

IN THE SUPREME COURT OF INDIA  
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 393 OF 2005  
AND  
CRIMINAL APPEAL NO. 394 OF 2005

State of Rajasthan	...	Appellant
Vs.		
Bhiya Ram @ Dharmendra	...	Respondent
	AND	
State of Rajasthan	...	Appellant
Vs.		
Kamal Singh	...	Respondent

O R D E R

1. One Bhiya Ram @ Dharmendra (original accused No.1) was tried along with one Kamal Singh (original accused No. 2) in Sessions Case No. 55 of 1999 in the Court of District and Sessions Judge, Rajasmand (Rajasthan) for offence under Section 8 read with Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the NDPS Act).

2. By its judgment and order dated 22/02/2001, learned Sessions Judge convicted both of them for offence under Section 8 read with Section 18 of the NDPS Act and sentenced each of them to suffer ten years rigorous imprisonment and a fine of Rs.1 lakh, in default, to undergo rigorous imprisonment for one year.

3. Being aggrieved by the said judgment and order, they carried appeals to the Rajasthan High Court. By the impugned judgment and order dated 13/2/2004, the Rajasthan High Court acquitted them and hence the State has come in appeal to this Court. Bhiya Ram @ Dharmendra is the respondent in Criminal Appeal No. 393 of 2005 and Kamal Singh is the respondent in Criminal Appeal No. 394 of 2005.

4. Shortly stated, the prosecution case is that on 15/4/1999 the Station House Officer - Sunderlal Soni received information at 2.30 p.m. on telephone that two persons had left at 2.00 p.m. by Kalpana Video bus from Udaipur to Jodhpur for smuggling opium. Finding the information to be reliable, they proceeded from the police station to nab the accused. They stopped a bus bearing Registration No. RJ 15 P 0147 which came from Udaipur side. PW-12 Sunderlal Soni, the Investigating Officer and PW-6 Constable Harak Lal entered the bus. On enquiry being made, the accused disclosed their names. It is the case of the prosecution that both Bhiya Ram and Kamal Singh were individually informed as required by Section 50 of the NDPS Act that if they wish, they can get their personal search conducted before or in the presence of a Magistrate or a Gazetted Officer. According to the prosecution, they opted to be searched by the SHO - PW12 Sunderlal Soni. Kamal Singh opened the suit case which contained two plastic pouches wrapped by threads. One of the pouches was opened. It was found to contain some wet black coloured material which was snuffed, tested and found to be opium. Similarly, the second pouch was also found to contain opium. They were weighed and seized after following the required procedure. Similarly, personal search of Bhiya Ram was conducted. On his body a plastic bag was found wrapped by white cloth. The said bag was opened and it was found to contain opium. The said opium was also seized after following the required procedure. Samples were drawn. FIR was registered. The appellants were then arrested. After completion of investigation, they were charged with the aforesaid offences.

5. As we have already noted, the learned Sessions Judge convicted them but the High Court reversed the order of conviction and acquitted them.

6. The basic contention of learned counsel for the respondent is that there was no strict compliance of Section 50 of the NPDS Act so far as appellant Bhiya Ram is concerned. He was asked as to whether he wanted to be searched before a Gazetted Officer or a Magistrate on which he stated

that he wanted to be searched by SHO. However, he was not informed that he had a statutory right that if he so requires, he shall be searched in the presence of a Gazetted Officer or a Magistrate. It is submitted that failure to communicate this right to him would not vitiate the trial but would render the recovery of illicit articles suspect and vitiate the conviction and sentence. We find substance in this submission.

7. We have perused the evidence. It is true that Bhiya Ram was not communicated that he had a statutory right to be searched before a Gazetted Officer or a Magistrate, if he so required. In this connection, we may usefully refer to the judgment of this Court in Vijaysinh Chandubha Jadeva

Vs. State of Gujarat (2011) 1 SCC 609. The relevant paragraph thereof could be quoted:

"24. Although the Constitution Bench in Baldev Singh case [(1999) 6 SCC 172] did not decide in absolute terms the question whether or not Section 50 of the NDPS Act was directory or mandatory yet it was held that provisions of sub-section (1) of Section 50 make it imperative for the empowered officer to "inform" the person concerned (suspect) about the existence of his right that if he so requires, he shall be searched before a gazetted officer or a Magistrate; failure to "inform" the suspect about the existence of his said right would cause prejudice to him, 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 of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from the person during a search conducted in violation of the provisions of Section 50 of the NDPS Act. The Court also noted that it was not necessary that the information required to be given under Section 50 should be in a prescribed form or in writing but it was mandatory that the suspect was made aware of the existence of his right to be searched before a gazetted officer or a Magistrate, if so required by him. We respectfully concur with these conclusions. Any other interpretation of the provision would make the valuable right conferred on the suspect illusory and a farce."

