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STATE OF RAJASTHAN

v

PARMANAND & ANR.

(Criminal Appeal No. 78 of 2005)

B

FEBRUARY 28, 2014

**[RANJANA PRAKASH DESAI AND
MADAN B. LOKUR, JJ.]**

C **NARCOTIC DRUGS AND PSYCHOTROPIC
SUBSTANCES ACT, 1985:**

s.50 - Non-compliance of - Respondents-accused caught carrying opium which was recovered from the bag in the hands of one of them - Respondents given a written common notice that they had a right to be searched before a nearest Gazetted Officer, or a Magistrate or before the Superintendent of raiding party - One of them signed for both agreeing to be searched by the Superintendent - Held: Bag of one of the respondents was searched and opium was recovered - His personal search was also carried out - Personal search of other respondent was carried out - Therefore, s.50 will have application - Accused persons must be communicated individually of their right - Further it was improper to tell the respondents that a third alternative was available and they could be searched before the Superintendent who was part of the raiding party - He could not be called an independent officer - Thus, breach of s.50 has vitiated the search - Conviction of respondents was illegal and they were rightly acquitted by High Court.

The respondents were prosecuted for offences punishable u/s 8 read with s.18 and u/s 8 read with s.29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 on the allegation that at about 4 A.M. on 14.10.1997 the respondents were caught carrying 9 Kg. 600 gms of opium. The said opium was recovered from the bag in the

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hands of respondent no. 1. The Special Judge convicted
 respondent No.1 u/s 8 read with s.18 of the NDPS Act and
 respondent No.2 u/s 8 read with s.28 of the NDPS Act.
 They were sentenced to 10 years rigorous imprisonment
 and a fine of Rs.10 lakhs each. However, the High Court
 acquitted the respondents holding that provisions of s.50
 of the Act had not been complied with.

Dismissing the appeal, the Court

HELD: 1.1 In the instant case, the conviction is solely
 based on recovery of opium from the bag of respondent
 No.1. A bag, briefcase or any such article or container
 etc. can under no circumstances be treated as a body of
 a human being. Therefore, it is not possible to include
 these articles within the ambit of the word "person"
 occurring in s. 50 of the NDPS Act. If merely a bag carried
 by a person is searched without there being any search
 of his person, s. 50 of the NDPS Act will have no
 application. But if the bag carried by him is searched and
 his person is also searched, s. 50 of the NDPS Act will
 have application. In the instant case, bag of respondent
 No.1 was searched. From the bag, opium was recovered.
 His personal search was also carried out. Personal
 search of respondent No.2 was also conducted.
 Therefore, in light of judgments of this Court s. 50 of the
 NDPS Act will have application. [para 9 and 12] [530-G;
 531-B-C; 532-B-C]

Dilip & Anr. v. State of Madhya Pradesh 2006 (9) Suppl.
 SCR 390 = (2007) 1 SCC 450; *Union of India v. Shah Alam*
 (2009) 16 SCC 644 - relied on.

Kalema Tumba v. State of Maharashtra 1999 (2) Suppl.
 SCR 670 = (1999) 8 SCC 257; *State of Himachal Pradesh*
v. Pawan Kumar 2005 (3) SCR 417 = (2005) 4 SCC 350 -
 referred to.

- A 1.2 The police witnesses have stated that the respondents were informed that they have a right to be searched before a nearest gazetted officer or a nearest Magistrate or before PW-5, the Superintendent. They were given a written notice. However, there was no individual communication of the right. A common notice was given on which only respondent No.2 is stated to have signed for himself and for respondent No.1. A joint communication of the right available u/s 50(1) of the NDPS Act to the accused would frustrate the very purport of s. 50. Communication of the said right to the person who is about to be searched is not an empty formality. Most of the offences under the NDPS Act carry stringent punishment and, therefore, the prescribed procedure has to be meticulously followed. These are minimum safeguards available to an accused against the possibility of false involvement. The communication of this right has to be clear, unambiguous and individual. The accused must be individually informed that u/s 50(1) of the NDPS Act, that he has a right to be searched before a nearest gazetted officer or before a nearest Magistrate. Therefore, the right has not been properly communicated to the respondents. The search of the bag of respondent No.1 and search of person of the respondents is, therefore, vitiated and resultantly their conviction is also vitiated. [para 13-14] [532-D-H; 533-A, B-C, E-F]

F *State of Punjab v. Balbir Singh* (1994) 3 SCC 299; *State of Punjab v. Baldev Singh* 1999 (3) SCR 977 = (1999) 6 SCC 172 - relied on.

