

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.943 OF 2005

VIJAYSINH CHANDUBHA JADEJA

APPELLANT(S)

VERSUS

STATE OF GUJARAT

RESPONDENT(S)

REFERENCE ORDER

This is an appeal preferred by the accused against the decision of the Division Bench of the High Court of Gujarat. The appellant herein was found guilty of the offence punishable under Section 31 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'the NDPS Act') and was sentenced to undergo 10 years imprisonment with a fine of Rs.10 lacs.

When the matter came before this Court, the appellant raised a contention that Section 50 of the NDPS Act was not duly

complied with and the conviction and sentence of the appellant was,

therefore, illegal. The appellant relied on a decision of the Constitution

Bench of this Court in State of Punjab Vs. Baldev Singh, reported in

2

1999(6) SCC p.172. The contention of the appellant is that the officer,

who conducted the search, did not inform him of his right to be

searched in the presence of a Gazetted Officer or a Magistrate. The

police only told him that the search on his body will be carried out and

whether he wanted to be searched in the presence of any Gazetted

Officer or a Magistrate. The Division Bench of the High Court held that

this is sufficient compliance of Section 50 of the NDPS Act and the

conviction of the appellant was upheld.

Counsel for the appellant submits that the Constitution

Bench in Baldev Singh's case (supra) has held that it is not enough that

the accused be informed or intimated that he would be searched in the

presence of a Gazetted Officer or a Magistrate but he should be

informed of his right to be searched in the presence of a Gazetted

Officer or a Magistrate and if there is any violation in this regard, it will

be violation of Section 50 of the NDPS Act.

When the matter came up before this Court, it was found that in some of the decisions rendered by this Court, a slightly different view was taken than what was expressed by the Constitution Bench with regard to interpretation of Section 50 of the NDPS Act. In the case *Joseph Fernandez Vs. State of Goa*, 2001(1) SCC p.707, a Bench of

3

three Hon'ble Judges held that even when the searching officer informed him that "if you wish you may be searched in the presence of a gazetted officer or a Magistrate"; it was held that it was in substantial compliance with the requirement of Section 50 of the NDPS Act, and the Court observed that it did not agree with the contention that there was non-compliance of the mandatory provisions contained in Section 50 of the NDPS Act. In another decision of this Court in *Prabha Shankar Dubey Vs. State of M.P.*, 2004(2) SCC p.56, the following information was conveyed to the accused : "By way of this notice, you are informed that we have received information that you are illegally

carrying opium with you, therefore, we are required to search your scooter and you for this purpose. You would like to give me search or you would like to be searched by a gazetted officer or by a Magistrate".

This was held to be substantial compliance of Section 50 of the NDPS

Act. In Krishan Kanwar (Smt.) Alias Thakuraeen Vs. State of

Rajasthan, 2004(2) SCC p.608, the same question was considered and

it was held that there is no specific form prescribed or initiated for conveying the information required to be given under Section 50 of the

NDPS Act and it was held that "what is necessary is that the accused

(suspect) should be made aware of the existence of his right to be

4

searched in the presence of one of the officers named in the section

itself. Since no specific mode or manner is prescribed or intended, the

court has to see the substance and not the form of intimation. Whether

the requirement of Section 50 have been met is a question which is to

be decided on the facts of each case and there cannot be any sweeping

generalization and/or a straitjacket formula."

A reference was also made to an earlier decision of this Court

in Manohar Lal vs. State of Rajasthan, 1996(11) SCC p.391, wherein

this Court held that "...it is clear from Section 50 of the NDPS Act that

the option given thereby to the accused is only to choose whether he would like to be searched by the officer making the search or in the presence of the nearest available Gazetted Officer or the nearest available Magistrate."

