Abdul Rashid Ibrahim Mansurl vs State Of Gujarat on 1 February, 2000

Equivalent citations: AIR 2000 SUPREME COURT 821, 2000 (2) SCC 513, 2000 AIR SCW 375, (2000) 1 KER LT 72, 2000 CRILR(SC&MP) 373, 2000 (1) SCALE 361, 2000 CALCRILR 239, 2000 SCC(CRI) 496, 2000 (1) LRI 1043, (2000) 1 JT 471 (SC), 2000 (1) UJ (SC) 587, 2000 (2) SRJ 413, (2000) SC CR R 321, 2000 CRILR(SC MAH GUJ) 373, 2000 CHANDLR(CIV&CRI) 418, (2000) 1 EASTCRIC 323, (2000) 1 EFR 539, (2000) 2 GUJ LR 1129, (2000) 2 GUJ LH 691, (2000) MAD LJ(CRI) 538, (2000) 18 OCR 512, (2000) 2 RAJ LW 264, (2000) 1 RECCRIR 611, (2000) 1 SCJ 675, (2000) 1 SUPREME 363, (2000) 27 ALLCRIR 458, (2000) 1 SCALE 361, (2000) 40 ALLCRIC 470, (2001) 1 CALLT 33, (2000) 1 CHANDCRIC 32, (2000) 1 ALLCRILR 585, (2000) 1 CRIMES 187, 2000 CHANDLR(CIV&CRI) 145, (2000) 1 RECCRIR 217, (2000) 1 CHANDCRIC 33, 2000 (1) ANDHLT(CRI) 217 SC, (2000) 5 BOM CR 442

Bench: K.T. Thomas, S. Rajendra Babu

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           CASE NO.:
Appeal (crl.)  78 of 1992

PETITIONER:
ABDUL RASHID IBRAHIM MANSURl

RESPONDENT:
STATE OF GUJARAT

DATE OF JUDGMENT: 01/02/2000

BENCH:
DR. A.S. ANAND CJ & K.T. THOMAS & S. RAJENDRA BABU

JUDGMENT:
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JUDGMENT 2000 (1) SCR 542 The Judgment of the Court was delivered by THOMAS, J. Appellant was an auto-rickshaw driver. On the evening of 12.1.1988 an auto-rickshaw was intercepted by a posse of police person-nel while it was proceeding to Shahpur (Gujarat). Four gunny bags were found stacked in the vehicle. They contained 'Charas' (Cannabis hemp). Appellant was arrested and prosecuted for offences under Section 20(b)(ii) of the Narcotics Drugs and Psychotropic Substances Act, 1985 (for short 'the Act') besides Section 66(l)(b) of the Bombay Prohibition Act.

The trial court acquitted the appellant, but on appeal by the State of Gujarat a Division Bench of the High Court of Gujarat set aside the order of acquittal and convicted him of the offences under the

above sections. He was sentenced to rigorous imprisonment for ten years and a fine of Rupees one lakh for the first count while no separate sentence was im-posed for the second count.

Facts are not seriously disputed by the appellant. More details about the facts are the following :

> PW-2 Premsingh M. Vishen, Inspector of Police at Dariapur Police Station, got information on 12.1.1988 that one Iqbal Syed Husen was trying to transport Charas upto Shahpur in an auto-rickshaw bearing No. GTH 3003. PW-2 collected some more policemen and proceeded to the main road in quest for the contraband movement. At about 4.00 PM they sighted the auto- rickshaw which was then driven by the appellant. They stopped it and checked it and found four gunny bags placed inside the vehicle. Police took the vehicle to the Police Station and when the gunny bags were opened ten packets of Charas were found concealed therein. The value of the said contraband was estimated to be Rs. 5.29 lakhs. When investigation was conducted it was revealed that the said consignment was loaded in the auto rickshaw by two persons - Iqbal Syed Husen and Mahaboob Rasal Khan. The police made a search to trace them out but failed. And unceremoniously dropping them, a charge sheet was laid against the appellant only before the Chief Metropolitan Magistrate for the above mentioned offences and the case was later committed to the Court of Sessions.
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> Prosecution examined four witnesses. PW-1 is a panch witness and PW-2 Premsingh M. Vishen, the Inspector of Police, who headed the raiding party which intercepted the vehicle, PW-3 PSO of Dariapur Police Station was examined to prove the FIR. PW-4 Baldev Singh Vaghela was the Sub-Inspector of Police, Dariapur, Forensic Science Laboratory which conducted tests on the samples of contraband reported that it contained Charas.
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> When the appellant was questioned by the trial court under Section 313 of the Code of Criminal Procedure he did not dispute the fact the he rode the auto-rickshaw and that the same was intercepted by the police party and that gunny bags kept in the vehicle were taken out and examined by them at the Police Station. His defence was that those four gunny bags were brought in a truck at Chokha Bazar by two persons who unloaded them into his vehicle and directed him to transport the same to the destination mentioned by them. He carried out the assignment without knowing what were the contents of the load in the gunny bags.
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> The Division Bench of the High Court found that the appellant failed to prove that he did not know the contents of the load and hence the presumption in Section 35 of the Act remained un- rebutted. It was mainly on the said premise that the Division Bench held the appellant guilty of the offence for which he was convicted and sentenced as aforesaid.