- G *Paramjit Singh and Anr. v. State of Punjab* 1997 (1) CRIMES 242; *Dharamveer Lekhram Sharma and Another v. The State of Maharashtra and Ors.* 2001 (1) CRIMES 586 - stood approved.

- H *State of Himachal Pradesh v. Pirthi Chand* (1996) 2 SCC 37 - stood disapproved.

1.3 The idea behind taking an accused to a nearest Magistrate or a nearest gazetted officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer. Therefore, it was improper for PW-10, SI, to tell the respondents that a third alternative was available and that they could be searched before PW-5, the Superintendent, who was part of the raiding party. PW-5 cannot be called an independent officer. PW-10 could not have given a third option to the respondents when s. 50(1) of the NDPS Act does not provide for it and when such option would frustrate the provisions of s. 50(1) of the NDPS Act. On this ground also, the search conducted by PW-10 is vitiated. Breach of s. 50(1) of the NDPS Act has vitiated the search. The conviction of the respondents was, therefore, illegal. The respondents have rightly been acquitted by the High Court. [para 15] [533-G-H; 534-A-D]

Case Law Reference:

1997 (1) CRIMES 242	approved	Para 6	
2001 (1) CRIMES 586	approved	Para 6	E
(1994) 3 SCC 299	relied on	para 8	
(1996) 2 SCC 37	stood disapproved	para 8	
1999 (3) SCR 977	relied on	para 8	
1999 (2) Suppl. SCR 670	referred to	para 9	F
2005 (3) SCR 417	referred to	para 9	
2006 (9) Suppl. SCR 390	relied on	para 10	
(2009) 16 SCC 644	relied on	para 11	G

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 78 of 2005.

From the Judgment & Order dated 14.11.2003 of the High Court of Judicature for Rajasthan at Jaipur Bench, Jaipur in S.B. H

A Criminal Appeal No. 788 of 1998.

Imtiaz Ahmed, Naghma Imtiaz, Milind Kumar, S.S. Shamsbery, Bharat Sood, Varun Punia, Sandeep Singh, Ritesh Prakash Yadav, Harshvardhan Singh Rathore, Amit Sharma, Ruchi Kohli for the Appellant.

Nidhi, D.K. Thakur, Devendra Jha, Debasis Misra for the Respondents.

The Judgment of the Court was delivered by

C (SMT.) RANJANA PRAKASH DESAI, J. 1. The respondents were tried by the Special Judge (NDPS Cases), Chhabra, District Baran for offences under Section 8 read with Section 18 and under Section 8 read with Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the NDPS Act).

D 2. The case of the prosecution was that on 13/10/1997 during Kota Camp at Iklera, P.N. Meena, Sub-Inspector, Office of the Narcotics Commissioner, Kota received information at E 1900 hours in the evening that the respondents were to handover about 10 Kg opium on 14/10/1997 in the morning between 4.00 a.m. to 6.00 a.m. at Nangdi-Tiraha, Iklera, Chhipabaraud Road to a smuggler. This information was entered by SI Meena in the diary and he forwarded it to the F Investigating Officer J.S. Negi, Superintendent. J.S. Negi sent this information through Constable B.L. Meena to Assistant Narcotic Commissioner, Kota. Thereafter, raiding party was formed. The raiding party was headed by Superintendent J.S. Negi. The raiding party reached Nangdi-Tiraha by a G Government vehicle. Independent witnesses Ramgopal and Gopal Singh were called by SI Qureshi. Their consent was obtained. At about 4.25 a.m., the respondents came from the village Rajpura. On seeing the raiding party, they tried to run away but they were stopped. Enquiry was made with both the H respondents in the presence of the independent witnesses by

