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**IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE**

**BEFORE
HON'BLE SHRI JUSTICE VIJAY KUMAR SHUKLA**

ON THE 25th OF APRIL, 2024

CRIMINAL APPEAL No. 977 of 2000

BETWEEN:-

**RAEES KHAN S/O ABDUL MAJID,
AGE 41 YEARS, R/O BHAWANI MANDI,
TANWAR MOHALLA, JHALAWAD**

.....APPELLANT

(NONE APPEARED FOR APPELLANT)

AND

THE STATE OF M.P. (MADHYA PRADESH)

.....RESPONDENTS

(BY SHRI TARUN PAGARE - PUBLIC PROSECUTOR)

This appeal coming on for hearing this day, the court passed the following:

JUDGMENT

The present appeal is filed under section 374 Cr.P.C. being aggrieved by the judgment of conviction and sentence dated 12.7.2000 passed by XV ASJ, Indore in S.T.No. 537/93 whereby the appellant has been convicted under section 8/22 of NDPS Act and sentenced to undergo RI for 10 years and to pay fine of Rs.1 Lac and in default of payment of fine, to further undergo RI for 3 years.

2 . As per prosecution case, on 26.6.1993 at about 8.00 p.m. City Superintendent of Police, Kamalsingh Bundela (PW-9) arrested the appellants Raees Khan and Pradeep opposite House No. 48, Main road, Shivampuri

Colony, Indore. Raees was said to have carrying the briefcase in his hands. City Superintendent of Police, Juni Indore intimated the same to Police station Bhawarkuan on wireless. On receiving the information, Incharge police Inspector Shiv Om Mahajan (PW-4) along with Sub Inspector Kunjansingh Bundela (PW-8), Head Constable Sharad Patil (PW-5) and Constable Pawan (PW-3) and Mohansingh (PW-6) reached at the spot and briefcase was got opened in the presence of witnesses, Vidyasagar (PW-1) and Mahendrasingh (PW-7) in the presence of Gazetted City Superintendent of Police Kamalsingh Bundela and in the briefcase one plastic bag containing 450 gram of Opium powder was seized and in another packet, 1 kg. brown sugar (opium powder) was seized. The seizure memo is Ex.P/5. The samples were taken from the seized contraband and the accused persons were arrested by Ex.P/1 and P/2. The accused persons were arrested by Shiv Om Mahajan. The seized samples were sent for chemical examination to the lab. In FSL report(Ex.P/10), in the seized articles Alkalide Meconic Acid and in another packet Methaqualon element were present. After investigation chargesheet was filed for the offence under section 8/12 of NDPS Act. Initially three persons were prosecuted, however two accused persons namely Pradeep and Wahid Khan were acquitted by the trial court.

3. The prosecution has examined City Superintendent of Police Kamal Singh Bundela who deposed that appellant Raees was carrying briefcase and when the briefcase was opened, two packets containing brown sugar and opium were seized. The samples were taken from the packets and same were sent for chemical examination. The prosecution has also examined Inspector Shiv Om Mahajan (PW-4), Sub-Inspector Kunjansingh (PW-8), Head Constable Sharad Patil (PW-5) and Constable Mohansingh (PW-6) and Pawan (PW-3), who have

supported the testimony of City Superintendent of Police . The independent witnesses Vidhyasagar (PW-1), Mahendrasingh (PW-7) and Rajkumar (PW-9) did not support the prosecution case and stated that they were called at the police station and they were forced to sign the documents. The question arises for consideration is whether the provisions of section 40 and 50 of the NDPS Act have been complied with or not.

4. Counsel for the State submits that since the seizure was done by City Superintendent of Police, who is a Gazetted Officer, therefore there was no requirement to comply with the provisions of section 42 of NDPS Act. In regard to section 50, it is submitted that search was made by the Gazetted police officer, and therefore, the provision of section 50 of NDPS Act stands complied with.

5. As per testimony of City Superintendent of Police Kamalsingh Bundela (PW-9) the appellant was carrying bag in his hand and since the bag was being carried in the hands, the same would amount to personal search and therefore, mandatory provision of section 50 ought to have been complied with. Upon perusal of Panchnama (Ex.P/5), it is apparent that no notice was served to the appellant communicating him about his right to be searched by a Gazetted officer. In the case of *Vijay Singh Vs. State of Gujarat, 2011(1) SCC 609* and in the case of *State of Punjab Vs. Baljinder Singh, 2019(10) SCC 473*, the Constitutional Bench held that search of vehicle, container or premises does not amount to personal search and therefore, compliance of section 50 is not mandatory but in the facts of the present case as per testimony of City Superintendent of Police (PW-9) the alleged bag was in the hands of the appellant which would amount to personal search.

6. Counsel for the State submits that since the entire search and seizure had been carried out by a Gazetted police officer (PW-9), the provisions of NDPS Act have been complied with.

7. The aforesaid submission cannot be appreciated because if the search is made by a police officer, the same would defeat the purpose of section 42 and 50 of the NDPS Act. The safeguards mentioned in section 50 are intended to protect a person against false accusation and frivolous charges as also to lend credibility to the search and seizure conducted by the empowered officer.

8. In the case of *Tofan Singh Vs. State of Tamil Nadu, 2021 (4) SCC (1)* it has been held that statement of NDPS officer is not admissible as they are police officer. Admittedly in the present case, City Superintendent of Police, Kamalsingh Bundela was a police officer and the provision of section 42 and 50 of the Act have not been complied with which are mandatory provision.

In view of aforesaid, the impugned judgment of conviction and sentence is not sustainable and the same is hereby set aside.

The Appeal is allowed and appellant is acquitted of the charge. The bail bond of the appellant shall be discharged.

(VIJAY KUMAR SHUKLA)
JUDGE

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