As the appellant did not engage any advocate for himself Mr. Sudhir Nandrajog, Advocate was appointed as amicus curiae to argue for him. Learned counsel contended first that there was total non-compliance with the requirements of Section 50 of the Act which had vitiated the seizure of the contraband. Section 50 contains the conditions under which search of a person shall be conducted. In State of Punjab v. Baldev Singh, [1999] 6 SCC 172, a Constitution Bench of this Court, while interpreting Section 50 of the Act, has held, inter alia, thus :

"(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 course prejudice to an accused.

(3) That a search made by an empowered officer, on prior infor-mation, 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 on accused, where the convic-tion 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."

Sri Vashank P. Adhyaru, learned counsel for the State of Gujarat contended that there was no question of complying with the conditions stipulated in Section 50 of the Act as no search of the person was con-ducted in this case. According to the learned counsel, the search conducted was of the conveyance and the mere fact that appellant was them driving the vehicle would not make it a search of his person. Learned counsel cited the decisions in Kalema Tumba v. State of Maharashtra, [1999] 8 SCC 257 and Sarjudas v. State of Gujarat, [1999] 8 SCC 508.

In the former case, accused was a person who arrived at Sabar International Airport (Mumbai) and when the intelligence officer of Nar-cotic Central Bureau checked one of his baggage he detected 2 Kgs. of Heroin therefrom. Before the baggage was opened the accused was asked to identify it and when he did so the officer again checked it up with the Baggage Tag affixed on the Air Ticket in the possession of the accused. The contention that the conditions under Section 50 of the Act were not complied with before the baggage was searched, has been repelled by this Court on the premise that it was not a search of the "person" of the accused. In the second mentioned case, the contention based on Section 50 was negative on the factual premise that "Charas" was found kept in a bag which was hanging on the scooter ridden by the accused. Learned Judges held that opening and checking the said bag did not amount to search of the "person" of the accused.

In the present case, the appellant has no case that he was searched by the police party. The place where the gunny bags found stacked in the vehicle was not inextricably connected with the person of the appellant. Hence it is an idle exercise in this case, on the fact situation, to consider whether there was non- compliance with the conditions stipulated in Sec- tion 50 of the Act.

But the more important contention advanced by Shri Sudhir Nandrajog, learned amicus curiae was that there was non- compliance with Section 42 of the Act which was enough to vitiate the search as a whole. Section 42 reads thus :

> 42. Power of entry, search, seizure and arrest without warrant or authorisation, - (1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government or of the Border Security Force as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing, that any narcotic drug, or psychotropic substance, in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed in any building, conveyance or enclosed place, may, between sunrise and sunset -
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> (a) enter into and search any such building, conveyance or place;
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> (b) in case of resistance, break open any door and remove any obstacle to such entry;
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> (c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under Chapter IV relating to such drug or substance; and
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> (d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under Chapter IV relating to such drug or sub-stance :
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> Provided that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sun set and sun rise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-

section (1) or records grounds for his belief under the proviso thereto he shall forthwith send a copy thereof to his immediate official superior."

For the purposes of this case, PW-2 being a police officer much above the rank of a constable, would be "any such officer" as envisaged b the Section, If he had reason to believe from information given by any person that narcotic drug was kept or concealed in any building, con-veyance or enclosed place the requirements to be complied with by him before he proceeded to search any such building or conveyance or enclosed place were two-fold. First is that he should have taken down the informa-tion in writing. Second is that he should have sent forthwith a copy thereof to his immediate official superior. In this case PW-2 admitted that he proceeded to the spot only on getting the information that somebody was trying to transport narcotic substances. When he was asked in cross-examination whether he had taken down the information in writing he had answered in negative. Nor did he even apprise his superior officer of any such information either then or later, much less sending a copy of the information to the superior officer. However, learned counsel for the respondent - State of Gujarat contended that the action was taken by him not under Section 42 of the Act but it was under Section 43 as per which he was not obliged to take down the information. We are unable to appreciate the argument because, in this case, PW-2 admitted that he proceeded on getting prior information from a constable and the information was precisely one falling within the purview of Section 42(1) of the Act. Hence PW-2 cannot wriggle out of the conditions stipulated in the said sub- section. We therefore, unhesitatingly hold that there was non-compliance with Section 42 of the Act.

Learned counsel for the State next contended that such non- com-pliance with Section 42 of the Act cannot be visited with greater conse-quences than what has been held by the Constitution Bench of this Court regarding non-compliance of the conditions in Section 50 of the Act.

A two Judge Bench of this Court has considered the said question along with other questions in State of Punjab v. Balbir Singh, [1994] 3 SCC 299. In paragraph 25 of that judgment the conclusions were laid down, of which what is relevant for this case regarding Section 42(1) is the following:

> "(2-C) Under Section 42(1) the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc. he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.
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> To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.