SI Qureshi. The respondents gave their names. Respondent A
No. 1 Parmanand had one white colour gunny bag of manure
in his left hand. SI Qureshi told the respondents that he had to
take their search. They were told about the provisions of Section
50 of the NDPS Act. They were told that under Section 50(1)
of the NDPS Act, they had a right to get themselves searched B
in the presence of any nearest Magistrate or any gazetted
officer or in the presence of Superintendent J.S. Negi of the
raiding party. One written notice to that effect was given to them.
On this notice, appellant Surajmal gave consent in writing in C
Hindi for himself and for appellant Parmanand and stated that
they are ready to get themselves searched by SI Qureshi in the
presence of Superintendent J.S. Negi. He also put his thumb
impression. Thereafter, bag of respondent No. 1 Parmanand
was searched by SI Qureshi. Inside the bag in a polythene bag
some black material was found. The respondents told him that D
it was opium and they had brought it from the village. The weight
of the opium was 9 Kg. 600 gms. Necessary procedure of
drawing samples and sealing was followed. The respondents
were arrested. After completion of the investigation, respondent
no. 1 Parmanand was charged for offence under Section 8 read E
with Section 18 of the NDPS Act and respondent No.2
Surajmal was charged for offence under Section 8 read with
Section 18 and for offence under Section 8 read with Section
29 of the NDPS Act. The prosecution examined 11 witnesses.
The important witnesses are PW-5 J.S. Negi, the
Superintendent, PW-9 SI Meena and PW-10 SI Qureshi. The F
respondents pleaded not guilty to the charge. They contended
that the police witnesses had conspired and framed them. The
case is false.

3. Learned Special Judge convicted respondent No.1 G
Parmanand under Section 8 read with Section 18 of the NDPS
Act and respondent No.2 Surajmal under Section 8 read with
Section 28 of the NDPS Act. They were sentenced for 10
years rigorous imprisonment each and a fine of Rs.10 lakhs
each. In default of payment of fine, they were sentenced to H

A undergo rigorous imprisonment for two years.

4. Aggrieved by the said judgment and order, the respondents preferred an appeal to the Rajasthan High Court. By the impugned order, the Rajasthan High Court acquitted the respondents. Hence, this appeal by the State.

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5. Mr. Imtiaz Ahmed, learned counsel for the State of Rajasthan submitted that the High Court was wrong in coming to the conclusion that there was no compliance with Section 50 of the NDPS Act. Counsel submitted that PW-10 SI Qureshi has clearly stated that the respondents were communicated their right under Section 50(1) of the NDPS Act. A written notice was also given to them and only after they consented to be searched by PW-10 SI Qureshi in the presence of PW-5 J.S. Negi, the Superintendent, that the search of their person and search of bag of respondent No.1 Parmanand was conducted. Counsel submitted that the High Court was also wrong in disbelieving independent pancha witnesses. Counsel urged that the impugned order is perverse and deserves to be set aside.

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6. Ms. Nidhi, learned counsel for the respondents, on the other hand, submitted that admittedly notice under Section 50 of the NDPS Act was a joint notice. The respondents were entitled to individual notice. The search is, therefore, vitiated. In this connection, counsel relied on judgment of the Punjab and Haryana High Court in *Paramjit Singh and Anr. v. State of Punjab*¹ and judgment of the Bombay High Court in *Dharamveer Lekhram Sharma and Another v. The State of Maharashtra and Ors.*² Counsel submitted that search was a farce. The High Court has, therefore, rightly acquitted the respondents.

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7. The question is whether Section 50 of the NDPS Act was complied with or not. Before we go to the legalities, it is

1. 1997 (1) CRIMES 242.

