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UNION OF INDIA

v.

SHAH ALAM & ANR.

(Criminal Appeal No. 1158-1159 of 2004)

JUNE 11,2009

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[B. SUDERSHAN REDDY AND AFTAB ALAM, JJ.]

Narcotic Drugs and Psychotropic Substances Act, 1985 – s.50, s.8 r/w 21 – Allegation of illegal possession of 100 C *grams of heroin by respondents – Body search of respondents, packets of heroin found in shoulder bags carried by them – Conviction u/s. 8/21 and sentenced to rigorous imprisonment for 10 years with fine – However, acquittal by High Court – Interference with – Held: Not called for – Alleged* D *recovery of heroin from respondents in violation of s.50 – Non-examination of independent witnesses of search and recovery – More so, respondents already served 4/5th of the maximum permissible punishment for the offence as amended by Act 9 of 2001.*

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Respondents were convicted u/s. 8 r/w s. 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 for illegal possession of 100 gms. heroin and were sentenced to rigorous imprisonment for 10 years and fine of Rs. 1 lakh. However, they were acquitted u/s. 8 r/w s. F **29. High Court set aside the order of trial court; however, upheld the acquittal u/s. 8 r/w s. 29. Hence the present appeal.**

Dismissing the appeal, the Court

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HELD: 1.1. Under s. 21 of the Narcotic drugs and Psychotropic Substances Act, 1985 as it stood in 1994 when the occurrence took place, the sentence of rigorous imprisonment for ten years and fine of rupees one lakh

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was the minimum punishment for illegal possession of 100 grams of heroin. It has now become the maximum permissible punishment as the law stands today, by Amendment Act 9 of 2001. Having regard to the way the Act has been amended by the Legislature and the graded form it has come to assume both in regard to the quantities of narcotics and the punishments it would not have been wrong for this Court to decline to interfere in this matter on the ground that the respondents have already served 4/5th of the (now) maximum permissible punishment for the offence. [Para 6] [1122-E-G]

1.2. From the evidence of the complainant, PW1 and the seizure memo, it is evident that the two respondents were subjected to a body search in course of which packets of heroin were found in the shoulder bags carried by them and were recovered from there. [Para 9] [1125-E-F]

1.3. On the facts of the case, it is found that the alleged recovery of heroin from the respondents was made in complete violation of the provisions of section 50 of the Act. Apart from this the non-examination of the two independent witnesses of the search and recovery was another grave omission by the prosecution. A formal petition for discharge of the two witnesses was filed by the prosecution before the trial court and it is not that they were simply not produced before the court. Therefore, it is satisfied that the High Court took the correct view of the matter and the judgment under appeal does not suffer from any infirmity. [Paras 10 and 11] [1126-D-F]

Dilip and Anr. v. State of M.P. **(2007) 1 SCC 450, relied on.**

State of H.P. vs. Pawan Kumar **(2005) 4 SCC 350, referred to.**

A **Case Law Reference:**

(2005) 4 SCC 350	**Referred to.**	**Para 8**
(2007) 1 SCC 450	**Relied on.**	**Para 9**

B CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 1158-1159 of 2004.

From the Judgment & Order dated 22.11.2002 and 26.02.2003 of the High Court of Judicature at Allahabad at Lucknow Bench, Lucknow in Crl. Appeal No. 523 of 2000 and
C Crl. Misc. Correction Appln. No. 1093 of 2003 in Crl. Appeal No. 523 of 2000.

S.N. Terdal, S. Wasim A. Qadri and Sadhana Sandhu (for Sushma Suri), for the Appellants.

D Nagendra Rai, R.K. Gupta, A.B. Siddiqui, Arun Yadav, Shekhar Kumar and Bihari Trigunayat for the Respondents.

The Judgment of the Court was delivered by

E **AFTAB ALAM, J.** 1. The two respondents Shah Alam and Mazzum Haq were held guilty of illegally possessing 100 grams of heroin each and were accordingly convicted by the trial court under Section 8 read with Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 and sentenced to undergo
F rigorous imprisonment for ten years and to pay a fine of Rs.1 lakh each and in default to undergo rigorous imprisonment for a further period of six months. They were acquitted of the other charge under Section 8 read with Section 29 of the Act. In appeal, the Allahabad High Court, Lucknow Bench, set aside the judgment and order passed by the trial court and acquitted
G the respondents of the charge under Section 8/21 of the Act.

