

Nirmal Singh Pehlwan @ Nimma vs Inspector, Customs, Customs House, ... on 21 July, 2011

Equivalent citations: 2011 AIR SCW 5697, 2011 (12) SCC 298, 2012 (1) AIR JHAR R 751, 2012 (1) AIR KAR R 257, 2011 CRI LJ (SUPP) 360 (SC), (2011) 3 EFR 369, (2011) 8 SCALE 430, (2012) 1 DLT(CRL) 424, (2011) 3 RECCRIR 831, (2011) 3 ALLCRIR 2303, (2011) 105 ALLINDCAS 96 (SC), (2011) 74 ALLCRIC 892, (2011) 2 ORISSA LR 689, (2011) 50 OCR 214, (2012) 1 CURCRIR 259, 2012 CALCRILR 2 388, (2011) 3 CHANDCRIC 288, (2011) 3 ALLCRILR 679, 2012 (1) SCC (CRI) 555, 2011 (89) ALR SOC 28 (SC)

Bench: Gyan Sudha Misra, Harjit Singh Bedi

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1857 OF 2010

NIRMAL SINGH PEHLWAN @ NIMMA

.. APPELLANT(S)

vs.

INSPECTOR, CUSTOMS, CUSTOMS HOUSE,
PUNJAB

.. RESPONDENT(S)

O R D E R

This appeal is directed against the concurrent judgments of the courts below whereby the appellant has been sentenced to undergo 10 years R.I. and to pay a fine of rupees one lakh and in default to undergo RI for two years for having violated the provisions of Section 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the 'Act').

The facts of the case are as under:

During the course of a joint Naka held on the 4th January, 1999 by a party comprising officials from the Customs Preventive Staff, the Punjab Police and the CIA Staff, Majitha, set up at the T-crossing near Saki Bridge, Ajnala, a Maruti car bearing registration No. PB-02-P-5595 was seen coming from the opposite side at about 9.40 a.m. There were three occupants in the car and two of them taking advantage of the thick fog at that time ran away whereas the third one, the appellant

Nirmal Singh, was apprehended by PW.4 Prem Singh-Superintendent Customs. PW.4 disclosed his identity to the appellant and told him that as he was suspected to be in possession of some narcotic, he should give his option as to whether he wished to be searched before a Magistrate or a Gazetted Officer. The appellant stated that he would be satisfied if he was searched in the presence of a Gazetted officer. Khazan Singh and Sarup Singh were also called as public witnesses. On a search of the appellant's person two packets of brown powder each weighing 1 kilogram were found lying in his lap. The powder was tested with the aid of a drug testing kit and was found to be heroin. Samples of 5 grams were drawn from each packet and after the samples had been homogenized, they were sent to the laboratory for analysis. The Chemical Examiner in his report opined that the seized articles were indeed heroin.

During the course of the investigation the appellant also made a confession under Section 108 of the Customs Act admitting his guilt. The matter was ultimately sent up for trial after the completion of the investigation. Sarup Singh and Khazan Singh, the independent witnesses, were given up as having been won over by the appellant. The prosecution accordingly placed primary reliance on the statement of PW.1 Jagtar Singh, Inspector of Customs and PW.4 Prem Singh and the confession of the appellant made to him as also the circumstantial evidence in the case. The accused was also examined under Section 313 of the Cr. P.C. and he stated that he had been roped in on account of his animosity with Swaran Singh-DSP and his brother Kartar Singh-SP as he had been involved in the murder case of their brother, Ranjit Singh. He also produced several witnesses in defence.

The Trial Court, on a consideration of the evidence, held that the case against the appellant had been proved beyond doubt more particularly as he had made a confession to PW.4 which was admissible in evidence as PW.4 was not a police officer. It was also found that the provisions of Section 50 of the Act had been complied with as Ex. P.A., a consent memo, had been drawn up prior to the search. The Trial Court accordingly convicted and sentenced the appellant, as already mentioned above. The conviction and sentence has been confirmed by the High Court.

Before us, Mr. Sanjay Jain, the learned counsel for the appellant, has raised primarily two arguments based on the judgments of this Court. The first is *Vijaisingh Chandu Bha Jadeja vs. State of Gujarat* (2011 (1) SCC 609). In this case it has been observed by the Constitution Bench that the provisions of Section 50 of the Act postulated that before a search was made of a person suspected of carrying a narcotic he should be informed of his right that he had an option of being searched in the presence of a Gazetted Officer or a Magistrate and that merely because a consent memo had been drawn up whereby he had chosen to be searched before the Magistrate or a Gazetted Officer (on the option given to him by an authorized officer) would not amount to full compliance with the aforesaid provision.