H 2. 2001 (1) CRIMES 586.

necessary to see what exactly the important police witnesses A
have stated about compliance of Section 50 of the NDPS Act.
The gist of the evidence of the police witnesses PW-5 J.S. Negi,
the Superintendent, PW-9 SI Meena and PW-10 SI Qureshi is
that the respondents were informed that they have a right to be B
searched in the presence of a gazetted officer or a nearest
Magistrate or before J.S. Negi, the Superintendent, who was
present there. They were given a written notice. On that notice,
respondent No.2 gave his consent in Hindi in his handwriting
that he and respondent No.1 Parmanand are agreeable to be C
searched by PW-10 SI Qureshi in the presence of PW-5 J.S.
Negi, the Superintendent. He signed on the notice in Hindi and
put his thumb impression. Respondent No.1 Parmanand did not
sign. There is nothing to show that respondent No.1 Parmanand
had given independent consent. Search was conducted. PW- D
10 SI Qureshi did not find anything on the person of the
respondents. Later on, he searched the bag which was in the
left hand of respondent No.1 - Parmanand. In the bag, he found
black colour material which was tested by chemical kit. It was
found to be opium.

8. In *State of Punjab v. Balbir Singh*,³ this Court held that E
Section 50 of the NDPS Act is mandatory and non-compliance
thereof would vitiate trial. In *State of Himachal Pradesh v. Pirthi*
Chand,⁴ this Court held that breach of Section 50 does not
affect the trial. There were divergent views on this aspect and, F
therefore, a reference was made to the Constitution Bench. Out
of the three questions of law, which the Constitution Bench dealt
with in *State of Punjab v. Baldev Singh*,⁵ the question which
is relevant for the present case is whether it is the mandatory
requirement of Section 50 of the NDPS Act that when an officer
duly authorized under Section 42 of the NDPS Act is about to G
search a person, he must inform him of his right under sub-
section (1) thereof of being taken to the nearest gazetted officer

3. (1994) 3 SCC 299.

4. (1996) 2 SCC 37.

5. (1999) 6 SCC 172.

A or nearest Magistrate. The conclusions drawn by the Constitution Bench, which are relevant for this case could be quoted.

B “(1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the person concerned of his right under sub-section (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.

C (2) That failure to inform the person concerned about the existence of his right to be searched before a gazetted officer or a Magistrate would cause prejudice to an accused.

D (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.”

E 9. In this case, the conviction is solely based on recovery of opium from the bag of respondent No.1 - Parmanand. No opium was found on his person. In *Kalema Tumba v. State of Maharashtra*,⁶ this Court held that if a person is carrying a bag or some other article with him and narcotic drug is recovered

H 6. (1999) 8 SCC 257.

from it, it cannot be said that it was found from his person and, therefore, it is not necessary to make an offer for search in the presence of a gazetted officer or a Magistrate in compliance of Section 50 of the NDPS Act. In *State of Himachal Pradesh v. Pawan Kumar*,⁷ three-Judge Bench of this Court held that a person would mean a human being with appropriate coverings and clothing and also footwear. A bag, briefcase or any such article or container etc. can under no circumstances be treated as a body of a human being. Therefore, it is not possible to include these articles within the ambit of the word "person" occurring in Section 50 of the NDPS Act. The question is, therefore, whether Section 50 would be applicable to this case because opium was recovered only from the bag carried by respondent No.1 - Parmanand.

10. In *Dilip & Anr. v. State of Madhya Pradesh*,⁸ on the basis of information, search of the person of the accused was conducted. Nothing was found on their person. But on search of the scooter they were riding, opium contained in plastic bag was recovered. This Court held that provisions of Section 50 might not have been required to be complied with so far as the search of the scooter is concerned, but keeping in view the fact that the person of the accused was also searched, it was obligatory on the part of the officers to comply with the said provisions, which was not done. This Court confirmed the acquittal of the accused.

11. In *Union of India v. Shah Alam*,⁹ heroin was first recovered from the bags carried by the respondents therein. Thereafter, their personal search was taken but nothing was recovered from their person. It was urged that since personal search did not lead to any recovery, there was no need to comply with the provisions of Section 50 of the NDPS Act. Following *Dilip*, it was held that since the provisions of Section

7. (2005) 4 SCC 350.

8. (2007) 1 SCC 450.

9. (2009) 16 SCC 644.