2. Against the judgment and order of acquittal passed by the Allahabad High Court the Union of India has come in appeal by special leave.

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3. The recovery of heroin from the two respondents was made on August 5, 1994. They were convicted and sentenced by the trial court by judgment and order dated May 11, 2000 and were finally released on being acquitted by the High Court by its judgment and order dated November 22, 2002. On inquiry from the court Mr. S. N. Terdal, learned counsel appearing for the appellant, Union of India, stated that the respondents were not on bail either during trial or after conviction during the pendency of their appeal. This means that the respondents have already served 8 years and 3 months out of the total period of sentence of ten years (plus the default period of six months).

4. The law as it stands today is vastly different from what it was in 1994 when the occurrence took place. Now, 100 grams of heroin is an intermediate quantity between "small quantity" and "commercial quantity" (vide section 2 sub-clause (vii a) and (xxiii a) read with S. O. 1055(E) dated October 19, 2001 at serial no.56). After the amendment of the Act with effect from October 2, 2001 (vide Act 9 of 2001) the punishment for illegal possession of 100 grams of heroin is provided under Section 21 (b) of the Act which reads as under:-

> "21. Punishment for contravention in relation to manufactured drugs and preparations. - Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses any manufactured drug or any preparation containing any manufactured drug shall be punishable,-
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> (a).....
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> (b) where the contravention involves quantity, lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term *which may extend to* ten years and with fine *which may extend* to one lakh rupees;

A (c)....."

5. The position was quite different in 1994. At that time the possession of narcotic drug in excess of small quantity for personal consumption (5 milligrams, in case of heroin) attracted the punishment of rigorous imprisonment for a minimum period of ten years as well as fine of not less than rupees one lakh. Section 21 of the Act, as it stood in 1994, is as under:-

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"21. Punishment for contravention in relation to manufactured drugs and preparations.- Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses any manufactured drug or any preparation containing any manufactured drug shall be punishable with rigorous imprisonment for a term which shall *not be less than* ten years but which may extend to twenty years and shall also be liable to fine which shall *not be less than* one lakh rupees but which may extend to two lakh rupees:

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Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees."

6. It is, thus, to be seen that the sentence of rigorous imprisonment for ten years and fine of rupees one lakh that was the *minimum punishment* for illegal possession of 100 grams of heroin has now become *the maximum* permissible punishment as the law stands today. Having regard to the way the Act has been amended by the Legislature and the graded form it has come to assume both in regard to the quantities of narcotics and the punishments it would not have been wrong for this court to decline to interfere in this matter on the ground that the respondents have already served 4/5th of the (now) maximum permissible punishment for the offence. Nevertheless, we have examined the case on its merits and we

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are satisfied that the judgment of the High Court does not suffer from any infirmity and it does not call for any interference.

7. According to the prosecution case, on receipt of confidential information from an informer on August 5, 1994 a team of officers of the Central Bureau of Narcotics laid a vigil at Charbagh bus stand from 11.00 in the morning. At about 5 in the afternoon the informer gave the signal indicating the five suspects, including the two respondents, from each of whom the search party was able to recover 100 grams of heroin in presence of two independent witnesses, namely, Munni Lal and Salig Ram. The two respondents were tried before the Special Judge (E.C.A.), Lucknow (the other three suspects managed to abscond) who convicted and sentenced them as noted above. In appeal, however, the High Court set-aside the judgment of the Trial Court and acquitted the respondents. The High Court set-aside the Trial Court judgment mainly on two grounds; one, recovery of heroin was made from the respondents without observing the conditions laid down in Section 50 of the Act in regard to search and the other, the non-examination of the two independent witnesses in whose presence the recovery and seizures were made.

