

Suraj and Others Vs. The State of Karnataka

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Court : Karnataka

Decided On : Oct-07-2015

Judge : P.D. Waingankar

Appeal No. : Criminal Appeal Nos. 100069 & 100070 of 2015

Appellant : Suraj and Others

Respondent : The State of Karnataka

Judgement :

P.D. Waingankar, J. -

(1) By judgment of conviction and order of sentence dated 18.03.2015, the accused Nos. 1 and 2 Akash and Suraj have been convicted for the offence punishable under Section 22(c) of NDPS Act by the Principal District and Sessions and Special Judge, Dharwad in Spl.NDPS.C.C. No. 3/2013 and have been sentenced to undergo rigorous imprisonment for a period ten years and to pay fine of Rs. 1,00,000/ - each, in default to further undergo simple imprisonment for a period of one year.

(2) Aggrieved by the judgment of conviction and sentence, the accused No. 2 - Suraj has preferred Crl.A. No. 100069/2015 and accused No. 1 -Akash preferred Crl.A. No. 100070/2015. Since both the appeals are arising out of the same judgment of conviction and sentence, they are disposed of by this common judgment.

(3) Heard the learned counsel for the appellants and the learned Government Advocate. Perused the records.

(4) Learned counsel appearing for the appellants have vehemently argued before me that the judgment of conviction and order of sentence passed against both the appellants is contrary to law and true facts of the case and in flagrant violation of the mandatory provisions of Sections 42, 50 and 57 of the NDPS Act. It is also submitted that there was absolutely no evidence muchless legally acceptable evidence so as to convict the appellants, inasmuch as the conviction is bad in law. As such, the learned counsel sought to set aside the judgment of conviction and sentence passed against both the appellants. Learned counsels relied upon the following decisions in support of their arguments

1) 2011 (1) SCC 609 in a case of Vijaysinh Jadeja vs. State of Gujarat.

2) (2014) 5 SCC 345 (State of Rajasthan -v - Paramanand and another).

(5) Per contra, the learned Addl. Government Advocate while arguing in support of the judgment of conviction and sentence of both the appellants by the Special Judge would submit that all the mandatory requirements under the Act have been duly complied with and since there was sufficient evidence both the appellants have been convicted while acquitting the other accused. Hence, the learned Government Pleader sought for dismissal of both the appeals.

(6) The case of the prosecution is briefly stated as under:

On 15.03.2012, one Smt. Chaya Angadi in -charge Deputy Superintendent of Excise, Dharwad Sub-division, (PW.1) received credible information at about 6.30 a.m. that some persons are transporting narcotic drug in a Tata -Indica Car from Belgaum towards Dharwad. Upon receipt of the credible information, she transmitted the information to her superior officers. Upon securing the panchas and her staff went near Narendra Cross on Pune -Bengaluru Highway and kept a watch for Tata -Indica Car. At about 10.00 a.m. a white Indica Car No. KA -25/B - 9333 came from Belgaum side in a great speed. PW.1 along with her staff by giving signal to the driver stopped the car. The driver though immediately stopped

