

CASE NO.:
Appeal (crl.) 1048 of 1997

PETITIONER:
Narcotics Control Bureau, Jodhpur

RESPONDENT:
Murlidhar Soni & Ors.

DATE OF JUDGMENT: 29/04/2004

BENCH:
N Santosh Hegde & B P Singh.

JUDGMENT:
J U D G M E N T

SANTOSH HEGDE, J.

The Narcotic Control Bureau, Jodhpur has preferred this appeal against the judgment of the High Court of Judicature for Rajasthan at Jodhpur by which judgment the High Court allowed the appeal of the respondent and his father filed against the judgment of the Special Judge, Narcotic Drugs and Psychotropic Substances Court, Jodhpur in Sessions Case No.155/94 whereby the trial court had convicted the appellant and his father of an offence punishable under section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the NDPS Act) and sentenced them to undergo 10 years' RI and to pay a fine of Rs.1 lakh. Brief facts necessary for the disposal of this appeal are as follows :

On the basis of certain confidential information received by the officers of the department on 23.9.1994 a raiding party was organised under the supervision of the Assistant Director of the Bureau who incidentally was a Gazetted Officer. Said team saw the respondent and his father Murlidhar Soni at about 9 p.m. on that day standing near the Manthan Cinema at Pali at which point of time the accused Murlidhar Soni (since dead) was carrying a cloth bundle. The raiding party then went to these 2 accused persons and identified themselves and expressed their desire to search the bag carried by Murlidhar Soni. The two accused persons were told that they have the right to be searched in front of a Gazetted Officer or a Magistrate. Thereupon the said persons expressed their desire to be searched by a Gazetted Officer and the Assistant Director, Narcotics Control Bureau being a Gazetted Officer conducted the search of the cloth bag from which 2.41 kg. of heroin was recovered. After taking the necessary samples the contraband goods were seized in front of witnesses and sealed and the said 2 persons were arrested. During the course of investigation it came to the knowledge of the investigating authority that there were 3 other persons involved in the purchase and sale of narcotics from the respondent herein and his father hence they were also arrested and charged for the offences as stated above.

The trial court came to the conclusion that the prosecution had established its charges against the respondent and his father Murlidhar Soni and convicted them accordingly while it found the prosecution has failed to establish charges against other accused persons hence acquitted them.

Said convicted accused persons as stated above preferred an appeal before the High Court which came to be decided by the impugned judgment, allowing the said appeal and setting aside

the conviction and sentence imposed on the appellants therein.

Very many questions involving the application of sections 42, 43, 50 and 57 of the NDPS Act were urged before the High Court and the High Court in the course of the judgment held on the facts of the case section 43 of the Act was applicable since the recovery in question was made in a public place. It also came to the conclusion there has been violation of various provisions of the Act like non-recording of the information received in advance, non-compliance of section 57 of the NDPS Act in not reporting the arrest of the accused persons. It also came to the conclusion though the accused persons were informed of their legal right of being searched by a Gazetted Officer or a Magistrate as per their desire they ought to have been taken to the nearest Gazetted Officer to be searched and the search made by the Assistant Director who himself was a Gazetted Officer was contrary to the provisions of section 50 of the Act since he was a member of the raiding party. After recording its finding in regard to the non-compliance of the statutory provisions of the NDPS Act the High Court also came to the conclusion that there was material on record to show that the statements of these accused were obtained under coercion and bodily injury which itself creates serious doubt as to the prosecution case.

