Delhi High Court Prithvi Pal Singh @ Munna vs State on 21 February, 2000 Equivalent citations: 2000 IIIAD Delhi 181, 84 (2000) DLT 464, 2000 (53) DRJ 201, 2000 (71) ECC 402 Author: M Siddiqui Bench: M Siddiqui ORDER M.S.A. Siddiqui, J. 1. This appeal is directed against the judgment and order dated 26.10.1995 passed by the Additional Sessions Judge, Delhi in Sessions Case No. 42/94 convicting the appellant under Section 21 of the Narcotic Drugs and Psychotropic Substances Act (for short 'the Act') and sentencing him to undergo rigorous imprisonment for ten years and to pay a fine of Rs. 1,00,000/- or in default to suffer further rigorous imprisonment for one year. 2. Briefly stated, the prosecution case is that on 15.7.1993 at about 7.05 p.m. a police party led by the ACP J.S. Rana (P.W. 11), upon information received, apprehended the appellant near the Imperial Cinema, Pahar Ganj. The appellant was given the option (Ex. PW-4/B) of being searched before a Gazetted Officer or a Magistrate. He declined the offer. At that time, the appellant was holding a rexene bag, which was delivered to him by the coaccused Devki Nandan. On search, the said bag was found to contain 100 grams of heroin, which was seized vide seizure memo (Ex. PW-4/C). The appellant was charged with an offence punishable under Section 21 of the Act and tried. 3. The appellant abjured his guilt and alleged that a false case has been foisted on him. Learned Additional Sessions Judge, on an assessment of the evidence adduced by the prosecution, accepted the prosecution case and convicted and sentenced the appellant as indicated above. 4. The question for consideration is whether on 15.7.1993, the contraband was recovered from the appellant's possession in accordance with the provisions of the Act. The prosecution case pertaining to recovery of the contraband revolves around the evidence of ACP J.S. Rana (PW-11), ACP H.L. Manaktala (PW-8), Constable Dalveer Singh (PW-9), SI Panna Lal (PW-5), SI Rishal Singh (PW-4) and the Constable Raj Kumar (PW-3). ACP J.S. Rana (PW-11) deposed that on 15.7.1993 at about 6.15 P.M., he received secret information to the effect that one person in possession of heroin would be coming at Imperial Cinema, Pahar Ganj to supply heroin to the appellant. He conveyed the said information to the ACP Narcotic Cell, who directed him to organize a raiding party. Pursuant to the said directions, a raiding party consisting of himself, ACP H.L. Manaktala (PW-8), Inspector A.S. Bajwa, SI Panna Lal (PW-5), SI Rishal Singh (PW-4), Head Constable Rajender Singh, Constable Raj Kumar (PW-3) and Constable Dalveer Singh (PW-9) was constituted. Public witnesses were approached but they declined to join the raiding party. However, a Nakabandi was held near the Imperial Cinema and at about 7.05 P.M. the appellant was nabbed on being pointed out by the informer. At that time, the appellant was holding a rexene bag (P-1), which was delivered to him by the co-accused Devki Nandan. The appellant was given the option (Ex. PW-4/B) for being searched in the presence of a Gazetted Officer or a Magistrate and on his declining, he was searched and the said bag (Ex. P-1) was found to contain 100 grams of heroin, which was seized vide seizure memo (Ex. PW-4/C). A sample of five grams was taken out and the sample and the remaining heroin were converted into two separate parcels, which were sealed on the spot. The CRCL form was filled in on the spot. The Rukka (Ex. PW-

11/A) was prepared on the spot and the case property along with CRCL form and the Rukka (Ex. PW-11/A) was sent to the Police Station through Constable Raj Kumar (PW-3). The prosecution witnesses, namely, Constable Raj Kumar (PW-3), SI Rishal Singh (PW-4), SI Raman Lal (PW-5), ACP H.L. Manaktala (PW-8) and Constable Dalveer Singh (PW-9), have supported the said version of ACP J.S. Rana (PW-11). 5. Learned counsel for the appellant contended that the trial court ought to have disbelieved the evidence of police officials in the absence of the corroboration from an independent source. His contention is that there is no acceptable explanation regarding noncompliance with the provision of sub-Section (4) of Section 100 Cr. P.C., which in the light of Section 51 of the Act, is applicable to the case, inasmuch as no independent witness was associated to witness the alleged search and seizure. 6. In State of Punjab Vs. Baldev Singh, 1999 (4) JT SC 595, it was held that the provisions of the Code of Criminal Procedure relating to search, seizure or arrest apply to search, seizure and arrest under the Act also to the extent they are not inconsistent with the provisions of the Act. Thus, while conducting search and seizure, in addition to the safeguards provided under the Code of Criminal Procedure, the safeguards provided under the Act are also required to be followed. It is well settled that failure to comply with the provisions of the Code of Criminal Procedure in respect of search and seizure and particularly those of Sections 100, 102, 103 and 165 per se does not vitiate the trial under the Act. But it has to be borne in mind that conducting a search and seizure in violation of statutory safeguards would be violative of the reasonable, fair and just procedure. In Maneka Gandhi Vs. Union of India, , it was held that when a statute itself provides for a reasonable, fair and just procedure, it must be honoured. Thus, an accused has the right to a reasonable, fair and just procedure. The statutory provisions embodied in Sections 41 to 55 and Section 57 of the Act and Sections 100, 102, 103 and 165 of the Code of Criminal Procedure provide for a reasonable, fair and just procedure. 