8. In view of this settled position in law, no infirmity can be found in the High Court's judgment, so far as the acquittal of Bhiya Ram is concerned, which rests inter alia on the above ground.

9. Coming to the case of Kamal Singh, according to the prosecution, he was carrying a suit case. The High Court has found that recovery of a bag from his possession is doubtful. PW-6 Harak Lal, the constable, who entered the bus with PW-12 Sunderlal Soni, the Investigating Officer, stated in the examination-in-chief that Kamal Singh had a suit case/attachi and Bhiya Ram had a bag. In the cross-examination, he stated that Kamal Singh had a cloth bag lying in his lap and Bhiya Ram had the attachi lying under his feet. This is also contrary to the evidence of PW-12 Sunderlal Soni. This discrepancy cannot be explained away as an error. In the circumstances of the case, the High Court's view that the recovery of a bag from Kamal Singh is doubtful, cannot be called perverse. Having considered the evidence in its proper perspective and having regard to the settled legal position, we are of the considered opinion that the view taken by the High Court is a reasonably possible view which should not be disturbed in this appeal against acquittal.

10. The criminal appeals are, therefore, dismissed.

.....J.  
(RANJANA PRAKASH DESAI)

.....J.  
(MADAN B. LOKUR)

NEW DELHI;  
FEBRUARY 18, 2014.

REVISÉD  
ITEM NO.101 COURT NO.13 SECTION II

S U P R E M E C O U R T O F I N D I A  
RECORD OF PROCEEDINGS  
CRIMINAL APPEAL NO(s). 78 OF 2005

STATE OF RAJASTHAN Appellant (s)

VERSUS

PARMANAND AND ANR. Respondent(s)

(With appln(s) for exemption from filing O.T.  
WITH APPEAL(CRL) NO. 393 of 2005  
APPEAL(CRL) NO. 394 of 2005  
APPEAL(CRL) NO. 592 of 2005  
(With office report)

Date: 18/02/2014 This Appeal was called on for hearing today.

CORAM :  
HON'BLE MRS. JUSTICE RANJANA PRAKASH DESAI  
HON'BLE MR. JUSTICE MADAN B. LOKUR

For Appellant(s)

Mr. Imtiaz Ahmed, Adv.  
Mrs. Nagma Imtiaz, Adv.  
Mr. Milind Kumar, Adv.

Mr. S.S. Shamsbery, Adv.  
Mr. Bharat Sood, Adv.  
Mr. Varun Punia, Adv.  
Mr. Sandeep Singh, Adv.  
Mr. Ritesh Prakash Yadav, Adv.  
Mr. Harshvardhan Singh Rathore, Adv.  
Mr. Amit Sharma, Adv.  
Ms. Ruchi Kohli

For Respondent(s)

Ms. Nidhi, Adv. (SCLSC)  
Mr. D.K. Thakur, Adv.  
Mr. Devendra Jha, Adv.  
Mr. Debasis Misra, Adv.

Mr. V.J. Francis, Adv.  
Mr. Anupam Mishra, Adv.

UPON hearing counsel the Court made the following  
O R D E R

Criminal Appeal No.78 of 2005:-

Heard parties at length today.

Hearing concluded.

Judgment is reserved.

Criminal Appeal Nos 393 of 2005 and 394 of 2005:-

The Criminal Appeals are dismissed in terms of the signed Order.

Criminal Appeal No. 592 of 2005:-

At the request of the learned counsel, the appeal is adjourned for two weeks.

| (Vishal Anand) | | (Indu Pokhriyal) |  
| Court Master | | Court Master |

(Signed Order is placed on the file)

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Mr. Ritesh Prakash Yadav, Adv.  
Mr. Harshvardhan Singh Rathore, Adv.  
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