

CASE NO.:
Appeal (crl.) 861 of 1997

PETITIONER:
Babubhai Odhavji Patel, etc. etc.

RESPONDENT:
State of Gujarat

DATE OF JUDGMENT: 27/10/2005

BENCH:
K.G. Balakrishnan & B.N. Srikrishna

JUDGMENT:
J U D G M E N T
WITH

CRIMINAL APPEAL NO. 1132 OF 1997

K.G. BALAKRISHNAN, J.

The appellant in Criminal Appeal No. 861 of 1997, along with two others was tried by the Addl. Sessions Judge, Banaskantha in Gujarat, for the offence punishable under the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as NDPS Act). All the accused were found guilty of the offence under Section 17 of the NDPS Act. They preferred an appeal before the High Court of Gujarat and by the impugned judgment the High Court dismissed the appeal. Aggrieved by the same, the present appeals are filed by the appellants.

The facts of the case are that on 1.7.1989 PSI, L.U. Pandey, along with other police constables, was on patrol duty in the night of 1.7.1989 and at about 5.30 A.M., they noticed a tanker lorry bearing registration number GRS 6407 crossing the Palanpur railway crossing line. They signaled the vehicle to be stopped. The vehicle was stopped and they made a search of the lorry. The tanker lorry had three cabins. The police team wanted to conduct further search of the tanker lorry; therefore, they called two Panch witnesses and in their presence they opened the lid of the first cabin of the tanker with a spanner. They found a bundle of jute bag and on further search it was found that the jute bundle contained a dark brown substance which smelled like opium. The contents were found to weigh more than 5.5 kilograms. The entire quantity was seized by the police and out of the seized material, 15 grams was taken as a sample and sent for examination by the forensic science laboratory. It was found that the seized substance was opium.

The appellant completely denied his involvement and at the trial he alleged that there was violation of Section 42 of the NDPS Act. The appellant had also contended that there were procedural irregularities in conducting the search and sending the sample to the laboratory and in recording the arrest of the appellant. According to the appellant, all these procedural violations have caused serious prejudice to the accused and therefore the appellant is entitled to be released. We have carefully considered the contentions advanced by the counsel for the appellants and found no merit in the same.

As regards violation of Section 42 of the NDPS Act, it was contended that PSI, N.U. Pandey had received previous information

before going for the search, but he had not recorded this information anywhere and that he had also not informed his superior officers about the proposed seizure. In the present case, the officer who conducted the search was examined as PW-2. What he stated in the evidence was that the D.I.G. had instructed him that intoxicant materials were being transported illegally from the States of Rajasthan and Uttar Pradesh and the vehicles had been passing through Banaskantha district. This was only a general information given by the D.I.G. to PW-2 and such information is not bound to be recorded as a source of information as contemplated under Section 42 of the NDPS Act. Section 42 of the NDPS Act provides that a specific information alone need be recorded by the officer empowered to conduct a search. Here, PW-2 and the members of the patrol team were doing the usual patrol duty and they incidentally came across the tanker lorry in question and on search recovered the contraband substance from the vehicle. We do not think that there is any violation of Section 42 of the NDPS Act.

The counsel for the appellant further contended that the search was conducted at 5.30 A.M., that is before the sunrise and the PSI should have obtained a warrant or authorization for conducting the search of the vehicle. This plea also is without any merit. The contraband substance, namely the opium, was recovered from the tanker when the usual search of suspected vehicles carrying such contraband was being conducted by the police officials. The police party had no previous information that any contraband substance was being concealed in any building, conveyance or enclosed space and they have to conduct a search pursuant to such information. Then only they would require a warrant or authorization as contemplated under Section 42 of the NDPS Act. If it is a chance recovery, the procedure contemplated under Section 42 cannot be complied with and the evidence of PW-2 would clearly show that it was a chance recovery.

The counsel for the appellant would further contend that there was violation of Section 50 of the NDPS Act as the appellant was searched without being informed of the option of search before a gazetted officer or judicial magistrate. It is important to note that no narcotic substance was recovered on the person of the appellant. Even if it is assumed that a search was made on the person of the appellant by PW-2, no evidence in that behalf was made use of by the prosecution to sustain the charge against the appellant. The counsel for the appellant placed reliance on *State of Punjab vs. Baldev Singh* (1999) 6 SCC 172. That decision has no application to the facts of the present case and even according to the said decision, if at all there is any violation of Section 50, it will not vitiate the trial but would render the recovery of the illicit article suspect. In the present case no article was found on the person of the appellant but was recovered from the tanker lorry. Therefore, the recovery itself is not tainted with any procedural irregularity.

The counsel for the appellant also raised a contention that the seal on the sample sent to the forensic science laboratory was found tampered with and this creates a serious suspicion about the report furnished by the laboratory. We find no substance in this argument either. This aspect of the matter was elaborately dealt with by the Sessions Court and the appellant had even given up this plea before the High Court.

The learned counsel further contended that the seized articles were not kept in proper custody and that there was violation of Sections 52, 55 and 57 of the NDPS Act. He placed reliance on *Valsala v. State of Kerala* (1993) 3 Supp. 665. We do not think that there is much force in this contention. This Court in *Gurbax Singh v. State of Haryana* (2001) 3 SCC 28 held that these

provisions are not mandatory provisions and they are only directory. In the present case, we do not find any serious violation of these provisions. The prosecution adduced evidence to prove that these provisions have been substantially complied with and the Sessions Judge discussed these matters in detail and accepted the prosecution case.

It is proved satisfactorily that the appellant who was the owner of the tanker lorry in question was found in possession of the narcotic substance weighing more than 5 kilograms. It is proved that the appellant was using this vehicle for illegally transporting the narcotic substance. He has rightly been found guilty by the sessions court and his conviction was rightly upheld by the High Court. We do not find any merit in the appeal and the same is liable to be dismissed.

The appellant was released on bail by this court by order dated 15th September, 1997 and there was also an interim stay of realization of the fine in terms of order dated 25th September, 1997. The appeal is dismissed and the appellant is directed to surrender before the authorities within four weeks to undergo the remaining period of the sentence of imprisonment. He is also liable to pay the fine imposed on him, if not already paid.

The connected Criminal Appeal No. 1132 of 1997 would also stand dismissed accordingly.