However, we notice that in the decisions in State of Punjab

Vs. Balbir Singh, 1994(3) SCC p.299, K.Mohana Vs. State of Kerla ,

2000(1) SCC p.222, and Vinod Vs. State of Maharashtra, 2002(8) SCC

p.351, the decision of the Constitution Bench was followed. It was held

therein that before conducting search, the police officer concerned

cannot merely ask the accused whether he would like to be produced

before the Magistrate or a Gazetted Officer for the purpose of search but

5

should inform him of his right in that behalf under the law.

We may now refer to the decision of the Constitution Bench

rendered in Baldev Singh's case (supra) in this regard. In Baldev

Singh's case (supra), an argument was raised that whether the accused/suspect is merely to be informed as to whether he prefers to be searched in the presence of the Magistrate or the Gazetted Officer and that it is not necessary that he should be informed of his right under Section 50 of the NDPS Act. This plea was negatived by the Constitution Bench and it was held :

"..... We are not persuaded to agree that reading into Section 50, the existence of a duty on the part of the empowered officer, to intimate to the suspect, about the existence of his right to be searched in the presence of a gazetted officer or a Magistrate, if he so requires, would place any premium on ignorance of the law. The argument loses sight of a clear distinction between ignorance of the law and ignorance of the right to a "reasonable, fair and just procedure".

It was further held that :

"Requirement to inform has been read in by this Court in other circumstances also, where the statute did not explicitly provide for such a requirement. While considering the scope of Article 22(5) of the Constitution of India and various other provisions of the COFEPOSA Act and the NDPS Act as amended in 1988, a Constitution Bench of this Court in Kamleshkumar Ishwardas Patel Vs. Union of India concluded : (SCC P.59, para 14)

"14. Article 22(5) must, therefore, be construed to mean that the person detailed has a right to make a representation against the order of detention which can be made not only to the Advisory Board but also to the detaining authority, i.e., the authority that has made the order of the detention or the order for continuance of such detention, which is competent to give immediate relief by revoking the said order as well as to any other authority which is competent under law to revoke the order for detention and thereby given relief to the person detained. The right to make a representation carries within it a corresponding obligation on the authority making the order of detention to inform the person detained of his right to make a representation against the order of detention to the authorities who are required to consider such a representation."

It was also reiterated at the end of the paragraph :

(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.

(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."

(Emphasis added)

From the aforesaid decision in Baldev Singh's case (supra), it

7

is clear that it is not enough that the accused be told that whether he

would prefer to be searched in the presence of a gazetted officer or a

Magistrate, but he must be told of his right to be searched in the

presence of a gazetted officer or a Magistrate. It may be noticed that

at clause (1) of Section 50 of the NDPS Act only indicates that only in

cases where the accused/suspect requires to be searched in the

presence of a gazetted officer or a Magistrate, he need be taken to such

place. It is also important to note that the option is for the searching

officer either to take him to the gazetted officer or to the Magistrate. In

Baldev Singh's case (supra), the Constitution Bench also observed that

it is not necessary that in the search memo or in the contemporaneous

document it should be specifically mentioned that the accused/suspect

apprised of his right under Section 50(1) of the NDPS Act. It has been

so held that it is enough that the officer, who conducts the search, gives

oral evidence to the effect that the accused was informed of his right under Section 50(1) of the NDPS Act.

Thus, in a way, it all depends on the oral evidence of the officer who conducts search, in case nothing is mentioned in the search mahazar or any other contemporaneous document prepared at the time of search. In view of the large number of cases coming up under the

8

provisions of the NDPS Act the interpretation of Section 50 of the Act requires a little more clarification as its applicability is quite frequent in many cases. In appreciating the law laid down by the Constitution Bench in Baldev Singh's case (supra), we have noticed that conflicting decisions have been rendered by this Court. We feel that the matter requires some clarification by a larger Bench. The matter be placed before the Hon'ble Chief Justice of India for taking further action in this regard.

