

HIGH COURT OF MADHYA PRADESH: BENCH AT
INDORE
BEFORE HON.SHRI JUSTICE I.S.SHRIVASTAVA
CRIMINAL APPEAL NO. 675/2004

Zubedabi w/o Rehman Bux

Vs.

State of M.P. Thro' P.S. Industrial Area Ratlam

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 Shri Sanjay Sharma, advocate for the appellant.
 Shri R.S.Chouhan, G.A. For respondent State

J U D G M E N T

(Delivered on 12.01.2010)

Arguments on this appeal filed by the appellant Zubeda under S. 374 of the Cr.P.C. heard. The Appeal has been preferred by the appellant being aggrieved by the judgment dated 14.5.2004 passed by the Court of Shri R.K.Shrivastava, Special Judge N.D.P.S.Act, Ratlam in Special S.T. No.39/00 by which the appellant has been convicted under S.8/18(B) of the N.D.P.S.Act (for short the Act) and sentenced to undergo rigorous imprisonment of 10 years and fine of Rs. 1,00,000/- (one lakh) and in default of payment of fine to undergo one year rigorous imprisonment.

2. According to prosecution case on 28.9.2000, A.S.I. J.S.Pawar of Police Station, Industrial Area, Ratlam on receiving an information from the informer that a lady Zubeda is coming on motor cycle with Sherani and going towards Baswada, will board a bus from Banjali Petrol Pump of Ratlam for Baswada and will proceed to Mumbai from Baswada. Thereafter J.S.Pawar arranged for a trap and called a lady constable Shobha Minj and reached the spot. There they saw that one motorcyclist dropped a lady but on chasing he ray away. The lady was stopped by the police force and after obtaining her consent as per procedure, her person and bag were searched. From her bag 9 packets of polythene were found; each of the packet was containing opium.

In all 9 kg of opium was seized from her bag. Two samples of 24-24 gms. each was prepared which were marked as article A1 to Art. I, A2 to A -I2 and 9 packets were marked as article A to article I thereafter packets and samples were sealed and as per procedure all the samples A1 to I1 were sent to F.S.L. Indore for examination. After completion of the investigation, challan was filed and after trial, appellant was punished as mentioned above.

3. It has been argued on behalf of the appellant that she has been falsely implicated in this case. There are two sets of evidence. In one set, she is said to have been in the bus from where she was caught and her bag was seized. In the second set of prosecution story, she was caught after she alighted from the motorcycle and was searched. Provision of S.50 of the Act was not complied with. She was not searched by a lady police constable. Her personal search was conducted against the rules. Samples were not sealed as per procedure. There is difference of evidence about the weight of samples; that they were of 12 gms. or 24 gms. Samples were not sealed at Police Station. The independent witness has not supported the prosecution case. The property was deposited in the Court and there was inordinate and unexplained delay in the deposit of the property in the Court. As per paper news given by the Superintendent Police, the accused was traveling in the bus from where the opium was seized. The quantity of opium is recorded in Ex.D.1 as 9 kg. and in Ex.D.2 as 8 kg. Hence appeal be accepted.

4. It has been argued on behalf of the respondent State that 9 kg. of opium was seized from the possession of the accused Zubeda. The prosecution case was proved before the trial Court and she has been rightly convicted. The appeal being devoid of merits, be dismissed.

5. Considered the arguments. Record perused.

6. According to ASI J.S.Pawar PW.7 he received

information from the informer that Zubeda is coming with Sherani on a motor cycle. She is having opium and she will board the bus from Banjali Petrol Pump, Ratlam. Therefore, he prepared Panchnama Ex.P.4 about the information of the informer. Thereafter he along with Head Constable Umesh Bajpai- PW.8, Constable Ganesh, Constable Somdutt, Constable Jitendra, lady Constable Shobha Minj and two independent witnesses reached Banjali Petrol Pump where they saw the motorcyclist alighting a lady. The motorcyclist was chased but he ran away along with motorcycle. Thereafter he along with Head Constable Umesh Bajpai and lady Constable Shobha Minj circled the lady and stopped her and after obtaining her consent as per due procedure, prepared Panchnama consent Ex.P.6 and took search of Zubeda from whom 9 polythene packets of opium were seized. Panchnama seizure Ex.P.15 was prepared. Accused lady Zubeda was arrested as per Panchnama Ex.P.16.