(3) Under Section 42(2) such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case."

When the same decision considered the impact of non-compliance of Section 50 it was held that !!it would affect the prosecution case and vitiate the trial". But the Constitution Bench has settled the legal position concerning that aspect in State of Punjab v. Baldev Singh (supra), the relevant portion of which has been extracted by us earlier. We do not think that a different approach is warranted regarding non-compliance of Sec-tion 42 also. If that be so, the position must be the following :

If the officer has reason to believe from personal knowledge or prior information received from any person that any narcotic drug or psychotropic substance (in respect of which an offence has been com-mitted) is kept or concealed in any building, conveyance or enclosed place, it is imperative that the officer should take it down in writing and he shall forthwith send a copy thereof to his immediate official superior. The action of the officer, who claims to have exercised it on the strength of such unrecorded information would become suspect, though the trial may not vitiate on that score alone. Nonetheless the resultant position would be one of causing prejudice to the accused.

Learned counsel for the State of Gujarat thereupon contended that as the appellant did not dispute the factom of recovery of the "charas" from the vehicle it does not matter that the information was not recorded at the first instance by the police officer. We cannot approve the contention because non-recording of information has in fact deprived the appellant as well as the court of the material to ascertain what was the precise infor- mation, which PW-2 got before proceeding to stop the vehicle. Value of such an information, which was the earliest in point of time, for ascertain-ing the extent of the involvement of the appellant in the offence, was of a high degree. A criminal court cannot normally afford to be ignorant of such a valuable information. It is not enough that PW-2 was able to recollect from memory, when he was examined in court after the lapse of a long time, as to what information he got before he proceeded to the scene. Even otherwise, the information which PW-2, in this case, recollected itself tends to exculpate the appellant rather than inculpate him.

In the above context, learned counsel for State sought to rely on the legal presumption envisaged in Section 35 of the Act, In fact the Division Bench of the High Court also mainly rested on that legal premise. Section 35 reads thus:

"35. Presumption of culpable mental state. - (1) In any prosecution for an offence under this Act, which requires a culpable mental state of the accused, the court shall

> presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.
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> Explanation - In this section 'culpable mental state' includes inten-tion, motive, knowledge, of a fact and belief in, or reason to believe, a fact.
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> (2) For the purpose of this section, a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability."

No doubt, when the appellant admitted that narcotic drug was recovered from the gunny bags stacked in the auto-rickshaw, the burden of proof is on him to prove that he had ao knowledge about the fact that those gunny bags contained such a substance. The standard of such proof is delineated in sub-section (2) as "beyond a reasonable doubt*. If the court, on an appraisal of the entire evidence does not entertain doubt of a reasonable degree that he had real knowledge of the nature of substance concealed in the gunny bags then the appellant is not entitled to acquittal. However, if the court entertains strong doubt regarding the accused's awareness about the nature of the substance in the gunny bags, it would be a miscarriage of criminal justice to convict him of the offence keeping such strung doubt un-dispelled. Even so, it is for the accused to dispel any doubt in that regard. The burden of proof cast on the accused under Section 35 can be discharged through different modes. One is that, he can rely on the materials available in the prosecution evidence. Next is, in addition to that be can elicit answers from prosecution witnesses through cross- examination to dispel any such doubt. He may also adduce other evidence when he is called upon to enter on his defence. In other words, if circumstances appearing in prosecution case or in the prosecution evidence are such as to give reasonable assurance to the court that appellant could not have had the knowledge or the required intention, the burden cast on him under Section 35 of the Act would stand discharged even if he has not adduced any other evidence of his own when he is called upon to enter on his defence.

In this case non-recording of the vital information collected by the police at the first instance can be counted as a circumstance in favour of the appellant. Next is that even the information which PW-2 recollected from memory is capable of helping the accused because it indicates that the real culprits would have utilized the services of an auto-rickshaw driver to transport the gunny bags and it is not necessary that the auto-rickshaw driver should have been told in advance that the gunny bags contained such offensive substance. The possibility is just the other way around that the said culprits would not have disclosed that information to the auto-rick- shaw driver unless it is shown that he had entered into a criminal con- spiracy with the other main culprits to transport the contraband. Prosecution did not adduce any evidence to show any such connivance between the appellant and the real culprits. There is nothing even to suggest that those culprits and the appellant were close to each other, or even known to each other earlier. Yet another circumstance discernible from the evidence in this case is that the police had actually arrayed two other persons as the real culprits and made all endeavour to arrest them, but they absconded themselves and escaped from the reach of the police.

From the above circumstances we hold that the accused had dis-charged the burden of proof in such a manner as to rebut the presumption envisaged in Section 35 of the Act. He is therefore, not liable to be convicted for the offences pitted against him.

In the result, we allow this appeal and set aside the conviction and sentence passed on the appellant by the High Court in the impugned judgment We restore the order of acquittal passed in his favour by the trial court We direct him to be set at liberty forthwith, if he is not required in any other case,