The second argument is based on the judgment of this Court in *Noor Aga vs. State of Punjab & Anr.* (2008 (16) SCC 417) in which this Court had deviated from the earlier position in law that a Customs Officer was not a police officer and a confession made to him under Section 108 of the Customs Act, was admissible in evidence. In this case it has been held that as a Custom Officer exercised police powers and a confession made by an accused could result in a conviction and sentence, such a confession was hit by the embargo placed by Section 25 of the Evidence Act, 1872, and was, therefore, not admissible in evidence.

On the other hand, Mr. R.P. Bhatt, the learned senior counsel for the respondent - Department, has pointed out that Ext. P.A. the consent memo in fact conveyed information to the appellant that he had a right to be searched in the presence of a Magistrate or a Gazetted Officer and that this amounted to full compliance with Section 50 of the Act. He has also pointed out that although *Noor Aga's* case did say that a confession made to a Custom Officer was hit by Section 25 of the Evidence Act and was therefore not admissible in the evidence, yet a judgment of a coordinate Bench of this Court in *Kanahiya Lal vs. Union of India* case (2008 (4) SCC 668) had reiterated the earlier position in the law as given in *Raj Kumar vs. Union of India* - 1990(2) SCC 409 that Officers of the Revenue Intelligence and ipso facto of the Customs Department could not be said to be police officers and a confession before them would not be hit by Section 25 of the Evidence Act.

We have examined the facts of the case in the light of the arguments raised by the learned counsel for the parties and the case law cited. Ext. P.A. is the consent memo under which the appellant had opted to be searched in the presence of a Gazetted officer. This memo is in the Gurmukhi script and has been read to us and we see that it cannot by any stretch of imagination be said to be informing the appellant of his right to be searched in the presence of a Gazetted Officer or a Magistrate as he was only given the option to be searched before one of the other. In *Vijaisingh's* case (*supra*) the Constitution Bench crystalised the issue before it in para 1 as under:

"The short question arising for consideration in this batch of appeals is whether Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "the NDPS Act") casts a duty on the empowered officer to "inform" the suspect of his right to be searched in the presence of a gazetted officer or a Magistrate, if he so desires or whether a mere enquiry by the said officer as to whether the suspect would like to be searched in the presence of a Magistrate or a gazetted officer can be said to be due compliance with the mandate of the said section?"

This was answered in paragraph 29 in the following terms:

"In view of the foregoing discussion, we are of the firm opinion that the object with which the right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that

insofar as the obligation of the authorised officer under sub- section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision."

It is therefore apparent that the precise question that was before the Constitution Bench was as to whether a consent memo could be said to be information conveyed to an accused as to his right under Section 50 of the Act. The Constitution Bench clearly stated that a consent memo could not be said to be such information as the provisions of Section 50 of the Act were mandatory and strict compliance was called for and any deviation therefrom would vitiate the prosecution. It was further held that it was not necessary that this information should be in a written form but the information had to be conveyed in some form or manner which would depend on the facts of the case. We have accordingly gone through the evidence of PW.4 Prem Singh. He did not utter a single word as to whether he had informed the appellant of his right and he merely took his option as to whether he would like to be searched before a Gazetted Officer or a Magistrate as noted in Ex.P.A. In the light of the judgment in Vijaisingh's case (supra) we find that there has been complete non-compliance with the provisions of Section 50 of the Act.

We also see that the Division Bench in Kanahiya Lal's case had not examined the principles and the concepts underlying Section 25 of the Evidence Act vis.-a- vis.

Section 108 of the Customs Act the powers of Custom Officer who could investigate and bring for trial an accused in a narcotic matter. The said case relied exclusively on the judgment in Raj Kumar's case (Supra). The latest judgment in point of time is Noor Aga's case which has dealt very elaborately with this matter. We thus feel it would be proper for us to follow the ratio of the judgment in Noor Aga's case particularly as the provisions of Section 50 of the Act which are mandatory have also not been complied with.

In view of what has been held above we find that the conviction of the appellant must be set aside. Accordingly we allow this appeal and order his acquittal.

.....J. (HARJIT SINGH BEDI)J. (GYAN SUDHA MISRA) New Delhi, July 21, 2011.