Ravi and Others Vs. State of Karnataka, by Manna-e-khelli Police

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Court : Karnataka Gulbarga

Decided On : Jan-22-2013

Judge : Anand Byrareddy

Appeal No. : Criminal Appeal No. 412 of 2007

Appellant : Ravi and Others

Respondent : State of Karnataka, by Manna-e-khelli Police

Judgement :

(Prayer: This Criminal Appeal is filed under Section 374(2) of the Criminal Procedure Code, 1973, against the judgment dated 8.1.2007 passed by the Principal Sessions Judge, Bidar in Spl.CC (NDPS) No.53/05 and etc.)

1. Heard the learned Counsel for the appellants and the learned Additional State Public Prosecutor.

2. The appellants were the accused before the trial court, who have suffered a sentence of rigorous imprisonment for a period of ten years and to pay a fine of Rs.1,00,000/- each, for committing an offence punishable under Section 20(ii)(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (Hereinafter referred to as the 'NDPS Act', for brevity).

3. The background to the said sentence being imposed is as follows:-

It transpires that the Manna-e-Khelli Police had received credible information on 20th October 2005 at 11 a.m., of ganja being transported from Andhra Pradesh to Maharashtra and the concerned had gone near the Manna-e-Khelli bus-stand, where they found the present appellants in possession of 5 bags of ganja weighing 45 Kilograms. The same was seized and a case having been registereds and on conclusion of the investigation, a charge-sheet was filed against the accused. The accused, who were in judicial custody, were represented by counsel and the accused having pleaded not guilty to the charges framed, the matter went to trial. The prosecution examined PWs.1 to 5 and marked Exhibits P.1 to P.3 and on the basis of the said evidence, the following points were framed for consideration:-

1. Whether the prosecution proves that, accused No.1, accused No.3 and accused No.4 along with deceased accused No.2 being husband and in-laws of daughter of complainant, in furtherance of their common intention gave cruelty and ill-treatment to deceased Laxmibai demanding Rs.10,000/- which was given to the accused and, thereby, accused committed an offence punishable under Section 498(A) read with Section 34 of the Indian Penal Code beyond all reasonable doubt?

2. Whether the prosecution proves that, on 27.5.2005 at about 11a.m., at Revappana Maddi in Indi town, in the house of accused, deceased Laxmibai without tolerating the ill- treatment and cruelty given by accused No.1, accused No.3 and accused No.4 along with deceased accused No.2 in order of demanding Rs.10,000/- which was due to be given to her mother attempted to commit suicide by pouring kerosene on her person and that while she was undergoing treatment in the Hospital, she died on 3.6.2005 at about 13.45 hours and that all accused in furtherance of their common intention, abetted its commission and, thereby, accused committed an offence punishable under section 306 read with Section 34 of the Indian Penal Code beyond all reasonable doubt?

3. Whether the prosecution proves that, on the said date, time and place, accused -1, accused-3 and accused-4 along with deceased accused-2, abused deceased Laxmibai in vulgar words and gave provocation to her intending that, such provocation would cause her to break public peace and thereby, accused

committed an offence punishable under Section 504 read with Section 34 of the Indian Penal Code beyond all reasonable doubt?"

The court below has answered the above points in the affirmative.

It is that which is under challenge in the present appeal.

4. The learned Counsel for the appellants would primarily canvass that the offences punishable under the NDPS Act are visited with stringent punishment and therefore, the procedure prescribed under the NDPS Act is to be strictly complied with. The learned Counsel would submit that the present proceeding suffers from the infirmity of the procedure not having been followed. He would draw attention to Section 42 of the Act which reads as follows:- "42. Power of entry, search, seizure and arrest without warrant or authorisation - (1) Any such officer (Being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics , customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from persons knowledge or information given by any person and taken down in writing that any narcotic drug or psychotropic substance or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset -

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstruction to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act; Provided that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief. (2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior."

The learned Counsel would submit that in the present case on hand, it is the case of the prosecution that the credible information of the illegal transportation of ganja and possession of the same was purportedly received at 7 a.m. on 20.10.2005, which would have required the Station House Officer or the person who had received the complaint to record the same in writing. The case diary produced in the present case on hand did not reflect any such record and in this regard, he would submit that the absence or failure to comply with the procedure under Section 42 of the NDPS Act, is fatal to the entire proceedings. This has been laid down in the case of Karnail Singh vs. State of Haryana, (2009)8 SCC 539, which has been relied upon and followed in State of Karnataka vs. Dondusa Namasa Baddi, (2010) 12 SCC 495 and Rajender Singh vs. State of Haryana, 2011(3) Crimes 210 (SC). It is settled law therefore that the provisions of Section 42 are mandatory. The essence of the provisions has been set out in the following terms:-

"In conclusion, what is to be noticed is that Abdul Rashid did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham hold that the requirements of Sections 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:

(a) The Officer on receiving the information of the nature referred to in sub-section (1) of Section 42 from any person had to record it in writing in the register concerned and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of Section 42(1).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, ad the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.

(c) In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is, after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance with requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending of a copy of such information to the official superior forthwith, may not be treated as violation of section 42. But if the information was received when the police officer was in the police station with

sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001." The learned Counsel would also submit that if the information was received when the officer was not in the police station, but while he was on the move, either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him. In such a situation, he could take action as per clauses (a) to (d) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior. In the present case on hand, admittedly, the information was received at 7a.m. on 20.10.2005 and the officers concerned along with other members forming the squad had gone to the bus-stand, where the appellants are said to have been apprehended at 10a.m., and therefore, there was sufficient time available to the concerned to have entered the case diary and recorded such information in writing. Neither was it done between 7a.m. and 10a.m., on that day, nor was it done at a later point of time. Therefore, in view of the law laid down by the apex court, in Karnail Singh, supra, which is well settled, the proceedings are hit by non-compliance with a mandatory requirement in law.