We are told that the appellant has already undergone a

sentence of 8 years and 8 months imprisonment. As the matter is referred to a larger Bench, it is likely that the final disposal of the appeal may take further time and in view of these peculiar circumstances, we grant interim bail to the appellant, pending disposal of the appeal finally. The appellant is directed to be released on interim bail on executing bail bonds to the satisfaction of the Additional Sessions Judge, Rajkot, Gujarat.

.....J.

.....
(K.G. BALAKRISHNAN)

9

.....J.

(DALVEER BHANDARI)

.....J.

(LOKESHWAR SINGH PANTA)

NEW DELHI;

2ND NOVEMBER, 2006

10

ITEM NO.101(PH)

COURT NO.2

SECTION IIA

S U P R E M E C O U R T O F I N D I A

RECORD OF PROCEEDINGS

CRIMINAL APPEAL NO(s). 943 OF 2005

VIJAYSINH CHANDUBHA JADEJA

Appellant (s)

VERSUS

STATE OF GUJARAT

Respondent(s)

(With appln(s) for bail and office report)

Date: 02/11/2006 This Appeal was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE K.G. BALAKRISHNAN

HON'BLE MR. JUSTICE DALVEER BHANDARI

HON'BLE MR. JUSTICE LOKESHWAR SINGH PANTA

For Appellant(s)

Mr. Arun Francis, Adv.

Mr. Sameer Parekh, Adv.

Ms. Ranjeeta Rohatgi, Adv.

For M/S P.H. Parekh & Co.,Adv.

For Respondent(s)

Ms. Hemantika Wahi,Adv.

Mr. V. Madhukar, Adv.

Ms. Pinky Behera, Adv.

UPON hearing counsel the Court made the following

O R D E R

The appellant is directed to be released on interim bail and the matter is directed to be placed before the Hon'ble Chief Justice of India for constitution of a larger

bench, in terms of the signed order.

(G.V.Ramana)

(Veera Verma)

COURT MASTER

COURT MA

STER

(Signed order is placed on the file)

11

4\177

1

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.943 OF 2005

VIJAYSINH CHANDUBHA JADEJA

APPELLANT(S)

VERSUS

STATE OF GUJARAT

RESPONDENT(S)

REFERENCE ORDER

This is an appeal preferred by the accused against the decision of the Division Bench of the High Court of Gujarat. The appellant herein was found guilty of the offence punishable under Section 31 of the Narcotic Drugs and Psychotropic Substances Act,

1985 (for short 'the NDPS Act') and was sentenced to undergo 10 years

imprisonment with a fine of Rs.10 lacs.

When the matter came before this Court, the appellant raised a contention that Section 50 of the NDPS Act was not duly complied with and the conviction and sentence of the appellant was, therefore, illegal. The appellant relied on a decision of the Constitution Bench of this Court in State of Punjab Vs. Baldev Singh, reported in

2

1999(6) SCC p.172. The contention of the appellant is that the officer,

who conducted the search, did not inform him of his right to be searched in the presence of a Gazetted Officer or a Magistrate. The police only told him that the search on his body will be carried out and whether he wanted to be searched in the presence of any Gazetted Officer or a Magistrate. The Division Bench of the High Court held that this is sufficient compliance of Section 50 of the NDPS Act and the conviction of the appellant was upheld.

Counsel for the appellant submits that the Constitution

Bench in Baldev Singh's case (supra) has held that it is not enough that the accused be informed or intimated that he would be searched in the presence of a Gazetted Officer or a Magistrate but he should be informed of his right to be searched in the presence of a Gazetted Officer or a Magistrate and if there is any violation in this regard, it will be violation of Section 50 of the NDPS Act.

