Sajan Abraham vs State Of Kerala on 7 August, 2001

Equivalent citations: AIR 2001 SUPREME COURT 3190, 2001 AIR SCW 2970, 2001 AIR SCW 2875, 2002 (1) BOM CR 606, 2001 UJ(SC) 2 1502, 2001 (8) SRJ 41, 2002 (1) MADLW 483, (2001) 2 DMC 609, 2001 (3) LRI 771, 2001 (5) SCALE 30, 2001 (6) SCC 581, (2001) 6 JT 178 (SC), (2001) 5 SUPREME 789.2, 2001 (2) UJ (SC) 1341, 2001 BLJR 3 1941, 2001 CRILR(SC MAH GUJ) 504, 2001 ALL CJ 2 1644.1, 2001 (3) SCT 1090, (2001) 3 RECCRIR 808, (2002) 139 ELT 241, (2002) MAD LJ(CRI) 59, (2001) 3 SCJ 96

Bench: A.P.Misra, S.V.Patil

CASE NO.:
Appeal (crl.) 1022 of 0000

PETITIONER:
SAJAN ABRAHAM

Vs.

RESPONDENT:
STATE OF KERALA

DATE OF JUDGMENT: 07/08/2001

BENCH:
A.P.Misra, S.V.Patil

JUDGMENT:

J U D G E M E N T MISRA, J.

This appeal is directed against the judgment and order of the High Court of Kerala in criminal appeal setting aside an order of acquittal passed by the Trial Court convicting the appellant under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the 'Act') and sentencing him to undergo rigorous imprisonment for 10 years and a fine of rupees one lakh, in default to undergo simple imprisonment for one year. In order to appreciate the controversy, we are herewith giving the essential matrix of facts.

The appellant was put on trial for an offence punishable under Section 21 of the Act. As per prosecution story, on the 10th October, 1993 at 7.45 p.m. the appellant was in possession of

manufactured drug by name 'Tidigesic' and three syringes for injecting the same, by the road near the Blue Tronics Junction at Palluruthy. The Head Constable PW 3 and two other Constables of the Special Squad got information at about 7 p.m. on the said date that a person was selling injectible narcotic drugs near the Blue Tronics Junction, Palluruthy. They informed this to PW5, Sub Inspector of police, Palluruthy Cusba Police Station who was coming in a jeep along with his police party. Thereafter PW5 along with his police party including PW3 and other members of the Special Squad went to the scene of occurrence and stopped their vehicle little away from the spot. On reaching there they found the accused standing on the road with a packet in his hand. He was identified by PW3 and apprehended by PW5. On search, the packet possessed by the appellant revealed it contained 5 strips of 5 ampoules each of Tidigesic and three injection syringes and a purse containing currency note of Rs.10/-. At the spot one ampoule was taken as sample for chemical analysis and the said contraband articles were seized as per Ex.P1 seizure mahazar prepared at the spot. The appellant was also arrested there. The charge sheet was submitted, the appellant pleaded not guilty.

The trial court found discrepancies in the evidence of the prosecution witnesses thus disbelieved the prosecution story, hence acquitted the appellant.

In the trial court records, Ex.P8 is a certificate of analysis issued by the Regional Chemical Examiner's Laboratory, Kakkanad, which shows that the articles seized was Buprenorphine Hydrochloride solution containing 0.3 milligram of Buprenorphine per milli litre and that Buprenorphine is a thebaine derivative. It is accepted that baine is a phenanthrene alkaloid, an opium derivative and as such it is a manufactured drug coming within the ambit of Section 21 of the N.D.P.S. Act. As per the evidence of PW 3, he got the information about the appellant at about 7 p.m. and to ascertain this he actually arrived there at 7.30 p.m. After identifying him he proceeded to Palluruthy Police Station to inform his superior the sub- Inspector of Police. But on the way he met S.I. of Police, Palluruthy who was on patrol duty. Then they all went to the place where the appellant was standing. The prosecution case is that before search the prosecution complied with the condition as laid down under Section 50 of the NDPS Act. Thereafter he was searched wherein it was found that he was in possession of 25 ampoules of Tidigesic in 5 strips and three injection syringes. PW1 and one Shamsuddin CW2 are two independent witnesses of the seizure mahazar Ex.P1 since other three witnesses are police constables. Since Shamsuddin was not available for examination in spite of the efforts, PW1 deposed about the said search and seizure. Finally, the High Court held that PW1's evidence is fully corroborated by PW3 and PW5 with respect to the prosecution version regarding the seizure of the contraband and the arrest of the appellant by PW5. The discrepancies in their testimony as pointed out by the trial court were trivial which do not affect the veracity or the credibility of the prosecution story. The High Court on reappraisal of evidence came to the conclusion that the trial court was not justified in acquitting the appellant. It held that the prosecution has established with positive evidence beyond reasonable doubt that the appellant has committed an offence punishable under Section 21 of the Act, hence convicted and sentenced the appellant as aforesaid.

The leaned counsel for the appellant submits with vehemence that the prosecution has violated mandatory provisions of the Act, namely, Section 42, Section 50 and Section 57, hence conviction

and sentence is liable to be set aside.