8. Mr. Terdal, learned counsel appearing in support of the appeal submitted that the High Court had misled itself into error by overlooking the difference between the person of the respondents and the baggage carried by them. In this case the recovery of the heroin was made from the bags being carried by the respondents and not from their persons. Section 50 of the Act laid down the conditions for search of the person and not for any bag or brief case etc. being carried by him/her and hence, the provisions of section 50 had no application in the facts of this case. Learned Counsel further submitted that as a matter of fact heroin was first recovered from the bags being carried by the respondents and then they were also subjected to a search of their persons but the personal search did not lead to any further recoveries and, therefore, there was no

A question of any violation of Section 50 of the Act. In support of the submission he relied upon a three-judge Bench decision of this Court in *State of H.P. vs. Pawan Kumar* (2005) 4 SCC 350. In paragraphs 10 and 11 of the decision it was observed as under:

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> "10. We are not concerned here with the wide definition of the word "person", which in the legal world includes corporations, associations or body of individuals as factually in these type of cases search of their premises can be done and not of their person. Having regard to the
> C scheme of the Act and the context in which it has been used in the section it naturally means a human being or a living individual unit and not an artificial person. The word has to be understood in a broad common-sense manner and, therefore, not a naked or nude body of a human being
> D but the manner in which a normal human being will move about in a civilized society. Therefore, the most appropriate meaning of the word "person" appears to be – "the body of a human being as presented to public view usually with its appropriate coverings and clothing". In a civilized society
> E appropriate coverings and clothings are considered absolutely essential and no sane human being comes in the gaze of others without appropriate coverings and clothings. The appropriate coverings will include footwear also as normally it is considered an essential article to be
> F worn while moving outside one's home. Such appropriate coverings or clothings or footwear, after being worn, move along with the human body without any appreciable or extra effort. Once worn, they would not normally get detached from the body of the human being unless some specific
> G effort in that direction is made. For interpreting the provision, rare cases of some religious monks and sages, who, according to the tenets of their religious belief do not cover their body with clothings, are not be taken notice of. Therefore, the word "person" would mean a human being
> H with appropriate coverings and clothings and also

footwear."

"11. A bag, briefcase or any such article or container, etc. can, under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body of a human being. Depending upon the physical capacity of a person, he may carry any number of items like a bag, a briefcase, a suitcase, a tin box, a thaila, a jhola, a gathri, a holdall, a carton, etc. of varying size, dimension or weight. However, while carrying or moving along with them, some extra effort or energy would be required. They would have to be carried either by the hand or hung on the shoulder or back or placed on the head. In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore, it is not possible to include these articles within the ambit of the word "person" occurring in Section 50 of the Act."

9. The legal proposition advance by Mr. Terdal, based on the distinction between search of someone's person and the baggage carried by him/her is unexceptionable but his submission is not supported by the facts of this case. We have carefully gone through the records of this case. From the evidence of the complainant, PW1 and the seizure memo (Fard Baramdegi) Ext Ka 2 it is evident that the two respondents were subjected to a body search in course of which packets of heroin were found in the shoulder bags carried by them and were recovered from there. The facts of the case in hand are very close to another decision of this Court in *Dilip and Another V. State of M.P.* (2007) 1 SCC 450 where it was observed in paragraphs 12, 15 and 16 as under.

"12. Before seizure of the contraband from the scooter, personal search of the appellants had been carried out and, admittedly, even at that time the provisions of Section

A 50 of the Act, although required in law, had not been complied with."

"15. Indisputably, however, effect of a search carried out in violation of the provisions of law would have a bearing on the credibility of the evidence of the official witnesses, B which would of course be considered on the facts and circumstances of each case."

"16. In this case, the provisions of Section 50 might not have been required to be complied with so far as the C search of scooter is concerned, but, keeping in view the fact that the person of the appellants was also searched, it was obligatory on the part of PW 10 to comply with the said provisions. It was not done."

D 10. On the facts of the case we find that the alleged recovery of heroin from the respondents was made in complete violation of the provisions of Section 50 of the Act. Apart from this the non-examination of the two independent witnesses of the search and recovery was another grave omission by the prosecution. It is significant to note here that a formal petition for discharge E of the two witnesses was filed by the prosecution before the trial court and it is not that they were simply not produced before the court.

11. We are, therefore, satisfied that the High Court took F the correct view of the matter and the judgment coming under appeal does not suffer from any infirmity. We find no merit in these appeals and those are accordingly dismissed. The respondents are discharged from their bail bonds.

N.J. Appeal dismissed.