7. It has been argued on behalf of the appellant that for the search of a lady, provisions under S.50 of the Act were not complied with. According to S. 50(4) of the Act no female shall be searched by any one except by a female. But the accused was not searched by a female. Lady constable Shobha Minj PW.9 was examined by the prosecution to prove this fact. According to statement of Shobha Minj PW.9, she reached Banjli Petrol Pump along with ASI J.S.Pawar PW.7. When she reached there she saw a lady was sitting in the bus. They asked her about the contents of the basket and on search, opium was found in it. She does not remember the actual quantity of opium but as per her approximation it was 8 kg. Thereafter with the lady and opium they came to the police station. Where after testing, opium was confirmed. This witness was declared hostile and in cross examination, she has again confirmed that lady was sitting in the bus on a seat which was for two persons. She took out the basket from the bus which was being kept on a seat of the bus. She deposed that it is correct to say that she did not go to the spot from Ratlam. It is also correct that she did not see any bus nor Zubeda was alighting from any bus before her. It is correct to say

that she saw Zubeda at Police Station in Ratlam. In this way she has not supported the fact that basket was seized from Zubeda near a petrol pump but she has confirmed the fact that Zubeda was sitting in bus and from the bus she took out a basket. In this way she has not supported the fact that she searched the person of Zubeda. She has said that she searched the basket in the bus and found opium in it but this is not prosecution case. Prosecution case is about the seizure of opium from the basket possessed by Zubeda near petrol pump. Therefore, this witness Shobha Minj PW.9 has not supported the prosecution story and also not supported the fact that she searched the person of Zubeda. IN this way compliance of S.50 is not proved. The above statement of Shobha Minj PW.9 who is a police constable, goes to the root of the case because according to prosecution story, on receiving information of the informer and the statement of JS Pawar -PW.7 and Umesh Bajpai -PW.8, Zubeda was not arrested from the bus but as soon as she was alighting from the motorcycle, she was caught on road. Hence due to difference of facts, the prosecution story becomes doubtful.

8. It is notable that in news paper Ex.D.1 Dainik Bhaskar dated 29.9.2000 and Ex.D.2 daily Agniban of 28.9.2000 which is an evening daily news paper, has been produced. In both these news papers, news item has been published with reference to the information given by the S.P. Sanjay Mane that he was informed by the informer that in a bus a lady is travelling with opium. Hence on his instruction police raided the bus near Dhamnod and seized opium from Zubeda who is resident of Ratlam. According to Dainik Bhaskar Ex.D.1, 9 kg. of opium was seized from her and according to daily Agniban Ex.D.2, 8 kg. of opium was seized. Though news published in the news paper are not reliable as to its contents without their proofs; but since they have been produced in defence, hence the burden to prove the news is not so strict like the prosecution. Only the probability raised by the defence are to be seen in Ex.D.1 and Ex.D.2. As per news item published as the source of S.P. it has been mentioned that the opium was seized

from Zubeda sitting in the bus and lady constable Shobha Minj PW.9 has supported the fact that at the time of seizure Zubeda was sitting in the bus along with basket; hence looking to the statement of Shobha Minj PW.9 defence raised by the appellant can not be said to be baseless. It is also notable that ticket Art. L from Ratlam to Banswada was also seized from her. Hence it again creates a doubt about the seizure of the opium from Zubeda whether it was from the bus or it was from appellant Zubeda near petrol pump while she was alighting from the motor cycle.