7. Section 43 of the Act read along with sub-Section (4) of Section 100 Cr.P.C. contemplates that search should, as far as practicable, be made in the presence of two independent and respectable witnesses of the locality and if the designated officer fails to do so, the onus would be on the prosecution to establish that the association of such witnesses was not possible on the facts and circumstances of a particular case. The stringent minimum punishment prescribed by the Act clearly renders such a course imperative. Thus, the statutory desirability in the matter of search and seizure is that there should be two or more independent and respectable witnesses. The search before an independent witness would impart much more authenticity and credit worthiness to the search and seizure proceedings. It would also verily strengthen the prosecution case. The said safeguard is also intended to avoid criticism of arbitrary and highhanded action against authorized officers. In other words, the Legislature in its wisdom considered it necessary to provide such a statutory safeguard to lend credibility to the procedure relating to search and seizure keeping in view the severe punishment prescribed in the Act. That being so, the authorized officer must follow the reasonable, fair and just procedure as envisaged by the statute scrupulously and the failure to do so must be viewed

with suspicion. The legitimacy of judicial process may come under cloud if the Court is seen to condone acts of violation of statutory safeguards committed by the authorized officer during search and seizure operations and may also undermine respect of law. That cannot be permitted. 8. It is undisputed that no public witness was associated during the course of search and seizure proceedings and the prosecution case hinges solely on the testimony of the police officials. As per prosecution case, the secret information was received at 6.20 p.m. and the appellant was apprehended at 7.05 p.m. Thus there was sufficient time to procure attendance of public witnesses to witness the search and seizure. This is not a case where due to urgency of the matter or for any other reason, it was not possible to comply with the provision of subSection (4) of Section 100 for associating public witnesses during the course of search and seizure. It is also undisputed that the appellant was apprehended in the market, which is a crowded place. Prosecution witnesses Constable Raj Kumar (P.W. 3), SI. Rishal Singh (P.W. 4), S.I. Pannalal (P.W. 5), A.C.P. Manaktala (P.W. 8) and ACP J.S. Rana (P.W. 11), who were members of the raiding party, want us to believe that at the relevant time public witnesses were approached but they declined to join the raiding party. It is worth mentioning that the evidence of the said police officials is conspicuous by the absence of any description as to who were the persons who were asked to witness the search and seizure and whether they were called upon to do so by an order in writing. Reference may in this context be made to the provision of sub-Section (8) of Section 100 Cr. P.C., which provides that any person, who without reasonable cause, refuses or neglects to attend and witness a search under Section 100 of the Code, when called upon to do so by an order in writing delivered or tendered to him, shall be deemed to have committed an offence under Section 187 IPC. In the instant case, there is nothing to indicate that the authorized officer had served or even attempted to serve an order in writing upon any public witness as envisaged by sub-section (8) of Section 100 Cr. P.C. In this connection, I may usefully excerpt the following observations of Malik Sharief ud Din, J. in Rattan Lal Vs. State 1987 (2) Crimes 29: "..... In the case in hand the seizure and the arrest have been made under Section 43 of NDPS Act. Admittedly, no public witness was involved in the matter of search and seizure as envisaged by sub-Section (4) of Section 100 Cr.P.C. The explanation offered is that public witnesses were requested but they declined to cooperate. My experience is that this explanation is now being offered in almost all cases. In the circumstances of a particular case it may so happen that for a variety of reasons public witnesses may decline to associate themselves but generally speaking it does not so happen. If a public witness declines to co-operate without reasonable cause inspite of an order in writing, to witness the seizure and search, he will be deemed to have committed an offence under Section 187 I.P.C. and this has been clearly spelt out in sub-Section (8) of Section 100 Cr.P.C. In the present case there is a vague explanation that public witnesses were approached but they declined. Neither the name of such witness has been given nor has any order in writing to that effect been preserved, nor it is asserted that a mention about the same has been made in the case diary. Obviously, there is a deliberate attempt to defeat the legislative safeguards."

