

2023 SCC OnLine TS 341

In the High Court of Telangana at Hyderabad
(BEFORE CHILLAKUR SUMALATHA, J.)

Rajesh Naik

Versus

State of Telangana

Criminal Petition No. 616 of 2023

Decided on February 7, 2023

The Order of the Court was delivered by

CHILLAKUR SUMALATHA, J.:— Heard Sri. Srinath Reddy, learned counsel who argued on behalf of Sri. Nageshwar Rao Pujari, learned counsel on record for the petitioner as well as the learned Additional Public Prosecutor who is representing the Respondent-State.

2. This Criminal Petition is filed under Section 439 Cr. P.C. seeking the Court to enlarge the petitioner, who is arrayed as Accused No. 1 in Crime No. 1084 of 2022 of Chandanagar Police Station, on bail.

3. The case facts as could be perceived through the contents of complaint presented by the Sub-Inspector of Police, Chandanagar Police Station, are that on 19.12.2022 at about 4.00 PM, while the defacto complainant i.e. the Sub-Inspector of Police, Chandanagar Police Station, was conducting vehicle checking at Nallagandla 'X' roads along with her staff, she found a person running away on seeing police personnel. The said person was apprehended and was questioned as to why he started running away. On search, they found a small bag in his possession. In the bag, they found 48 packets of crystalline powder. On that, the nearby persons were secured as mediators and the confession -cum-seizure panchanama was recorded. 48 packets each consisting 1 gram of MDMA Drug, were seized.

4. Making his submission, learned counsel for the petitioner contends that the prosecuting agency has narrated three versions about the alleged recovery of the contraband and which version is true is not known. Learned counsel referred to the contents of the complaint and the contents of Part-I Case Diary to substantiate his version. Learned counsel submits that while in the complaint it is narrated that when the petitioner was running away on seeing police, he was detained and the nearby persons were secured as panchayatdars, surprisingly, in Part-I Case diary, it is narrated that on receipt of information about the sale of MDMA Drug, police reached the spot and apprehended the petitioner. A perusal of record reveals justification in the said submission. In Part-I Case Diary, there is a narration that on receipt of credible information

about transportation, possession and selling of MDMA Drug, the Sub-Inspector of Police sent a requisition to the Assistant Commissioner of Police, Miyapur Division, obtained permission and rushed to the spot along with staff and panchayatdars and apprehended the petitioner. Such a narration is not found in complaint.

5. Apart from pointing out the above contradiction, learned counsel based his submission regarding violation of the procedure prescribed under the Narcotic Drugs and Psychotropic Substances Act for conducting personal search of the accused. Section 50 of the Narcotic Drugs and Psychotropic Substances Act reads as follows:—

50. Conditions under which search of persons shall be conducted—

- (1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 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 section 42 or to the nearest Magistrate.*
- (2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).*
- (3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.*
- (4) No female shall be searched by anyone excepting a female.*
- (5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Criminal Procedure Code, 1973 (2 of 1974).*
- (6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.*

6. As per the said provision, more particularly, under Section 50(1), personal search can only be conducted before the presence of a Gazetted Officer or Magistrate in case the person detained intends for such a search. Further, there is no mention in the complaint that

atleast such an information that the petitioner has got the right to ask for search before a Gazetted Officer is furnished to him by the officer who proposed to conduct search of the person.

7. Law is well established that in case search is conducted upon a vehicle or other conveyance, there is no requirement of following Section 50(1) of Narcotic Drugs and Psychotropic Substances Act. But when search of a person is required to be conducted, then it is obligatory on part of the officer who apprehends person to inform the person detained that he has right to seek the search to be conducted in the presence of a Gazetted Officer and in case the person detained intends to avail the opportunity of search being conducted in the presence of a Gazetted Officer, the person has to be taken to the nearest Gazetted Officer for conducting personal search. Though it is also indicated that in case there is no possibility of taking the person for personal search to such a Gazetted Officer, the officer conducting search has to record reasons to that effect and has to pass the information to the superior police officer.

8. In the case on hand, such procedure appears to have been not followed. Stating that deviation in following the prescribed procedure and failure to follow the prescribed procedure vitiates the trial, learned counsel for the petitioner relied upon the decision of the Hon'ble Apex Court in the case between *STATE Of PUNJAB v. BALDEV SINGH*. In the said decision, the Hon'ble Supreme Court at Para 26 of the order held as follows:—

"26. The safeguard or protection to be searched in presence of a Gazetted Officer or a Magistrate has been incorporated in Section 50 to ensure that persons are only searched with a good cause and also with a view to maintain the veracity of evidence derived from such search. We have already noticed that severe punishments have been provided under the Act for mere possession of Illicit Drugs and Narcotic Substances. Personal search, more particularly for offences under the NDPS Act, are critical means of obtaining evidence of possession and it is, therefore, necessary that the safeguards provided in Section 50 of the Act are observed scrupulously. The duty to inform the suspect of his right to be searched in presence of a Gazetted Officer or a Magistrate is a necessary sequence for enabling the concerned person to exercise that right under Section 50 because after Maneka Gandhi v. Union of India it is no longer permissible to contend that the right to personal liberty can be curtailed even temporarily, by a procedure which is not reasonable, fair and just and when a statute itself provides for a just procedure, it must be honoured. Conducting a search under Section 50, without intimating to the suspect that he has a right to be searched before a Gazetted Officer or a Magistrate, would be violative of the

reasonable, fair and just procedure and the safeguard contained in Section 50 would be rendered illusory, otiose and meaningless. Procedure based on systematic and unconscionable violation of law by the officials responsible for the enforcement of law, cannot be considered to be fair, just or reasonable procedure. 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 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."