With regard to Section 42, the submission is that PW5 has not recorded the information given by PW3 with respect to the appellant's involvement before proceeding to arrest him in this case. This constitutes violation of Section 42 of the Act. It is true under Section 42(1), the officer concerned, when he has reason to believe from his personal knowledge or information received from any person, he is obliged to take it down in writing if such information constitutes an offence punishable under Chapter IV of the Act and send it forthwith to his immediate superior. Such an officer is empowered to search any building, conveyance and in case of any resistance, break up any door or remove any obstacle for such entry, seizure of such drug or substance and to arrest such person whom he has reason to believe to have committed any offence punishable under the said Chapter. Thereafter such officer has to send a copy of this information forthwith to his immediate superior. Submission is that PW5 after receiving the said information has not communicated it to his immediate superior which constitutes violation of Section 42. In construing any facts to find, whether prosecution has complied with the mandate of any provision which is mandatory, one has to examine it with pragmatic approach. The law under the aforesaid Act being stringent to the persons involved in the field of illicit drug, traffic and drug abuse, the legislature time and again has made some of its provisions obligatory for the prosecution to comply, which the courts have interpreted it to be mandatory. This is in order to balance the stringency for an accused by casting an obligation on the prosecution for its strict compliance. The stringency is because of the type of crime involved under it, so that no such person escapes from the clutches of law. The court however while construing such provisions strictly should not interpret it so literally so as to render its compliance, impossible. However, before drawing such an inference, it should be examined with caution and circumspection. In other words, if in a case, the following of mandate strictly, results in delay in trapping an accused, which may lead the accused to escape, then prosecution case should not be thrown out.

In the present case, PW3 the Head Constable got information with reference to the appellant only at about 7 p.m. that the person is selling injectable Narcotic drugs near the Blue Tronics Junction, Palluruthy. When he proceeded for Pilluruthy Police Station to give this information to his immediate superior S.I. of Police PW5, he found PW5 along with his police party, who were on patrol duty coming, hence the said information was communicated there by PW3 to PW5. Thereafter, PW5 along with his police party and PW3 immediately proceeded towards the place where the appellant was standing. Had they not done so immediately, the opportunity of seizure and arrest of the appellant would have been lost. How PW5 could have recorded the information given by PW3 and communicated to his superior while he was on motion, on patrol duty, in the jeep before proceeding to apprehend him is not understandable? Had they not acted immediately, appellant would have escaped. On these facts, we do not find any inference could be drawn that there has been any violation of Section 42 of the Act.

Next submission is, the prosecution has violated Section 50 of the Act which is mandatory as held by the Constitution Bench of this Court in State of Punjab vs. Baldev Singh (1999) 6 SCC 172. The submission is, the appellant was not informed in writing of his right to be searched in the presence of a Magistrate or a Gazetted Officer.

We find PW1, PW3 and PW5 have deposed that PW5 has informed the respondent orally about it but the appellant opted out of this right. It is only thereafter a search was made.

In the present case we find the High Court recorded a finding that PW5 informed the appellant about his right as provided under Section 50 of the Act which is established not only by the oral evidence of PWs. 1, 3 and 5, but also by the recitals made in Ext.P1 the seizure mahazar prepared by PW5 and the F.I. Statement given by the respondent (the appellant before us). The submission, however, is communicating orally to the appellant is not a compliance under Section 50. We cannot agree. The aforesaid Constitution Bench upholds oral communication also to be valid under Section 50 of the Act. Hence, this submission has no merit.

Thus in our considered opinion, we do not find, on the facts of this case, as also recorded by the High Court that there has been any violation of Section 50 of the Act.

The last submission for the appellant is, there is non- compliance of Section 57 of the Act. He submits under it, an obligation is cast on the prosecution while making an arrest or seizure, the officer should make full report of all particulars of such arrest or seizure and send it to his immediate superior officer within 48 hours of such arrest or seizure. The submission is, this has not been done. Hence the entire case vitiates. It is true that the communication to the immediate superior has not been made in the form of a report, but we find, which is also recorded by the High Court that PW5 has sent copies of FIR and other documents to his superior officer which is not in dispute. Ex.P9 shows that the copies of the FIR along with other records regarding the arrest of appellant and seizure of the contraband articles were sent by PW5 to his superior officer immediately after registering the said case. So, all the necessary information to be submitted in a report was sent. This constitutes substantial compliance and mere absence of any such report cannot be said it has prejudiced the accused. This section is not mandatory in nature. When substantial compliance has been made, as in the present case it would not vitiate the prosecution case. In the present case, we find PW5 has sent all the relevant material to his superior officer immediately. Thus we do not find any violation of Section 57 of the Act.

In State of Punjab vs. Balbir Singh (1994) 3 SCC 299, this Court held:

> "The provisions of Sections 52 and 57 which deal with the steps to be taken by the officers after making arrest or seizure under Sections 41 to 44 are by themselves not mandatory.."

In view of our aforesaid findings, we do not find any infirmity in the impugned order of the High Court. Accordingly the present appeal fails and has no merit and is dismissed.