9. It is significant to mention that the appellant was apprehended in a busy market. There is inconsistency between the statements of prosecution witnesses regarding presence of public witnesses at the time of the alleged search and seizure. Constable Raj Kumar (P.W. 3) and ACP Manaktala (P.W. 8) have admitted in their cross examination that some people had collected at the spot to witness the alleged search and seizure, whereas the remaining witnesses, namely: S.I. Rishal Sigh (P.W. 4), S.I. Panna Lal (P.W. 5) and ACP J.S. Rana (P.W. 11) have contradicted the said statements of Constable Raj Kumar (P.W. 3) and ACP Manaktala (P.W. 8.). Having regard to the time and place of the alleged search and seizure, the statements of Constable Raj Kumar (P.W. 3) and ACP Manaktala (P.W. 8) appear to be true. However, the aforesaid prosecution witnesses have stated in one voice that no shopkeeper or anybody from the public was asked to witness the alleged search and seizure. In that view of the matter, it may safely be inferred that although public witnesses were available but no attempt was made by the authorized officer to associate them before searching the appellant. I am unable to find any reason as to why the authorized officer did not even make any attempt to associate any independent witness or witnesses during the course of search and seizure operation. As already observed the compliance with the procedural safeguards contained in the Code of Criminal Procedure and the Act are intended to serve dual purpose to protect a person against false accusation and frivolous charges as also to lend credibility to the search and seizure conducted by the authorized officer. It has to borne in mind that where the error, irregularity or illegality touching the procedure committed by the authorized officer is so patent and loudly obtrusive that it leaves on his evidence an indelible stamp of infirmity or vice which cannot be obliterated or cured, then it would be hazardous to place implicit reliance on it. The aforesaid circumstances make the Court to be circumspect and look for corroboration of the testimony of the said police officials from an independent source. No such corroboration is forthcoming in this case. 10. There is another infirmity which has shaken the foundation of the prosecution case to an irreparable extent. The Rukka (Ex. PW-11/A) reveals that the alleged search and seizure was made at 7.05 P.M. and the Rukka was sent to the police station at 8.35 P.M. on the basis of which the FIR (Ex. PW-7/A) was registered at the Police Station Pahar Ganj. The prosecution witnesses have stated in one voice that the documents were prepared on the spot. The FIR (Ex. PW-7/A) shows that it was registered at 8.50 P.M. Surprisingly, the notice under Section 57 of the Act (Ex. PW/A), the seizure memo (Ex. PW-4/C), the personal search memo of the appellant (Ex. PW-4/D) and the search memo of the appellant's house (Ex. PW-4/F) bear the number of the FIR (Ex. PW-7/A). The number of the FIR (Ex. PW-7/A) given on the top of the aforesaid documents is in the same ink and in the same handwriting, which clearly indicates that all these documents were prepared at the same time. The prosecution has not offered any explanation as to under what circumstances number of the FIR (Ex. PW-7/A) had appeared on the top of these documents. This gives rise to two inferences that either the FIR (Ex. PW-7/A) was registered prior to the alleged recovery of the contraband or that number of the FIR was inserted in these

documents after its registration. In both the situations, it seriously reflects upon the veracity of the prosecution case and robs the efficacy of the evidence of the aforesaid police officials regarding the alleged recovery of contraband from the appellant's possession. 11. Thus, the network constituted by the circumstances mentioned above leaves a gap of varied dimensions through which the appellant can get out with equal facility. Unfortunately, the learned Additional Sessions Judge did not take notice of the aforesaid infirmities in the prosecution case and unjustifiably accepted the prosecution evidence. Consequently, the impugned order of conviction and sentence cannot be sustained in law. 12. In the result, the appeal is allowed. The impugned judgment, the order of conviction and sentence are set aside and the appellant is acquitted of the offence charged under Section 21 of the Act. The appellant is in custody. He be set at liberty immediately, if not wanted in any other case. Fine, if paid, shall be refunded to the appellant.