9. Further, drawing conclusions, the Hon'ble Supreme Court at Para 57 of the order observed as follows:—

"57. On the basis of the reasoning and discussion above, the following conclusions arise:

- (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 concerned person 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 concerned person about the existence of his right to be searched before a Gazetted Officer or a Magistrate would cause prejudice to an accused.*
- (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.*
- (4) That there is indeed need to protect society from criminals. The societal intent in safety will suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it does not exist. The answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously inviting action*

against the concerned official so that the laxity on the part of the investigating authority is curbed. In every case the end result is important but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of judicial process may come under cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for law and may have the effect of unconscionably compromising the administration of justice. That cannot be permitted. An accused is entitled to a fair trial. A conviction resulting from an unfair trial is contrary to our concept of justice. The use of evidence collected in breach of the safeguards 50 have by Section 50 at the trial, would render the trial unfair.

- (5) *That whether or not the safeguards provided in Section 50 have been duly observed would have to be determined by the Court on the basis of evidence led at the trial. Finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of Section 50, and particularly the safeguards provided therein were duly complied with, it would not be permissible to cut-short a criminal trial.*
- (6) *That in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Section 50 are mandatory or directory, but, hold that failure to inform the concerned person of his right as emanating from Sub-section (1) of Section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law.*
- (7) *That an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search.*
- (8) *A presumption under Section 54 of the Act can only be raised after the prosecution has established that the accused was found to be in possession of the contraband in a search conducted in accordance with the mandate of Section 50. An*

illegal search cannot entitle the prosecution to raise a presumption under Section 54 of the Act

(9) *That the judgment in Pooran Mal's case² cannot be understood to have laid down that an illicit article seized during a search of a person, on prior information, conducted in violation of the provisions of Section 50 of the Act, can by itself be used as evidence of unlawful possession of the illicit article on the person from whom the contraband has been seized during the illegal search.*

(10) *That the judgment in Ali Mustaffa's case³ correctly interprets and distinguishes the judgment in Pooran Mal's case and the broad observations made in Pirthi Chand's case⁴ and Jasbir Singh's case⁵ are not in tune with the correct exposition of law as laid down in Pooran Mal's case."*

10. Thus, by the decision of the Hon'ble Apex Court, it is clear that the illicit article, if any, seized from the accused during search, in violation of the safeguards provided under Section 50 of the Narcotic Drugs and Psychotropic Substances Act, cannot be used as evidence of proof of unlawful possession of the contraband.

11. The submission of the learned Additional Public Prosecutor, however, is that the petitioner is a Drug Peddler and in the light of ensuing New Year celebrations, he thought of selling MDMA Drug and gain profitably and therefore, he was proceeding to Hyderabad for selling the Drug. In the light of failure on part of the Investigating Agency to follow the prescribed procedure and when it is clearly brought on record that the Investigating Agency has projected two contra versions regarding receipt of information, apprehension of the petitioner and subsequent search, this Court is of the view that it would be wholly undesirable to keep the petitioner in judicial custody for longer period.

12. Further submitting that the mandate under Section 37 of the Narcotic Drugs and Psychotropic Substances Act does not mean that there should be sufficient proof of the accused not being guilty of the offence and that reasonable grounds of believing that the accused cannot be held guilty of offence is sufficient, learned counsel for the petitioner relied upon the decision of the Hon'ble Apex Court in the case between *UNION OF INDIA v. SHIV SHANKER KESARI*⁶

13. Having considered the clear deviation in the version of the investigating agency and further, as the mandatory procedure prescribed is not followed, this Court is of the view that the request of the petitioner for enlargement of bail can be honoured.

14. Resultantly, the Criminal Petition is allowed with the following conditions:—

- (i) The petitioner/Accused No. 1 shall be enlarged on bail on his executing a personal bond for Rs. 75,000/- (Rupees Seventy Five Thousand only) with two sureties for like-sum each to the satisfaction of the Court concerned. The sureties are directed to submit their two latest passport size photographs at the time of furnishing solvency. One such photograph is ordered to be pasted in the Surety Register against the name of the surety. The other photograph shall be kept in the case record concerned.
- (ii) The petitioner/Accused No. 1 should not involve in any unlawful activity.
- (iii) The petitioner/Accused No. 1 should afford all assistance for proper investigation of the case.
- (iv) The petitioner/Accused No. 1 should not cause the evidence of the offence disappear.
- (v) The petitioner/Accused No. 1 should not tamper with the evidence in any manner.
- (vi) The petitioner/Accused No. 1 should not by way of inducement, threat or promise, dissuade any person who is acquainted with the facts of the case, from disclosing such facts to the Court or to the Police Officer.
- (vii) In case the petitioner/Accused No. 1 holds a passport, he shall surrender the same if the same is not seized till now.
- (viii) The petitioner/Accused No. 1 should ensure his presence whenever required by the Court or Police.
- (ix) The petitioner/Accused No. 1 shall not leave India without previous permission of the Court concerned.
- (x) The petitioner/Accused No. 1 shall file an affidavit before the Court concerned disclosing the following particulars:—
 - (1) Contact number
 - (2) Mail address
 - (3) Residential particulars.

15. In case, there is any change in the aforementioned details, the petitioner shall intimate the Court concerned by giving a fresh affidavit duly mentioning the change. He shall continue to do so till filing of the final report.

16. Any deviation of the above conditions would entitle the respondent to take appropriate steps for cancellation of the bail granted.

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¹ (1999) 6 SCC 172

² (1974) 1 SCC 345

³ (1994) 6 SCC 569

⁴ (1996) 2 SCC 37

⁵ (1996) 1 SCC 288

⁶ (2007) 7 SCC 798

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