the car, he ran away. Accused No. 1 Akash who was sitting by the side of the driver though attempted to run away he was apprehended. Since the search warrant was not obtained in order to search the vehicle after recording the reasons, the car was searched. A plastic cover was found beneath the driver's seat. On enquiry with accused No. 1 regarding the contents, he disclosed that it contained white colour powder. Upon closer inspection, PW.1 and his staff suspected that it was cocaine. It appears that before conducting search on the person of the accused No. 1 he was made aware of his right to be searched in the presence of a Gazetted officer. It is the case of the prosecution that he opted to conduct the search on his person by other Gazetted officer. Thereby, the presence of a Gazetted officer PW-3 was secured and in his presence the search was conducted on the person of the accused No. 1. Nothing was found on his person. The Cocaine that was found in the bag was weighed. It was 1021 grams. Three sets of samples consisting of 10 gram each were taken and were sealed properly. A panchanama was drawn as per Ex -P6 in the presence of PW-2 and PW-4. Accused No. 1 was taken to office of the Excise Superintendent, Dharwad with the car and the substance seized. A complaint came to be lodged by PW.1 which came to be registered in Crime No. 1/2011 -12 of Dharwad Excise Police Station. The sample cocaine was sent for chemical examination to FSL Bengaluru. PW.9 - Nagaraj, Chief Chemist examined the sample and gave his report as per Ex.P8 stating that the substance was cocaine. During the course of investigation, PW -1 recorded confession statement of accused No. 1 wherein he disclosed the name and address of driver of the car. Thereby accused No. 2 was apprehended at Belgaum. Four other accused persons were also arrested including the owner of the car who were involved in the crime along with the appellants. PW.8 -H. Shivanna Deputy Superintendent of Excise took up further investigation. Upon following the other formalities of investigation, he filed charge -sheet against six accused persons for the offence punishable under Section 20(c) of the NDPS Act including the appellants since they were transporting cocaine illegally without any pass or permit.

All the accused Nos. 1 to 6 appeared before the Special Judge. They denied the charge leveled against them. The prosecution went for trial by examining nine witnesses. It has marked Exs.P1 to P11 apart from MOs -1 to 4. All the accused

were examined under Section 313 of Cr.P.C. The defence of all the accused was that of total denial and false implication. They did not choose to lead defence evidence. The learned Special Judge on appreciation of evidence found appellants/accused Nos. 1 and 2 guilty of the offence punishable under Section 20(c) of NDPS Act while acquitting accused Nos. 3 to 6.

(7) The arguments of the learned counsel for the appellants is that the evidence placed on record by the prosecution was not sufficient or worthy of credence so as to convict the appellants for the offence. It is further case of the appellants that in a case of this nature where punishment is harsh, the law expects strict compliance of all the mandatory provisions such as Sections 42, 50 and 57 of NDPS Act. Therefore, it is to be seen whether the mandatory provisions of Sections 42, 50 and 57 of NDPS Act are strictly complied with or not. These mandatory provisions are in the nature of in built security from false implication of the accused. It has come in the evidence that the accused No. 1 who was apprehended on the spot was made aware of his right to be searched in the presence of a Gazetted officer in compliance with Section 50 of the Act by issuance of a notice as per Ex.P3. The accused opted to conduct search on his person by a Gazetted officer and as such the presence of a Gazetted officer PW-3 from the same department was secured and in his presence the search on the person of the accused No. 1 was conducted. It is borne out from Ex.P3 notice and also from the evidence of PW.1 that the accused was not made aware of his right to be searched either in the presence of a Gazetted officer or in the presence of a Magistrate and therefore it is needless to say that there was non-compliance of mandatory provision of Section 50 of NDPS Act which vitiates the trial. Substantial compliance is no compliance. Section 50 mandates strict compliance.

(8) SECTION 50 of NDPS Act reads as under:

"Conditions under which search of persons shall be conducted - (1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 of section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest

Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub -section (1).

(3).....

(4).....

(5).....

(6).....

In a decision reported in : 2011 (1) SCC 609 in a case of Vijay Sinha Jadeja Vs. State of Gujarat, the Constitution Bench of the Supreme Court in head note -D held as under: -

"Narcotic drugs and Psychotropic Substances Act, 1985-S.50-Strict interpretation of-Need for-To prevent misuse of wide powers conferred on empowered officer and false implication of innocent persons, observance of safeguards provided in NDPS Act, held, are to be strictly construed-Interpretation of Statutes- Particular statutes or provisions-Penal provision-Provisions providing safeguards."

