

Supreme Court of India

T.P. Razak Alias Nagappan Razak vs State Of Kerala on 28 February, 1995

Equivalent citations: 1996 (2) ALT Cri 208, 1996 (2) BLJR 1424, 1995 (2) SCALE 385, 1995 Supp (4) SCC 256

Bench: S Agrawal, F Uddin

ORDER

1. Leave granted.

2. The appellant has been convicted for the offence under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 [hereinafter referred to as 'the Act'] for having been found in possession of four small packets containing brown sugar weighing 870 mg. on August 31, 1990. He was convicted by the Sessions Judge, Kozhikode Division and sentenced to undergo rigorous imprisonment for a period of 11 years and to pay a fine of Rs. 1,00,000/- (Rupees one lakh) and in default of payment of fine to undergo rigorous imprisonment for a further period of five years. The appeal filed by the appellant against the said conviction and sentence was dismissed by the High Court by Judgment dated September 27, 1991 with the modification that the sentence was reduced to rigorous imprisonment for ten years and while retaining the fine of Rs. 1,00,000/- it is directed that in default of payment he would undergo rigorous imprisonment for a period of two years.

3. The only question that has been raised by Shri T.N. Singh, the learned Counsel appearing for the appellant, is that the conviction and sentence cannot be sustained since there has been non-compliance with the provisions of Section 50 of the Act which have been held to be mandatory in the recent decisions of this Court in the State of Punjab v. Balbir Singh , and All Mustaffa Abdul Rahman Moosa v. State of Kerala .

In State of Punjab v. Balbir Singh (supra) this Court has laid down as under :

The question considered above arise frequently before the trial courts. Therefore, we find it necessary to set out our conclusions which are as follows :

(1) If a police officer without any prior information as contemplated under the provisions of the Narcotic Drugs & Psychotropic Substances Act makes a search or arrests a person in the normal course of investigation into a offence or suspected offences as provided under the provisions of Or PC and when such search is completed at that stage Section 50 of the Narcotic Drugs & Psychotropic Substances Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered\* officer Who should thereafter proceed in accordance with the provisions of the Narcotic Drugs & Psychotropic Substances Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the Narcotic Drugs & Psychotropic Substances Act.

x x x x x x x x x x (5) On prior information the empowered officer or authorised officer while acting under Sections 41(2) or 42 should comply with the provisions of Section 50 before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a Gazetted Officer or a Magistrate as provided thereunder. It is obligatory on the part of such officer to inform the person to be searched. Failure to inform the person to be searched and if such person so requires, failure to take him to the Gazetted Officer or the Magistrate, would amount to non-compliance of Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial. After being so informed whether such person opted for such course or not would be a question of fact.

5. In the present case the case of the prosecution is that on August 21, 1990, on the basis of the information received by P.W. 4, the Sub-Inspector of Police, Town Police Station, Kozhikode, that the appellant is by the side of the High Way Tourist Home with brown sugar in his possession, P.W. 4 along with other constables proceeded to the said place at 8.30 P.M. and that when they reached there they saw the appellant and the search of the appellant revealed a match box with him containing four small packets containing brown sugar weighing 370 mg. In other words, the case of the prosecution is that the search of the appellant was conducted by P.W. 4, the Sub-Inspector of Police on the basis of a prior information about his having brown sugar in his possession. The case, therefore, falls under conclusion (5) laid down by this Court in *State of Punjab v. Balbir Singh* (supra).

6. As regards compliance with the requirements of Section 50 of the Act there is only the evidence of P.W. 4 who has deposed in the Court that before the appellant was searched he had asked the appellant whether he is to be taken before a Gazetted Officer or a Magistrate for conducting the search and that the appellant replied that it was not necessary. This fact is, however, not mentioned in the F.I.R., Ex.P.7 as well as in the Seizure Mahazar, Ex.P.I. P.W.I, the other witness of the search, also does not support the said version of P.W. 4. The trial Judge did not consider it necessary to assess the evidence since he was of the view that it was not necessary to comply with the provisions of Section 50 of the Act. The High Court has also proceeded on the basis that the provisions of Section 50 were directory and non-compliance was not fatal to the prosecution case.

7. Having regard to the fact that the F.I.R. and Seizure Mahazar do not mention about the appellant having been asked before the search was conducted as to whether he would like to be produced before a Gazetted Officer or a Magistrate and the further fact that P.W.I, the other independent witness, also does not state about this we are of the view that the prosecution has filed to establish that there was compliance with the provisions of Section 50 of the Act before conducting the search of the appellant. In view of the non-compliance with the mandatory provisions of Section 50 of the Act on reliance can be placed on the alleged search of the person of the appellant and the alleged recovery of four small packets containing 370 mg. of brown sugar from his possession. The conviction and the sentence imposed on the appellant cannot, therefore, be upheld and has to be set aside.

8. The appeal is accordingly allowed and his conviction and sentence for the offence under Section 21 of the Act is set aside. The appellant shall be released forthwith if he is not required in connection

with any other case.