When the matter came up before this Court, it was found that in some of the decisions rendered by this Court, a slightly different view was taken than what was expressed by the Constitution Bench with regard to interpretation of Section 50 of the NDPS Act. In the case *Josherph Fernandez Vs. State of Goa*, 2001(1) SCC p.707, a Bench of

3

three Hon'ble Judges held that even when the searching officer informed him that "if you wish you may be searched in the presence of a gazetted officer or a Magistrate"; it was held that it was in substantial compliance with the requirement of Section 50 of the NDPS Act, and the Court observed that it did not agree with the contention that there was non-compliance of the mandatory provisions contained in Section

50 of the NDPS Act. In another decision of this Court in Prabha Shankar Dubey Vs. State of M.P., 2004(2) SCC p.56, the following

information was conveyed to the accused : "By way of this notice, you

are informed that we have received information that you are illegally

carrying opium with you, therefore, we are required to search your

scooter and you for this purpose. You would like to give me search or

you would like to be searched by a gazetted officer or by a Magistrate".

This was held to be substantial compliance of Section 50 of the NDPS

Act. In Krishan Kanwar (Smt.) Alias Thakuraeen Vs. State of

Rajasthan, 2004(2) SCC p.608, the same question was considered and

it was held that there is no specific form prescribed or initiated for

conveying the information required to be given under Section 50 of the

NDPS Act and it was held that "what is necessary is that the accused

(suspect) should be made aware of the existence of his right to be

searched in the presence of one of the officers named in the section

itself. Since no specific mode or manner is prescribed or intended, the

court has to see the substance and not the form of intimation. Whether

the requirement of Section 50 have been met is a question which is to

be decided on the facts of each case and there cannot be any sweeping

generalization and/or a straitjacket formula."

A reference was also made to an earlier decision of this Court

in Manohar Lal vs. State of Rajasthan, 1996(11) SCC p.391, wherein

this Court held that "...it is clear from Section 50 of the NDPS Act that

the option given thereby to the accused is only to choose whether he

would like to be searched by the officer making the search or in the

presence of the nearest available Gazetted Officer or the nearest

available Magistrate."

However, we notice that in the decisions in State of Punjab

Vs. Balbir Singh, 1994(3) SCC p.299, K.Mohana Vs. State of Kerla ,

2000(1) SCC p.222, and Vinod Vs. State of Maharashtra, 2002(8) SCC

p.351, the decision of the Constitution Bench was followed. It was held

therein that before conducting search, the police officer concerned

cannot merely ask the accused whether he would like to be produced

before the Magistrate or a Gazetted Officer for the purpose of search but

should inform him of his right in that behalf under the law.

We may now refer to the decision of the Constitution Bench

rendered in Baldev Singh's case (supra) in this regard. In Baldev

Singh's case (supra), an argument was raised that whether the

accused/suspect is merely to be informed as to whether he prefers to

be searched in the presence of the Magistrate or the Gazetted Officer

and that it is not necessary that he should be informed of his right

under Section 50 of the NDPS Act. This plea was negatived by the

Constitution Bench and it was held :

"..... We are not persuaded to agree that reading into Section 50, the existence of a duty on the part of the empowered officer, to intimate to the suspect, about the existence of his right to be searched in the presence of a gazetted officer or a Magistrate, if he so requires, would place any premium on ignorance of the law. The argument loses sight of a clear distinction between ignorance of the law and ignorance of the right to a "reasonable, fair and just procedure".

It was further held that :

"Requirement to inform has been read in by this Court in other circumstances also, where the statute did not

explicitly provide for such a requirement. While considering the scope of Article 22(5) of the Constitution of India and various other provisions of the COFEPOSA Act and the NDPS Act as amended in 1988, a Constitution Bench of this Court in Kamleshkumar Ishwardas Patel Vs. Union of India concluded : (SCC P.59, para 14)

6

"14. Article 22(5) must, therefore, be construed to mean that the person detailed has a right to make a representation against the order of detention which can be made not only to the Advisory Board but also to the detaining authority, i.e., the authority that has made the order of the detention or the order for continuance of such detention, which is competent to give immediate relief by revoking the said order as well as to any other authority which is competent under law to revoke the order for detention and thereby given relief to the person detained. The right to make a representation carries within it a corresponding obligation on the authority making the order of detention to inform the person detained of his right to make a representation against the order of detention to the authorities who are required to consider such a representation."