Mr. P.P.Malhotra, learned senior counsel appearing on behalf of the appellant contended that the finding of courts below that there has been violation of sections 42, 43, 50 and 57 of the Act is wholly erroneous and contrary to the decisions of this Court. He pointed out that though on the basis of a prior information a raiding party was constituted still provisions of section 42 did not apply to the facts of the case since the search and seizure was made in an open place and not in a place as contemplated under section 42 of the Act. In this regard he pointed out from the impugned judgment of the High Court itself that the High Court had held that a search and seizure in this case actually falls under section 43 of the Act but it still applied the requirement of section 42 to the facts of the case. He also pointed out that as per the law laid down by this Court, when a recovery and seizure is made not from the person of the accused but from a bag, suitcase or a container, the provisions of section 50 did not apply because that section operates only in cases where a search of a person (body) is conducted. He further submitted that the High Court seriously erred in coming to the conclusion that a Gazetted Officer who is a member of the raiding party cannot be a Gazetted Officer empowered to search under section 50. In support of his contention learned counsel relied on the judgments of this Court in *Ganga Bahadur Thapa v. State of Goa* (2000 (10) SCC 312), *Narayanaswamy Ravishankar v. Asstt. Director, Directorate of Revenue Intelligence* (2002 (8) SCC 7), *Rajendra and Anr. v. State of M.P.* (2004 (1) SCC 432), *Kalema Tumba v. State of Maharashtra and Anr.* (1999 (8) SCC 257), *Sarjudas and Anr. v. State of Gujarat* (1999 (8) SCC 508), *Gurbax Singh v. State of Haryana* (2001 (3) SCC 28), *State of Punjab v. Balbir Singh* (1994 (3) SCC 299); and *M. Prabhulal v. Assistant Director, Directorate of Revenue Intelligence* (2003 (8) SCC 449).

Mr. Kailash Vasdev, learned senior counsel for the respondents contended that assuming for argument's sake that the finding of the High Court in regard to the statutory provisions of law is wrongly decided even then the respondent now before the court cannot be held guilty of the offence as charged for factual reasons. He pointed out that even according to the prosecution the bag in question was being carried by respondent's father and there is no material to show that this respondent had any knowledge as to the contents of the said bag. In such situation, the possession of the narcotics by his father could ever be

construed as conscious possession of this respondent also. He also submitted that the High Court has come to the conclusion that the accused persons were subjected to bodily injury and the so-called statements recorded under section 67 of the Act were in fact made to be given by the accused because of such bodily injury. This finding of the court by itself is sufficient to uphold the impugned judgment of the High Court.

Having heard learned counsel for the parties and perused the records we are of the opinion that it is not necessary for us to go into the legal arguments addressed by the learned counsel as to the applicability of the various provisions of the Act since we think this appeal can be disposed of on the factual finding arrived at by the High Court with which we are in agreement. Therefore we do not express any opinion on the findings of the High Court on the applicability of section 42, 43, 50 and 57 of the Act and proceed to examine the facts which justify the dismissal of the appeal. The High Court in the course of its judgment has observed that the alleged statements of these accused persons purportedly made under section 67 of the Act were obtained under duress.

We are in agreement with this finding of the High Court. It is to be noted that even though these accused persons were arrested on 24.9.1994, they were produced before the court only on 27.9.1994 on which date both the accused submitted before the court that they had suffered injuries at the hands of the investigating agency and it is under such physical threat their statements were recorded under section 67 of the Act. The said court had directed a medical examination of these accused on that day itself. The medical report and the evidence of DWs.1 and 2, the doctors who examined them, clearly shows that these accused had suffered injuries and Murlidhar Soni had actually suffered a fracture of the 10th left rib. The defence of the prosecution that these injuries might have been suffered by an accidental fall of the accused, cannot be accepted, thus, we are in agreement with the finding of the High Court that the statements of these accused persons have been obtained by the prosecuting agency under duress. It is also to be noted that even according to the prosecution case so far as this respondent is concerned, his only role in regard to the contraband was to take his father on his scooter to the place where they were allegedly arrested. The bundle in question which contained the contraband was carried by Murlidhar Soni and there is no material whatsoever to show that the present respondent had the knowledge that the bundle contained any contraband. In our opinion since the prosecution has not placed any material to show the conscious possession of the contraband by the respondent herein and since Murlidhar Soni is dead, we think the contentions advanced on behalf of the respondent as to the possession of the contraband by the respondent has to be accepted.

For the reasons stated above this appeal fails and the same is dismissed.