9. According to Ex.P.6 the appellant was informed by the I.O. that she may give a consent for the search before the gazetted officer or a magistrate or by police and search can be taken up by lady constable. Hence accused consented for search by police. But it is clear from Ex.P.6 that appellant was not informed about the right to be searched before the gazetted officer or magistrate. Simply her consent was obtained. This procedure does not fulfil the requirement of S. 50 of the Act; hence the appellant is liable to be acquitted.

10. According to Panchnama search Ex.P.8 of Zubeda it is mentioned that her bag was searched by J.S.Pawar and Shobha Minj PW.9 and after recovery of 9 packets of opium, personal search of the accused Zubeda was taken up by the lady constable Shobha Minj and from her purse Rs.850/- and a ticket from Ratlam to Baswada was found which were seized by a separate Panchnama. It has been argued on behalf of appellant that search of lady must be taken in presence of the panch witnesses by lady constable. The procedure that in the presence of the panch witnesses, search by the lady constable has no meaning. It is violative of the fundamental rights of the lady and in presence of a male witness a lady can not be searched effectively.

11. From Ex.P.8 it appears that at the same time search of Jubeda was taken up by J.S.Pawar A.S.I. and after recovery of 9 packets from the basket, Zubeda was searched by lady constable

Shobha Minj PW.9 from her purse Rs.850/- and one ticket from Ratlam to Banswada was recovered. From perusal of Ex.P.8 it appears that the search was taken at Banjali Petrol Pump, Sailana Ratlam Road. But the search was against the provisions of law. According to S.50(4) of the Act, no female shall be searched by any one except any female, but at the same time Jubeda was searched by A.S.I. J.S.Pawar and thereafter by lady constable Shobha Minj.

12. In *State of Punjab Vs. Baldev Singh [(1999) 6 SCC 172]* it has been held that *“Thus, while conducting search and seizure, in addition to the safeguards provided under the Code of Criminal Procedure, the safeguards provided under the NDPS act are also required to be followed. Section 50(4) of the NDPS Act lays down that no female shall be searched by anyone excepting a female. This provision is similar to the one contained in Section 52 of the Code of Criminal Procedure, 1898 and section 51(2) of the Code of Criminal Procedure, 1973 relating to search of females. Section 51(2) of the Code of Criminal Procedure, 1973 lays down that whenever it is necessary to cause a female to be searched, the search shall be made by another female with strict regard to decency. The empowered officer must, therefore, act in the manner provided by section 50(4) of the N.D.P.S Act read with section 51(2) of the Code of Criminal Procedure, 1973 whenever it is found necessary to cause a female to be searched. The document prepared by the investigating officer at the spot must invariably disclose that the search was conducted in the aforesaid manner and the name of the female official who carried out the personal search memo of the female concerned should indicate compliance with the aforesaid provisions. Failure to do so may not only affect the credibility of the prosecution case but may also be found as violative of the basic right of a female to be treated with decency and proper dignity. “*

13. Therefore it is not desirable that a lady be searched in the presence of male witnesses and at public place which violates the basic right of a female to be treated with decency and proper dignity. This simply shows that search of Jubeda by constable Shobha Minj was only a formality. It is to be noted that Shobha Minj PW.9 in her statement has not supported the fact that at Banjali Petrol Pump she took a search of Jubeda. In her cross examination she had admitted that she did not go to the place of incident.

14. Therefore, whenever a female is to be searched under the provisions of the Act, proper care should be taken that she should be searched before a gazetted officer or before nearest magistrate, as desired under S.50. If available, the witnesses must be lady witnesses and searching officer must necessarily be lady officer so that the search of the female may be carried with

decency and proper dignity of the female.

15. As regards preparation of the samples of the seized opium is concerned, J.S.Pawar, ASI PW.7 has deposed that he has prepared samples from 9 packets. From each packet, he prepared samples of 24-24 gms. each which were marked as A1, A2, to A - I1 & A, A to I2. Umesh Bajpai Head Constable PW.8 being a member of raiding party, has deposed in para 6 that samples of 12 – 12 gms. were prepared but he could not inform about the total weight of the opium seized from Zubeda. Shobha Minj PW.9 was also a member of raiding party, is also not definite about the weight of the opium. She has deposed that she does not remember the actual weight but approximately it was 8 kg. In this way she is not confirmed about the weight of sample. In this way statement of witness about the total weight of the opium seized and the weight of the samples is different which does not confirms with each other and contrary to each other. If they all were present at the same time, then there should not be factual difference in this matter.