It was also reiterated at the end of the paragraph :

(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.

(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."

(Emphasis added)

From the aforesaid decision in Baldev Singh's case (supra), it

7

is clear that it is not enough that the accused be told that whether he

would prefer to be searched in the presence of a gazetted officer or a

Magistrate, but he must be told of his right to be searched in the

presence of a gazetted officer or a Magistrate. It may be noticed that

clause (1) of Section 50 of the NDPS Act only indicates that only in

cases where the accused/suspect requires to be searched in the

presence of a gazetted officer or a Magistrate, he need be taken to such

place. It is also important to note that the option is for the searching

officer either to take him to the gazetted officer or to the Magistrate. In

Baldev Singh's case (supra), the Constitution Bench also observed that

it is not necessary that in the search memo or in the contemporaneous

document it should be specifically mentioned that the accused/suspect

apprised of his right under Section 50(1) of the NDPS Act. It has been

so held that it is enough that the officer, who conducts the search, gives

oral evidence to the effect that the accused was informed of his right

under Section 50(1) of the NDPS Act.

Thus, in a way, it all depends on the oral evidence of the

officer who conducts search, in case nothing is mentioned in the search

mahazar or any other contemporaneous document prepared at the time

of search. In view of the large number of cases coming up under the

8

provisions of the NDPS Act the interpretation of Section 50 of the Act

requires a little more clarification as its applicability is quite frequent in

many cases. In appreciating the law laid down by the Constitution

Bench in Baldev Singh's case (supra), we have noticed that conflicting

decisions have been rendered by this Court. We feel that the matter

requires some clarification by a larger Bench. The matter be placed before the Hon'ble Chief Justice of India for taking further action in this regard.

We are told that the appellant has already undergone a sentence of 8 years and 8 months imprisonment. As the matter is referred to a larger Bench, it is likely that the final disposal of the appeal may take further time and in view of these peculiar circumstances, we grant interim bail to the appellant, pending disposal of the appeal finally. The appellant is directed to be released on interim bail on executing bail bonds to the satisfaction of the Additional Sessions Judge, Rajkot, Gujarat.

.....J.

.....
(K.G. BALAKRISHNAN)

.....J.
(DALVEER BHANDARI)

.....J.
(LOKESHWAR SINGH PANTA)

NEW DELHI ;

2ND NOVEMBER, 2006

10

ITEM NO.101(PH)

COURT NO.2

SECTION IIA

S U P R E M E C O U R T O F I N D I A

RECORD OF PROCEEDINGS

CRIMINAL APPEAL NO(s). 943 OF 2005

VIJAYSINH CHANDUBHA JADEJA

Appellant (s)

VERSUS

STATE OF GUJARAT

Respondent(s)

(With appln(s) for bail and office report)

Date: 02/11/2006 This Appeal was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE K.G. BALAKRISHNAN

HON'BLE MR. JUSTICE DALVEER BHANDARI

HON'BLE MR. JUSTICE LOKESHWAR SINGH PANTA

For Appellant(s)

Mr. Arun Francis, Adv.

Mr. Sameer Parekh, Adv.

Ms. Ranjeeta Rohatgi, Adv.

For M/S P.H. Parekh & Co.,Adv.

For Respondent(s)

Ms. Hemantika Wahi,Adv.

Mr. V. Madhukar, Adv.

UPON hearing counsel the Court made the following

O R D E R

The appellant is directed to be released on interim bail and the matter is directed to be placed before the Hon'ble Chief Justice of India for constitution of a larger bench, in terms of the signed order.

(G.V.Ramana)

(Veera Verma)

COURT MASTER

COURT MA

STER

(Signed order is placed on the file)