(10) Since no such option was given there is a clear -cut violation of mandatory provision of Section 50 of the NPDS Act and therefore it vitiated the alleged recovery of contraband. The learned Sessions Judge in order to overcome the mandate of Section 50 has observed in the judgment that Section 50 was not applicable to the facts of the case since nothing was found on the person of accused No. 1. The observation made by the Special Judge is contrary to law laid down by the Supreme Court in (2014) 5 SCC 345 in the case of State of Rajasthan Vs. Parmanand and Another. In Head note C, the Supreme Court held as under: -

"Narcotic Drugs and Psychotropic Substances Act, 1985-S.50-Applicability of-Conditions for-Personal search-What is-Search of bag-When amounts to personal search-If merely a bag carried by a person is searched without there being any search of his person, S.50 will have no application-but if bag carried by him is searched and his person is also searched, S.50 will have application - In the

present case, R -1's bag was searched wherefrom opium was recovered R1's personal search was also carried out-Personal search of R -2 was also conducted-Therefore, S-50 will have application."

It is immaterial whether narcotic drug was found on the person of the accused or not. Once the investigation officer has decided to conduct a search on the person of the accused, Section 50 should and must be complied. Ex.P3 notice discloses that search was conducted on the person of accused No. 1. But no option was given as required under Section 50 of the Act to conduct search on his person.

(11) Coming to the merits of the case, though the prosecution examined nine witnesses, PW.2-Shankarappa and PW.4-Patrappa are the only two independent witnesses being the panchas to Ex.P6 the seizure panchanama whereunder contraband said to have been seized. But both of them have not supported the case of the prosecution. When the independent witnesses PW-2 and PW-4 have not supported prosecution case and the recovery of contraband has not been satisfactorily proved, the conviction cannot be sustained inasmuch as, nothing has been recovered from accused No. 2. PW.9 is a chemical examiner who gave a report as per Ex.P8 that the sample that was forwarded was cocaine. There is no dispute regarding the report. The other witnesses are all the officials of the Excise Department. In the absence of the evidence of independent witnesses, their evidence will have to be assessed with great care and caution. I have read the evidence of all the witnesses particularly that of PW.1. I find lot of inconsistencies and material contradictions in her evidence which go to the root. No evidence, muchless, the evidence which inspire the confidence of the court has been placed on record regarding the complicity of accused No. 2 in the crime. The accused No. 2 is stated to be the driver of Indica Car who ran away. The accused No. 2 was arrested after about 20 days from Belgaum. No identification parade was conducted for the purpose of identification of accused No. 2. Except the statement of accused No. 1 who said to have furnished the information regarding accused No. 2, no other evidence is forthcoming so as to involve or connect the accused No. 2 to the alleged crime, more so, for the reason that no contraband has been recovered from accused No. 2.

(12) Though there was sufficient time and PW -1 was aware of commission of cognisable offence, investigation proceeded without registration of the FIR in violation of mandatory provision of Section 154 Cr.P.C. No explanation is forthcoming as to why the FIR was not registered upon receipt of credible information disclosing the cognisable offence.

(13) No search warrant was obtained to search the car, not even an attempt was made to obtain search warrant. PW-1 admits that there was no impediment for her to obtain search warrant. Further, PW-1 was not a police officer. In that case, she ought to have produced necessary notification under section 53 of the Act having invested in her the power of an officer incharge of police station for the investigation of the offence under NDPS Act. She has not even whispered about her power and authority to make search, seizure and investigate the offence under NDPS Act in her evidence. Her locus standi to investigate is also doubtful in this case.

(14) Thus, having regard to the non-compliance of the mandatory provisions of Section 50, 42, 53 of the NDPS Act and the recovery is not established beyond reasonable doubt, the learned Sessions Judge was not justified in convicting the appellant-accused Nos. 1 and 2. On my re-appreciation of evidence, I have no other choice than to set -aside the judgment of conviction and sentence of accused No. 1 and 2 and acquit them of the charge levelled against them. Accordingly, I pass the following:

ORDER

Both the appeals are allowed. The judgment of conviction and order of sentence dated 18.3.2015 passed against the appellants by the Prl. District and Sessions Judge and Special Judge, Dharwad in Spl.NDPS.CC. No. 3/2013 is hereby set -aside. The appellants/accused Nos. 1 and 2 are acquitted of the charge levelled against them.

The fine amount deposited by both the appellants before the Special Judge in pursuance of the order passed by this Court is ordered to be refunded to them.