The learned Counsel would further submit that it is also on record that the quantity of ganja that was seized was said to be 45 Kilograms and consisted of the leaves, seeds and stalks of the ganja plant. This is reflected in the judgment of the court below in more than one place. The learned Counsel would draw attention to the definition of 'ganja' as contained in the NDPS Act and would submit that 'ganja' does not include seeds and leaves, if they are not accompanied by the flowering or fruiting tops of the Cannabis plant. In the present case on hand, the weight of the so-called ganja is indicated as 45 Kilograms, which includes leaves, stalks and

seeds. Therefore, the exact weight of the offending substance is not accurate and this would have a strong bearing on the degree of punishment that a person accused of possessing such substance is visited with. Hence, the entire proceedings would also be tainted on account of such inaccurate weighment of the substance involved.

The learned Counsel would further submit that it is the case of the prosecution that the accused were sitting on a katta at the bus-stand and the bags were lying nearby. This would not give rise to a presumption that the bags did indeed belong to the petitioners or that they were transporting the same. However, the co-incidence of the appellants being found sitting there and being mulcted with the offence of possessing the said material is wholly unfair and is not capable of acceptance with any degree of certainty. Hence, it cannot be said that the commission of the offence by the appellants has been proved beyond all reasonable doubt. The learned Counsel would also canvass other grounds which may not be necessary to be reproduced having regard to the three primary grounds referred to hereinabove in considering the case of the appellants.

5. On the other hand, the Additional State Public Prosecutor would seek to justify the judgment and would submit that the thrust of the defence, at the time of trial, was to challenge the seizure proceedings and to claim that the procedure insofar as seizure, weighment and analysis of the substance not being in accordance with law. It is for the first time that these additional grounds are being urged before this court. In any event, he would submit that insofar as the contention that the mandatory requirement of Section 42 of the NDPS Act, not being complied with. He would point out that Karnail Singh, supra, has laid down that there can be an exception to the mandatory requirement of recording the receipt of information in writing and if an emergent situation so warranted, the same could be postponed. In any event, the absence of such recording cannot be said to be fatal, when otherwise the prosecution has established that the appellants were in possession of the offending substance, which is a large quantity of ganja and hence, the same not having been dislodged, as found by the trial court, there is no warrant for interference, on the contention that there was non-compliance with the mandatory requirement of law.

The second contention urged, namely, that there was no accurate weighment of the material in question is concerned, since the definition of 'ganja' would not include seeds and leaves, if they are not accompanied by the flowering or fruiting tops of the Cannabis plant, is a contention, that may not be available to the appellants, as there is evidence placed on record, namely, the forensic report, which clearly indicates that the seized substance was ganja and therefore, there is not much sustenance that could be drawn from the contention that the material was not ganja, when scientific evidence is placed on record to demonstrate otherwise. Insofar as the further contention that the material did not belong to the appellants and that they were in possession by coincidence and they have been foisted with a false criminal case, is again a desperate contention to disown the substance that has been seized. On the other hand, this is a self-serving claim and possession or otherwise of the goods, has been established by the evidence of the concerned Investigation Officer and his men, which was conducted in the presence of the Tahsildar, who is also a witness in the proceedings and therefore, seeks to justify the judgment.

6. On these rival contentions, the prosecution seeking to contend that the requirement under Section 42 of the NDPS Act is not mandatory is incorrect. The law as laid down by the apex court in Karnail Singh, supra, which has been consistently reiterated in Dondusa Namasa Baddi, supra and Rajender Singh, supra, is well-settled. In the facts and circumstances, there was absence to record in writing the information received in the first instance and there was no emergent situation, which warranted the postponement of the said act of recording the information received in writing nor is there any such record in writing at a later point of time, as could be seen from the records made available. Therefore, there is infirmity in the proceedings and as laid down by the apex court, the entire proceedings are vitiated by virtue of such failure to record the circumstances in writing.

The next contention that the quantity indicated as having been in the possession of the appellants is also inaccurate, as the weighment was of the stalks, leaves, seeds and possibly, the flowering and fruiting tops. There is no attempt at segregation of the same in arriving at the weight of the substance. As rightly

pointed out by the learned counsel for the appellants, the definition of 'ganja' is explicit. It excludes the seeds and leaves when not accompanied by the fruiting or flowering tops of the Cannabis plant. In the instant case, not only were the seeds and leaves, but also the stalks were included in the weightment of the substance that was seized and therefore, would be an inaccurate weighment and it would have a telling effect on the degree of punishment that could be imposed having due regard to the weight of the substance, as the NDPS Act provides for a Schedule, which prescribes the degree of punishment dependent on the weight of the substance involved. Therefore, there is a failure in the charges being framed accurately against the accused.

The further contention that the goods itself did not belong to the appellants may not be a strong ground, on which the case would rest. However, the first two grounds referred to hereinabove are sufficient to hold that the proceedings are vitiated.

Consequently, the appeal is allowed and the judgment of the court below is set aside. The appellants are acquitted and are set at liberty. The fine amount, if any, paid by the appellants is to be refunded to the appellants. The bail bonds stand cancelled.

The office is directed to intimate the jail authorities of this judgment in order that the appellants be set at liberty.