16. As regards members of raiding party, J.S.Pawar has deposed that he went to the spot along with Head Constable Umesh Bajpai, Constable Ganesh, Constable Somdutt, Constable Jitendra and lady Constable Shobha Minj. Witness to the spot Umesh Bajpai PW.8 has deposed that he along with J.S. Pawar, A.S.I., lady constable Shobha Minj and Constable Inderjit Singh proceeded to the spot by jeep MP-03-4T41. In this way he has not supported the statement of J.S.Pawar PW.7.

17. As regards sealing of samples is concerned, it has been argued that they were not duly sealed on the spot and at the Police Station after the seizure.

18. Dilip Singh PW.6 has deposed that on 28.9.2000 J.S.Pawar Station Incharge of the P.S. gave him sealed 9 packets of Crime No. 303/00 which he registered at S.N. 187 of the register Ex.P.19. In cross examination he has deposed that when

the packets were delivered to him, the cloth bag was marked but the seizure slip was not pasted on it. The packets were given to him in sealed condition. This shows that all the sealed packets which were kept in a bag of cloth which was not sealed and property was deposited in the Malkhana of the Police Station without further sealing by the Incharge of the police station.

19. J.S.Pawar PW.7 has deposed in his cross examination in para 30 that when the packet was opened in the court, the chit which was pasted on packet was not torn when stitching was opened. It is correct to say that the chit is not pasted on the stitching of the packet. The packet has been encircled by the thread and seal has been impressed on it on article 'B'. It is correct to say that on article C the chit has not been pasted on the stitching but after encircling by thread, the slip has been pasted. Similar is the condition with other packets. The Court has also observed in para 32 that from all the packets A to I, the seizure slip has not been pasted on cloth bag. For testing a pen has been moved below the seizure chit and chit was not found pasted on the cloth bag. But it was found that the chit was placed on the bag and it was encircled by thread and sealed by Chapadi. Similar is the condition with the sealing of the packet at the Police Station. This shows that samples were not sealed property at the time of the seizure at the police station. Hence due to doubtful sealing all these packets in the circumstances, as above discussed, the prosecution case is doubtful.

20. As regards the independent witnesses Sitaram PW.3 has been examined as independent witness and other witness Shantilal has not been examined by the prosecution before the trial Court. Sitaram PW.3 has been declared hostile. He has not supported the prosecution story and proceedings taken up by the investigating officer. According to his statement he and Shantilal were called to Police Station by police personnel. He saw a lady accused at the Police Station. On request of Shantilal he and Shantilal signed on Ex.P.4 to Ex.P.16. He did not saw the opium. On specific question being asked. he denied. In this way he has

not supported the prosecution case.

21. Therefore, on the basis of above discussion, it is clear that there is doubt about the fact that whether the opium was seized from the appellant when she was in bus or she was on the road. The compliance of S.50 of the Act is not as per the procedure and defective. There is difference of evidence about the sampling of the opium. There is grave contradiction in the statement of J.S.Pawar PW.7 and Umesh Bajpai PW.8. Samples were sealed defectively. The independent witness has not supported the prosecution case. Therefore, in the light of law laid down in *Dilip & another Vs. State of M.P. - (2007) 1 SCC (Cri.) 377* and *K.Mohanan Vs. State of Kerala - 2001(1) EFR 219*, *Ritesh Chakrawarty Vs. State of M.P. (2007) 1 SCC Crie) 562* this appeal deserves to be accepted.

22. Therefore, the appeal is accepted and the conviction and sentence of the appellant Zubeda under S. 8/18(B) of the Act is set aside. She be released if not required in any other offence. The fine if deposited, be returned to her.

(I.S.Shrivastava)
JUDGE

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