raid.

8.The bare reading of Sec.50 of N.D.P.S Act would reveal that the conditions found therein have to be complied with only where there is search of persons. When any Officer duly authorised under Sec.42 is about to search any person under the provisions of Sec.41, Sec.42 or Sec.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 Sec.42 or to the nearest Magistrate. As a matter of fact, Sec.42 of the Act enables search of persons by any such officer superior in rank to a peon, sepoy or constable of the departments of Central Excise,,Narcotics, Customs, Revenue Intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf. There is no dispute that Inspectors of Police were empowered under Sec.42 for search, seizure and arrest of the person concerned. Therefore, the search being conducted in the presence of a superior Officer of the same department does not in any way affect the veracity of the search, but the Full Bench ruling of the Calcutta High Court is a ruling of caution so that it may not be said that the Officer of the Narcotic Bureau will be interested in securing a conviction if he himself is a member of the raiding party. In this case, P.W.3 is a member of the raiding party and though he is a gazetted officer, he took the accused/ appellant before P.W.2 - the Superintendent of Police, Special Branch who was not a member of the raiding party but at whose instance the raid was made. Even otherwise Sec.50 may not attract to the facts of the present case because, there was no search of the person in this case. Search of the person has to be distinguished from the search of any bag or other container which the person carries.

9.With regard to the search of persons, Sec.100(3) Cr.P.C speaks as below:

" Where any person in or about such place is reasonably suspected of concealing about his person any article for which search should be made, such person may be searched and if such person is a woman, the search shall be made by another woman with strict regard to decency". Suppose a bag carried by a woman has to be searched, it does not require another woman to make the search. "person" means the body and the wearing apparel and search requires touching of the body. That is why Sec.100 (3) Cr.P.C provides that search of a woman shall be made by

another woman taking into consideration that a male officer cannot be permitted to touch a female accused in view of decency and respect to the fair sex. Search of a bag even carried by a woman does not require another woman to do so. Sub Sec.7 of 100 Cr.P.C would say that if any person is searched under sub section (3), a list of all things taken possession of shall be prepared, and a copy thereof shall be delivered to such person.

10. Equally N.D.P.S Act also provides for search of persons in Sec.43 (b) in contrast to search of places. In this connection the Supreme Court in BIRA KISHORE KAR VS STATE OF ORISSA (2001 SCC (CRL) 645 has held that Sec.50 would come into play only in the case of search of a person as distinguished from search of any premise etc. It was a case where the accused was found lying on a plastic bag in one of the compartments of the train. The said plastic bag was then seized and on verification, it was found to contain 10 kilo grams of poppy straw. Their Lordships have made a distinction between search of person and search of any premises and since the appellant in that case was sitting on a plastic bag they held that Sec.50 is not attracted. The above said ruling was rendered based on a Constitution Bench ruling of the Supreme Court reported in STATE OF PUNJAB VS BALDEV SINGH (19 99 SCC (CRL)1080. Their Lordships in that case have held "Section 50 would come into play only in the case of a search of a person as distinguished from search of any premises etc. However, if the empowered officer, without any prior information as contemplated by Sec.42 of the Act makes a search or causes arrest of a person during the normal course of investigation into an offence or suspected offence and on completion of that search, a contraband under the NDPS Act is also recovered, the requirements of Sec.50 of the Act are not attracted".

11. In this case, the appellant was possessing a polythene bag inside which 378 small packets of ganja of about 950 grams were found. The only difference between the facts of this case and the facts in the case reported in BIRA KISHORE KAR VS STATE OF ORISSA (2001 SCC (CRL) 645 is that in the later case, a plastic bag containing ganja was placed in the compartment and the appellant in that case was found lying on it and his body was touching the bag, while in this case, the appellant was said to have been possessing a polythene bag. Search of a bag is different from search of the person himself. Therefore, I hold that though in this case the provisions of Sec.50 have been complied with even though P.W.3 before whom the search was made is an officer of the same department, I am inclined to believe the case of the prosecution and I hold that there is no violation of Ssec.50 of N. D.P.S. Act.

12. In the case of KALEMA TUMBA VS STATE OF MAHARASHTRA AND ANOTHER (1999 SCC (CRL) 1422 the Apex Court considered the mandatory provisions of Sec.50 of N.D.P.S. Act and held that only when the person of an accused is to be searched then he is required to be informed about his right to be examined in the presence of a gazetted officer or a

Magistrate. It further held that in view of the decision in the case of STATE OF PUNJAB VS BALDEV SINGH (1999 SCC (CRL)1080. , the decision rendered by the Apex Court in STATE OF PUNJAB VS JASBIR SINGH (1996) 1 SCC 288) wherein it was held that though puppy husk was recovered from the bags of the accused, he was required to be informed about his right to be searched in the presence of a gazetted officer or a Magistrate, stood over ruled. In that case heroin was found from the bags belonging to the appellant and not from his "person" and therefore it was held that it was not necessary to conduct search in the presence of a gazetted officer or a Magistrate. The Supreme Court in KALEMA TUMBA VS STATE OF MAHARASHTRA AND ANOTHER (1999 SCC (CRL) 14 22 has held as follows: "Only when the person of an accused is to be searched then he is required to be informed about his right to be examined in the presence of a gazetted officer or a Magistrate. As rightly pointed out by the High Court search of baggage of a person is not the same thing as search of the person himself. If a person is carrying a bag or some other article with him and a narcotic drug or a psychotropic substance is found from it, it cannot be said that it was found from his "person".

The Apex Court in latest ruling rendered in the case of GURBAX SINGH VS STATE OF HARYANA (2001 SCC (CRL) 426 has strengthened the view taken in the above said ruling by holding that search of a person is different from search of the bag found in his possession. According to the facts of that case, after looking at the police party the appellant who was sitting in the compartment became panicky and left the train from the door towards the side of engine carrying gunny bag on his left shoulder. On suspicion, he was nabbed in the presence of the witness and it was found that he was carrying poppy straw weighing 7 kg in a polythene bag of white colour. In that case also, the Supreme Court has held that Sec.50 of the N.D.P.S. Act would be applicable only in cases where search of the person is carried out and not the search of bags though the appellant was acquitted on different grounds.

13.In view of the above discussions, I hold that the offence has been proved beyond all reasonable doubts. With regard to the sentence, the trial court imposed 3 years R.I to the appellant. The Judgment was delivered on 24.9.93 and immediately he was remanded to custody. Thereafter, this Court granted bail only on 8.12.94. Even prior to his release on bail pending trial, he was said to be in prison for some time. Taking into consideration the quantity of ganja possessed by the appellant and in view of the fact that the appellant has been in jail for about 15 months, I am inclined to sentence the accused to the period already undergone in lieu of three years.

14.In the result, the conviction of the accused/appellant by the trial court is confirmed and the sentence of fine of Rs.5,000/- imposed on the appellant also stands confirmed and the sentence of imprisonment of three years R.I imposed on the appellant by the trial court is reduced to the period already undergone.

28-03-2002

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Index: Yes/no

Web site: yes

To

1.The III Additional Sessions Judge, Pondicherry

2.The Sessions Judge, Pondicherry

3.The Public Prosecutor for Pondicherry, High Court, Madras

MALAI.SUBRAMANIAN,J

Judgment in

Crl.Appeal No.656/1994

28-03-2002

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