A 50 of the NDPS Act were not complied with, the High Court was right in acquitting the respondents on that ground.

B 12. Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application. In this case, respondent No.1 Parmanand's bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of respondent No.2 Surajmal was also conducted. Therefore, in light of judgments of this Court mentioned in the preceding paragraphs, Section 50 of the NDPS Act will have application.

D 13. It is now necessary to examine whether in this case, Section 50 of the NDPS Act is breached or not. The police witnesses have stated that the respondents were informed that they have a right to be searched before a nearest gazetted officer or a nearest Magistrate or before PW-5 J.S. Negi, the Superintendent. They were given a written notice. As stated by E the Constitution Bench in *Baldev Singh*, it is not necessary to inform the accused person, in writing, of his right under Section 50(1) of the NDPS Act. His right can be orally communicated to him. But, in this case, there was no individual communication of right. A common notice was given on which only respondent F No.2 – Surajmal is stated to have signed for himself and for respondent No.1 – Parmanand. Respondent No.1 Parmanand did not sign.

G 14. In our opinion, a joint communication of the right available under Section 50(1) of the NDPS Act to the accused would frustrate the very purport of Section 50. Communication of the said right to the person who is about to be searched is not an empty formality. It has a purpose. Most of the offences under the NDPS Act carry stringent punishment and, therefore, the prescribed procedure has to be meticulously followed. H These are minimum safeguards available to an accused

against the possibility of false involvement. The communication of this right has to be clear, unambiguous and individual. The accused must be made aware of the existence of such a right. This right would be of little significance if the beneficiary thereof is not able to exercise it for want of knowledge about its existence. A joint communication of the right may not be clear or unequivocal. It may create confusion. It may result in diluting the right. We are, therefore, of the view that the accused must be individually informed that under Section 50(1) of the NDPS Act, he has a right to be searched before a nearest gazetted officer or before a nearest Magistrate. Similar view taken by the Punjab & Haryana High Court in Paramjit Singh and the Bombay High Court in Dharamveer Lekhram Sharma meets with our approval. It bears repetition to state that on the written communication of the right available under Section 50(1) of the NDPS Act, respondent No.2 Surajmal has signed for himself and for respondent No.1 Parmanand. Respondent No.1 Parmanand has not signed on it at all. He did not give his independent consent. It is only to be presumed that he had authorized respondent No.2 Surajmal to sign on his behalf and convey his consent. Therefore, in our opinion, the right has not been properly communicated to the respondents. The search of the bag of respondent No.1 Parmanand and search of person of the respondents is, therefore, vitiated and resultantly their conviction is also vitiated.

15. We also notice that PW-10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate or before a nearest gazetted officer or before PW-5 J.S. Negi, the Superintendent, who was a part of the raiding party. It is the prosecution case that the respondents informed the officers that they would like to be searched before PW-5 J.S. Negi by PW-10 SI Qureshi. This, in our opinion, is again a breach of Section 50(1) of the NDPS Act. The idea behind taking an accused to a nearest Magistrate or a nearest gazetted officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer.

- A Therefore, it was improper for PW-10 SI Qureshi to tell the respondents that a third alternative was available and that they could be searched before PW-5 J.S. Negi, the Superintendent, who was part of the raiding party. PW-5 J S. Negi cannot be called an independent officer. We are not expressing any
- B opinion on the question whether if the respondents had voluntarily expressed that they wanted to be searched before PW-5 J.S. Negi, the search would have been vitiated or not. But PW-10 SI Qureshi could not have given a third option to the respondents when Section 50(1) of the NDPS Act does not
- C provide for it and when such option would frustrate the provisions of Section 50(1) of the NDPS Act. On this ground also, in our opinion, the search conducted by PW-10 SI Qureshi is vitiated. We have, therefore, no hesitation in concluding that breach of Section 50(1) of the NDPS Act has vitiated the
- D search. The conviction of the respondents was, therefore, illegal. The respondents have rightly been acquitted by the High Court. It is not possible to hold that the High Court's view is perverse. The appeal is, therefore, dismissed.

R.P.

Appeal dismissed.